KENTUCKY PARALEGAL ASSOCIATION
PARALEGAL PROFESSIONAL STANDARDS OF CONDUCT
Second Edition – 2010

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KENTUCKY PARALEGAL ASSOCIATION

PARALEGAL PROFESSIONAL STANDARDS OF CONDUCT

PREAMBLE

Supreme Court Rule 3.700 Provisions Relating to Paralegals

> ***"While the responsibility for compliance with standards of professional conduct rests with members of the Bar, a paralegal should understand those standards. It is, therefore, incumbent upon the lawyer employing a paralegal to inform him of the restraints and responsibilities incident to the job and supervise the manner in which the work is completed. However, the paralegal does have an independent obligation to refrain from illegal conduct. Additionally, and notwithstanding the fact that the [Kentucky Rules of Professional Responsibility are] not binding upon lay persons, the very nature of a paralegal's employment imposes an obligation to refrain from conduct which would involve the lawyer in a violation of the [Rules]."***

The promulgation of rules on Paralegal Professional Standards of Conduct is a vital part of the Kentucky Paralegal Association's professional responsibility to abide by the Kentucky Supreme Court rules on paralegal practice. These standards are intended to assure that our members conform to the 2009 Kentucky Rules of Professional Conduct. Accordingly, the standards provided in this regulation provide Kentucky paralegals with a specific set of rules addressing paralegal professional responsibility. They are derived from Supreme Court Rule 3.700 Provisions Relating to Paralegals, the Kentucky Rules of Professional Conduct, Kentucky Bar Association ethics and unauthorized practice of law opinions, and general principles of legal and business ethics. Each standard is designed to guide, explain, and instruct paralegals on their responsibility to the lawyers who supervise them and the public they serve. These standards are not intended to give rise to a legal cause of action for their breach. They are to be used solely for paralegal practice guidance and as a basis for regulating the professional conduct of our members.

PARALEGAL STANDARDS OF CONDUCT

STANDARD 1. COMPETENCE

A paralegal shall provide competent service when assisting supervising lawyers and their clients. Competent service requires paralegal education, training, and work experience in the application of legal concepts, skills, and knowledge. A paralegal shall be

knowledgeable of Supreme Court Rule 3.700 Provisions Relating to Paralegals and the Kentucky Rules of Professional Conduct. A paralegal shall maintain competence by participating in continuing paralegal education programs on substantive legal subjects, skills, and paralegal standards of conduct.

STANDARD 2. DILIGENCE

A paralegal shall work with reasonable care, industry, and punctuality when assisting supervising lawyers and their clients.

STANDARD 3. RELATIONS WITH CLIENTS

A paralegal shall communicate with and provide service to clients only under the supervision of a lawyer. The lawyer must remain fully responsible for the representation and all paralegal relations with a client must be directed by a supervising lawyer. It shall be made clear to a client that a paralegal is not a lawyer. A paralegal shall not form lawyer-client relationships for a supervising lawyer, give legal advice, or exercise independent legal judgment when communicating with a client.

STANDARD 4. CLIENT AND FIRM CONFIDENTIALITY

(a) A paralegal shall not reveal information relating to the firm's representation of clients or firm internal operations except for disclosures that are impliedly authorized to perform paralegal services for supervising lawyers and clients except:

> (1) a paralegal may reveal such information to the minimum extent necessary to establish a claim or defense in a controversy with a supervising lawyer or client, or
>
> (2) to comply with law or court order.

(b) A paralegal's duty of confidentiality to a firm and its clients is a continuing responsibility which is applicable even though a paralegal has changed employment or left paralegal practice.

STANDARD 5. CONFLICTS OF INTEREST

(a) To avoid conflicts of interest a paralegal shall inform supervising lawyers of any responsibilities the paralegal has to third persons or by the paralegal's own personal or financial interests which may conflict with the interests of firm clients. The supervising lawyer is responsible for resolving paralegal conflict issues.

(b) A paralegal shall not use information relating to a client learned in the course of employment to the disadvantage of a client unless the supervising lawyer is informed and the lawyer obtains client consent after consultation.

STANDARD 6. CLIENT AND FIRM PROPERTY

A paralegal responsible for working with and safeguarding client property shall comply with Kentucky Rule of Professional Conduct 1.15 Safeguarding Property. In working with client and firm property a paralegal will apply reasonable business practices to assure its proper use, security, and disposition.

STANDARD 7. RELATIONS WITH PERSONS OTHER THAN CLIENTS

In the course of performing paralegal services under the supervision of a lawyer a paralegal shall not:

(a) knowingly make a false statement of material fact or law to a third person;
(b) communicate with a person known to be represented by a lawyer with out the consent of that lawyer;
(c) when dealing with an unrepresented person state or imply the paralegal is disinterested and correct any perceived misunderstandings by such person;
(d) communicate legal advice to an unrepresented person (a paralegal may suggest that the unrepresented person secure counsel); and
(e) use means that only embarrass, delay, or burden a third person.

A paralegal who receives a document relating to the representation of a supervising lawyer's client and knows or reasonably should know that the document was inadvertently sent shall refrain from reading the document and promptly inform the supervising lawyer for instructions on promptly notifying the sender, and abiding by the instructions of the sender regarding its disposition.

STANDARD 8. LAW FIRM PARALEGAL POLICIES

A paralegal shall adhere to law firm measures for paralegal compliance with the professional obligations of a lawyer. In most cases a supervising lawyer's instructions on matters of professional responsibility will be determinative of the issue and a complying paralegal will not be subject to discipline under these Standards of Conduct. However, following the instructions of a lawyer will not excuse paralegal conduct that any reasonable nonlawyer would understand as abusive, fraudulent, dishonest, deceitful, or illegal.

STANDARD 9. UNAUTHORIZED PRACTICE OF LAW

A paralegal shall not engage in the unauthorized practice of law as proscribed by Kentucky law and Supreme Court rules.

STANDARD 10. DONATED PARALEGAL SERVICE

A paralegal should voluntarily donate paralegal service as a matter of public service. Paralegals are encouraged to donate 25 hours of service a year. Donated service

must be performed under the supervision of a lawyer. Normally a paralegal should coordinate donated service with that of the employing lawyer. This will permit best use of a paralegal's donated service and assist the supervising lawyer in meeting the Kentucky Bar Association's goal of 50 hours annually of donated lawyer service.

STANDARD 11. ADVERTISING AND SOLICITATION

A paralegal shall know the Kentucky Rules of Professional Conduct on lawyer advertising and limitations on solicitation of clients. A paralegal's name and status may be included on the letterhead of an employing lawyer and the paralegal may with the lawyer's permission include the lawyer's name on the paralegal's business card.

STANDARD 12. MISCONDUCT

It is professional misconduct for a paralegal to:

(a) violate or attempt to violate the KPA Paralegal Professional Standards of Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) engage in the unauthorized practice of law;
(c) commit any felony or crime involving moral turpitude;
(d) commit fraud or deceit in applying for Certified Kentucky Paralegal status;
(e) disclose the contents of the Certified Kentucky Paralegal exam;
(f) advertise paralegal services in a manner that is false or misleading to the public;
(g) fail to pay KPA fees or other monies; and
(h) fail to meet Continuing Paralegal Education requirements.

DEFINITIONS

Paralegal: A person under the supervision and direction of a licensed lawyer, who may apply knowledge of law and legal procedures in rendering direct assistance to lawyers engaged in legal research; design, develop or plan modifications or new procedures, techniques, services, processes or applications; prepare or interpret legal documents and write detailed procedures for practicing in certain fields of law; select compile and use technical information from such references as digests, encyclopedias or practice manuals; and analyze and follow procedural problems that involve independent decisions. SCR 3.700.

Paralegal Practice: Providing legal service or work authorized by SCR. 3.700, *Provisions Relating to Paralegals*, and federal agencies that require paralegal education and training in the application of legal concepts and skills for competent performance.

Practice of Law: The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services. SCR. 3.020.

Unauthorized Practice of Law: A person is guilty of unlawful practice of law when, without a license issued by the Supreme Court, he engages in the practice of law, as defined by rule of the Supreme Court. K.R.S. 524.130.

ANNOTATED PARALEGAL STANDARDS OF CONDUCT

Standard 1. Competence

A paralegal shall provide competent service when assisting supervising lawyers and their clients. Competent service requires paralegal education, training and work experience in the application of legal concepts, skills, and knowledge. A paralegal shall be knowledgeable of Supreme Court Rule 3.700 Provisions Relating to Paralegals and the Kentucky Rules of Professional Conduct. A paralegal shall maintain competence by participating in continuing paralegal education programs on substantive legal subjects, skills, and paralegal standards of conduct.

🕮 ***Cross Reference to the Kentucky Rules of Professional Conduct:***

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

(1) In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

(2) A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all

legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

(3) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

(4) A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

(5) Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

(6) To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Paralegal Practice Guide: *One of the most valuable contributions a competent paralegal can make to a law firm is thorough, accurate, and timely work production. By knowing and applying good legal and business practices a paralegal avoids lawyer and paralegal errors and omissions that can lead to malpractice claims. Paralegals have not been held liable to date in Kentucky for their malpractice, but supervising lawyers have been found liable for malpractice because of a paralegal error.*

Standard 2. Diligence

A paralegal shall work with reasonable care, industry, and punctuality when assisting supervising lawyers and their clients.

🕮 *Cross Reference to the Kentucky Rules of Professional Conduct:*

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

(1) A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

(2) A lawyer's work load must be controlled so that each matter can be handled competently.

(3) Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

(4) Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client

depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

Paralegal Practice Guide: *Paralegals must pursue their work with commitment and dedication. In addition to individual effort, paralegals are well situated to assure that office docket and work control procedures are adequate and responsive to firm needs. Skill with computer applications of legal work control procedures is an essential component of maintaining a high level of diligence.*

Standard 3. Relations With Clients

A paralegal shall communicate with and provide service to clients only under the supervision of a lawyer. The lawyer must remain fully responsible for the representation and all paralegal relations with a client must be directed by a supervising lawyer. It shall be made clear to a client that a paralegal is not a lawyer. A paralegal shall not form lawyer-client relationships for a supervising lawyer, give legal advice, or exercise independent legal judgment when communicating with a client.

Cross Reference to Supreme Court Rule 3.700 Provisions Relating to Paralegals:

Sub-Rule 2. For purposes of this rule, the unauthorized practice of law shall not include any service rendered involving legal knowledge or legal advice whether representation, counsel or advocacy in or out of court, rendered in respect to the acts, duties, obligations, liabilities or business relations of the one required services where:

A. The client understands that the paralegal is not a lawyer;

B. The lawyer supervises the paralegal in the performance of his duties; and

C. The lawyer remains fully responsible for such representation, including all actions taken or not taken in connection therewith by the paralegal to the same extent as if such representation had been furnished entirely by the lawyer and all such actions had been taken or not taken directly by the lawyer.

D. The services rendered under this Rule shall not include appearing formally in any court or administrative tribunal except under Sub-rule 3 below, nor shall it include questioning of witnesses, parties or other persons appearing in any legal or administrative action including but not limited to depositions, trials, and hearings.

Sub-Rule 7. A lawyer shall require a paralegal, when dealing with a client, to disclose at the outset that he is not a lawyer. A lawyer shall also require such a disclosure when the paralegal is dealing with a court, administrative agency, attorney or the public, if there is any reason for their believing that the paralegal is a lawyer or is associated with a lawyer.

🕮 *Cross Reference to the Kentucky Rules of Professional Conduct:*

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

(1) Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

(2) If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously communicated to the lawyer that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

(3) Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the

lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

(4) A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

(5) The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

(6) Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

(7) In some very unusual circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may

not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Paralegal Practice Guide: *Kentucky's rules give paralegals a wide scope of activity provided they are supervised by a lawyer. It is imperative that paralegals identify their status at the outset of all client relations to include when receiving initial calls from potential clients. A paralegal may pass on legal advice from a lawyer to a client, but should not expand, interpret, or counsel the client in any manner. A paralegal can make a valuable contribution to lawyer-client relations by assuring that client communications as required by Rule 1.4 are accurate and timely.*

Standard 4. Client And Firm Confidentiality

(a) A paralegal shall not reveal information relating to the firm's representation of clients or firm internal operations except for disclosures that the client gives the firm informed consent or are impliedly authorized to perform paralegal services for supervising lawyers and clients except:

(1) a paralegal may reveal such information to the minimum extent necessary to establish a claim or defense in a controversy with a supervising lawyer or client, or

(2) to comply with law or court order.

(b) A paralegal's duty of confidentiality to a firm and its clients is a continuing responsibility which is applicable even though a paralegal has changed employment or left paralegal practice.

Cross Reference to Supreme Court Rule 3.700 Provisions Relating to Paralegals:

Sub-Rule 4. A lawyer shall instruct a paralegal employee to preserve the confidences and secrets of a client and shall exercise care that the paralegal does so.

Cross Reference to the Kentucky Rules of Professional Conduct:

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to secure legal advice about the lawyer's compliance with these Rules;

(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including a disciplinary proceeding, concerning the lawyer's representation of the client; or

(4) to comply with other law or a court order.

Comment

(1) This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

(2) A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

(3) The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

(4) Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

(5) Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or, to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

(6) Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1), recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

(7) A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(*2*) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct. SCR 3.530, Advisory opinion – informal and formal, authorizes a lawyer to request an advisory opinion from the requester's Supreme Court District Committee member regarding ethics and unauthorized practice of law questions. The question may be submitted in writing or by telephone using the KBA Ethics Hotline. Communications between the requester and any District Committee member or Ethics Committee member are granted confidentiality by SCR 3.530 and are permitted disclosure by paragraph (b)(*2*).

(8) Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(*3*) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. Lawyers may also report incidents of potential malpractice that have not ripened into a client claim to a lawyer's liability insurer for legal advice and to comply with policy reporting requirements provided the report is made on a confidential basis and protected by the attorney-client privilege. The right to defend also applies, of course, where a proceeding has been commenced.

