

# LEGAL ETHICS FOR LEGAL ASSISTANTS

While there are no professional guidelines for legal secretaries, assistants or paralegals similar to those that apply to attorneys, legal assistants still must be cognizant of ethical rules. Because legal assistants work within the larger legal environment and because their actions can and do directly affect clients, legal assistants have to be fully aware of the ethical responsibilities and restraints that define the ethical obligations of attorneys.

Of course, this does not mean that there are no rules governing legal assistants. For instance, the Business and Professions Code contains rules whose violation subjects a legal assistant to criminal sanctions that can include jail and fines. Bus. & Prof. Code § 6455. However, those violations are limited to the legal assistant misrepresenting him or herself or performing services for which he or she is not authorized. While the Code also prohibits legal assistants from disclosing confidential information, only an unspecified civil remedy is implied. Bus. & Prof. Code § 6453. There are other ethical standards, such as those created by the California Alliance of Paralegal Associations. They can be viewed at their website at [www.caparalegal.org](http://www.caparalegal.org). While all of these rules are important, and to some degree overlap, most important are the Rules of Professional Conduct that pertain to attorneys. Legal assistants work for attorneys, and it is the attorney's ethical obligations that most define the ethical environment.

Forgetting for the moment that one should be aware of these ethical requirements and act in a manner consistent with them, there are other practical reasons for legal assistants to be aware of the rules. If a legal assistant violates one of the rules, such as divulging a confidential communication or improperly contacting an opposing party, the attorney for whom he or she works will undoubtedly be held responsible for the violation. It is no defense for the attorney that the violation was committed by the assistant, since it is the attorney's responsibility to make sure that his or her employees act ethically.

California attorneys are governed by the Rules of Professional Conduct. Rule 3-110 mandates that “[a] member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.” This obligates an attorney to properly supervise subordinate attorneys and non-attorneys, and subjects an attorney to discipline for allowing, either intentionally or negligently, a legal assistant to commit an act that the attorney may personally be prohibited from committing. If the attorney is called onto the ethical carpet as a result of a legal assistant's conduct, you can be assured that the legal assistant will suffer along with the attorney. Whether that means loss of a job or being a defendant in a lawsuit, none of the possibilities are desirable.

Therefore, each legal assistant should be generally familiar with the RPC. These rules can be found on the web site for the California Bar Association at [www.calbar.ca.gov](http://www.calbar.ca.gov)<sup>[1]</sup> While one should be able to assume that attorneys will be sure that their assistants are aware of these rules, the legal assistant should not rely on anybody else to make him or her aware of ethical requirements. When it comes down to it, you are all individually responsible to ensure that you act ethically. It is nobody else's responsibility.

When discussing in more detail the ethical rules that the legal assistant should know, the first issue is to define exactly what a legal assistant is and what services he or she can legally perform. From there, we will move on to discuss confidentiality issues, conflicts of interest, ex-parte communications, the unauthorized practice of law and billing issues.

## DEFINING A LEGAL ASSISTANT

The California Business and Professions Code defines who may hold themselves out as paralegals,

creates educational requirements, and delineates what services legal assistants can legally perform. For the purposes of the Code, “[t]he terms ‘paralegal,’ legal assistant,’ ‘freelance paralegal,’ ‘independent paralegal,’ and ‘contract paralegal’ are synonymous . . . .” Bus. & Prof. Code § 6454. A legal assistant is anyone who contracts with or is employed by an attorney or law firm and “who performs substantial, specifically delegated legal work under the direction and supervision of an active member of the State Bar of California . . . .” Bus. & Prof. Code §6450(a). One important part of the definition is that a legal assistant can only be employed by an attorney. Bus. & Prof. Code §6450(b)(6).

The tasks that a legal assistant can perform are also circumscribed. These tasks include, but are not limited to, case planning, development, and management; legal research; interviewing clients; fact gathering and retrieving information; drafting and analyzing legal documents; collecting, compiling, and utilizing technical information to make an independent decision and recommendation to the supervising attorney; and representing clients before a state or federal administrative agency if that representation is permitted by statute, court rule, or administrative rule or regulation. Bus. & Prof. Code § 6450(a). The Code also specifically prohibits a legal assistant from performing certain services. These include the providing of legal advice; representing a client in court; selecting, explaining, drafting or recommending the use of any legal document to or for any person other than the attorney who directs and supervises the paralegal, or engaging in conduct that constitutes the unlawful practice of law. Bus. & Prof. Code § 6450(b).

