# JOB DUTIES

## Ethical challenges in the attorney-paralegal relationship.

WRITTEN BY **LYNN CROSSETT**

No single code of ethics governs all Texas paralegals. Instead, paralegal conduct is governed indirectly by the Texas Disciplinary Rules of Professional Conduct, or TDRPC. Paralegal conduct is governed indirectly by the TDRPC because Rule 5.03 provides that lawyers are responsible for the TDRPC violations of their non-lawyer assistants.[1] Because Texas paralegals are governed indirectly by the TDRPC, they must be mindful of all its provisions. However, there are some provisions that are of particular relevance to paralegals. These are the provisions relating to competence and supervision (Rules 1.01 and 5.03), the unauthorized practice of law (Rule 5.05), confidentiality (Rule 1.05), and conflicts of interest (Rules 1.06-1.09).

Further guidance for attorneys and paralegals can be found in guidelines adopted by the American Bar Association and the State Bar of Texas regarding the utilization of paralegal services. In 1991, the American Bar Association adopted the ABA Model Guidelines for the Utilization of Legal Assistant Services (the "Model Guidelines").[2] The Model Guidelines were updated in 2003 and again in 2012, which included a title change to reflect the more common usage of the term "paralegal" in place of "legal assistant."[3] Texas, like most states, has adopted similar guidelines or recommendations for attorneys with regard to working with paralegals. In 1993, the State Bar of Texas adopted its General Guidelines for the Utilization of the Services of Legal Assistants by Attorneys (the "Texas Guidelines").[4]

The focus of the Model Guidelines and its Texas counterpart is to provide guidance to attorneys regarding the utilization of paralegal services. They do not address directly the conduct of paralegals. However, the Model Guidelines and Texas Guidelines provide important information for paralegals as well as attorneys.

This article focuses on perhaps the two most challenging ethics areas for paralegals and for attorneys utilizing paralegals: avoiding the unauthorized practice of law and breaches of confidentiality.

### Unauthorized Practice of Law

The unauthorized practice of law issue is governed not only by ethics rules but also by statute, both civil and criminal. However, the focus here is on the relevant TDRPC provision, Rule 5.05, and the issues of particular relevance to paralegals. Rule 5.05 simply prohibits an attorney from practicing in a jurisdiction in which he or she is not licensed and from assisting another in the unauthorized practice of law.[5] A paralegal who engages in the unauthorized practice of law while employed by an attorney subjects the attorney to possible discipline under Rule 5.05.

As a general matter, a paralegal may be found to have engaged in the unauthorized practice of law if he or she does any of the following things:

1) establishes the attorney-client relationship or the fees for the representation;
2) gives legal advice;
3) takes a deposition;
4) represents a client in court, except as allowed by law to appear before certain administrative agencies; or
5) otherwise provides legal services to the public without the supervision and direction of a licensed attorney.[6]

The first five of the Model Guidelines and the first six of the Texas Guidelines address the issue of the unauthorized practice of law, specifically how attorneys working with paralegals are responsible for ensuring that their paralegals are not engaging in the unauthorized practice of law. The Model Guidelines do not define what constitutes the "practice of

law."[7] That is left to the states, often defined by statute, disciplinary rule, and court interpretation. The Model Guidelines provide authoritative guidance on attorneys' obligations to ensure they are not inadvertently assisting a paralegal in the unauthorized practice of law, which would violate Model Rule 5.5 and its state counterpart in the professional rules of most states.[8]

*Signing Pleadings*

The Model Guidelines do not specifically address the issue of signing pleadings, although this issue would fall under the general guidance contained in Model Guideline 2 that allows lawyers to delegate tasks to paralegals except where prohibited by state or other law or the Model Guidelines themselves. Most states allow only attorneys to sign pleadings. This rule may be contained in ethics or procedural rules.[9] If attorneys are the only ones authorized to sign pleadings, it follows that only attorneys may sign for the attorney of record by permission. That means a paralegal would not be allowed to sign his or her supervising attorney's name, even by permission, and that would include the use of a signature stamp. Good practice would extend this notion to certificates of service, which are a part of the pleading as well.[10] In fact, good practice would extend this prohibition to settlement agreements, advice letters, or any document giving legal advice. Of course, paralegals may sign other types of correspondence as long as their title is included.[11]

*Giving Legal Advice*

One of the three things Model Guideline 3 and Texas Guideline 6 specifically prohibit the attorney from delegating to a paralegal is "responsibility for a legal opinion rendered to a client."[12] All states prohibit non-lawyers from giving legal advice but determining what constitutes giving legal advice can be a challenge, especially at times when the determination must be made instantaneously in response to a client question. When a client asks a paralegal (or other non-attorney) a question, the paralegal should always ask himself or herself the following three questions before answering:

1) Does the answer require the paralegal to utilize his or her legal knowledge or judgment?
2) Does the answer concern the client's legal rights or responsibilities?
3) Will the client take some action as a result of the answer?[13]

If the answer to any of the questions is yes, the paralegal cannot answer the question, even if he or she knows the answer. The fact that the paralegal typically will know the answer and will want to be helpful is what makes it the biggest challenge. Instead, the paralegal must remind the client that he or she is not an attorney and cannot give legal advice. However, the paralegal can still be helpful and refer the question to the attorney, who may answer the question directly or relay an answer to the client through the paralegal. When the attorney relays the answer to the client, it is imperative that the paralegal not interpret or expand upon the answer. It is also very important to make a record of the exchange, which can be accomplished by a simple memo to the file.[14]

