

### **NFPA Informal Ethics and Disciplinary Opinion No. 95-3**

The following ethics and disciplinary opinion of the National Federation of Paralegal Associations (NFPA) is offered based upon its positions and research in the area of paralegal ethics. It should not be construed as binding and must be interpreted in conjunction with the applicable state's Supreme Court rules and opinions governing the professional conduct of members of the legal profession. This opinion may be used for guidance and, by the appropriate entity, as a persuasive argument in favor of the findings of NFPA.

**Question: May a paralegal with whom a conflict of interest in a legal matter has been identified erect an ethical wall? If so, what steps should be taken to erect and adhere to that ethical wall?**

**Facts:** The individual is employed by a law firm and performs paralegal work, using the title "paralegal." (See Endnote 1.) She possesses a four-year bachelor's degree in paralegal studies and performs substantive legal work with supervision by, or with accountability to, an attorney in the firm. A conflict of interest involving the paralegal and client of the law firm has been identified by the paralegal and disclosed to the supervising attorney. The paralegal would like to know if it is possible to erect an ethical wall around her and, if so, what steps should be taken to erect and adhere to that ethical wall to ensure that the client's confidences are maintained and communication to and from the paralegal is effectively barred. (See Endnote 2.)

**Opinion:** A paralegal employed by a law firm in any state, with the exception of Nevada, must comply fully with the implementation and maintenance of an ethical wall in every instance in which a conflict of interest with the paralegal has been identified. (See Endnotes 3 and 4.) The following steps should be taken to erect and adhere to the ethical wall.

- (a) prohibit the paralegal from having any connection with the matter;
- (b) ban discussions with or the transfer of documents to or from the paralegal;
- (c) restrict access to files; and
- (d) educate all members of the firm, corporation or entity as to the separation of the paralegal (both organizationally and physically) from the pending matter.

**Discussion:** Canon 8 of the [NFPA Model Code of Ethics and Professional Responsibility](#) (Model Code) states, "[A] paralegal 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." The Ethical Considerations of Canon 8 of the Model Code provide additional direction concerning the issues that may present in a situation in which a conflict of interest involving a paralegal is identified. Specifically, the paralegal is obligated to act solely for the benefit of the client, free of compromising influences and loyalties. Those conflicting influences or loyalties could result from personal or business relationships (see Endnote 5), prior employment situations (see Endnote 6) or family relationships (see Endnote 7). If it is determined that a conflict of interest exists, then, the Model Code

prohibits the paralegal from participating in or conducting work on the matter. (See Endnote 8.) Importantly, as was recognized by the inquirer, the Model Code requires that the paralegal implement and maintain an ethical wall, discussed more specifically above.

Those states which have guidelines and/or rules that deal with paralegals agree with the NFPA Model Code's prohibition on a paralegal continuing to work or be involved in any way in a legal matter when a conflict of interest has been identified. However, few states have issued formal or informal opinions on this issue. (See Endnote 9.) Since the modification of the only state opinion which did not allow the implementation of an ethical wall in such an instance (see Endnote 10), the existing state opinions are in agreement with the NFPA Model Code's requirements for complying with the implementation and maintenance of an ethical wall. (See Endnote 11.)

Additionally, American Bar Association (ABA) Opinion 88-1526 permits paralegals formerly employed by a firm with a matter adversarial to a second firm to become employed by the second firm provided that there is an effective screening process, a consent obtained from the adversary and the client and a Chinese Wall is erected. (See Endnote 12.) Lastly, Guideline 7 of the ABA Model Guidelines for Utilization of Legal Assistant Services adopted in 1991 states, "[A] lawyer should take reasonable measures to prevent conflicts of interest resulting from a legal assistant's other employment or interests insofar as such other employment or interests would present a conflict of interest if it were that of the lawyer."

Several courts have addressed the issue of that which constitutes a conflict of interest with a paralegal. (See Endnote 13.) Generally, it has been held that the attorney is required to screen for potential conflicts of interest involving paralegals in his/her employ. Thereafter, if a conflict of interest is identified, an ethical wall must be erected to bar all communications with, and document transfer from and to, the paralegal with whom the conflict has been revealed. Simultaneously, the attorney is required to obtain the client's consent for continued representation, and in adversarial proceedings, a consent from the adversary(ies). The holdings of the courts in all jurisdictions have disqualified numerous attorneys and law firms from continued representation of a client or entity if these requirements have not been met. The decisions clearly recognize that, in the performance of paralegal work, a paralegal is exposed to client confidences, information about transactions, attorney strategy and other privileged information.

