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PARALEGAL ETHICS
- WHERE IS THE LINE DRAWN?

Revised Rules of Professional Conduct

In view of the recent enactment of the Revised Rules of Professional Conduct in Indiana, it is important that legal professionals understand where the line is drawn with respect to utilization of non-lawyer assistants, and especially paralegals, practicing law. In making such determination, we begin with Rule 5.3 of the Indiana Rules of Professional Conduct, which sets out an attorney's responsibilities regarding non-lawyer assistants:

(a), (b) A...lawyer...shall make reasonable efforts to ensure that the... [paralegal's] conduct is compatible with the professional obligations of the lawyer

(c) A lawyer shall be responsible for the conduct of...[the paralegal] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

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

(2) the lawyer...knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment [2]: Paragraph (a) requires lawyers...to make reasonable efforts to establish policies and procedures designed to provide reasonable assurances that non-lawyers in the firm will act in a way compatible with the Rules of Professional Conduct.

HOWEVER, that does not take YOU off the hook!!

Unauthorized Practice of Law

The definition of the practice of law and, conversely, the unauthorized practice of law is established by law and varies from one jurisdiction to another. The Indiana Supreme Court has original jurisdiction in matters relating to the unauthorized practice of law. (Art. 7, Sec. 4, Indiana Constitution, In Re: Mittower, 693 N.E. 555 (Ind. 1998).) Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. The Indiana Supreme Court in a recent case involving a non-lawyer engaged in the unauthorized practice of law determined that the practice of law without a license is not a "victimless crime" because the legal interests of people assisted by those who are not qualified to act as attorneys can be irreparably damaged. (State, ex rel. Ind. St. Bar v. Diaz, 838 N.E.2d 433 (Ind. 2005).) This Rule does not prohibit a lawyer from

employing the services of paralegals and other paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. (Comment [2] from Rule 5.5)

Just what is the Practice of Law?

In determining what constitutes the practice of law, the Indiana Supreme Court has elected not to attempt a comprehensive definition "because the infinite variety of fact situations each must be judged according to its own specific circumstances. (Diaz, supra. 443.)

For purposes of determining whether a person has engaged in the practice of law, the practice of law includes making it one's business to act for others in legal formalities, negotiations or proceedings. (Matter of Contempt of Mittower, 693 N.E.2d 555.)

A core element of the practice of law is the giving of legal advice to a client, and merely entering into such a relationship constitutes the practice of law. (Noethtich v. State, 676 N.E.2d 1078.)

Holding oneself out as an attorney where one is not licensed to practice law constitutes the unauthorized practice of law. (Matter of Contempt of Supreme Court, 673 N.E.2d 755.)

A person who gives legal advice to clients and transacts business for them in matters connected with the law is engaged in the practice of law. (Matter of Thonert, 693 N.E.2d 559.)

The production and communication to clients of motions, pleadings and proposed agreed entries, undertaken by law office support staff members who are not themselves lawyers, without supervision of an attorney licensed to practice in Indiana constitutes the unauthorized practice of law. (Matter of Thonert, 693 N.E.2d 559.)

The Indiana Supreme Court has had several occasions to address whether non-lawyers assisting persons in filling out documents with legal ramifications constitutes the practice of law.

In State ex rel. Indiana State Bar Ass'n v. Indiana Real Estate Ass'n, the issue presented was whether licensed real estate brokers and salespersons were engaged in the unauthorized practice of law when they used form legal documents prepared by attorneys, selected which forms to be used, and inserted words within the printed forms in connection with the real estate transactions. (*See* 244 Ind. at 217, 191 N.E.2d at 713.) This Court stated:

> Generally, it can be said that the filling in of blanks in legal instruments, prepared by attorneys, which require only the use of common knowledge regarding the information to be inserted in said blanks, and general knowledge regarding the legal consequences involved, does not constitute the practice of law. However, when the filling in of such blanks involves considerations of significant legal refinement, or the legal consequences of the act are of great significance to the parties involved, such practice may be restricted to members of the legal profession. (244 Ind. At 220, 191 N.E.2d at 715.)
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> . . . . It cannot be urged, with reason, that a lawyer must preside over every transaction where written legal forms must be selected and used by an agent acting for one of the parties. Such a restriction would so paralyze business activities that very few transactions could be expeditiously consummated . . . . The possibility of an occasional improvident act in the use of such forms may not, with reason, be made the basis for denying the right to perform the same act in a thousand instances where the public convenience and necessity would seem to require it. Lawyers, themselves, on rare occasions have been known to make errors in the drafting of such forms.