(9) A lawyer entitled to a fee is permitted by paragraph (b)(*3*) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

(10) Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(*4*) permits the lawyer to make such disclosures as are necessary to comply with the law.

(11) A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(*4*) permits the lawyer to comply with the court's order.

(12) Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure

should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

(13) Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(*4*). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

(14) A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

(15) When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

(16) The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Paralegal Practice Guide: *Client confidentiality is the primary professional responsibility duty of the legal profession. Paralegals must understand that the scope of client confidentiality covers <u>all</u> matters relating to a client representation even if they appear to be of inconsequential significance or already widely known by others. The best practice is not to discuss client matters other than with the supervising lawyer and when in the*

direct service of the client. Client information learned when working with a former law firm must be kept confidential even though a paralegal is no longer employed by that firm.

Standard 5. Conflicts Of Interest

(a) To avoid conflicts of interest a paralegal shall inform supervising lawyers of any responsibilities the paralegal has to third persons or by the paralegals own personal or financial interests that may conflict with the interests of firm clients. The supervising lawyer is responsible for resolving paralegal conflict issues.

(b) A paralegal shall not use information relating to a client learned in the course of employment to the disadvantage of a client unless the supervising lawyer is informed and the lawyer obtains client consent after consultation.

🕮 ***Cross Reference to the Kentucky Rules of Professional Conduct:***

Rule 1.7 Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing. The consultation shall include an explanation of the implications of the common representation and the advantages and risks involved.

Comment

General Principles

(1) Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

(2) Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

(3) A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

(4) If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments (5) and (29).

(5) Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

(6) Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

(7) Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

(8) Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

(9) In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9

or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

(10) The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

(11) When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

(12) A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

(13) A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

(14) Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

(15) Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

(16) Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

(17) Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

(18) Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality)

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(19) Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related mat-

ters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

(20) Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain it or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

(21) A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other clients and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

(22) Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client

will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

(23) Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

(24) Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

(25) When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

(26) Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment (7). Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment (8).

(27) For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest Rules, the lawyer should make clear the lawyer's relationship to the parties involved

(28) Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

(29) In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the rela-

tionship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

(30) A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing Rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

(31) As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

(32) When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

(33) Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

(34) A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such

as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

(35) A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to

the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them before the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

Comment

Business Transactions Between Client and Lawyer

(1) A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

(2) Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

(3) The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

(4) If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

(5) Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

(6) A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the

lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

(7) If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

(8) This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

(9) An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

(10) Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

(11) Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party

payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

(12) Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

(13) Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The Rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

(14) Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to

arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

(15) Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

(16) Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

(17) The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of

independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

(18) Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

(19) When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

(20) Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

Selected Paragraphs and Comments of Rule 1.10 Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(d) A firm is not disqualified from representation of a client if the only basis for disqualification is representation of a former client by a lawyer presently associated with the firm, sufficient to cause that lawyer to be disqualified pursuant to Rule 1.9 and:

> (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no specific part of the fee therefrom; and

(2) written notice is given to the former client.

Comment

(2) The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

(4) The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

Paralegal Practice Guide: *Paralegal conflicts of interest may result in lawyer disqualification from a representation, court sanctions, disciplinary action, and malpractice liability. Paralegals must be vigilant for circumstances of their own that create a conflict for a supervising lawyer as well as those of others in the firm.*

Standard 6. Client And Firm Property

A paralegal responsible for working with and safeguarding client property shall comply with Kentucky Rule of Professional Conduct 1.15 Safeguarding Property. In working with client and firm property a paralegal will apply reasonable business practices to assure its proper use, security, and disposition.

Cross Reference to the Kentucky Rules of Professional Conduct:

Rule 1.15 Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client, third person, or both in the event of a claim by each to the property. The separate account referred to in the preceding sentence shall be maintained in a bank which has agreed to notify the Kentucky Bar Association in the event that any overdraft occurs in the account. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other

property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client, third person, or both in the event of claims by each to the property. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, third person, or both in the event of a claim by each to the property, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(d) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(e) Except for non refundable fees as provided in 1.5(f), a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

Comment

(1) A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Financial Recordkeeping Rule.

(2) Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

(3) Paragraph (c) describes the handling of disputes, including those between the lawyer and the client, the lawyer and third persons (or entities), and the client and third parties.

Paragraph (c) recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property until the claims are resolved. Generally, if the claim is based on a contract obligation, writing signed by the client, statutory lien, court order, legal obligation to ensure payment to a third party employed by the attorney to provide services in furtherance of the client's claim, or other law, the lawyer may not disburse the funds until the dispute is resolved. In these circumstances the client should also be advised of the risks of not paying a valid claim. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

(4) While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (d) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's. A lawyer may deposit funds in a trust account to provide funds for restitution of the defalcation caused by others, if necessary under any legal obligation to a banking institution, client or third party whose funds have been converted.

(5) Paragraph (e) requires that when a lawyer has collected an advance deposit on a fee or for expenses or a flat fee for services not yet completed, the funds must be deposited in the trust account until earned, at which time they should be promptly distributed to the lawyer. The foregoing shall not apply to non refundable fees. At the termination of the client-lawyer relationship the lawyer must return any amount held that was not earned or was an unreasonable fee, as provided by Rules 1.5 and 1.16(d).

(6) The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

Paralegal Practice Guide: *Managing client and firm funds and property is one of the most responsible and sensitive assignments in a law firm. Paralegals must acquire requisite training in money and property accountability. Common errors in client trust account management are:*

- *Failure to internally reconcile trust account for each client.*
- *Account contains other than client funds and lawyer funds to cover bank charges.*
- *Source or identity of funds not identified.*
- *Checks including trust and non-trust funds not deposited to trust account.*
- *Failure to indicate from which client funds drawn.*
- *Client's current balance not indicated.*
- *Checks made payable to cash.*

The "Client Trust Account Principles & Management for Kentucky Lawyers" published by Lawyers Mutual Insurance Company of Company is recommended for research and guidance on client trust account matters. It will be used as one of the primary study guides for the Certified Kentucky Paralegal exam.

Standard 7. Relations With Persons Other Than Clients

In the course of performing paralegal services under the supervision of a lawyer a paralegal shall not:

(a) knowingly make a false statement of material fact or law to a third person;
(b) communicate with a person known to be represented by a lawyer with out the consent of that lawyer;
(c) when dealing with an unrepresented person state or imply the paralegal is disinterested and correct any perceived misunderstandings by such person;
(d) communicate legal advice to an unrepresented person (a paralegal may suggest that the unrepresented person secure counsel); and
(e) use means that only embarrass, delay, or burden a third person.

A paralegal who receives a document relating to the representation of a supervising lawyer's client and knows or reasonably should know that the document was inadvertently sent shall refrain from reading the document and promptly inform the supervising lawyer for instructions on promptly notifying the sender, and abiding by the instructions of the sender regarding its disposition.

🕮 ***Cross Reference to the Kentucky Rules of Professional Conduct:***

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer:

(a) shall not knowingly make a false statement of material fact or law to a third person; and

(b) if a false statement of material fact or law has been made, shall take reasonable remedial measures to avoid assisting a fraudulent or criminal act by a client including, if necessary, disclosure of a material fact, unless prohibited by Rule 1.6.

Comment

Misrepresentation

(1) A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

(2) This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

(3) Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily a lawyer can avoid assisting in a client's crime or fraud by withdrawing from the representation. Nonetheless, sometimes a lawyer is required to take more overt measures such as giving notice of the fact of withdrawal, disaffirming an opinion, document, affirmation or the like, to prevent the lawyer's services' being used to further the client's crime or fraud. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted in the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6. [See also, Rules 1.6(b), 1.13 (c) and8.4(c).]

Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment

(1) This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible over-

reaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

(2) This Rule applies to communications with any person, who is represented by counsel concerning the matter to which the communication relates.

(3) The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

(4) This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with non-lawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

(5) Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused.

(6) A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

(7) In the case of a represented organization, this Rule prohibits communications to a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a

constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(g). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

(8) The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

(9) In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Rule 4.3 Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person. The lawyer may suggest that the unrepresented person secure counsel.

Comment

(1) An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f). Unlike Rule 4.3 of the ABA Model Rules of Professional Conduct (2003), this Rule provides that under no circumstances shall a lawyer give legal advice to an unrepresented person.

(2) The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the suggestion to obtain counsel. Whether the discussion of the client's position impermissibly assumes the character of rendering legal advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and Comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an

unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the client's position as to the meaning of the document or explain the lawyer's view of the underlying legal obligations.

Rule 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall:

(1) refrain from reading the document,

(2) promptly notify the sender, and

(3) abide by the instructions of the sender regarding its disposition.

Comment

(1) Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships. such as the client-lawyer relationship.

(2) Paragraph (b) recognizes that lawyers sometimes receive documents or other communications that were mistakenly sent or produced by opposing parties or their lawyers. If it is clear from the circumstances that the document was not intended for the receiving lawyer, that lawyer must avoid reading the substance of the communication, notify the sender of the mistake, and comply with any reasonable request of the sender, allowing for protective measures (e.g. returning to sender, deleting or otherwise destroying the communication). The question whether the privileged status of such a document has been waived is a matter of law beyond the scope of these Rules. Similarly, this Rule does not address the legal duties of a lawyer who received a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

Paralegal Practice Guide*: Paralegals are frequently tasked by supervising lawyers to pass information to third persons, make inquiries, and investigate cases. It is essential that a paralegal understand the Kentucky Rules of Professional Conduct requirements*

for truthfulness in dealing with persons other than clients to assure basic fairness and honesty in providing legal service.

Standard 8. Law Firm Paralegal Policies

A paralegal shall adhere to law firm measures for paralegal compliance with the professional obligations of a lawyer. In most cases a supervising lawyer's instructions on matters of professional responsibility will be determinative of the issue and a complying paralegal will not be subject to discipline under these Standards of Conduct. However, following the instructions of a lawyer will not excuse paralegal conduct that any reasonable nonlawyer would understand as abusive, fraudulent, dishonest, deceitful, or illegal.

🕮 ***Cross Reference to the Kentucky Rules of Professional Conduct:***

Rule 5.1 Responsibilities of Partners, Managers and Supervisory Lawyers

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

(1) Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

(2) Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

(3) Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

(4) Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

(5) Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

(6) Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

(7) Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

(8) The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

Rule 5.2 Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

(1) Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

(2) When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

> (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall 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;

(b) 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; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer only if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

(1) Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. 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.

(2) Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Paralegal Practice Guide: *A supervising lawyer's responsibility for the misconduct of a paralegal as provided in Rule 5.3 is an example of the doctrine of "respondeat superior." Paralegals are obligated to follow the instructions of their employers just as any other employee and must be mindful that their misconduct may subject a supervising lawyer to bar disciplinary action. In addition, because of the paralegal's unique status in the legal profession, a paralegal, unlike other employees, has an independent duty to comply with paralegal standards of conduct mandated by the Kentucky Supreme Court and implied in the Kentucky Rules of Professional Conduct. Usually following a supervising lawyer's instructions allows a paralegal to meet professional standards without fear of discipline. In those rare case when it is clear that the instructions involve abu-*

sive, fraudulent, dishonest, deceitful, or illegal conduct the paralegal cannot escape accountability by claiming only to have been following orders. Compare this situation with Rule 5.2, Responsibilities of a Subordinate Lawyer, in the preceding paragraph.

Standard 9. Unauthorized Practice Of Law

A paralegal shall not engage in the unauthorized practice of law as proscribed by Kentucky law and Supreme Court rules.

🕮 ***Cross Reference to Supreme Court Rule 3.020 Practice of Law Defined***:

The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services....

🕮 ***Cross Reference to Supreme Court Rule 3.700 Provisions Relating to Paralegals:***

Sub-Rule 1. A lawyer shall ensure that a paralegal in his employment does not engage in the unauthorized practice of law.

Sub-Rule 2. For purposes of this rule, the unauthorized practice of law shall not include any service rendered involving legal knowledge or legal advice whether representation, counsel or advocacy in or out of court, rendered in respect to the acts, duties, obligations, liabilities or business relations of the one required services where:

A. The client understands that the paralegal is not a lawyer;

B. The lawyer supervises the paralegal in the performance of his duties; and

C. The lawyer remains fully responsible for such representation, including all actions taken or not taken in connection therewith by the paralegal to the same extent as if such representation had been furnished entirely by the lawyer and as such actions had been taken or not taken directly by the lawyer.

D. The services rendered under this Rule shall not include appearing formally in any court or administrative tribunal except under Sub-rule 3 below, nor shall it include questioning of witnesses, parties or other persons appearing in any legal or administrative action including but not limited to depositions, trials, and hearings.

Sub-Rule 3. For purposes of this Rule 3.700, the unauthorized practice of law shall not include representation before any administrative tribunal or court where such service or representation is rendered pursuant to a court rule or decision which authorizes such practice by nonlawyers.

Sub-Rule 5. A lawyer shall not form a partnership with a paralegal if any part of the partnership's activities consists of the practice of law, nor shall a lawyer share on a proportionate basis, legal fees with a paralegal.

🕮 ***Cross Reference to Kentucky Revised Statute 524.130 Unauthorized practice of law:***

(1) Except as provided in KRS 341.470 and subsection (2) of this section, a person is guilty of unlawful practice of law when, without a license issued by the Supreme Court, he engages in the practice of law, as defined by rule of the Supreme Court.
(2) A licensed nonresident attorney in good standing, although not licensed in Kentucky, is not guilty of unlawful practice if, in accordance with rules adopted by the Supreme Court, he practices law under specific authorization of a court.
(3) Unlawful practice of law is a Class B misdemeanor.

🕮 ***Cross Reference to the Kentucky Rules of Professional Conduct:***

Rule 5.4 Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

….

(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; and

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

….

