

NFPA Informal Ethics and Disciplinary Opinion No. 95-4

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: *Is it ethical for a paralegal to bill clients for tasks which are more clerical and non-professional than substantive in nature?*

Facts: The paralegal requesting this opinion is employed with numerous other paralegals by a law firm and performs paralegal work with supervision by or accountability to attorneys. (See Endnote 1.) Currently, the paralegals' time for performing legally substantive work is billed to clients of the law firm. Those paralegals are supported in their work by secretaries who perform many tasks including filing and photocopying. The law firm is considering employing additional paralegals, but no additional secretaries, thereby increasing the likelihood that paralegals may be required to perform clerical tasks such as filing and photocopying.

Opinion: A paralegal's ethical obligations require that the tasks and services performed by the paralegal for which compensation may be sought (1) be substantive and not clerical in nature; and (2) consist of tasks and services which otherwise would be performed by an attorney. In certain situations, compensation for services accomplished by the paralegal, but which normally may be characterized as clerical or secretarial in nature may be sought. However, in those situations, the rate of compensation for clerical tasks should be less than the market rate for paralegal time. (See Endnotes 2 and 3.)

Discussion: The National Federation of Paralegal Associations (NFPA) has a long history of supporting attorney fees for paralegal time at market rates in state and federal legislative and judicial arenas. (See Endnote 4.) At a time when clients are concerned about the delivery of cost-effective legal services, attorneys are able to provide clients with a higher caliber work product at a lower cost through the use of paralegals. Those paralegals are qualified through education, work and/or experience to perform legally substantive tasks that, in the absence of the paralegal, would be performed by the attorney.

It is generally accepted that when paralegals perform *legally substantive work* [emphasis added] on legal matters, attorneys in the private and public sector bill their clients for the paralegals' time. The economic advantages derived from employing paralegals are widely known within the legal and business communities. In fact, several federal and state statutes permit the award of attorney fees for paralegal services [emphasis added] to prevailing parties. (See Endnotes 5 and 6.) Additionally, both the American Bar Association (ABA) Model Guidelines for the Utilization of Legal Assistant Services

published in 1991 and an ABA resolution adopted in 1993 support the award of attorney fees for paralegal time in an attorney's application for fees.

The ABA Model Code of Professional Responsibility and ABA Model Rules of Professional Conduct set forth the factors which shall be considered in determining the reasonableness of attorneys' fees. Those which can be applied to paralegals are:

1. the time and labor required, the novelty and difficulty of the issues involved, and the skill requisite to perform the legal services properly [emphasis added not in original];
2. the fee customarily charged in the locality for similar legal services;
3. the amount involved and the result obtained;
4. the experience, reputation and ability of the lawyer or lawyers performing the services; and
5. whether the fee is fixed or contingent. (See Endnote 7.)

Paralegals need to make sure that the attorneys with whom they work are familiar with these requirements, as well as with any specific jurisdictional requirements, in order to ensure that the compensation for paralegal time is obtained with attorneys' fees. In general, these requirements include

1. that the paralegal's time and services are accurately and completely recorded;
2. that the tasks performed by the paralegal for which compensation is sought are legally substantive and not clerical;
3. that the individual performing the tasks is qualified as a paralegal through education, training and/or work experience; and
4. that the rate of compensation sought is comparable to the rate of compensation generally sought in that locale and market.

Canon 2 of the NFPA Model Code of Ethics and Professional Responsibility (Model Code) states, "[A] paralegal shall maintain a high level of personal and professional integrity." The ethical considerations of Canon 2 further state that, "[a] paralegal shall ensure that all timekeeping and billing records prepared by the paralegal are thorough, accurate and honest." Consequently, if a paralegal is asked to perform services which are clerical or non-professional in nature, the paralegal must accurately reflect those tasks in his or her time records.

While the paralegal has an indirect responsibility to the client to ensure truth in billing, once the paralegal "thoroughly, accurately and honestly" describes the task accomplished and records of the actual time spent on the task, the paralegal has complied with his or her ethical obligations. Hence, the paralegal's indirect responsibility to the client to ensure truth in billing is fulfilled. However, the issue of whether and how that time is charged to the client becomes the attorney's obligation. Truth in billing remains the attorney's ethical obligation since the attorney has the direct relationship with the client and the ultimate authority concerning methods, amounts and descriptions used in billing practices with clients.

