

NFPA Informal Ethics and Disciplinary Opinion No. 05-2

The following opinion of the Ethics Board of the National Federation of Paralegal Associations, Inc. (NFPA) is offered based upon NFPA's positions and research in the area of paralegal ethics, discussions, and research by the members of the Ethics Board. This opinion should not be construed as binding and must be interpreted in conjunction with the applicable state's Supreme Court rules, statutes and opinions governing the professional conduct of members of the legal profession.

FACTS:

With the rise of the paralegal profession, law offices, as well as educational institutions which offer paralegal courses have become workplace opportunities for those educated and trained in law, but are not necessarily licensed to practice law. Although licensed attorneys have dominated both venues, paralegals have been able to proliferate throughout the entire legal profession, performing substantive legal work as well as teaching at paralegal schools. Either of these occupational activities usually requires education and training; however, neither requires a license to practice law. Thus, a disbarred attorney could arguably qualify by education and training to work as a paralegal or to teach at a paralegal school.

This scenario raises two questions:

QUESTION #1:

Are there or should there be ethical provisions that govern whether a disbarred attorney could teach at a paralegal school?

OPINION as to Question #1:

There are no ethical provisions regarding the employment of a disbarred attorney to teach at a paralegal school. Ultimately, the decision to hire a disbarred attorney is a matter of policy and requires careful consideration of several factors.

DISCUSSION as to Question #1:

While no ethical provisions govern the hiring of disbarred attorneys to teach at paralegal schools, several policy considerations come into play.

It would appear permissible for a paralegal school to restrict disbarred attorneys from teaching paralegal/legal assistant students altogether as a blanket policy. Because disbarment would have been the result of a violation (and a grievous one at that) of ethics – that is, The Rules of Professional Conduct – a paralegal school could consider the disbarred attorney unqualified as an appropriate role model. This may be particularly true, since ethics is an integral part of legal education for both paralegals and lawyers.

Hiring a disbarred attorney could appear to “allow the fox to supervise the chicken coop,” so to speak. An impeccable role model is arguably preferable.

On the other hand, the circumstances surrounding the attorney's disbarment may have little or nothing to do with his or her ability to teach. Disbarment could have occurred as a result of or amidst attenuating factors such as personal difficulties, addiction, depression, inexperience or abuse. Inadvertent commingling of funds would present a vastly different picture from out and out embezzlement. Moreover, the disbarment could have occurred some time ago, in which case, rehabilitation may be a factor. Ultimately, the school may want to take into consideration these and any other factors such as compassion or redemption in its hiring process. The decision or the possibility to seek reinstatement may be another factor. Certainly, a full disclosure from the disbarred attorney as to the totality of the circumstances surrounding his or her disbarment should be required as part of the application process. It may very well be that a disbarred attorney could be an excellent teacher as well as a cautionary tale, incarnate. Whether a school would wish to take additional measures or encompass other forms of disciplinary sanctions would be a matter of internal institutional policy outside the scope of this opinion.

QUESTION #2:

Are there, or should there be, ethical provisions that govern whether a disbarred attorney could be employed as a paralegal?

OPINION as to Question #2:

Not all states have rules or laws regarding paralegal practice, but some of those states that do, have rules or laws prohibiting disbarred attorneys from working as paralegals. Thus, the question differs from state to state. NFPA itself provides a comprehensive survey of each state's rules or statutes on this precise issue. See, Rules & Ethics Opinions concerning Non-lawyer Activities; available at:

<http://www.paralegals.org/associations/2270/files/DisbarredDB.htm>. As with any compilation, updating is an integral part of performing thorough research.

Since much of NFPA's Ethical Code parallels the ABA's Rules of Professional Conduct, behavior resulting in disbarment does not comport with the provisions of NFPA's Ethical Code. Thus, at a minimum, the stance of the professional organization for paralegals would cast doubt on the propriety of employing a disbarred attorney to perform paralegal tasks. Central to this concern is the possible appearance of impropriety and the possibility of UPL by the disbarred attorney.

DISCUSSION as to Question #2:

The ABA's Rules of Professional Conduct do not apply directly to paralegals, or to the work performed by paralegals. However, some states do have rules or statutes regulating the employment of disbarred attorneys within the legal workplace. For instance, a rule of the Florida Bar regulates the hiring of disbarred attorneys and even prohibits certain attorneys from employing a disbarred attorney for the first three years of disbarment. The Florida rule also prohibits the disbarred attorney from contact with both clients and trust fund accounts.

California takes a different approach. California law requires registration of "legal

document assistants” and “unlawful detainer assistants” both of whom perform clerical and administrative tasks as independent contractors. Cal. Bus. & Prof. Code §6202, also prohibits disbarred attorneys from registering as either. Other states may very well have similar restrictions. Certainly the direction of both the bar and the paralegal profession is heading toward a heightened awareness of ethical standards. For instance, both the Florida and California provisions are relatively new. Moreover, for the paralegal profession, ethics are a primary concern.