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation ; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

(1) The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employ-

ment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

(2) This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

Paralegal Practice Guide: *Kentucky has one of the most progressive rules in the U.S. allowing paralegal practice under the supervision of a lawyer. Under the Supreme Court's rules paralegals may "apply knowledge of law and legal procedures in rendering direct assistance to lawyers engaged in legal research; design, develop or plan modifications or new procedures, techniques, services, processes or applications; prepare or interpret legal documents and write detailed procedures for practicing in certain fields of law; select compile and use technical information from such references as digests, encyclopedias or practice manuals; and analyze and follow procedural problems that involve independent decisions." Specific activities of paralegals include:*

- *Attending client conferences and correspond with and obtaining information from clients;*
- *Drafting legal documents for lawyer review and witnessing the execution of documents;*
- *Assisting at closings and similar meetings between parties and lawyers;*
- *Maintaining estate and guardianship trust accounts, transferring securities and other assets, and assisting in the day-to-day administration of trusts and estates;*
- *Conducting research, checking citations in briefs and memoranda, and indexing and organizing documents;*
- *Preparing summaries of depositions, interviewing witnesses, and obtaining records; and*
- *Preparing summaries of trial transcripts and obtaining information from courts.*

Standard 10. Donated Paralegal Service

A paralegal should voluntarily donate paralegal service as a matter of public service. Paralegals are encouraged to donate 25 hours of service a year. Donated service must be performed under the supervision of a lawyer. Normally a paralegal should coordinate donated service with that of the employing lawyer. This will permit best use of a paralegal's donated service and assist the supervising lawyer in meeting the Kentucky Bar Association's goal of 50 hours annually of donated lawyer service.

Cross Reference to the Kentucky Rules of Professional Conduct:

Rule 6.1 Pro Bono Public Service

A lawyer is encouraged to voluntarily render public interest legal service. A lawyer is encouraged to accept and fulfill this responsibility to the public by rendering a minimum of fifty (50) hours of service per calendar year by providing professional services at no fee or a reduced fee to persons of limited means, and/or by financial support for organizations that provide legal services to persons of limited means. Pro bono services may be reported on the annual dues statement furnished by the Kentucky Bar Association. Lawyers rendering a minimum of fifty (50) hours of pro bono service shall receive a recognition award for such service from the Kentucky Bar Association.

Comment

(1) The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This Rule expresses that policy but is not intended to be enforced through disciplinary process.

(2) The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

(3) The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

Paralegal Practice Guide: *As an integral part of Kentucky's legal profession a paralegal shares a lawyer's obligation to open the legal system to economically disadvantaged persons. Paralegals should enthusiastically donate time and services in a coordinated effort with lawyers to meet an important Supreme Court goal of professional responsibility.*

Standard 11. Advertising And Solicitation

A paralegal shall know the Kentucky Rules of Professional Conduct on lawyer advertising and limitations on solicitation of clients. A paralegal's name and status may be included on the letterhead of an employing lawyer and the paralegal may with the lawyer's permission include the lawyer's name on the paralegal's business card.

🕮 ***Cross Reference to Supreme Court Rule 3.700 Provisions Relating to Paralegals:***

Sub-Rule 6. The letterhead of a lawyer may include the name of a paralegal where the paralegal's status is clearly indicated: A lawyer may permit his name to be included in a paralegal's business card, provided that the paralegal's status is clearly indicated.

🕮 ***Cross Reference to the Kentucky Rules of Professional Conduct:***

Rule 7.09 Direct Contact with Potential Clients

(1) No lawyer shall directly or through another person, by in person, live telephone, or real-time electronic means, initiate contact or solicit professional employment from a potential client unless:

(a) the lawyer has an immediate family relationship with the potential client; or

(b) the lawyer has a current attorney-client relationship with the potential client.

This Rule shall not prohibit response to inquiries initiated by persons who may become potential clients at the time of any other incidental contact not designed or intended by the lawyer to solicit employment.

(2) A lawyer shall not solicit professional employment from a potential client even when not otherwise prohibited by paragraph (1) if:

(a) The potential client has made known to the lawyer a desire not to be solicited by the lawyer; or

(b) the solicitation involves coercion, duress or harassment.

(3) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a potential client known or reasonably believed to be in need of legal services in a particular matter, must contain the words "THIS IS AN ADVER-

TISEMENT" in all capital letters prominently displayed in type at least as large as the type in the body of the communication unless:

(a) the lawyer has an immediate family relationship with the potential client; or

(b) the lawyer has a current attorney-client relationship with the potential client.

Further, in each such written or recorded or electronic communication the envelope, document, or container, by which such communication is transmitted shall contain the word "ADVERTISEMENT" in all capital letters, and in type large enough to be conspicuous and placed in a conspicuous location on the same side of the envelope, document, or container upon which the lawyer's name and/or address appears. If an electronic communication is sent by or on behalf of the lawyer to a potential client in a container or on a disc or other format on which words may appear, the outside of the container, or disc, or other format shall be marked as provided in this rule. If a recorded telephone, electronic, video, or digital communication is sent under this rule, a speaker must first recite the language "THE FOLLOWING IS AN ADVERTISEMENT" and shall further state at the end of the communication the language "THIS MESSAGE HAS BEEN ANADVERTISEMENT".

(4) No communication pursuant to SCR 3.130(7.09)(3) shall be sent to those potential clients who have been involved in a disaster as defined in SCR 3.130(7.60) until thirty (30) days have elapsed from the occurrence of the disaster.

(5) Notwithstanding the prohibitions in SCR 3.130(7.09)(1), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular manner covered by the plan.

Comment

(1) Communications to prior clients are not prohibited if the lawyer is required by the circumstances of the representation to communicate with a prior client to advise the client of changes in the law that would result in additional legal work.

(2) SCR 3.130(7.04)(5) permits a lawyer to participate with an organization that uses personal contact to solicit members for its group or prepaid legal service plan, provided that personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (5) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but should be designed to inform

potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must make reasonable efforts to determine that the plan sponsors are in compliance with the Rules.

(3) Neither this rule nor SCR 3.130(7.20) prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Rule 7.15 Communications Concerning a Lawyer's Service

A lawyer shall not make a false, deceptive or misleading communication about the lawyer or the lawyer's service. A communication is false, deceptive or misleading if it:

(a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or

(b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) Compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

Comment

(1) This Rule governs all communications about a lawyer's services, including advertising permitted by SCR 3.130(7.20). Whatever means are used to make known a lawyer's services; statements about them must be truthful. Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer' communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

(2) The prohibition in SCR 3.130(7.15)(b) of statements that may create "unjustified expectations" may preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented in a manner that may lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case.

(3) Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading.

Rule 7.20 Advertising

(1) A lawyer may advertise legal services through communications in compliance with these Rules.

(2) A lawyer shall not give anything of value to a non-lawyer for recommending the lawyer's services, except that a lawyer may:

(a) pay the reasonable cost of advertising or communication permitted by this Rule; and,

(b) pay the usual charges of a legal service plan, not to include a division of fees, operated by an organization not owned or directed by the lawyer, or,

(c) pay the usual charges of a not-for-profit or qualified lawyer referral service that has been approved by the highest court in the jurisdiction where the service operates an agency designated by that court or by the Kentucky Bar Association.

(3) Any communication made pursuant to these Rules shall include the name of at least one lawyer licensed in Kentucky, or law firm any of whose members are licensed in Kentucky, responsible for its contents.

(4) Communication by a lawyer with a person or entity with whom that lawyer has an immediate family or current attorney-client relationship, or a communication in response to an inquiry from any person or entity seeking information, shall be exempt from the provisions of the Advertising Rules and the Advertising Regulations, with the exception of SCR 3.130(7.15).

(5) If a lawyer or a law firm advertises legal services and a lawyer's name or image is used to present the advertisement, the lawyer must be the lawyer who will actually perform the service advertised unless the advertisement prominently discloses that the service may be performed by other lawyers. If the advertising lawyer or firm is advertising for clients for the purpose of referring the client to another lawyer or firm, that fact must be disclosed prominently in the advertisement.

Comment

(1) Neither this Rule nor SCR 3.130 (7.3) prohibits communications authorized by law, such as notice to members of a class in class action litigation.

(2) A lawyer is allowed to pay for advertising permitted by this Rule, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by

such programs. Paragraph (b) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

(3) A lawyer may pay the usual charges of a legal service plan or a not-for-profit qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists potential clients to secure legal representation. This Rule only permits a lawyer to pay the usual charges of a not-for-profit qualified lawyer referral service. A not-for-profit qualified lawyer referral service is one that is approved by the highest court of the jurisdiction where the service operates or by an agency designated by the highest court in that jurisdiction to handle such approvals, or in Kentucky by the Kentucky Bar Association.

(4) A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must make reasonable efforts to determine that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with potential clients, but such communication must conform with the Advertising Rules and Advertising Regulations. For example, the plan may not engage in advertising that is false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan mislead potential clients to believe that the plan was a lawyer referral service sponsored by a state agency or bar association. Similarly, the lawyer may not allow in-person, telephonic, or real-time contacts by the plan that would violate SCR 3.130(1.5)(e).

(5) This Rule does not address the circumstances under which a lawyer may be permitted to share or split a fee with other lawyers. For ethical requirements applicable to fee sharing arrangements see SCR 3.130(1.5)(e).

Rule 7.25 Identification of Advertisements

All advertisements must include the words "THIS IS AN ADVERTISEMENT", unless excepted by SCR 3.130(7.09). In recorded telephone, electronic, video, or digital communications, other than television, the speaker must first state "THE FOLLOWING IS AN ADVERTISEMENT" and must further state at the end of the communication "THIS MESSAGE HAS BEEN AN ADVERTISEMENT". All television communication, video recording or digital recording must prominently display the words "THIS IS AN ADVERTISEMENT" on the screen for as long as the lawyer's or firm's name appears on the screen. If a television communication video recording, or digital recording is longer than 60 seconds, the words "THIS IS AN ADVERTISEMENT" must be displayed throughout the entire communication. The words "THIS IS AN ADVERTISEMENT" must be prominently displayed onevery page of any advertisement in writing, and displayed without scrolling on the first screen of every page of a website.

Rule 7.40 Communication of Fields of Practice

A lawyer may communicate the fact that the lawyer does or does not practice in

particular fields of law. A lawyer who concentrates in, limits his or her practice to, or wishes to announce a willingness to accept cases in a particular field may advertise or publicly state that information in any manner otherwise permitted by these Rules. Any such advertisement or statement shall be strictly factual and shall not contain any form of the words “certified”, “specialist”, “expert”, or “authority”, except as follows:

(1) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Lawyer" or a substantially similar designation.

(2) A lawyer certified by an appropriate governmental agency in admiralty practice may use the designation "Admiralty", "Proctor in Admiralty", or a substantially similar designation.

(3) A lawyer may state or imply that he or she is “certified”, a “specialist”, an “expert” or “authority” in a particular field of law only if:

(a) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or by a national organization that the attorney demonstrates is qualified to grant such certification to attorneys who meet objective and consistently applied standards relevant to practice in a particular area of the law; and

(b) the name of the certifying organization is clearly identified in the communication; and

(c) if the lawyer is licensed to practice law in Kentucky, the communication must state that Kentucky does not certify specialties in legal fields. The communication may occur only for as long as the lawyer remains so certified and in good standing.

Comment

(1) This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted to so indicate.

(2) Recognition of specialization in patent matters is a matter of long-established policy of the Patent and Trademark Office. Designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

(3) Certificates discussed in SCR 3.130(7.40)(3) must meet the criteria set forth in *Peel v. Attorney Registration and Disciplinary Commission of Illinois,* 496 U.S. 91, 110 S.Ct. 2281 (1990). Stating or implying that the lawyer is certified as a “specialist”, an “expert” or “authority” is not permitted except as provided in this rule. The lawyer may state or imply that he or she is certified as a specialist, expert or authority only if the cer-

tification is granted by an organization approved by an appropriate state authority, such as a state bar association, or by an organization that qualifies under *Peel v. Attorney Registration and Disciplinary Commission of Illinois,* 496 U.S. 91, 110 S.Ct. 2281 (1990). Certifying organizations are expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. To insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication about certification, and the communication must state that Kentucky does not certify specialties in legal fields. If the Commission is not satisfied that the certifying organization's standards and procedures are sufficiently
meaningful and rigorous to make the communication truthful, it may disapprove the communication under SCR 3.130(7.15).

(4) Refer to SCR 3.130(702)(1)(i) for other applications of *Peel v. Attorney Registration and Disciplinary Commission of Illinois,* 496 U.S. 91, 110 S.Ct. 2281 (1990).

Rule 7.50 Firm Names and Letterheads

(1) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.15.

(2) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(3) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any period in which the lawyer is not actively and regularly practicing with the firm.

(4) Lawyers may state or imply that they practice in a legal entity only if that is the fact.

(5) The name of a lawyer who is suspended by the Supreme Court from the practice of law may not be used by the law firm in any manner until the lawyer is reinstated. A lawyer who has been permanently disbarred shall not be included in a firm name, letterhead, or any other professional designation or advertisement.

Comment

With regard to paragraph (4), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith and Jones," for that title suggests partnership in the practice of law.

Paralegal Practice Guide: *Lawyer advertising and solicitation of clients are two of the most sensitive professional responsibility issues. Wide use of law firm Websites increase the risk of violation of advertising rules. The guidelines are in flux and often un-*

enforced. Paralegals should make a special effort to keep abreast of developments in these areas to assure they as well as supervising lawyers comply with current requirements.

Standard 12. Misconduct

It is professional misconduct for a paralegal to:

(a) violate or attempt to violate the KPA Paralegal Professional Standards of Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) engage in the unauthorized practice of law;
(c) commit any felony or crime involving moral turpitude;
(d) commit fraud or deceit in applying for Certified Kentucky Paralegal status;
(e) disclose the contents of the Certified Kentucky Paralegal exam;
(f) advertise paralegal services in a manner that is false or misleading to the public;
(g) fail to pay KPA fees or other monies; and
(h) fail to meet Continuing Paralegal Education requirements.