*Communicating with Clients, Opposing Counsel or Unrepresented Parties, and the Court*

Model Guideline 4 and Texas Guideline 5 require attorneys to make reasonable efforts to ensure that clients, courts, and other attorneys are aware of the paralegal's status and that he or she is not licensed to practice law. Under Model Rule 1.4, attorneys have an obligation to 1) keep clients reasonably informed, 2) reasonably consult with clients about the means used to attain their objectives, and 3) promptly comply with reasonable client requests for information.[15] This is the most common source of client complaints.[16] Paralegals play an important role in helping attorneys meet this obligation, keeping the supervising attorney informed about communications received and relaying information to clients accurately and timely.[17] In fact, paralegals are often the front line in communications, not only with clients but often with witnesses, opposing counsel or their employees, and with court personnel.

Although the obligation rests with the attorney to properly train and supervise, the paralegal can develop good practices to help avoid any confusion. Paralegals must always make the paralegal title clear in communications. Paralegals should always identify themselves by title; doing so when you meet someone in person or by phone should become second nature, especially with clients, witnesses, court personnel, and opposing counsel and their employees.[18]

*Using Business Cards and Letterhead*

Model Guideline 5 and Texas Guideline 11 specifically allow attorneys to include a paralegal's name and title on business cards and law firm letterhead. However, some states, like Texas, may require a notation on firm letterhead that the individual is not licensed to practice law.[19]

## Confidentiality

Rule 1.05 places an ethical obligation on the attorney (and in Rule 5.03, indirectly on paralegals) to protect client confidences. This means more than simply preserving the attorney-client privilege. The information protected by Rule 1.05 goes beyond the evidentiary rule protecting confidential attorney-client communications and can include all information relating to the client, both privileged and unprivileged.[20] Therefore, paralegals must take a very cautious and protective approach to dealing with client information.

Model Guideline 6 and Texas Guideline 7 address the issue of maintaining the confidentiality of client information. The attorney's duty of confidentiality is as fundamental to the attorney-client relationship as the attorney's duty of loyalty.[21] This goes beyond the attorney-client privilege. The attorney-client privilege is essentially an evidentiary principle that protects privileged communications from discovery or being admitted in court.[22] The privilege extends to paralegals and other employees who may have confidential communications with a client, although only if the paralegal is performing a legal function.[23]

The ethical obligation to protect client confidences is much broader than the attorney-client privilege. Whereas the attorney-client privilege only protects certain communications, the ethical duty of confidentiality protects "information relating to the representation of the client."[24] It includes all information and communications relating to a client, and sometimes even the client's location and identity.[25] It protects everything the attorney learns while investigating and developing the case. It protects information even if the lawyer is not yet retained and even if the initial contact is with the paralegal. And the duty continues indefinitely.[26]

## Conclusion

The Model Guidelines and their state counterpart provide a useful training tool for attorneys and their paralegals. The comments to the Model Guidelines and Texas Guidelines provide additional clarification and guidance, including citations to relevant authority in the Model Rules and state law. They provide a resource for ongoing training and continuing education for attorneys and paralegals.[26] **TBJ**

## NOTES

1. Tex. Disciplinary R. Prof'l Conduct 5.03.
2. ABA Model Guidelines for the Utilization of Legal Assistant Services (1991).
3. ABA Model Guidelines for the Utilization of Paralegal Services (2012).
4. General Guidelines for the Utilization of the Services of Legal Assistants by Attorneys (State Bar of Texas 1993).
5. Tex. Disciplinary R. Prof'l Conduct 5.05.
6. Vicki Brittain & Terry Hull, *Paralegal Handbook* 59-60 (2003).
7. Guideline 2 Cmt., ABA Model Guidelines for the Utilization of Paralegal Services (2012).
8. *Id.*
9. *See, e.g.,* Tex. R. Civ. P. 57 ("Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, …").
10. *See* Tex. R. Civ. P. 21(g) ("The party or attorney of record shall certify to the court compliance with this rule in writing on the document to be filed or served.").
11. Guideline 4 Cmt., ABA Model Guidelines for the Utilization of Paralegal Services (2012).
12. Guideline 3, ABA Model Guidelines for the Utilization of Paralegal Services (2012); Guideline 6, General Guidelines for the Utilization of the Services of Legal Assistants by Attorneys (State Bar of Texas 1993).
13. Brittain & Hull, *supra* note 6.
14. *Id.*
15. Model Rules of Prof'l Conduct R. 1.4 (2013).
16. Arthur Garwin, *The Paralegal's Guide to Professional Responsibility* 97 (American Bar Association 2015).
17. *Id.*
18. Brittain & Hull, *supra* note 6, at 60.
19. Supreme Court of Texas Prof. Ethics Comm. Op. 436, 49 Tex. B.J. 1085 (1986); *see also* William P. Statsky & Lynn Crossett, *The Texas Paralegal* 147-48 (Cengage 2010).
20. Tex. Disciplinary R. Prof'l Conduct 1.05.
21. Garwin, *supra* note 16, at 63.
22. *Id.* at 64.
23. *Id.* (citing *Volrie v. Texas,* No. 1305667-CR, 2007 Tex. App. LEXIS 6574 (Aug. 16, 2007) (mem. op.).
24. *Id.* at 66 (quoting Model Rules of Prof'l Conduct R. 1.4 (2013)).
25. *Id.*
26. *Id.* at 67-68.

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