In Miller v. Vance, the Supreme Court considered whether the preparation of a mortgage instrument by a bank employee who was not an attorney constituted the unauthorized practice of law. (*See* 463 N.E.2d at 251.) The Court reasoned:

> . . . . While it is true that the preparation of mortgage instruments might be classified as the practice of law in some circumstances, that is not the case here. (Id. at 252.)
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> The Court, however cautioned:
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> We emphasize that there are certain limitations which apply to bank employees similar to those placed upon real estate brokers . . . . The lay bank employee may not give advice or opinions as to the legal effects of the instruments he prepares or the legal rights of the parties. The bank may not make any separate charge for the preparation of the mortgage instruments. (Id. at 253.)

Thus, in both Indiana Real Estate and Miller, The Court permitted non-lawyers to fill out legal forms in situations in which the chance for legal error was low. The forms were used in routine transactions in the course of the jobs for which the non-lawyers were trained in Miller and for which the non-lawyers were both trained and licensed in Indiana Real Estate, and the forms were prepared by lawyers for use in such transactions.

What services can a paralegal perform in Indiana?

Guideline 9.1 through 9.10 of the Ind. Rules of Professional Conduct provides specific guidance for the use of paralegals:

9.1: A non-lawyer assistant shall perform services only under the direct supervision of a lawyer authorized to practice in the State of Indiana...A lawyer...should take reasonable measures to ensure that the non-lawyer assistant's conduct is consistent with the lawyer's obligations under the Rules of Professional Conduct. Note the key words here are: only under the direct supervision of a lawyer. Although Indiana expressly places the responsibility for supervision of paralegals upon lawyers, some states have concluded that a paralegal is not relieved from an independent obligation to work directly under an attorney's supervision. (ABA Model Guideline for the Utilization of Paralegal Services, 2003 Revisions.) The Supreme Court of New Jersey has held that a "paralegal who recognizes that the attorney is not directly supervising his or her work or that such supervision is illusory because the attorney knows nothing about the field in which the paralegal is working must understand that he or she is engaged in the unauthorized practice of law." (In Re: Opinion No. 24 of the Committee on the Unauthorized Practice of Law, 607 A.2d 962, 969 (N.J. 1992).)

9.2: *...a lawyer may delegate to a...paralegal any task normally performed by the lawyer; however, any task prohibited by statute, court rule, administrative rule or regulation, controlling authority or the Indiana Rules of Professional Conduct may not be assigned to a non-lawyer. Note that the scope of a paralegal's work is only limited to (1) any task normally performed by a lawyer (so long as lawyer is responsible for work product; and (2) those tasks not specifically prohibited).

What Tasks are Prohibited by Statute, Court Rule, Administrative Rule or Regulation, Controlling Authority or the Indiana Rules of Professional Conduct?

Guideline 9.3 sets forth three (3) specific tasks which a lawyer may not delegate to a paralegal (non-lawyer assistant):

(a) responsibility for establishing an attorney-client relationship;

(b) responsibility for establishing the amount of a fee to be charged for a legal service; or

(c) responsibility for a legal opinion rendered to a client.

Other prohibited tasks include criminal activity, tasks which exceed a limited scope of representation, or actions that a lawyer regards as repugnant, unethical, imprudent.

They include acts of fraud and unreasonable fees. Lawyer shall not reveal information unless client gives informal consent. (See Indiana State Rules of Professional Conduct in Title 34, Appendix Court Rules, Civil Rules of Professional Conduct.)

Legal Advice and Legal Opinions

It is clear that only licensed attorneys may give legal advice and render legal opinions. Is there a difference between "legal advice" and "legal opinion?"

What is a Legal Opinion?

Rule 2.1 states that advice goes beyond giving a legal opinion. Advice refers not only to law but to other considerations such as moral conduct, economic, social and political factors, that may be relevant to the client's situations.

(Comment [1] from Rule 2.1): ...honest assessment. Legal advice often involves unpleasant facts that a client may be disinclined to confront.

(Comment [2] from Rule 2.1): ...relevant moral and ethical considerations in giving advice...moral and ethical considerations impinge most legal questions and may decisively influence how the law will be applied.

(Comment [3] from Rule 2.1): ...responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

What is legal advice? If you are asked to choose for someone between one alternative or another, that is giving legal advice.

The core element of practicing law is giving of legal advice to a client and placing oneself in a very sensitive relationship where the confidence of the client and management of his affairs is left totally in the hands of the "attorney." (Matter of Fletcher, 655 N.E.2d 58.)

Practicing law includes doing or performing services or acts of justice and any matter depending therein, throughout its various stages and includes legal advice and counsel. (Matter of Fletcher, 655 N.E.2d 58.)