🕮 ***Cross Reference to Supreme Court Rule 3.700 Provisions Relating to Paralegals:***

While the responsibility for compliance with standards of professional conduct rests with members of the Bar, a paralegal should understand those standards. … However, the paralegal does have an independent obligation to refrain from illegal conduct. Additionally, and notwithstanding the fact that the [*Kentucky Rules of Professional Responsibility are*] not binding upon lay persons, the very nature of a paralegal's employment imposes an obligation to refrain from conduct which would involve the lawyer in a violation of the [*Rules*]."

🕮 ***Cross Reference to the Kentucky Rules of Professional Conduct:***

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable Rules of Judicial Conduct or other law.

Comment

(1) Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

(2) Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

(3) A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Paralegal Practice Guide: *Avoiding allegations of misconduct is best accomplished by having a thorough understanding of a paralegal's role in the legal system, the limits of paralegal practice, and the diligent acquisition of and maintenance of professional qualifications and skills. There are numerous resources available for help when confronted with a Standards of Conduct problem beginning with the KPA. Do not go it alone, always seek help if in doubt -- it is better to be safe than sorry.*

APPENDIX A

FULL TEXT: SUPREME COURT RULE 3.700 PROVISIONS RELATING TO PARALEGALS WITH COMMENTS

Preliminary Statement. The availability of legal services to the public at a price it can afford is a goal to which the Bar is committed, and one which finds support in Canons 2 and 8 of the Code of Professional Responsibility. The employment of paralegals furnishes a means by which lawyers may expand the public's opportunity for utilization of their services at a reduced cost.

For purposes of this Rule, a paralegal is a person under the supervision and direction of a licensed lawyer, who may apply knowledge of law and legal procedures in rendering direct assistance to lawyers engaged in legal research; design, develop or plan modifications or new procedures, techniques, services, processes or applications; prepare or interpret legal documents and write detailed procedures for practicing in certain fields of law; select, compile and use technical information from such references as digests, encyclopedias or practice manuals; and analyze and follow procedural problems that involve independent decisions.

Purpose. Rapid growth in the employment of paralegals increases the desirability and necessity of establishing guidelines for the utilization of paralegals by the legal community. This Rule is not intended to stifle the proper development and expansion of paralegal services, but to provide guidance and ensure growth in accordance with the Code of Professional Responsibility, statutes, court rules and decisions, rules and regulations of administrative agencies, and opinions rendered by Committees on Professional Ethics and Unauthorized Practice of Law.

While the responsibility for compliance with standards of professional conduct rests with members of the Bar, a paralegal should understand those standards. It is, therefore, incumbent upon the lawyer employing a paralegal to inform him of the restraints and responsibilities incident to the job and supervise the manner in which the work is completed. However, the paralegal does have an independent obligation to refrain from illegal conduct. Additionally, and notwithstanding the fact that the Code of Professional Responsibility is not binding upon lay persons, the very nature of a paralegal's employment imposes an obligation to refrain from conduct which would involve the lawyer in a violation of the Code.

Sub-Rule 1. A lawyer shall ensure that a paralegal in his employment does not engage in the unauthorized practice of law.

Sub-Rule 2. For purposes of this rule, the unauthorized practice of law shall not include any service rendered involving legal knowledge or legal advice whether representation, counsel or advocacy in or out of court, rendered in respect to the

acts, duties, obligations, liabilities or business relations of the one required(sic) services where:

A. The client understands that the paralegal is not a lawyer;

B. The lawyer supervises the paralegal in the performance of his duties; and

C. The lawyer remains fully responsible for such representation, including all actions taken or not taken in connection therewith by the paralegal to the same extent as if such representation had been furnished entirely by the lawyer and as such actions had been taken or not taken directly by the lawyer.

D. The services rendered under this Rule shall not include appearing formally in any court or administrative tribunal except under Sub-rule 3 below, nor shall it include questioning of witnesses, parties or other persons appearing in any legal or administrative action including but not limited to depositions, trials, and hearings.

Sub-Rule 3. For purposes of this Rule 3.700, the unauthorized practice of law shall not include representation before any administrative tribunal or court where such service or representation is rendered pursuant to a court rule or decision which authorizes such practice by nonlawyers.

Sub-Rule 4. A lawyer shall instruct a paralegal employee to preserve the confidences and secrets of a client and shall exercise care that the paralegal does so.

Sub-Rule 5. A lawyer shall not form a partnership with a paralegal if any part of the partnership's activities consists of the practice of law, nor shall a lawyer share on a proportionate basis, legal fees with a paralegal.

Sub-Rule 6. The letterhead of a lawyer may include the name of a paralegal where the paralegal's status is clearly indicated: A lawyer may permit his name to be included in a paralegal's business card, provided that the paralegal's status is clearly indicated.

Sub-Rule 7. A lawyer shall require a paralegal, when dealing with a client, to disclose at the outset that he is not a lawyer. A lawyer shall also require such a disclosure when the paralegal is dealing with a court, administrative agency, attorney or the public, if there is any reason for their believing that the paralegal is a lawyer or is associated with a lawyer.

COMMENT

Sub-rule 1

The Kentucky Constitution, Section 109, creates one Court of Justice for the Commonwealth. Section 116 empowers the Kentucky Supreme Court to promulgate rules of prac-

tice and procedure for the Court of Justice. In addition, the Supreme Court has statutory authority to govern the conduct and activity of members of the Bar. KRS 21A.160.

Pursuant to constitutional and statutory authority, the Kentucky Supreme Court has adopted rules which govern the unauthorized practice of law. SCR 3.020 defines the practice of law in general and descriptive terms. SCR 3.470 provides that any attorney who aids another in the unauthorized practice of law shall be guilty of unprofessional conduct. SCR 3.460 delineates the procedure to be followed when a person or entity "not having the right to practice law" engages in the practice of law.

As of January 1, 1978, the American Bar Association Code of Professional Responsibility was accepted as a sound statement of professional conduct for members of the Kentucky Bar Association, with the exception of provisions which conflict with *Bates v. State Bar of Arizona.* SCR 3.130.

Canon 3 of the Code of Professional Responsibility provides that "A lawyer should assist in preventing the unauthorized practice of law." Further, "A lawyer shall not aid a nonlawyer in the unauthorized practice of law." DR 3-101(A). The rationale of this sub-rule may be found in EC 3-1 through EC 3-6 of the Code of Professional Responsibility.
The foregoing authorities demonstrate that paralegals cannot, any more than any other person or entity, engage in the unauthorized practice of law. Members of the Bar who employ paralegals incur a professional responsibility to ensure that their paralegal employees do not transgress the rules governing the practice of law contained in these authorities and thereby involve their employers in violations of their own professional responsibilities. A lawyer may, however, allow a paralegal to perform services involving the practice of law, provided that such services comply with the requirements of Sub-rule 2 and Sub-rule 3.

Sub-rule 2
The Code of Professional Responsibility, in particular EC 3-6, recognizes the value of utilizing the services of paralegals under certain conditions:

> "A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal services more economically and efficiently."

Maintaining a "direct relationship" with the client does not preclude a paralegal from meeting with the client nor does it mandate regular and frequent meetings between the lawyer and client. However, when it appears that consultation between the lawyer and the client is necessary, the lawyer should talk directly to the client.

Sub-rule 3
Notwithstanding the restrictions imposed upon nonlawyers with respect to engaging in the practice of law, exceptions exist by virtue of statute, administrative rule or regulation, or court rule or decision. Under certain circumstances, lay representation of parties does

not constitute the unauthorized practice of law. For example, the Federal Administrative Procedure Act, Title 5, U.S.C. Section 555(b) authorizes federal administrative agencies to permit nonlawyers to represent parties in proceedings before the agencies. Such lay representation is also provided for in statutes and regulations governing administrative proceedings involving the Public Assistance (A.FDC), Medicaid, and Food Stamp Programs. See, 42 U.S.C. Section 601, Section 602 (1977); 42 U.S.C. Section 1396 (1977); 7 U.S.C. Section 2019 (1977); and the implementing regulations, 45 C.F.R. Section 205.10(a), and 7 C.F.R. Section 271.1(a)(1) (1977).

The Kentucky Department for Human Resources has implemented these federal regulations. Lay representation is specifically provided for in regulations governing hearings and appeals in certain programs. 904 KAR 2:055, Section 1-12.

The United States Supreme Court has held that federal law controls the administration of federal grant-in-aid programs. See, Ying v. Smith, 392 U.S. 309, 332-333 (1968); Rosado v. Wyman, U.S. 397, 421-422 (1970). Additionally, the court has held that in federally regulated areas, federal statutes and regulations prevail over a state's power to define and regulate the practice of law. See, Sperry v. Florida, 373 U.S. 379, 385 (1963); and Keller v. State Bar of Wisconsin, 374 U.S. 102 (1963), citing Sperry.

Sub-rule 4

This sub-rule reiterates the Code of Professional Responsibility. Canon 4, DR 4-101(D) provides in part that:

> "(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client. ..."
>
> This obligation is emphasized in EC 4-2 under Canon 4:
>
> "... It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise
>
> care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved."

Sub-rule 5

This sub-rule is based on the express provisions of DR 3-102(A) and DR 3-103(A) of the Code of Professional Responsibility. In accordance with these provisions, the compensation of a paralegal may not include a percentage of the fees received by his employer, or any remuneration, directly or indirectly, for referring matters of a legal nature to the employer.

DR 3-103(A) provides that: "A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." The rationale is found in EC 3-8: "Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman..... However, "A lawyer or law

firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement." DR 3-102(A)(3).

This Disciplinary Rule also reflects the rationale of EC 3-8:

> "Since a lawyer should not aid or encourage a layman to practice law, he should not ... share legal fees with a layman."
>
> "Profit-sharing retirement plans of a lawyer or law firm which include non-lawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with laymen are permissible since they do not aid or encourage laymen to practice law."

Sub-rule 6

The Code of Professional Responsibility, in particular DR 2-102(A)(4), provides direction concerning the information which may be provided on a lawyer's letterhead. In keeping with the spirit of DR 2-102(A)(4), paralegals may be listed on the letterhead if there is a clear indication of their status, i.e., they are not lawyers. These names should properly be listed under the separate heading of "Paralegals."

A paralegal may have a business card with the lawyer's name or law firm's name on it, provided the status of the paralegal is clearly indicated. It is not necessary that any lawyer's name appear on such business card. The card is designed to identify the paralegal and to state by whom the paralegal is employed. The business card of a paralegal shall be approved, in form and substance, by the lawyer-employer.

Sub-rule 7

A lawyer should instruct a paralegal employee to disclose at the beginning of any dealings with a client that he is not an attorney. Whenever any person dealing with a paralegal has reason to believe that the paralegal is a lawyer or associated with a lawyer, the paralegal shall make clear that he is not a lawyer. Even if a paralegal appears before an administrative agency or court in which a lay person is entitled to represent a party, the paralegal should nevertheless disclose his status to the tribunal. Routine early disclosure of nonlawyer status is necessary to ensure that there will be no misunderstanding as to the responsibilities and role of the paralegal. Disclosure may be made in any way that avoids confusion. Common sense suggests a routine disclosure at the outset of communication.

If a paralegal is designated as the individual in the office of a lawyer or law firm who should be contacted, disclosure of his or her nonlawyer status should be made at the time of such designation.

APPENDIX B

FULL TEXT: SELECTED KBA ETHICS AND UNAUTHORIZED PRACTICE OPINIONS RELATING TO PARALEGALS

SCOPE OF PARALEGAL PRACTICE

Opinion KBA U-47
Opinion: (November 1994)

Question: The following question regarding paralegals refers to scenarios in which the paralegal is outside of the office talking to clients and the paralegals supervising attorney is not present. The supervising lawyer has asked: "Is the paralegal's rendering of advice the unauthorized practice of law if: (1) it is made clear that the paralegal is not a lawyer; (2) the lawyer discusses the specific issues with the paralegal both before the paralegal-client discussions and afterwards; and (3) the attorney accepts full responsibility for the paralegals actions and advice?"

Answer: No.

References: SCRs 3.020 and 3.700; KBAs E-266 (1982); E-341 (1990); KBA U-45; ABA/BNA Lawyer's Manual on Professional Conduct 21:8601 et seq.

The requester contends that in his area there are a lot of misunderstandings about what a paralegal may or may not do, and that such misunderstandings have led to friction, threats of bar discipline, and so forth.

Much of what a paralegal does, whether the work be done in or out of the office, would be the unauthorized practice of law under SCR 3.020 except for the fact that the work is "supervised" by a lawyer, within the meaning of SCR 3.700. Kentucky does not recognize the concept of a "free-standing" paralegal service in which the paralegal provides legal services directly to members of the public. KBA U45 (1992).

In the past we have issued opinions making it clear that the lawyer may not send a paralegal to engage in unsupervised representation of the client in court or administrative proceedings [KBA E-266 (1982)], or in depositions [E341 (1990)]. Furthermore, the ABA has issued opinions making it clear that a lay legal assistant or paralegal may conduct initial interviews with clients so long as the client subsequently confers with the supervising lawyer [ABA Informal Op. 998 (1967)] and may sign correspondence incident to his or her proper functions, so long as he or she is clearly identified as a nonlawyer [ABA Informal Op. 1367 (1976)]. The question now before us is more difficult to answer because it deals in generalizations about "supervision" and the notion that a lawyer must maintain a "direct relationship" with the client.