## **PROTECTING OF CONFIDENTIAL INFORMATION**

Like an attorney, a legal assistant is “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” Bus. & Prof. Code §§ 6068(e), 6453. Exactly what this means is further defined in the Evidence Code and case law, which declares what constitutes the attorney-client and work-product privileges.

The attorney-client privilege is at the heart of the American system of jurisprudence. It, more than anything else, defines the relationship between the lawyer and his or her client. In a nutshell, it mandates that, with certain exceptions, what is said between the lawyer and the client must remain confidential. No court or law enforcement agency, without the client’s consent, can compel an attorney or a client to disclose what a client tells a lawyer. If a client admits to his or her attorney that he or she has committed murder, or caused the release of a toxic cloud, the attorney cannot be compelled to disclose that information. Without the privilege clients cannot be free to truthfully communicate with their attorneys.

Exactly what constitutes privileged information is defined in the Evidence Code. Thus, privileged information means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. Evid. Code § 952. The communication does not have to be made directly to the attorney in order for it to be considered privileged. Communications to persons employed by the attorney, such as secretaries and legal assistant, are also considered protected.

An attorney has no discretion as to whether he or she will disclose privileged information. The Evidence Code compels an attorney not to disclose such information. For example, Evidence Code section 955 states that “[t]he lawyer who received or made a communication subject to the privilege under this article shall claim the privilege whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 954.”

The work-product privilege works in conjunction with the attorney-client privilege to protect the

impressions and thought processes of the attorney. The attorney's strategies and tactics cannot be involuntarily disclosed. According to the Code of Civil Procedure

[i]t is the policy of the state to: (1) preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases; and (2) to prevent attorneys from taking undue advantage of their adversary's industry and efforts.

(b) Subject to subdivision (c), the work product of an attorney is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice.

(c) Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances.

Code of Civ. Pro. § 2018.

The import of protecting these privileges cannot be overstated. Not only will the disclosure of such information get one sued and/or fired, but in almost every case keeping privileges confidential can be the difference between winning and losing. Legal assistants have to be particularly aware of those circumstances that can lead to the intentional and/or negligent disclosure of privileged communications. There are a number of such circumstances, some of which would be discussed below.

One of the most obvious situations, but the one that occurs frequently, is best described as "idle chitchat." The conversation at a restaurant, or the bragging with friends at a ball game, or the telling of war stories with relatives are all potential sources of disclosure. The problem, even if the name of the client is not disclosed, is that one cannot be aware of all of the people that are listening. The stranger at the adjacent bar stool or in the next restaurant booth can be the wrong person who is there at the wrong time. Even if such chances are slim that a disclosure will take place, given the potential dramatic negative consequences, the risk is too great to take.

Similar to the above, another potential source of disclosure is communications between the legal assistants and opposing counsel and persons who work for him or her. Depending on the assignments given to the legal assistant, there may be considerable contact between members of opposing counsel's office, be they other legal assistants or attorneys. Each such communication is an opportunity to learn information about the case or to disclose such information. In fact, it is a time honored tradition for counsel to use these communications as an opportunity to obtain otherwise privileged information.

Another opportunity for the disclosure of privileged communications relates to the exchange of documents. Almost every piece of litigation involves the exchange of relevant documents. One of the primary responsibilities of most legal assistants is to prepare these documents for disclosure to opposing counsel. Rightly or wrongly, legal assistants are given tremendous responsibility for the review of documents. One of the reasons relate to the reluctance of clients to pay for attorneys to review documents. In fact, in some of the guidelines issued by insurance carriers, document review is listed as services that should be provided by legal assistants. Another reason relates to the complexity of cases and the increasing number of documents involved. In some cases, such as those involving Superfund, intellectual property or mass torts, there can be thousands or hundreds of thousands of pages of documents involved. Most attorneys do not feel that they have the time to review such documents so give their legal assistants the responsibility to take at least the first cut at the documents.