The following excerpt from the May 2005 edition of Update, a publication of the American Bar Association Standing Committee on Paralegals (Vol. 6, No. 3, p. 4):

"**Giving Legal Advice**. Courts have traditionally applied three tests to determine whether conduct constitutes the giving of legal advice. The first test is whether the advice given is generally understood to require legal skill or knowledge. The second test is whether the conversation involves advising someone of their legal rights. Most

courts recognize a standard exception: a response to a client's inquiry does not constitute the rendition of legal advice when the legal assistant merely acts as a conduit of advice between a lawyer and a client. If a legal assistant does not convey any thoughts or advice of his or her own, then he or she is not giving legal advice, and therefore, not practicing law. Thus, legal assistants delivering information pursuant to instruction and on behalf of a lawyer should always be certain to make it clear to the client that the lawyer is the source of the information. The third test is whether the advice given is not normally given by a non-lawyer as part of another business or transaction. If someone who is not a lawyer dispenses law-related advice in furtherance of the ordinary course of his or her regular job, it may not amount to the practice of law. For example, many bankers and financial planners regularly dispense advice that involves legal aspects of investment and tax situations."

Special Considerations

Duty to Inform and Identification.

It is the lawyer's responsibility to take reasonable measures to ensure that others are aware that the paralegal performing legal services is not licensed to practice law. This specifically includes clients, courts and other lawyers, as well as the public in general. (Guideline 9.4.) It is interesting to note that while the Ind. Rules of Professional Conduct places the responsibility for the duty to inform upon the attorney, both the National Federation of Paralegal Associations and the National Association of Legal Assistants require paralegals to disclose their status. (NFPA, Model Code of Professional Ethics and Responsibility and Guidelines for Enforcement, EC 1.7(a)-(c). NALA Canon 5.) It would be a prudent practice for attorneys to discharge this responsibility within the initial written engagement.

Guideline 9.5 affords paralegals recognition as an important member in rendering professional legal services. 9.5 provides that paralegals may be identified by name and title on the attorney's letterhead and on business cards. The paralegal status must be clearly indicated, and the business card and/or letterhead may not be used in a deceptive way or for unethical solicitation.

Conflicts of Interest. Guideline 9.10(g).

"A non-lawyer assistant shall avoid conflicts of interest and shall disclose any possible conflict to the employer or client, as well as to the prospective employers or clients."

Note that the Guidelines and the direct Rules of Professional Conduct place dual duties and responsibilities upon the lawyer and the paralegal to avoid conflicts of interest. (See, generally, Rules 1.7 - 1.12 and Rule 5.3.) Remember that Rule 5.3 requires that lawyers with managerial authority or direct supervisory authority must make reasonable efforts to ensure that the paralegal's conduct is compatible with the professional

obligations of the lawyer. Paralegals should be instructed to inform the supervising lawyer and the management of the firm of any interest that could result in a conflict of interest or even give the appearance of a conflict. Such disclosure should include a paralegal's personal relationships, as well as situations where they may have a financial interest.

ABA Informal Opinion 1526 (1988), defines the duties of both the present and former employing lawyers and reasons that the restrictions on paralegals' employment should be kept to "the minimum necessary to protect confidentiality" in order to prevent paralegals from being forced to leave their careers, which "would disserve clients as well as the legal profession." The Opinion describes the attorney's obligations (1) to caution the paralegal not to disclose any information and (2) to prevent the paralegal from working on any matter on which the paralegal worked for a prior employer or respecting which the employee has confidential information.

Disqualification is mandatory where the paralegal gained information relating to representation of an adverse party while employed at another law firm and has revealed it to lawyers in the new law firm, where screening of the paralegal would be ineffective, or where the paralegal would be required to work on the other side of the same or substantially related matter on which the paralegal had worked while employed at another firm. When a paralegal moves to an opposing firm during ongoing litigation, courts have held that a rebuttable presumption exists that the paralegal will share client confidences. (See, e.g., Phoenix v. Founders, 887 S.W.2d 831, 835 (Tex. 1994).)

Compensation and Fees

A Lawyer May Charge for the Work Performed by Non-lawyer Assistants. Guideline 9.7.

In Missouri v. Jenkins, (491 U.S. 274 (1989)), the United States Supreme Court held that in setting a reasonable attorney's fee under 28 U.S.C. § 1988, a legal fee may include a charge for paralegal services at "market rates" rather than "actual cost" to the attorneys. In its opinion, the Court stated that, in setting recoverable attorney fees, it starts from "the self-evident proposition that the 'reasonable attorney's fee' provided for by statute should compensate the work of paralegals, as well as that of attorneys. Id. at 286. In addition to approving paralegal time as a compensable fee element, the Supreme Court effectively encouraged the use of paralegals for the cost-effective delivery of services. It is important to note, however, that Missouri v. Jenkins does not abrogate the attorney's responsibilities to set a reasonable fee for legal services, and it follows that those considerations apply to a fee that includes a fee for paralegal services.