We assume that differences of opinion may have developed on these issues across the country. However, Kentucky has addressed this issue in its Paralegal Code, SCR 3.700, Sub-Rule 2: "The unauthorized practice of law shall not include any service rendered involving legal knowledge or legal advice ... where

A. The client understands that the paralegal is not a lawyer;
B. The lawyer supervises the paralegal in the performance of his duties; and
C. The lawyer remains fully responsible for such representation ... ."

The Kentucky Paralegal Code also states that "maintaining a direct relationship with the client does not preclude a paralegal from meeting with the client nor does it mandate regular and frequent meetings between the lawyer and client ... when it appears that consultation between lawyer and client is necessary, the lawyer should talk to the client."

In light of these standards we think that the question asked should be answered in the negative. Here the paralegal is acting as a conduit for the lawyer's legal advice. The lawyer warrants that he or she will be providing adequate supervision, will be assuming full responsibility, and that the client will be fully informed of the paralegal's status.

Opinion KBA U-54
Opinion: (March 1998)

Question 1: May a lay person search a real estate title and render an opinion as to quality and quantity of title to a non-lawyer third person without engaging in the unauthorized practice of law?

Answer: No.

OPINION

Question 2: May a lay person search a real estate title and report to a non-lawyer third person the existence and contents of recorded documents without expressing an opinion as to the validity enforceability, quality or quantity of title found in those records without engaging in the unauthorized practice of law?

Answer: See Opinion.

"[A] title examination consisting of analysis of recorded interests in land coupled with an opinion as to its legal status is a service which can be performed for others only by a licensed attorney." Kentucky State Bar Assn. v. First Federal Savings & Loan of Covington, Ky., 342 S.W.2d 397 (1961). KBA U-21.

A lay person may review public records and report to a non-lawyer third person what was found. However, opinions regarding the quality or quantity of deficiencies,

whether certain documents constitute a "lien" or "encumbrance" or statements interpreting the documents would constitute the giving of legal advice and therefore the unauthorized practice of law. SCR 3.020.

Opinion KBA U-63
Issued: March 2006

QUESTION 1: Does a non-attorney business entity or corporation, whose business is the creation, preparation or typing of legal forms and documents, engage in the unauthorized practice of law when, in addition to creating, preparing or typing the forms, the non-attorney or entity assists in the identification of the purchaser's legal goal and advises the purchaser on the proper choice and utilization of the forms to achieve their legal goal?

ANSWER: Yes. See Opinion

QUESTION 2: Does the answer to Question 1 change if the non-attorney business entity or corporation uses the services of an attorney, even if referred to as a "supervising," "on call" or "employee" attorney?

Answer: No.

AUTHORITY

SCR 3.020 defines the practice of law. The Supreme Court of Kentucky has the exclusive authority to promulgate rules governing the practice of law. Turner v. Kentucky Bar Association, 980 S.W.2d 560 (Ky. 1998).

The compelling reason for such regulation is to protect the public against rendition of legal services by unqualified persons. Comment to Kentucky Rule of Professional Conduct SCR 3.130-5.5.

The practice of law is defined by SCR 3.020 as any service "involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services."

The "unauthorized" practice of law is the performance of those defined services by non-lawyers for others. Countrywide Home Loans, Inc. et. al v. Kentucky Bar Association, 113 S.W. 2d 105 (Ky. 2003).

Corporations are not permitted to practice law in the Commonwealth. Kentucky Bar Association v. Tussey, 476 S.W.2d 177 (Ky. 1972); KBA U-32; Kentucky Bar Association v. Legal Alternatives, Inc., 792 S.W.2d 368 (Ky. 1990).

OPINION

For many years the public has been able to obtain from office supply stores and a variety of other sources, pre-printed form documents identified as wills, contracts, powers of attorney, partnership agreements, articles of incorporation and other similar documents all of which will be referred to as "legal form documents" for purposes of this discussion.

More recently certain entities and businesses have emerged which not only sell preprinted business type legal forms, but in addition thereto offer the public the opportunity to blanks and have the documents typed by the business. The customers would be representing themselves in various types of legal matters such as dissolution of marriageand consumer bankruptcy cases.

Some types of legal forms seem quite simple to complete while others are more complicated. The sale of these preprinted legal forms, in and of itself, does not constitute the unauthorized practice of law.

However, the Kentucky Bar Association has become aware that some such entities and businesses advertise directly while others strongly imply that by using their "services" no purchase price of these forms the name and phone number of an identified attorney who is represented to be available to "provide information" for the purchasers of the legal forms. In some instances the purchasers are encouraged to contact the identified attorney for advice.

The purely ministerial acts of typing forms, filing in blanks on commercially available preprinted forms, or official forms of the courts, would not constitute the practice of law. However, if the services of these entities are not so limited, the services could violate the prohibition against the unauthorized practice of law.

The following are illustrative of the services that if rendered by such entities or businesses, would be the unauthorized practice of law:

1. Offering services to the public in such a manner that creates an impression in the public that it may rely upon such entities or businesses to properly prepare legal form documents for them or on their behalf, other than properly typing;

2. Representing to the public that such entities or businesses, or any persons that are either employed by or who act in concert with them, are capable of advising the public as to which forms are needed and how to use them;

3. Completing forms or assisting in the completion of forms that are not official forms approved by the Administrative Office of the Courts of the Supreme Court of Kentucky or the relevant state or federal Court or administrative agencies, if conveying information that would lead a reasonable person to believe that the completed form is legally sufficient for the customer's purpose;

4. Providing services such as conducting interviews to ascertain and evaluate information necessary to properly complete forms, that go beyond the mere selling of forms, typing of forms, providing written general information or providing secretarial or notary services;

5. Preparing or assisting in the preparation of any pleadings, motions, legal memoranda, arguments, briefs, notices or any other legal documents or pleadings for another person unless mere typing services are offered;

6. Using the title "paralegal" unless the employee is working directly for and under the supervision of a member of the Kentucky Bar Association and performs specifically delegated substantive legal work for which a member of the Kentucky Bar Association is responsible;

7. Giving advice and making decisions on behalf of another person that requires legal skill and knowledge of the law greater than that possessed by the average citizen;

8. Giving advice to another person concerning the application, preparation, advisability, or quality of any legal instrument or document in connection with any legal proceeding or procedure;

9. Construing or interpreting the legal effect of Kentucky or Federal laws and statutes for another person, as those laws relate to any legal matter, including but not limited to probate, dissolution of marriage, and bankruptcy matters;

10. Giving advice and/or explaining legal remedies and options to another person that affects that person's procedural and substantive legal rights, duties and privileges;

11. Providing direct advice to another person in the nature of explanation, recommendation, advice and assistance in the selection and completion of preprinted legal forms;

12. Initiating and controlling a lawyer-client relationship, setting fees and paying an attorney to do work for a third party;

13. Engaging in any personal legal assistance in the preparation of legal forms including the service of "correcting" customer's errors or omissions or providing customers with any assistance in preparing the forms other than mere typing or ministerial acts of correcting typographical errors;

14. Advising another person as to the sale, preparation or typing of a will, living trust or related documents by recommending or identifying the type of will, living trust or related documents most appropriate for another person's situation;

15. Assembling and/or drafting a will, living trust, deed, durable power of attorney or related documents for another person;

16. Executing and/or advising on the steps necessary for the legal execution of a will, living trust, deed, durable power of attorney or related documents for another person other than providing notary services;

17. Funding and/or advising on the funding of a living trust for another person.

The preceding are examples of services which, if provided by non-attorneys, would constitute the unauthorized practice of law. The list is not intended to be exhaustive of all possibilities but merely exemplary of the types of improper activities that might be engaged in by non-attorneys or legal form document preparation entities.

If a customer already has identified their legal goals and intends the use of the forms to achieve such ends, then selling them the forms they request is not the practice of law.

However, "[p]racticing law is not confined to performing services in actions or proceedings in courts of justice, but includes giving advice and preparing wills, contracts, deeds, mortgages, and other instruments of a legal nature." Howton v. Morrow, 106 S.W.2d 81, 82 (Ky. 1937). (emphasis added) If the entity advises the customers that the document is advisable or legally sufficient for their particular legal situation, that is the unauthorized practice of law.

The availability of an “on call” attorney as part of the services being sold not only does not avoid the unauthorized practice of law, it adds another layer of problems.

If the entity or business has an employee who is a licensed attorney whose services have been sold as part of the package, and who, advises, or assists the purchaser in how to achieve their particular legal goal, one of two significant problems is involved. First, the services are being sold by the lay entity (however organized). Corporations cannot practice law. This relationship would cause the employee attorney to be aiding and assisting the entity in the unauthorized practice of law. See Kentucky Bar Association v. First Federal Savings & Loan Association, 342 S.W.2d 397 (Ky. 1960); SCR 3.130- 5.5(e).

Second, similar business practices by an unincorporated entity, while they may not constitute the unauthorized practice of law by a corporation, raise other troubling ethical considerations for the attorney or firm involved which are outside the scope of this opinion but deserve mention. These include improper fee splitting, advertising and/or improper referral of legal business to the attorney. See KBA E-264; SCR 3.130-5.4.

Likewise, there may be consumer protection issues which are outside of the scope of this opinion.

CLIENT CONFIDENTIALITY, CONFLICTS OF INTEREST, SHARED OFFICES AND CHANGING EMPLOYERS

KBA E-308
Opinion (September 1985)

Question: If a paralegal leaves a law firm (the "former firm") and is hired by another law firm (the "hiring firm"), which is the opposing counsel in several cases, does the hiring firm have a conflict of interest?

Answer. Qualified yes.

References: SCR 3.700 Sub-Rule 4; Code of professional Responsibility (1969), Preamble; Disciplinary Rules 1-102(A)(3), 4-101(D), 5- 105(D), and 7-107(J), Ethical Considerations 4-1, 4-2 and 4-5; Philadelphia Opinion 80-77 (1980); Philadelphia Opinion 80-199 (1980): Vermont Opinion 79-28 (1979) (MARU 12841); Vermont Opinion 782 (1978)(MARU 12822)

This opinion assumes that: (1) the hiring firm is opposing counsel in ongoing litigation; (2) the paralegal worked on the case while employed by the former firm, and (3) the hiring firm knows that the paralegal formerly worked on the case.

The Preliminary Statement to the Code of Professional Responsibility states:

> Obviously the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers; however, they do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to professional employment. A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representation of a client.

This statement implies that no conflict of interest can be imputed to the hiring firm. Such conflicts are normally imputed under DR 5- 105(D), which requires the partners and associates of a "lawyer" to withdraw from or decline employment if the lawyer must decline it or withdraw under DR 5-105. Since the paralegal is not subject to DR 5-105(D), he or she cannot have a conflict of interest which can be imputed to the hiring firm. See Vermont Opinion 78-2 (stating that conflict-of-interest rules should not apply to the hiring of paralegals because of the foregoing reason and because (i) it is difficult to distinguish paralegals from other office staff, (ii) paralegals' job opportunities and mobility would be limited, and (iii) there is no compelling appearance of impropriety). But see Vermont

Opinion 79-28 (stating that there is an appearance of impropriety, but declining to state that there is a conflict of interest or that the hiring firm must withdraw).

Despite the foregoing, lawyers have duties regarding the employment of paralegals which can provide a basis for disqualification in the present case. DR 4-101(D) requires a lawyer to exercise reasonable care to prevent employees from disclosing or using confidences or secrets of a client. In addition, Kentucky Supreme Court Rule 3.700 Sub-Rule 4 states: "A lawyer shall instruct the paralegal employee to preserve the confidences and secrets of a client and shall exercise care that the paralegal does so." Together these rules require that the former firm: (1) instruct the paralegal not to disclose the client's confidences and secrets after leaving the firm; (2) inform the hiring firm that the paralegal has been so instructed; (3) request that the paralegal not be permitted to work on or discuss the case; (4) request that the hiring firm instruct the paralegal not to disclose confidences or secrets of the former firm's clients; (5) request that the hiring firm inform the former firm if the paralegal discloses confidences or secrets of the former firm's client; (6) request that the hiring firm withdraw from the case if the paralegal discloses confidences or secrets of the former firm's clients; (7) request written assurances from the hiring firm that it will comply with the former firm's requests; (8) advise the clients of the paralegal's change in employment; and (9) move to disqualify the hiring firm If the client so requests.

DR 4- 101(D) and Kentucky Supreme Court Rule 3.700 Sub Rule 4 do not require the hiring firm to comply with the former firm's requests. To interpret them otherwise would impose upon lawyers a duty to preserve the confidences and secrets of other lawyers' clients. But since there is no attorney/client relationship in such cases, there can be no such duty.

Nevertheless, under Canon 9 the hiring firm has a duty to avoid even the appearance of impropriety. When a paralegal joins the opposing firm in a case on which the paralegal formerly worked, there is a possibility of an appearance of impropriety. The hiring firm is presumed to know of the paralegal's involvement in the case, and thus it may appear that the paralegal has been hired because of his or her involvement in the case. To mitigate this possible appearance of impropriety, the hiring firm must comply with the former firm's request as set forth above. If the hiring firm refuses to comply with any of these requests, then it may be disqualified upon the former firm's motion and after a hearing to determine whether there has been or is likely to be any disclosure of confidences or secret of the former firm's clients. See Summit v. Mudd, 679 S.W.2d 225 (Ky. 1984).

KBA E-406

Issued: November 20, 1998

Question 1: May two law firms that often represent clients with adverse interests employ the same legal secretary?

Answer: Qualified No.

Question 2: May two or more lawyers who share office space and often represent clients with adverse interests, share a legal secretary?

Answer: Qualified No.

Question 3: May two law firms or lawyers sharing office space share a legal secretary when the law firms or office-sharing lawyer do not represent clients with adverse interests?

Answer: Qualified Yes.