The review and organization of such documents is oftentimes boring and time consuming. The

monotonous nature of the assignment can dull the senses of even the sharpest mind. Whatever the temptation might be skim rather than read, do not give in. While parties usually spend considerable time reviewing the documents that are produced by the opposing counsel, the same attention is not paid to the documents that they produce. The bottom line for document review is to take the time necessary to identify privileged documents and if there is a question as to whether a document is privileged, ask the supervising attorney. Remember, that a legal assistant is not an attorney, but that without the assistance of the legal assistant, the attorney cannot be in a position to decide if a document is privileged.

## EX PARTE COMMUNICATIONS

Rule 2-100 of the Rules of Professional Conduct mandate that “[w]hile representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.” While a seemingly simple rule, it has many complexities primarily relating to how the other party is defined. This would not be so important if violations of the rule were not such a fertile ground for motions to disqualify counsel. In numerous cases where it is even arguable that the rule has been violated, one can be sure that the allegation of the violation will be followed by the motion to disqualify. Given the drastic nature of that remedy, you must be careful to ensure that you do not run afoul of the rule.

In order to violate the rule, you would have to know that the person that you are talking to is represented by counsel. While this creates somewhat of a safe haven, knowledge can be implied through conduct. An ostrich approach to contacts will not necessarily protect one from violating the rule.

The rule defines party as:

- (1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or
- (2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

When the action only involves individuals, application of the rule is fairly straightforward. For the purposes of the rule it does not matter who contacted whom. If the represented party directly contacts the legal assistant, that legal assistant cannot discuss the matter with him or her. The legal assistant should politely sever the communication and then contact the supervising attorney.

While identifying a party when individuals are involved may be simple, it becomes complicated when dealing with entities such as corporations or partnerships. Clearly, the rule does not prohibit communications with all employees of a corporation who is a party. Only communications with parties are proscribed.

The first part of the definition is the easiest, except for the definition of managing agent. The term managing agent is not synonymous with anyone who is a manager. Managing agents are limited to those persons who have policy making authority for the corporation and who poses “binding corporate authority . . .” *Koo v. Rubio’s Restaurants*, 109 Cal. App. 4th 719, 737 (2003). The rule is directed to those persons whose conduct is imputed to the corporation or whose statements may constitute admissions of the corporation. *Triple A Machine Shop, Inc. v. Superior Court*, 213 Cal. App. 3d 131, 140 (1989).

Exactly when an individual’s statements will be binding on a corporation is not an easy answer to

obtain. It involves some knowledge of the evidence code and the hearsay rule. Evidence Code section 1222 defines when an "authorized statement" is admissible. Its admission requires that the person be authorized to make the statement concerning the subject matter. That does not mean that the individual has to have specific authority to make the particular statement, but that he or she have general authority over the subject matter. For instance, the head of human relations probably would have authority to speak on corporate policies regarding hiring and firing. Evid. Code § 1222(a). Similar rules apply to communication with employees. Employees must be those whose statement would bind the corporation.

In addition to the above, the prohibitions are limited to those persons who are employees or managing agents at the time of the communication. *Triple A Machine Shop*, 213 Cal. App. 3d 131.

What becomes clear, is that it can oftentimes be a daunting task to determine whether communications with an employee of a corporation is prohibited or allowed. The best that a legal assistant can do is identify those situations where the issues might arise and then discuss the matter with the supervising attorney. Let the attorney make the call. In fact, for the legal assistant to independently make the call might constitute the unauthorized practice of law.

## **THE UNAUTHORIZED PRACTICE OF LAW**

Section 6126 of the Business and Professions Code prohibits the unauthorized practice of law. However, the statute does not define what the practice of law. That has been left to the courts. Most of the case law dealt with situations where an individual is hired to perform services for a third party. That is not the situation that most legal assistants will confront. Rather, the issue will be whether the act being performed as part of employment with a firm constitutes the practice of law.