Other considerations abound:

Disbarment under the ABA’s Rules would also appear to be a violation of NFPA’s Ethical Code. While there is no direct prohibition against a disbarred attorney performing paralegal tasks, NFPA’s Ethical Code would cast some doubt as to the qualifications of a disbarred attorney.

For any rule governing the employment of a disbarred attorney in the legal workplace, the primary concern would be the possibility of UPL, particularly the rendering of legal advice by the disbarred attorney. The attorney, when licensed, was able to and probably became accustomed to giving legal advice. Once disbarred, the (former) attorney could easily give legal advice as a matter of habit. Most attorneys may have a general knowledge of UPL. However, trained paralegals have a heightened awareness of the prohibitions.

There is also the possibility that a licensed attorney may not properly supervise a disbarred attorney as prudently or cautiously as he or she would supervise a paralegal. The question is admittedly complex and there are a myriad of situations involving disbarred attorneys that are difficult to anticipate. While it is difficult to make a recommendation as to the employability of disbarred attorneys as paralegals, there may be a growing consensus that some restrictions could prevent harm to clients and the public interest.

At present, the hiring of a disbarred attorney to teach at a paralegal school or to perform tasks as a paralegal does not violate the NFPA Ethics Code, nor the ABA Rules of Professional Conduct, nor the ethical codes of most states. The NFPA Ethics Board recommends that in states allowing disbarred attorneys to perform tasks as paralegals, supervisors ensure that the disbarred attorney does not render legal advice or otherwise engage in the unauthorized practice of law.

The following authorities are cited in support of this opinion for Question #1 – no authorities extant.

The following authorities cited in support of this opinion for Question #2:

Rules relating to the Florida Bar:

RULE 3-6.1 GENERALLY An authorized business entity (as defined elsewhere in these rules) may employ individuals subject to this rule to perform such services only as may ethically be

performed by other lay persons employed by authorized business entities.

(a) **Individuals Subject to This Rule.** Individuals subject to this rule are suspended attorneys and former attorneys who have been disbarred, disbarred on consent, or whose disciplinary resignations have been allowed.

(b) **Definition of Employment.** An individual subject to this rule shall be considered as an employee of an authorized business entity if the individual is a salaried or hourly employee or volunteer worker for an authorized business entity, or an independent contractor providing services to an authorized business entity.

(c) **Employment by Former Subordinates.** An individual subject to this rule may not, for a period of 3 years from the entry of the order pursuant to which the suspension, disciplinary resignation, or disbarment became effective, or until the individual is reinstated to the practice of law, whichever occurs sooner, be employed by or work under the supervision of another attorney who was supervised by the individual at the time of or subsequent to the acts giving rise to the order.

(d) **Notice of Employment.** Before employment commences the employer shall provide The Florida Bar with a notice of employment and a detailed description of the intended services to be provided by the employee.

(e) **Client Contact.** No employee shall have direct contact with any client. Direct client contact does not include the participation of the employee as an observer in any meeting, hearing, or interaction between a supervising attorney and a client.

(f) **Reports by Employee and Employer.** The employee and employer shall submit sworn information reports, quarterly based on a calendar year, to The Florida Bar. Such reports shall include statements that no aspect of the employee's work has involved the unlicensed practice of law, that the employee has had no direct client contact, and that the employee did not receive, disburse, or otherwise handle trust funds or property.

California Bus. & Prof. Code, §6202 provides as follows: § 6402. Registration Requirement; Registration of Disbarred and Suspended Lawyers Prohibited

A legal document assistant or unlawful detainer assistant shall be registered pursuant to this chapter by the county clerk in the county in which his or her principal place of business is located (deemed primary registration), and in any other county in which he or she performs acts for which registration is required (deemed secondary registration). Any registration in a county, other than the county of the person's place of business, shall state the person's principal place of business and provide proof that the registrant has satisfied the bonding requirement of Section 6405. **No person who has been disbarred or suspended from the practice of law pursuant to Article 6 (commencing with Section 6100) of Chapter 4 may, during the period of any disbarment or suspension, register as a legal document assistant or unlawful detainer assistant.** The Department of Consumer Affairs shall develop the application required to be completed by a person for purposes of registration as a legal document assistant. The application shall specify the types of proof that the applicant shall provide to the county clerk in order to demonstrate the qualifications and requirements of Section 6402.1.

See also, In Re Comish, 889 So. 2d 236 (La. 2004) (upholding disciplinary recommendation of the Disciplinary Board for attorney's failure to exercise sufficient supervisory oversight of employee disbarred attorney as a violation of rules of professional conduct.

*** By making a request to the National Federation of Paralegal Associations (NFPA) for an opinion and/or recommendation concerning proper conduct for a member of the legal profession as it pertains to ethical conduct, obligations, utilization and/or discipline of paralegals, the inquirer and his/her employers, employees, agents, and representatives agree to indemnify, hold harmless, and defend the NFPA, its Officers, Directors, Coordinators, Ethics Board and Managing Director from any claims arising from any act or omission of NFPA except those occasioned by NFPA's willful or deliberate acts.