References:: KRPC 1.6; 1.7; 1.8;1.9; 1.10; 5.3; Oliver v. KBA , 779 S.W.2d 212 (KY 1989); Ciaffone v. Eighth Judicial Dist. Ct., 945 P.2d 950 (Nev. 1997); ABA Formal Op. 88-356 (1988); ABA Informal Op. 88-1526 (1988); KBA E-308 (1985); Utah Op. 125 (1994); Oregon Ethics Op. 1991-50 (1991); ABA/BNA LMPC 91:606.

OPINION

These inquiries ask whether it is ethical for two or more unrelated lawyers or firms to employ the same legal secretary. While the Kentucky Rules of Professional Conduct do not apply directly to nonlawyers, Rule 5.3 requires partners and supervising lawyers to take reasonable steps to ensure that nonlawyer "conduct is compatible with the professional obligations of the lawyer." KRPC 5.3.

Two separate but related obligations are implicated by these inquiries. The first is the duty to preserve client confidences. Rule 1.6 provides, in part, "[a] lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized to carry out the representation...." KRPC 1.6. While Rule 1.6 clearly authorizes disclosure of confidential information to a legal secretary in furtherance of the representation, Rule 5.3 obligates the lawyer to take appropriate action to protect against improper disclosure by the secretary or other nonlawyer assistant. *See* KRPC 5.3, Comment.

Closely related to the duty to protect against disclosure of client confidences is the duty of loyalty, which is codified in the conflict of interest rules. KRPC 1.7 - 1.12. The duty of loyalty is often expressed in terms of the lawyer's duty to exercise independent professional judgment in the representation of the client. In this regard, the conflict rules have no direct consequence for the legal secretary or other nonlawyer employers. But the concept of loyalty has a much broader meaning, which is reflected in the rules prohibiting a lawyer from using "information relating to the representation of a client [or former client] to the disadvantage of the client...." KRPC 1.8(b) and 1.9(b). The lawyer's duty to protect against improper use of client information does have consequences for the legal secretary.

Thus, analysis of these inquires begins with the premise that Rule 5.3 obligates the lawyer to protect against both improper disclosure and improper use of confidential information. The threshold question is how does the lawyer go about satisfying his or her obligations under Rule 5.3? The Comment to Rule 5.3 starts by restating the obvious: "[a] lawyer should give ... assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to the representation of the client...." It is clear that the lawyer must do more than merely "instruct" the legal secretary about his or her ethical obligations. Legal secretaries and other nonlawyer employees are not trained as lawyers and are not subject to discipline. The burden falls upon all of the lawyers, whether they are lawyers in formal law firms or office-sharers, to evaluate their respective practices and the nature of the work to be assigned to the legal secretary to determine if it is possible to develop policies and procedures that will adequately protect client interests. In analyzing these questions, special attention must be given to both the assignment of work and access to client files.

Question 1 deals with the firms that often represent adverse interests. In order to protect client confidences, the two firms would have to work together to develop policies that ensure that legal secretary would not be assigned work involving conflicting interests. has serious doubts as to whether it is practical, or even possible, to monitor conflicts between two unaffiliated firms on a continuing basis. This is not to say that a legal secretary can never work for two firms at the same time. There may be situations where by each is so distinct that conflicts would never arise, but that is not the case presented by Question 1.

Protecting client confidences requires more than coordinating and monitoring work assignments. As Comment 11 to Rule 1.10 correctly notes, "[p]reserving confidentiality is a question of *access* to information" (emphasis added). Both firms would have to take special precautions to prevent access to and the sharing of confidential information about clients who have conflicting interests. *See generally,* ABA Inf. Op. 88-1526 (1988); ABA Formal Op. 88- 356; KBA E-308; Oliver v. KBA, Ky., 779 S.W.2d 212 (1989). While recognizing that screening has been employed to avoid disqualification when a secretary moves from one firm to another, the practicality of screening when the secretary has a continuing relationship with two firms is doubtful. Just as with work assignments, both firms would have to evaluate their client screened. We believe this is unrealistic in most, if not all, situations. Finally, the law firms must consider also the threat of law firm disqualification by a court of law as a result of simultaneous employment of the legal secretary, though court disqualification is not a matter of ethics. *See, e.g.,* Ciaffone v. Eight Judicial Dist. Ct., 945 P.2d 950 (Nev. 1997).

Question 2 asks whether office-sharing lawyers can share a legal secretary if the office-sharers often represent adverse interests. Whether such an arrangement is permissible will depend on the particular facts of each individual situation. The problems presented by office-sharers who represent conflicting interests are similar to those described above and the duty to protect against improper disclosure and use is the same. Thus, it is not surprising that most ethics committees that have considered this issue strongly advise

against sharing legal secretaries and other nonlawyer employees who have access to sensitive material. *See generally*, ABA/BNA LMPC sec 91:601, 606; Utah Ethics Op 93-99 (1994); Oregon Ethics Op. 1991-50 (1991). The Committee notes that if the office-sharers conduct their practice as a firm, they will be treated as a firm for conflict of interest purposes. KRPC 1.10, Comment 1. Shared use of a secretary, along with access to client files, are two factors that would weigh heavily in favor of treating office-sharers as a firm.

Question 3 deals with the sharing of a legal secretary by office-sharing attorneys and law firms when the firms or office-sharers do not represent adverse interests. The Committee notes that the interests and concerns discussed above are equally relevant in any evaluation of sharing a legal secretary. There may be situations in which the nature of the work done by each law firm is so distinct that conflicts rarely, if ever, arise and thus can be detected and dealt with in accord with the above discussion. Likewise, the Committee recognizes that it may be possible to structure office-sharing arrangements so that the office-sharers do not represent conflicting interests. This opinion should not be read to suggest that law firms or office-sharers can never share secretaries.

The issues to which this opinion is addressed involve a legal secretary. The same principles would apply to other nonlawyer employees of attorneys.

KBA E-417
Issued: July 2001

Question: May a lawyer share office space with persons or organizations engaged in activities other than the practice of law?

Answer: A lawyer may *not* share office space with persons or organizations engaged in such other activities *unless* the office-sharing arrangement, in its physical layout and its functional operation, will:

> a) safeguard confidential information of the lawyer's clients, by preventing unauthorized access;
> b) preserve the lawyer's professional independence, by keeping the law practice separate and distinct from other activities and by avoiding impermissible conflicts of interest; *and*
> c) conform to rules governing information about legal services, by avoiding improper advertising and referral or solicitation of prospective clients.

Ordinarily, office sharing arrangements will satisfy these requirements if they:

> (i) provide exclusive and secure facilities for the lawyer to meet clients, communicate with them, and store information relating to their representation;
> (ii) establish the distinct identity of the law practice by furnishing clearly differentiated signage and entry to the law office and by avoiding uses of common employees or facilities in ways that suggest the practice and other activities are somehow affiliated;

and
(iii) allow no misleading communications on the premises regarding legal services, no communications suggesting that the law practice is affiliated with another activity, no improper advertising or contacts by the lawyer with prospective clients, and no scheme by which the law practice and other activities give or receive anything of value in return for client referrals.

References*:* Kentucky Rules of Professional Conduct (S.C.R. 3.130) 1.6, 1.7(b), 5.4, 5.5, 7.10, 7.20, 7.30; KBA Opinions E-406, E-322, E-192; ABA Formal Opinion No. 328 and Informal Opinion No. 1482

OPINION

This Committee has long advised lawyers to view office-sharing arrangements with caution. In 1978 the Committee issued KBA Opinion E-192, adopting an outright prohibition against office-sharing with professionals or businesspersons engaged in activities other than the practice of law. The Committee acknowledged that its prohibitory approach contrasted with several informal opinions of the American Bar Association, which had allowed office-sharing arrangements on a case-by-case approach if they did not become "feeders" for the law practice, create indirect advertising, or entail an improper apportioning of fees or expenses. These informal ABA opinions flowed from Formal Opinion 328 (1972), in which the ABA Committee on Ethics and Professional Responsibility had eschewed broad language condemning "indirect solicitation" or "feeding the law practice." Instead, the ABA Committee insisted, "any proscription must be based on provisions of the Code [of Professional Responsibility]."

Nonetheless, in KBA Opinion E-192 our Committee considered office-sharing to be a phenomenon deserving of separate treatment and categorical condemnation:

> [T]he evils of direct or indirect solicitation on [the] part of the laymen are inevitable. Sooner or later, there will, in fact, be a feeder service for the practice of law…. With all due regard to the American Bar Association, it is our opinion that a lawyer may not share office space and expenses with a real estate broker. Furthermore, a lawyer may not share office space and expenses with a certified public accountant *or any other group or groups of people*. [Emphasis supplied.]

In 1982, the ABA issued Informal Opinion No. 1482, revisiting the issue of office sharing in the context of the Code. The ABA Committee explained its adherence to the case-by case approach:

> The Model Code does not prohibit a lawyer from sharing office space with a private business. Nonetheless, steps must be taken by any lawyer who practices in such a setting to avoid possible misunderstanding that could be created by sharing offices. Because certain specific legal obligations and ethical protections hinge upon the existence of an attorney-client relationship, care

must be taken to leave no doubt as to when that relationship exists and when it does not.

When the ABA later promulgated the Model Rules of Professional Conduct, it maintained the same approach. As explained in one authoritative commentary:

> Nothing in either the ABA Model Rules or the ABA Model Code specifically proscribes the sharing of office space, personnel, equipment, or expenses. A lawyer who decides to enter into this type of arrangement, however, must consider various ethical constraints against misleading the public, revealing client confidences, or engaging in improper division of fees or solicitation. [ABA/BNA Lawyers' Manual on Professional Conduct (2000), at p. 91:601, hereinafter cited as ABA/BNA Manual.]

Recent opinions of state bar ethics committees outside Kentucky have followed the ABA's lead. *Id.* at pp. 91:610-12, and 614-15. As noted by the Michigan Standing Committee on Professional and Judicial Ethics, office-sharing is not, of itself, the ethical issue; rather, it is the factual setting in which compliance with ethical protections must be examined. These protections include the preservation of client confidences and secrets, the exercise of a lawyer's independent professional judgment in representing clients, and the accuracy and propriety of communications concerning the lawyer's services. Mich. Prof. Jud. Eth. Op. No. RI-118 (1992).

We agree. The modern Rules treat office-sharing as a context in which ethical issues arise, rather than as a separate problem to be addressed by categorical prohibition. When we adopted the categorical approach in KBA Opinion E-192, our concern was primarily with "feeder" operations that contravened the spirit of prohibitions against lawyer advertising and client solicitation. Although the lines of demarcation against advertising and solicitation had already begun to shift by 1978, we created a prophylactic remedy against a source of activities perceived to be broadly prohibited. Today, as court decisions have forced outright prohibitions of advertising or solicitation to be replaced by fact-sensitive regulations and limitations, the categorical approach to office-sharing has become overbroad. Office-sharing arrangements vary greatly. It would be an oversimplification to say that *no* arrangement *ever* could satisfy the ethical standards relating to confidential information, independent professional judgment, or communications about a lawyer's services. Moreover, a categorical preclusion against office sharing may stifle some ethically responsible office-sharing arrangements that could produce salutary effects, such as enabling lawyers to control costs and to make their services more fully available to clients of moderate means.

In our view, the time has come to allow office-sharing arrangements while holding them strictly accountable under these ethical standards. Indeed, our Committee already has moved in that direction with respect to office-sharing by lawyers with other lawyers. We have stated, for example, that prosecutors and defense counsel may not share offices because of the obvious risks to confidentiality of client information and to each lawyer's professional independence; but we have allowed office-sharing if part-time

government lawyers' duties are limited to special functions, and we have allowed prosecutors and defense counsel to rent space in the same building if the offices are "sufficiently separate to ameliorate the concerns raised by 'office sharing'." KBA Opinion E-322 (1987).

Accordingly, today we modify that part of KBA Opinion E-192 which categorically prohibits all office-sharing arrangements between lawyers and persons engaged in occupations or professions other than the practice of law. We reaffirm, however, the ethical mandate that any office-sharing arrangement, in its physical layout and functional operation, must safeguard confidentiality under Rule 1.6 [Kentucky S.C.R. 3.130 (1.6)], by preventing unauthorized access to client information. The arrangement also must preserve the lawyer's professional independence under Rules 5.4 and 5.5, by keeping the law practice separate and distinct from other activities. Finally, the arrangement must conform to Rules 7.10, 7.20, and 7.30; it must avoid improper communications, by the lawyer or by the office-sharing nonlawyers, of information about legal services. It is the lawyer's responsibility to assure that a contemplated office-sharing arrangement will satisfy all of these standards and will conform to any other applicable provisions of the Rules of Professional Conduct.

Experience with office-sharing in jurisdictions outside Kentucky has revealed the kinds of safeguards ordinarily needed to demonstrate compliance with these ethical requirements. Confidentiality must be protected by providing space in which lawyer-client conversations cannot be seen or overheard; by providing separate and secure computer systems and files for client-related records, including client-related billing and accounting information; and by providing separate telephone service to the lawyer's office as well as a means of safeguarding the confidentiality of any information sent or received by facsimile machine. S*ee generally, e.g.,* D. C. Ethics Opinion No. 303 (2001); N.Y. Cty. Law. Ass'n Comm. Prof. Ethics Opinion 692 (1993). In order further to protect confidentiality and to assure the lawyer's professional independence, any shared staff must be trained and supervised in preserving the separateness of law office work and the confidentiality of client records and communications. *See, e.g.,* Pa. Bar Ass'n Comm. Legal Ethics Prof. Resp. Informal Opinion No. 95-105 (1995); Mich. Prof. Jud. Ethics Opinion, *supra*. Common receptionists ordinarily should be avoided; if one is used, however, the lawyer's telephone line must be separate and exclusive; incoming calls must be answered in a way that identifies the lawyer or law office without reference to the other activities. Neither a shared receptionist nor any other shared staff may handle confidential client information. Moreover, if the lawyer's clients have interests adverse to the other professionals or businesspersons sharing office space on the premises, staff must not be shared at all. *Cf.* KBA Opinion E-406 (1998) (stating that lawyers representing clients with adverse interests may not share a legal secretary).