Some situations are easy. Appearing in court, except under specific circumstances, is the practice of law. So is questioning a witness at a deposition or directly advising a firm client of the law without first obtaining authority from the supervising attorney.<sup>[2]</sup> The tougher case, is like the one discussed above - deciding whether an individual is a party under Rule 2-100. The best description as to when work performed by a legal assistant, in house, constitutes the practice of law, was given by Bankruptcy Judge Samuel L. Bufford, in *In re Carlos*. Judge Bufford stated:

There are many tasks in a law firm that a non-attorney may appropriately carry out. Legal secretaries have traditionally performed typing, filing and other clerical functions. Support personnel often conduct ministerial tasks where they interface with the public, with clients or with other counsel, such as the delivery and pickup of papers, and the ordering and picking up of supplies. Paralegals have been used to a great extent in more recent years to do document analysis and control, and a number of other functions that require some training and expertise (but not all of the qualifications of an attorney). In addition, law firms sometimes hire professionals such as economists and accountants to assist in the representation of client interests. This court's decision reflects no disapproval of such conduct.

Such work by non-attorneys in a law firm must be preparatory in nature. It may include research, investigation of details, the assemblage of data or other necessary information, and other work that assists the attorney in carrying out the legal representation of a client. The work must be supervised by an attorney. Furthermore, the work must become or be merged into the work of the attorney, so that it becomes the attorney's work product. If the work of the non-attorney employee of a law firm stands on its own, such work constitutes the unauthorized practice of law.

227 B.R. 535, 539 (C.D. Cal. 1998) (citations omitted.).

The key determination is whether the decisions are being made by the supervising attorney or the legal assistant. If the legal assistant only gives advice to the attorney, and the ultimate decision is made by the attorney, then the legal assistant has not practiced law. Using this definition, and applying it to the Rule 2-100 situation, if the legal assistant makes the decision as to whether the rule applies and then proceeds to take action without first contacting the supervising attorney, then that is the practice of law.

## **CONFLICTS OF INTEREST**

Along with the need to keep clients communications privileged, the other primary duty of the attorney is to ensure that the clients interests come first. Attorneys work under very strict rules relating to ensuring that no conflicts of interest between the client and the attorney exist. There are two primary rules which relate to these duties; one dealing with business interests that might be adverse to the client and the other relates to representing parties that have conflicting interests: Rules of Professional Conduct 3-300 and 3-310. The first states:

A member 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 each of the following requirements has been satisfied:

(A) The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client; and

(B) The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

(C) The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

Cal. R. Prof. Conduct 3-300.

Related to these rules is a prohibition on representing a client when the attorney has a relationship with opposing counsel. Rule 3-320 states that “[a] member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.”

While all of these rules relate to an attorney’s conduct, the court have been clear that the conduct of legal assistants can also cause conflicts of interests. In *re Complex Asbestos Litigation*, 232 Cal. App. 3d 572 (1991). In *In re Complex Asbestos Litigation*, a paralegal left one law firm that represented asbestos parties and went to work for another firm that was prosecuting cases defended by the former firm. The paralegal had access to privileged asbestos information at the prior firm, and that firm moves to disqualify the new firm from all related cases. The Court of Appeal found that disqualification was warranted, regardless of the fact that a paralegal and not an attorney was involved. The critical determination was that the paralegal had access to privileged communications and information.

It must be pointed out that the above rules do not directly bind legal assistants. The rules relate only to attorneys. But the legal assistants conduct and history does effect the ability of the attorneys to comply with the rules and to continue to represent their clients. Legal assistants must be cognizant of these rules and bring to the attention of supervising attorneys any conduct that might potentially create such a conflict

of interest.

## **BILLING PRACTICES**

For better or worse, most legal assistants are required to keep time records. These records may be used for billing purposes, to determine hourly requirements, or both. Suffice to say that they are an integral part of the legal assistants job responsibilities. Especially as they relate to client billing they are also key to the economic survival of the law firm that employees the legal assistants.

All entries into these records should be truthful and complete. There can be a tendency to want to exaggerate time or projects; especially in situations where there is a problem with making hours. Or in the situations where the billing is due and the legal assistant “knows” that they will be doing the work over the weekend. It cannot be emphasized enough that the legal assistant has to fight the urge. Not only would the untruthful information constitute a lie and fraud, but many firms employ a “one strike and you’re fired” policy to billing irregularities.

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[1] Be aware that when following the rules, there may be a discussion of the rule. The discussion is sometime as important as the rule itself, and the legal assistant should be familiar with this also.

[2] While rendering the advice after seeking approval from the supervising attorney may not be the practice of law, it is a basic practice that is ripe with disastrous consequences.