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# Ethical landmines on using nonlawyer staff

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Delegating some of the substantive legal work that law practices require may, without the proper understanding of the role of your nonlawyer staff (paralegals, secretaries or other staff within a firm), lead to professional and ethical violations that could result in serious consequences for the lawyer and the firm.

“I want to emphasize that a lawyer can get in trouble just as easily by failing to adequately manage the ethical responsibility of nonlawyers as they may in the course of supervising lawyers,” said Thomas G. Wilkinson, Jr., a member of the Philadelphia office of Cozen O’Connor.

He was a panellist on the webinar, “Ensuring Your Staff is Ethically Supporting You” and was joined by Kellyn O. McGee, a professor of law at Savannah Law School in Georgia.

According to Wilkinson, a member of the ABA Standing Committee on Professionalism, any nonlawyer at a firm, district attorney’s or public defender’s office, or even a nonprofit legal service provider, is indirectly subject to the rules of professional conduct that have been adopted in every state except California.

[ABA Model Rule 5.3](#) requires lawyers who manage a law firm or directly supervise nonlawyers to make reasonable efforts to ensure that nonlawyers employed or retained by the lawyer or firm conduct themselves in a manner consistent with lawyers’ professional conduct rules. The rule also requires partners, managers and direct supervisors to take prompt corrective action when they learn of misconduct by a nonlawyer assistant.

“Lawyers have to be very clear and certain that their nonlawyer staff are helping to ensure that the rules are not being violated,” said McGee, who added that there are some guidelines issued by voluntary associations that paralegals are governed by:

- The ABA Standing Committee on Paralegals published a 2012 revision of the [ABA Model Guidelines for the Utilization of Paralegal Services](#). You can also view the [model guidelines](#) online
- The National Association of Legal Assistants (NALA) [Code of Ethics & Professional Responsibility](#).

Paralegals and nonlawyer staff should be able to perform many of the services that lawyers perform, so long as they do so under lawyer supervision and that the lawyer maintains responsibility for the work. To ensure this, both McGee and Wilkinson said firms should have regular training for nonlawyer staff to help them understand how the rules of professional conduct affect them professionally. Some guidelines:

**Protecting client confidentiality.** Lawyers may rely on nonlawyer assistants to gather information from clients and then relay the lawyer’s advice to the client, provided the lawyer takes steps to prevent the assistant from elaborating on or adding to the lawyer’s legal advice. Just as the lawyer is required to maintain the confidentiality of information provided by their clients, Wilkinson says it should be clearly understood by nonlawyer staff that any information they obtain or receive in the course of assisting a lawyer in representation of a client is confidential in nature. McGee added that the nonlawyer must understand “that they are not giving legal advice to clients, but simply repeating directions from the lawyer as opposed to it being their own opinion.”

**Beware of UPL (Unauthorized practice of law).** The ABA has emphasized paralegals’ independent duty to avoid UPL. Violations focus on several issues — prohibited activities (they cannot sign papers to be filed with the court, ask questions at a deposition or handle court appearances), permitted activities and how

paralegals “hold themselves out.” Wilkinson said it is easy to fall into a situation where the experienced and competent paralegal is the person the lawyer will naturally rely on to handle substantial aspects of a matter on behalf of a client. “Sometimes they will understand the ins and outs of a particular field even better than a lawyer may understand it,” he said. “But regardless, that should not cause the lawyer to find themselves in a situation where they have extended so much reliance on the paralegal to work independently that the paralegal is effectively making legal judgments on behalf of the client.” He also said the nonlawyer should not present themselves as a lawyer or legal adviser, or leave the impression with the client or court that they are licensed to practice law.

McGee talked about a Massachusetts case in which the criminal defense attorney allowed a paralegal to set up an employment discrimination practice within the law firm that would be managed by the paralegal without substantial supervision. The paralegal had authority to sign the lawyer’s name, set and collect fees, drafted pleadings and give legal advice. The Massachusetts Supreme Judicial Court found that the attorney assisted the paralegal’s unauthorized practice of law and suspended him for a year and a day. “The paralegal was clearly practicing law,” McGee said.

**Avoidance of conflicts of interest.** Although all the conflicts rules applicable to lawyers are generally applicable to paralegals, the conflicts rules’ application to paralegals primarily focuses on lawyers’ hiring of paralegals. A paralegal moving to another law firm or law department cannot “switch sides” – assist in a matter adverse to the former client for whom the paralegal worked (on the same matter) as the old firm. ABA Model Rules and about half of the states’ rules permit firms to avoid imputation when hiring lawyers, if they timely screen the lawyers from the firm’s matter adverse to the new hire’s former client. “You have to be very specific in matters that they have been involved in at their previous firms,” Wilkinson said. “The same considerations that apply to lawyers’ moving will or should apply to nonlawyers.”

McGee highlighted a Georgia case in which a firm, upon learning that a paralegal hired six months earlier had worked for an adverse party at her previous firm, immediately implemented screening measures to protect against the paralegal's disclosure of confidential information she had gained from working on the case at her previous firm. However, the firm did not disclose this potential conflict to opposing counsel for two months. The Georgia Supreme Court sided with the firm, citing majority approach that rejects automatic imputation and permits firms to implement screening measures to protect any client confidences. But the court remanded the case to determine whether the firm gave "prompt" notice of the conflict once it learned of the problem.

**Fee sharing with paralegals/nonlawyers.** ABA Model Rule 5.4 prohibits fee sharing with a nonlawyer except in specific circumstances delineated in the rule. Disbarred or suspended lawyers are generally deemed "nonlawyers" within the meaning of the rule, and therefore typically barred from participating in any legal fee unless the former lawyer's conduct entitling him or her to the fee occurred while the lawyer was in good standing and duly authorized to practice. "Take, for example, if a lawyer made a referral of a contingent fee matter before being suspended, the former lawyer may be entitled to share in the fee after the suspension even if he or she is now working as a paralegal," Wilkinson explained.

McGee pointed to a case in Florida, where an attorney verbally agreed to pay a paralegal a bonus calculated as a percentage of the attorney's fees. The one stipulation was that the agreement could not be in writing. When the attorney later refused to pay the remaining bonus income, the paralegal sued. The attorney argued the agreement was unenforceable because it constituted an improper fee-sharing agreement that violated the professional conduct rules. "Well, the Florida District Court ruled that the attorney's promise to pay is enforceable even though the agreement violated the ethics rules against fee-sharing with nonlawyers," McGee said.

The program also covered the duty to supervise and train nonlawyers on billable guidelines, signing correspondence, exposure to liability or discipline for nonlawyer misconduct and embezzlement.

“Ensuring Your Staff Is Ethically Supporting You” was sponsored by the ABA [Section of Family Law](#), Division for Public Services, [Section of Legal Education and Admissions to the Bar](#), [Center for Professional Responsibility](#), [Law Practice Division](#) and the [Center for Professional Development](#).

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