The lawyer's professional independence also must be evidenced by an office arrangement that "makes it clear to all clients and others that they are dealing with the law firm at times when in fact this is the case." ABA Informal Opinion 1482, *supra*. Door signs, the entry to the law office, telephone listings, written materials such as stationery, and receptionist contacts must express the separate and distinct character of the law prac-

tice. Mich. Prof. Jud. Eth. Opinion RI- 206 (1994). A common conference room should not be used by the lawyer as a library or in any other way suggesting an affiliation of the law practice with another activity on the premises. *Id.* The names of law firms and other activities must not suggest the existence of such affiliation, and the law practice must not divide fees with the other activities. *See generally,* ABA/BNA Manual, *supra*, at p. 91:601. Moreover, the lawyer must take care to assure that relationships with other activities on the shared premises do not give rise to impermissible conflicts of interest, such as an economic interest of the lawyer or third person adversely affecting the representation of a client within the meaning of Rule 1.7(b).

Finally, the lawyer must take responsibility for assuring that no misleading information about his or her legal services is disseminated on the premises and that any communication about the lawyer conforms to restrictions on advertising and on direct contact with prospective clients. Communications may not suggest that the law practice is affiliated with another activity on the premises. Office-sharing may not be undertaken for the purpose of facilitating referrals or cross-referrals of clients; neither may anything of value be given or received for such referrals. *See, e.g.,* Arizona Ethics Opinion 84-10 (1984); Ohio Informal Ethics Opinion No. 90-2 (1990); and Wisconsin Ethics Opinion E-83-8 (1983) (*each cited in* ABA/BNA Manual, *supra).*

UNSUPERVISED PARALEGALS AND SUSPENDED AND DISBARRED LAWYERS

KBA U-45
Opinion: (1992)

Question 1: Does Kentucky recognize the concept of a 'free-standing' paralegal service in which a paralegal provides legal services directly to members of the public?

Answer: No. A paralegal's work must be supervised by a licensed attorney.

Question 2: May a paralegal, or any other non-lawyer. including a disbarred or suspended lawyer or a lawyer who has surrendered his or her license, provide services to the public by selecting and completing forms for filing in court?

Answer 2: No.

References: SCR 3.020, SCR 3.700; KBA U-38, KBA U-37, KBA U-14, KBA U-11, KBA U-8, KBA U-7; KBA E-256 and KBA-255; Lester v. KBA 532 S.W.2d 425 (Ky. 1976). C. Wolfram. Modern Legal Ethics (1986).

SCR 3.020 (Practice of law defined) provides that:

> The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court

rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services.... (emphasis added)

SCR 3.700 clearly describes a paralegal as a person whose work is "under the supervision and direction of a licensed lawyer," whose conduct is not unauthorized practice only because his or her work is "supervised" by a lawyer. SCR 3.700 Preliminary Statement and Sub-Rule 2. Kentucky law does not authorize the delivery of direct, "free-standing," or unsupervised paralegal services to members of the public. A paralegal may provide services to a lawyer or lawyers (or through lawyers) as an employee or independent contractor, but may not provide such services directly to the public without the supervision required by Rule 3.700. Compare KBA U- 14 (1976).

Except in instances in which federal law (statute, agency rule or Regulation, or court decision or standing order), or a state rule (see SCR 3.700 Sub-Rule 3) is to the contrary, the selection and filling out of forms for legal proceedings (divorce, probate, and the like) by a paralegal who is not supervised by a lawyer in the particular matter, or by a suspended lawyer, or by any other unlicensed person, is the unauthorized practice of law and is prohibited. See generally C. Wolfram. Modern Legal Ethics 839-840 (1986) and cases cited therein. See also KBA U-38, KBA U-37 and KBA U- 11, KBA U-8 and KBA U-7.

We also note that a disbarred or suspended lawyer, or a lawyer who has surrendered his or her license in lieu of discipline, is bound by the limitations of KBA E-255 and KBA E-256 regarding unauthorized practice of law. See also Lester v. KBA, 532 S.W.2d 435 (Ky. 1976).

KBA E-256

Issued: November 1981

Question: May a lawyer employ a former lawyer who is presently disbarred or under suspension to perform paralegal duties for the lawyer?

Answer: No.

References: KBA E-255

OPINION

The Ethics Committee believes that the KBA E-255 is dispositive on this issue.

KBA E-255

Issued: November 1981

Question: May a lawyer employ a former lawyer who is presently disbarred or under suspension to perform duties for the lawyer?

Answer: Qualified yes.

References: DR 3-101(A); Canon 9; KBA U-14; SCR 3.020, 3.470; ABA Informal Opinion 7, 1046, 1434; Howton v. Morrow, 106 S.W.2d 81 (Ky. 1937); Lester v. Kentucky Bar Assn, 532 S.W.2d 435 (Ky. 1975)

OPINION

The purpose of this opinion is to reconsider KBA E-228. The Ethics Committee hereby overrules and replaces KBA E-228 with the following opinion.

In Informal Opinion 7, the American Bar Association stated "an attorney should not employ a disbarred lawyer even to do only office work and see no clients, 'because of the practical difficulty of confining his activities to an area which does not include the practice of law and be cause such employment would show disrespect to the courts."' Ethics opinions in other states are at best conflicting.

In Kentucky, the Court in Howton v. Morrow, 106 S.W.2d 81 (Ky. 1937), held that "practicing law" is not confined to performing services in actions and proceedings in courts of justice, but includes giving advice, preparing wills, contracts, deeds, mortgages, and other instruments of legal nature.

The Court in 1975, in dicta, held that a disbarred attorney may serve as a "law clerk" to an attorney, however, the court will look behind the title and examine the duties performed to determine the real nature of the work. Lester v. Kentucky Bar Assn, 532 S.W.2d 435 (Ky. 1975).

In SCR 3.020 the court defines what the practice of law is:

> The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services. But nothing herein shall prevent any natural person not holding himself out as a practicing attorney from drawing any instrument to which he is a party without consideration unto himself therefore. An appearance in the small claims division of the district court by a person who is an officer of or who is regularly employed in a managerial capacity by a corporation or partnership which is a party to the litigation in which the appearance is made shall not be considered as unauthorized practice of law.

Further, SCR 3.470 "Attorney Aiding Unauthorized Practice" provides:

> Any attorney who knowingly aids, assists or abets in any way, form or manner any person or entity in the unauthorized practice of law shall be guilty of unprofessional conduct.

See also DR 3-101(A) which states: "A lawyer shall not aid a non-lawyer in the unauthorized practice of law." There are those in the legal profession who may argue that the best interest of the organized Bar would be served by hiring employees who have been disbarred, suspended, or have resigned from the practice of law. However, there seems to be no rule per se excluding the hiring of these individuals. It would seem that the best interest to society, as well as to the ex-lawyer, is that they should be employable within the legal system to undertake certain functions that are not the unauthorized practice of law.

Accordingly, with some trepidations, the Ethics Committee feels that the ex-lawyer can be employed with certain General Provisos, as well as Specific Provisos, as follows:

General Provisos

1. The individual may do anything a lay person could do.
2. The individual may perform such work which is of a preparatory or ministerial nature.

Specific Provisos

1. The individual may not have any contact whatsoever with a client of a lawyer.
2. The individual is not a Paralegal within SCR 3.700.
3. The individual may not have an office, or place, in the lawyer's facility.
4. The individual may perform any drafting acts, as long as they are submitted in draft form only to the responsible lawyer for approval.
5. The individual may perform clerical aspects of a probate matter.
6. The individual may do an abstract title examination.
7. The individual may provide legal research to a lawyer.

It seems clear to the Ethics Committee that an attorney who hires a suspended, disbarred, or resigned attorney does so at the attorney's own risk. If the previous lawyer engages in any unauthorized practice, the lawyer employing that person will be guilty of unprofessional conduct and will be appropriately disciplined by the Supreme Court of Kentucky.

KBA E-336
Issued: September 1989

Question: May a suspended lawyer serve as a Paralegal in a law firm once the stated period of suspension has expired?

Answer: Yes.

References: KBA E-256 and E-255 (1981).

OPINION

This question comes before us as a request for amendment of KBA E-256.

In KBA E-255 the Committee and Board indicated in certain "General Provisos" that a suspended lawyer may perform the functions of a law clerk and do other law related work that laymen may do, but that the suspended lawyer should not have direct contact with clients ("Special Proviso #l") and should not be given an office or place in a lawyer's facility ("Special Proviso #3"). Both E-255 ("Special Proviso #2") and a subsequent opinion, E-256, indicated that a suspended lawyer may not be designated or permitted to work as a paralegal in a lawyer's office. The rule against a suspended lawyer serving as a paralegal necessarily follows from the rules against "client contact" and having an office, or place, in the lawyer's facility." The obvious purposes behind these restrictions are (1) to counter evasion of the effects of a suspension (2) to enforce the prohibition against unauthorized practice of law and (3) to protect clients and others from being misled as to the suspended lawyers status.

Neither E-255 nor E-256 expressly limited the duration of the special restrictions (no client contact, no office or place in the lawyer's facility, no designation as a paralegal) to the stated period of suspension. Apparently, this has created some hardship, since a lawyer is not automatically reinstated upon the running of the period of suspension. Instead, he or she must reapply for admission and await the outcome of reinstatement procedures. A literal interpretation of E-255 and E-256 might lead one to conclude that a lawyer (1) may not serve as a paralegal at any time following the running of the period of suspension and preceding action on an application for reinstatement, and (2) may never serve as a paralegal if application for reinstatement is denied or is never sought. To put it another way, the opinions could be interpreted as permitting a suspended lawyer to serve as a paralegal only on condition that he or she first be readmitted as a full member of the Bar. Assuming that some logic supports this outcome, necessity and public policy do not require it.

For the reasons stated, KBA E-255 is amended to the extent that Specific Provisos ##1 3 apply only during the stated period of suspension. The prohibition of KBA E-256, that a suspended lawyer may not perform paralegal duties for a lawyer, is limited to the stated period of suspension.

PARALEGAL LIMITATIONS IN THE COURTROOM

KBA E-266

Opinion: (November 1982)

Question: May a lawyer send a non-lawyer to do anything in a courtroom with respect to the representation of a client without a supervising lawyer present?

Answer: No.

References: SCR 3.020; SCR 3.700; EC 3-6; KBA E- 142; KBA E- 19 1; KBA E-227; SCR 2.540

The question before us is basically 'May a lawyer make use of paralegals in the courtroom." This Committee notes at the outset that a paralegal is a relatively new term used in the practice of law. These individuals, both men and women, are not "licensed" by the Supreme Court of Kentucky. However, there is a Supreme Court Rule on the subject matter.

The practice of law in Kentucky is defined under SCR 3.020 as follows:

> "The practice or law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services. But nothing herein shall prevent any natural person not holding himself out as a practicing attorney from drawing any instrument to which he is a party without consideration unto himself therefor."

Supreme Court Rule 3.700 provides for certain provisions relating to paralegals. Of particular significance is Sub-Rule 1 which provides "a lawyer shall insure that a paralegal in his employment does not engage in the unauthorized practice of law."

In addition Sub-Rule 3 provides in essence that it is not the unauthorized practice of law for a lay person to represent a client before any administrative tribunal or court where the court rule or decision authorizes the practice of non-lawyers. The commentary that expands this section and shows that in certain areas of Federal Regulations a lay person is allowed to appear in court.

This Committee notes that in its review of both the Supreme, Civil and Criminal Rules of Court there is no provision which allows non-lawyers to appear in court in the Commonwealth of Kentucky.

This Committee is cognizant of EC 3-6 which provides as follows:

> "A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal services more economically and efficiently."

In the past, the Ethics Committee has been called upon to review the use by lawyers of the services of lay people (see KBA- 142 and KBA E- 191). It was the

Ethic Committee's opinion that a paralegal could not argue a motion on behalf of a client in court KBA E-227).

This Committee understands that in the Commonwealth of Kentucky we have historically had a "motion day or motion docket." While it can be said that many of the items placed upon these dockets require no legal skill when the clerk calls the case; it should, nevertheless be emphasized that it is a proceeding in court and there is no rule of court allowing individuals other than lawyers to appear in court in the Commonwealth of Kentucky.

While one could advocate that there are certain cases in which law (sic) people (paralegals, legal assistants, secretaries, investigator receptionists and friends) could perform the needed services, they are not lawyers.

It should be specifically noted that law students who have completed 2/3rds of the academic requirements for graduation from an approved law school. and have signed an "oath of legal intern"', are not allowed to appear in courts of this state without personal appearance and supervision by a member of good standing of the Bar in this state (SCR 2.540.)

It is our opinion that the Supreme Court Rules in Code of Professional Responsibility clearly dictate that the only person other than a lawyer who may appear in court in the representation of a client is a lawyer.

PARALEGALS AND DEPOSITIONS

KBA E-341
Opinion: (November 1990)

Question: May a lawyer delegate the task of taking depositions to a nonadmitted law school graduate or other lay assistant?

Answer: No.

References: KBA E-251 (1981); Oregon Op. 449 (1980); New York County Op. 666 (1985).

From time to time lawyers have attempted such delegation on the erroneous assumption that anything goes "outside of court." Such delegation is not proper. See Rules 1.1. 1.2. and 1.3 (counterparts to DRs 6-101(A)(3) and 7-101(A)(3), cited in E-251. Such delegation also runs afoul of SCR 3.020 (Unauthorized Practice of Law), a Rule that is not limited to practice in the courtroom.