Compensation. Guideline 9.8.

A lawyer may not split legal fees with a non-lawyer assistant nor pay a non-lawyer assistant for the referral of legal business. A lawyer may compensate a non-lawyer assistant based on the quantity and quality of the non-lawyer assistant's work and the value of that work to a law practice, but the non-lawyer assistant's compensation may not be contingent, by advance agreement, upon the profitability of the lawyer's practice.

Continuing Legal Education. Guideline 9.9.

A lawyer who employs a non-lawyer assistant should facilitate the non-lawyer assistant's participation in appropriate continuing education and pro bono activities.

Summary of Paralegal Ethics

Legal Assistant Ethics. Guideline 9.10.

All lawyers who employ non-lawyer assistants in the State of Indiana shall assure that such non-lawyer assistants conform their conduct to be consistent with the following ethical standards:

(a) a non-lawyer assistant may perform any task delegated and supervised by a lawyer so long as the lawyer is responsible to the client, maintains a direct relationship with the client, and assumes full professional responsibility for the work product.

(b) a non-lawyer assistant shall not engage in the unauthorized practice of law.

(c) a non-lawyer assistant shall serve the public interest by contributing to the delivery of quality legal services and the improvement of the legal system.

(d) a non-lawyer assistant shall achieve and maintain a high level of competence, as well as a high level of personal and professional integrity and conduct.

(e) a non-lawyer assistant's title shall be fully disclosed in all business and professional communications.

(f) a non-lawyer assistant shall preserve all confidential information provided by the client or acquired from other sources before, during, and after the course of the professional relationship.

(g) a non-lawyer assistant shall avoid conflicts of interest and shall disclose any possible conflict to the employer or client, as well as to the prospective employers or clients.

(h) a non-lawyer assistant shall do all things incidental, necessary, or expedient for the attainment of the ethics and responsibilities imposed by statute or rule of court.

(j) a non-lawyer assistant shall be governed by the Indiana Rules of Professional Conduct.

(k) for purposes of this Guideline, a non-lawyer assistant includes, but shall not be limited to: paralegals, legal assistants, investigators, law students.

QUESTIONS AND ANSWERS:

What if Mary asks a paralegal: What is the tort claim act? Is that a legal opinion? No. Where do I find the tort claim act? Is that a legal opinion? No.

Do you have to be charging money? Is it unauthorized practice of law if you give legal advice for free? – Doesn't matter whether you charge money.

If attorney hands a paralegal papers and says, "I'm in a hurry, draft this, sign my name, and file it," what do you do? Draft and have another attorney review and sign. See Rule 11/Rule 5.3.

Rule 5.3. Responsibilities Regarding Non-lawyer Assistants

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

(a) a partner, and a lawyer who individually or together with other lawyers possess 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 non-lawyer 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 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.

Guideline 9.1. Supervision

A non-lawyer assistant shall perform services only under the direct supervision of a lawyer authorized to practice in the state of Indiana and in the employ of the lawyer or the lawyer's employer. Independent non-lawyer assistants, to-wit, those not employed by a specific firm or by specific lawyers are prohibited. A lawyer is responsible for all of the professional actions of a non-lawyer assistant performing services at the lawyer's direction and should take reasonable measures to insure that the non-lawyer assistant's conduct is consistent with the lawyer's obligations under the Rules of Professional Conduct.

Guideline 9.2. Permissible Delegation

Provided the lawyer maintains responsibility for the work product, a lawyer may delegate to a non-lawyer assistant or paralegal any task normally performed by the lawyer; however, any task prohibited by statute, court rule, administrative rule or regulation, controlling authority, or the Indiana Rules of Professional Conduct may not be assigned to a non-lawyer.

Guideline 9.3. Prohibited Delegation

A lawyer may not delegate to a non-lawyer assistant:

(a) responsibility for establishing an attorney-client relationship;

(b) responsibility for establishing the amount of a fee to be charged for a legal service; or

(c) responsibility for a legal opinion rendered to a client.

Guideline 9.4. Duty to Inform

It is the lawyer's responsibility to take reasonable measures to ensure that clients, courts, and other lawyers are aware that a non-lawyer assistant, whose services are utilized by the lawyer in performing legal services, is not licensed to practice law.