It is helpful to briefly analyze the purposes of the rules which prohibit attorneys from representing a client with whom they have a conflict of interest, since those same purposes apply to the reasons for prohibiting paralegals from involvement in legal matters in which they have a conflict of interest. (See Endnote 14.) Generally, the rules prohibit attorneys from representing any conflicting interests, loyalties or influences. (See Endnote 15.) The primary purpose of the rules is to ensure that the client's secrets and confidences are maintained, regardless of whether it is a current or former client. It also is to avoid compromising the attorney's independent judgment on behalf of his/her clients. While paralegals do not establish the relationship with the client, nor control the attorney's independent judgment on matters involving the client, requiring the same

ethical obligation of a paralegal avoids giving the appearance of an impropriety in the attorney/client relationship. (See Endnote 16.)

As to the exception noted for paralegals working within the jurisdiction of the State of Nevada, NFPA may not render an ethics and disciplinary opinion which is in conflict with the applicable state supreme court rules and opinions governing the professional conduct of members of that state's legal profession. Since the Supreme Court of Nevada issued an opinion in 1994 which is contrary to NFPA's opinion and prohibits paralegals from becoming employed by a firm with which they have a conflict of interest on any matter, NFPA is obligated to advise paralegals in Nevada to comply with their state's opinion.

NFPA's Model Code of Ethics and Professional Responsibility was designed to provide paralegals with information and direction concerning various issues which arise in the workplace, including conflicts of interest. It is important that paralegals realize and understand their obligations to the client and the employer so that the interests of all are protected and preserved.

Endnote 1: NFPA agrees with the American Bar Association that the terms "paralegal" and "legal assistant" are synonymous and used interchangeably. NFPA defines a paralegal as, "a person qualified through education, training or work experience, to perform substantive legal work that requires knowledge of legal concepts and is customarily, but not exclusively, performed by a lawyer. This person may be retained or employed by a lawyer, law office, governmental agency, or other entity or may be authorized by administrative, statutory or court authority to perform this work."

Endnote 2: An "Ethical Wall", formerly known as a "Chinese Wall" is referred to as the screening method implemented in order to protect a client from a conflict of interest.

Endnote 3: The exception to paralegals working in the State of Nevada is based solely on a pre-existing 1994 opinion in Nevada. That opinion prohibits paralegals from accepting employment with a law firm which is representing any client which has an adversarial relationship to any client represented by the paralegal's prior law firm employer(s).

Endnote 4: While the responsibility to create the ethical wall is that of the attorney to whom the paralegal is accountable or by whom s/he is supervised, the paralegal should take reasonable measures to ensure that the ethical wall has been erected and, thereafter, comply with its implementation and maintenance.

Endnote 5: Model Code at EC-8.1.

Endnote 6: Model Code at EC-8.2.

Endnote 7: Model Code at EC-8.3.

Endnote 8: Model Code at EC-8.6.

Endnote 9: Those states include: Florida, Iowa, Kentucky, Michigan, New Jersey, New York, Tennessee, Virginia and Vermont; but cf, Nevada. See also, opinion issued by the Philadelphia (Pennsylvania) Bar Association. See, NFPA's Ethical Wall - It's Application to Paralegals (rev. 1995).

Endnote 10: New Jersey Supreme Court Advisory Committee on Professional Ethics (ACPE) Opinion Nos. 546 (1984) and 525 (prior to 1984); but cf, ACPE Opinion 665 (1992).

Endnote 11: See, Model Code at fn 5 and "Paralegals and Conflict of Interest," NFPA (1995).

Endnote 12: The phrase "Chinese Wall" was used in this ABA Opinion; however, as the result of a 1988 federal court decision, the phrase now is considered discriminatory. "Ethical wall" means the same as Chinese Wall and is the phrase currently used by most legal professionals.

Endnote 13: See NFPA's Ethical Wall - It's Application to Paralegals (rev. 1995).

Endnote 14: Both the American Bar Association's Model Code of Professional Conduct and the ABA's Model Rules for Professional Responsibility require that the attorney take reasonable measures to ensure that the paralegal's conduct is compatible with the attorney's professional responsibilities and ethical obligations.

Endnote 15: American Bar Association's Model Code of Professional Conduct, DR 5-105 at 16 and Canon 9, sec. 7.1.4, and the ABA's Model Rules for Professional Responsibility at sec. 1.7-1.12.

Endnote 16: Model Code EC-8.1.

Indemnification of NFPA: By making a request to the National Federation of Paralegal Associations 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.

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