Appendix C

CHANGES IN THE 2009 KENTUCKY RULES OF PROFESSIONAL CONDUCT OF SPECIAL SIGNIFICANCE FOR PARALEGALS

The 2009 Kentucky Rules of Professional Conduct (SCR 3.130, effective July 15, 2009) constitute a major advance in ethics standards for Kentucky lawyers and paralegals. The 2009 Rules expand, strengthen, and substantially improve the 1990 Rules. Virtually every 1990 rule is revised for clarity, important new rules are added, and comments to the rules are improved by providing practical guidance on applying the rules. Significantly, the 2009 Rules feature more risk management considerations than in the past. Given the important role that paralegals have in law firm administration and risk management, it has never been more important for paralegals to be well informed on professional conduct rules and risk management techniques to assure compliance with ethics standards and prevent malpractice and bar complaints. What follows is a presentation of those 2009 Rules that are of special importance to paralegals either as a guide for their work or as information necessary for a paralegal to effectively assist in the risk management of the law firm.

New Emphasis on Supervisory Professional Responsibility

The 2009 Rules provide more detailed and strengthened guidance for those responsible for managing a law firm to include encouraging good risk management practices of the type that paralegals are often responsible for implementing. For example, Comment (2) to Rule 5.1, Responsibilities of Partners, Managers and Supervisory Lawyers, is a new comment with the following risk management guidance:

- Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised. (*emphasis added*)

Similarly, a significant change to Comment (1) and new Comment (2) to Rule 5.3, Responsibilities Regarding Nonlawyer Assistants, makes it clear that it is mandatory for firm management to take a proactive role in assuring that the office staff complies with ethics standards:

- A key sentence in Comment (1) was changed to read "A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product." (*emphasis added*)

- Comment (2) provides in part: Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct.

Paralegals can play an important part in complying with these requirements by working with firm lawyers to develop firm ethics and risk management programs, attending paralegal continuing education programs, and becoming a KPA Certified Paralegal.

Writing Requirements

The 2009 Rules impose much more stringent requirements on properly informing clients about their matter and recording that advice in writing that sometimes is required to be signed by the client. Paralegals must know these requirements both for assisting their supervisory lawyer's compliance and to make sure the file is properly documented.

Rule 1.0, Definitions, define 'writing' and 'confirmed in writing' as follows:

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of an informed consent. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

Rules that require that informed consent be confirmed in writing are:

- 1.5(e): Division of fees between lawyers not in the same firm.
- 1.7(b): Conflicts of interest waivers.
- 1.9(a) and (b): Former client conflicts waivers.
- 1.10(c): Firm conflicts waivers (cross-reference to Rule 1.7).
- 1.11(a): Conflict waivers for lawyers formerly in government service.
- 1.11(d): Conflict waivers for government lawyers formerly in private practice.
- 1.12 (a): Conflict waivers for lawyer who has acted as a judge, arbitrator, or mediator in a matter.
- 1.17, Comment (11): Waivers for conflicts created by sale of a law practice (cross-reference to Rule 1.7).

- 1.18(d): Waivers of conflicts created by receiving information from a prospective client.
- 3.7, Comment (6): Waivers of conflicts for lawyer or firm acting both as advocate and witness.
- 6.5, Comment (3): Conflict waivers for known conflicts created by short-term representations in legal services programs (cross-reference to Rules 1.7, 1.9, and 1.10).

Rules that require that a client sign a writing are:

- 1.5(c): Contingent fee agreements.
- 1.5(f): Non-refundable retainer agreements.
- 1.8(a)(3): Business transactions between client and lawyer.
- 1.8(g): Aggregate settlements.

Rules that require that a client be advised in writing of the desirability of obtaining the advice of independent counsel are:

- 1.8(a)(2): Business transactions.
- 1.8(h): Settling claim with an unrepresented client or former client.

Writing requirements should be risk managed by conducting a training program to educate everyone in the firm – lawyers and staff – on what they are and how to comply with them. Develop form letters for the office form database suitable for tailoring to the specific situation requiring a writing. Use a file checklist for assuring that all writing requirements are met, that any required client signature is obtained, and that the file is documented showing compliance.

If writings are not presented to the client in person, send them in a way that confirms receipt. At a minimum use return service mail. Many situations will call for use of delivery services that provide proof of delivery. If writings are delivered by e-mail, be sure to employ a procedure that confirms that the e-mail reached its addressee. If you use electronic office files for writings, be sure office data management is well organized to file and retrieve them. Backup of office computer systems is critical to this process. Daily backup is recommended.

Definitive Guidance on Returning Client Files

File management is one of the major responsibilities of many paralegals. A major issue for file management is return of client files. This has been a long-time troubling problem for lawyers – especially when fees are owed, the lawyer is discharged, or the lawyer withdraws. Lawyers frequently mistakenly believe they can retain a client's file until all fees are paid. Rule 1.16 Comment (10) provides: "The lawyer may not condition return of the client's file, papers, and property upon payment of a fee. KRS 376.460 gives a lawyer the right to have payment of fees secured by a judgment the client recovers as a result of the lawyer's efforts."

The overriding principle in the ethics of returning client files is that a lawyer's fiduciary obligation of loyalty to a client mandates that the client's interest comes first. A client is entitled to the file regardless of the lawyer's interest if the client will be substantially prejudiced without it. Revised Comment (9) and new Comment (10) to Rule 1.16, Declining or Terminating Representation, adds to and codifies KBA ethics opinions on return of files. The "must know" requirements in the comments are:

- Comment (9):
    - The client's file, papers, and property after termination must be returned if the client requests the file.
    - The lawyer may retain a copy of the file.
    - A reasonable copying charge is permissible, but return of a client's files, papers, and property must not be conditioned on payment of a copying charge, unless the lawyer has previously provided a copy, either during the representation or after cessation of the representation.
    - One copy of the file and materials must be made available to the client even without payment if the client's interests will be substantially prejudiced without the documents.
- Comment (10):
    - Return of the client's file, papers, and property may not be conditioned on payment of a fee.
    - Uncompensated work product may be withheld, from the client's returned files (*e.g.*, draft of pleadings, agreements and the like), unless the client's interests will be substantially prejudiced without the uncompensated work product.
    - Documents or other relevant evidence, the original or its equivalent that may be required for trial preparation or as evidence for trial or in other legal proceedings, must be surrendered in their original form.

From a risk management perspective the first time to think about file closing is at the time you take the matter. Get client agreement in your letter of engagement on how the client file will be managed. A specific time and procedure for claiming files after the representation should be fixed including a warning that the files are subject to destruction if not claimed as stipulated. Include in letters of engagement who pays for file copying. Be sure that the firm's records destruction practices are coordinated as much as possible with those of business clients. When feasible, the firm should not retain client records that the client's record destruction program would eliminate. Keep track of what has been sent to a client during the course of the representation. Often at the conclusion of a matter the client will have most, if not all, of the file. If this is the case, duplication of ef-

fort and expense can be avoided by sending only those records the client lacks. The firm's retained copy of a file should be complete. Always consider the possibility of a malpractice claim when stripping a file. Better to keep too much than inadvertently destroy crucial exonerating evidence. Many experienced Kentucky lawyers have a file return policy of simply 'just give it to 'em," thereby avoiding bar complaints and frivolous malpractice claims.

Disputed Client Trust Account Funds

Many paralegals have significant responsibilities managing firm funds and client trust accounts. The most important change to Rule 1.15, Safekeeping Property, to note is the detailed guidance in the Rule and Comment (3) on handling disputed funds in a lawyer's possession. Comment (3) contains this invaluable risk management information:

Paragraph (c) describes the handling of disputes, including those between the lawyer and the client, the lawyer and third persons (or entities), and the client and third parties. Paragraph (c) recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property until the claims are resolved. Generally, if the claim is based on a contract obligation, writing signed by the client, statutory lien, court order, legal obligation to ensure payment to a third party employed by the attorney to provide services in furtherance of the client's claim, or other law, the lawyer may not disburse the funds until the dispute is resolved. In these circumstances the client should also be advised of the risks of not paying a valid claim. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer

Rule 1.18 Duties to Prospective Client

Paralegals often are the first person in a firm to begin the client intake process. Prior to the 2009 Rules there was considerable confusion over what fiduciary duties were owed prospective clients prior to being accepted as a client or those that were declined. It was well established before Rule 1.18 was included in the 2009 Rules that Kentucky lawyers owed fiduciary duties concerning confidentiality and conflicts of interest in preliminary discussions with persons seeking legal representation (*Lovell v. Winchester*, 941 S.W.2d 466 (Ky., 1997)). Rule 1.18 and its comments codify these duties. They provide guidance on who is and is not a prospective client and permissible resolution of conflicts of interest resulting from a preliminary discussion with a prospective client. Significant features of the Rule are:

- No matter how brief the consultation, any information learned by a lawyer can only be revealed as Rule 1.9, Duties to Former Client, allows.

- A conflict of interest is created when the lawyer receives information that could be "significantly harmful" to the prospective client.
- Comment 5 to the Rule permits, with the prospective client's informed consent, conditioning consultation with the understanding that information revealed to the lawyer will not preclude the lawyer from representing a different client in the matter.
- Waiver of a conflict of interest is permissible with the written informed consent of the affected client and the former prospective client.
- Prospective client conflicts of interest are imputed to other members of a firm, but screening is permissible to overcome the disqualification.

Rule 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs

Standard 10 of the Paralegals Standards of Conduct encourages paralegals to donated 25 hours a year of paralegal service. This has proven difficult to do because donated service must be under the supervision of a lawyer. Lawyers have been reluctant to participate in pro bono programs because of conflict of interest issues. This has reduced the opportunities for paralegals to participate in pro bono programs. New Rule 6.5 is designed to solve the problem that the strict application of the conflict of interest rules causes for lawyers volunteering to provide short-term limited legal services in programs such as legal advice hotlines, advice only clinics, or pro se counseling. In providing these services a client-lawyer relationship is established with no expectation that the lawyer's representation of the client will continue beyond the limited consultation. The intent is to make legal assistance more readily available to persons of limited means.

Rule 6.5
(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

> (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
>
> (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.
>
> (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.
>
> *Comments omitted*

Rule 8.3 Reporting Professional Misconduct

Rule 8.3 is the most dramatic addition to the 2009 Rules. It establishes a mandatory requirement that lawyers report violations of the Rules of Professional Conduct to

the KBA Bar Counsel. While it is clear that the Rules do not apply directly to paralegals and they have no requirement to report lawyer violations of the Rules, paralegals must understand Rule 8.3 and be prepared to assist their supervisory lawyers in dealing with incidents of lawyer violations. Paralegals must avoid becoming involved in a violation of the Rules or any illegal actions.

As a new rule, Rule 8.3's application is yet to be interpreted by the Kentucky courts or the KBA disciplinary authorities. What follows is an effort to frame the issues and offer an analytical approach in addressing them. Lawyers may call the KBA Ethics Hotline for help when dealing with a reporting misconduct question.

Paragraph (a) of the Rule establishes the operative terms for reporting misconduct. A helpful way of analyzing it is to break it down into its component parts:

- A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises
- a substantial question
- as to the lawyer' honesty, trustworthiness or fitness as a lawyer in other respects,
- shall inform the Association's Bar Counsel.

What does 'knows' mean?

- Rule 1.0 Terminology (f): Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. (*emphasis added*)
- The ABA Annotated Model Rules of Professional Conduct (6th ed.) at page 571 provides several examples of standards for determining actual knowledge. One of the best is "… a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question had more likely than not occurred."

Do you have to self-report?

- The Rule requires reporting of "another lawyer" not yourself.

What is a substantial question?

- Rule 1.0 Terminology (l): "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.
- Comment (2), Rule 8.3: The term "substantial" refers to the seriousness of the offense and not to the quantum of the evidence of which the lawyer is aware.

How do you determine that a substantial question of a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects has a rational connection to the practice law?

- Comment (2) to Rule 8.4, Misconduct, provides this guidance on fitness to practice Law: Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation. (*emphasis added*)

When do you report?[i]

- The Rule uses the imperative term "shall" in requiring that the Association's Bar Counsel be notified of the misconduct. Reporting is not discretionary. The Rule does not, however, provide a timeline for reporting. One standard is "… within a reasonable time under the circumstances." Factors to consider are protecting a client's interest and the severity of the misconduct. [ii]

Do you have to get client consent to report if the report includes client confidential information?

- Rule 8.3(c) provides in part that "A lawyer is not required to report information that is protected by Rule 1.6 or by other law." Other jurisdictions have uniformly held that the duty to report misconduct is subordinate to the Rule 1.6 duty of confidentiality. Client consent to report confidential information is necessary.[iii]

If a paralegal detects a violation of professional conduct rules by a lawyer not the paralegal's supervisory lawyer, the paralegal should inform the supervisory lawyer for appropriate action. If the concern is with the supervisory lawyer, a paralegal may discuss the situation with the supervisory lawyer for clarification and, if appropriate, correction. If a paralegal is confronted with a situation when the supervisory lawyer is violating the Rules, but will take no corrective action, the paralegal may consider withdrawing from the firm, reporting the matter to another lawyer in the firm, or voluntarily reporting the violation to the KBA Bar Counsel. Under no circumstances should paralegals allow themselves to be drawn into unethical or illegal conduct. Whistleblowers usually suffer for their often well-intended actions, but that may be the only protection for a paralegal that inadvertently has become involved in unethical or illegal conduct.

Editor's Note: Appendix C is a composite of materials that appeared in Lawyers Mutual Insurance Company of Kentucky's newsletter and KBA Bench & Bar articles written by Del O'Roark.

[i] In deciding whether misconduct should be reported do not become entangled with KRPC 3.4(f) that provides "A lawyer shall not: present, participate in presenting, or threaten to present criminal or disciplinary charges solely to obtain an advantage in any civil or criminal matter."

[ii] ABA Annotated Model Rules of Professional Conduct (6th ed.) at page 573.

[iii] ABA Annotated Model Rules of Professional Conduct (6th ed.) at page 574.