Guideline 9.5. Identification on Letterhead

A lawyer may identify non-lawyer assistants by name and title on the lawyer's letterhead and on business cards identifying the lawyer's firm.

Guideline 9.6. Client Confidences

It is the responsibility of a lawyer to take reasonable measures to ensure that all client confidences are preserved by non-lawyer assistants.

Guideline 9.7. Charge for Services

A lawyer may charge for the work performed by non-lawyer assistants.

Guideline 9.8. Compensation

A lawyer may not split legal fees with a non-lawyer assistant nor pay a non-lawyer assistant for the referral of legal business. A lawyer may compensate a non-lawyer assistant based on the quantity and quality of the non-lawyer assistant's work and the value of that work to a law practice, but the non-lawyer assistant's compensation may not be contingent, by advance agreement, upon the profitability of the lawyer's practice.

Guideline 9.9. Continuing Legal Education

A lawyer who employs a non-lawyer assistant should facilitate the non-lawyer assistant's participation in appropriate continuing education and pro bono publico activities.

Guideline 9.10. Legal Assistant Ethics

All lawyers who employ non-lawyer assistants in the state of Indiana shall assure that such non-lawyer assistants conform their conduct to be consistent with the following ethical standards:

(a) A non-lawyer assistant may perform any task delegated and supervised by a lawyer so long as the lawyer is responsible to the client, maintains a direct relationship with the client, and assumes full professional responsibility for the work product.

(b) A non-lawyer assistant shall not engage in the unauthorized practice of law.

(c) A non-lawyer assistant shall serve the public interest by contributing to the delivery of quality legal services and the improvement of the legal system.

(d) A non-lawyer assistant shall achieve and maintain a high level of competence, as well as a high level of personal and professional integrity and conduct.

(e) A non-lawyer assistant's title shall be fully disclosed in all business and professional communications.

(f) A non-lawyer assistant shall preserve all confidential information provided by the client or acquired from other sources before, during , and after the course of the professional relationship.

(g) A non-lawyer assistant shall avoid conflicts of interest and shall disclose any possible conflict to the employer or client, as well as to the prospective employers or clients.

(h) A non-lawyer assistant shall act within the bounds of the law, uncompromisingly for the benefit of the client.

(i) A non-lawyer assistant shall do all things incidental, necessary, or expedient for the attainment of the ethics and responsibilities imposed by statute or rule of court.

(j) A non-lawyer assistant shall be governed by the Indiana Rules of Professional Conduct.

(k) For purposes of this Guideline, a non-lawyer assistant includes, but shall not be limited to: paralegals, legal assistants, investigators, law students.

Trial Procedure **Rule 11. Signing and verification of pleadings**

(A) Parties Represented by Attorney. Every pleading or motion of a party represented by an attorney shall be signed by at least one [1] attorney of record in his individual name, whose address, telephone number, and attorney number shall be stated, except that this provision shall not apply to pleadings and motions made and transcribed at the trial or a hearing before the judge and received by him in such form. A party who is not represented by an attorney shall sign his pleading and state his address. Except when specifically required by rule, pleadings or motions need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two [2] witnesses or of one [1] witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleadings; that to the best of his knowledge, information, and belief, there is good ground to support it; and that it is not interposed for delay. If a pleading or motion is not signed or is signed with intent to defeat the purpose of the rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

(B) Verification by affirmation or representation. When in connection with any civil or special statutory proceeding it is required that any pleading, motion, petition, supporting affidavit, or other document of any kind, be verified, or that an oath be taken, it shall be sufficient if the subscriber simply affirms the truth of the matter to be verified by an affirmation or representation in substantially the following language:

"I (we) affirm, under the penalties for perjury, that the foregoing representation(s) is (are) true.
(Signed) ____________"

Any person who falsifies an affirmation or representation of fact shall be subject to the same penalties as are prescribed by law for the making of a false affidavit.

(C) Verified pleadings, motions, and affidavits as evidence. Pleadings, motions and affidavits accompanying or in support of such pleadings or motions when required to be verified or under oath shall be accepted as a representation that the signer had personal knowledge thereof or reasonable cause to believe the existence of the facts or matters stated or alleged therein; and, if otherwise competent or acceptable as evidence, may be admitted as evidence of the facts or matters stated or alleged therein when it is so provided in these rules, by statute or other law, or to the extent the writing or signature expressly purports to be made upon the signer's personal knowledge. When such pleadings, motions and affidavits are verified or under oath they shall not require other or greater proof on the part of the adverse party than if not verified or not under oath unless expressly provided otherwise by these rules, statute or other law. Affidavits upon motions for summary judgment under Rule 56 and in denial of execution under Rule 9.2 shall be made upon personal knowledge.

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