A recent decision by the Third Circuit Court of Appeals in *In re Busy Beaver Building Centers, Inc.*, may provide guidance as to the compensability of paralegal services when the paralegal has performed clerical tasks for which compensation is sought. (See Endnote 8.) *Busy Beaver* involved the appeal from a District Court decision regarding the appeal from a Bankruptcy Court opinion interpreting Section 330 of the Bankruptcy Code. (See Endnote 9.) Both the Bankruptcy and District Courts ruled that clerical services performed by paralegals were non-compensable legal services and were to be included in "office overhead." (See Endnote 10.)

The basis for the courts' decisions was that clerical services do not require the exercise of paraprofessional judgment and, therefore, are non-compensable. However, the Third Circuit stated,

"Section 330(a) on its face does not set up a bar to compensation for clerical services and, moreover, does not even in its terms differentiate clerical from non-clerical services. Instead, the statute focuses on who performs a service, and expressly provides that a court may award reasonable compensation for all actual, necessary services performed by the designated eligible fee award recipients (professionals and paraprofessionals)." (See Endnote 11.) In a footnote to the above passage, the Third Circuit cited *Missouri v. Jenkins* in saying that the term "reasonable attorneys' fee" may encompass separate charges for secretarial services." (See Endnote 12.) The Court further stated, "[T]hus we think the statute plainly specifies that the type of service performed by a paralegal (including whether it is clerical) affects the rate of compensation, not the compensability *vel non*." [Emphasis added]. (See Endnote 13.)

The Court further opined that even though paralegals may perform tasks which may appear "mundane," it may be that the paralegals bring their training and exercise, or potential exercise, of some professional judgment, to the task at hand. (See Endnote 14.)

For example, the combination of the paralegal's effort in retaining and instructing a legal secretary with the legal secretary's effort in performing the task may exceed the paralegal's effort in performing the task alone. Or, a legal secretary may lack the judgment needed in selecting and collating the documents to copy, and the expense of having a paralegal or attorney first instruct the legal secretary and then review his or her work.....may exceed the expense of having the paralegal or attorney personally perform the task in the first place." (See Endnote 15.)

It is imperative to remember, however, that clerical or non-substantive legal services performed by a paralegal may be compensable at a lower hourly rate than the normal hourly rate charged for the paralegal's time. NFPA certainly recognizes that the reality of practicing law and certain law firm management practices may require a paralegal to

occasionally perform clerical or secretarial tasks. Naturally, the goal of all legal work is to provide the most cost-efficient, but easily accomplished legal services.

The second part of the Third Circuit's opinion in *Busy Beaver* deals with the market-rate approach of awarding attorneys' and paralegal fees. The Third Circuit was quite clear in its finding that courts must allow attorneys and paralegals the same flexibility and leeway in the types of services and tasks billed for at their regular hourly rates that are regularly charged to non-bankruptcy clients. "The market billing practices include not only whether comparable non-bankruptcy firms typically charge the particular task to their clients as paralegals services, but the market rate at which such services are provided." (See Endnote 16.)

NFPA's Model Code of Ethics and Professional Responsibility and positions on issues affecting the paralegal profession have been designed to provide paralegals with information and direction concerning various issues which arise in the workplace, including the ethical obligations of paralegals concerning billing practices. It is important that paralegals realize and understand their obligations to the client and the employer so that the client receives both high caliber and cost efficient legal services.

Endnote 1: 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." NFPA agrees with the American Bar Association that the terms "paralegal" and "legal assistant" are synonymous and used interchangeably.

Endnote 2: It may be that compensation for the time for paralegals performing secretarial or clerical tasks is considered a part of the attorney's overhead or costs of operation.

Endnote 3: "Market rate" is based on the typical charge for a person of comparable education and experience performing a certain level of task in that area of law and geographical locale. For current market rates for paralegals, see NFPA's 1995 Findings of Paralegal Compensation and Benefits Survey (1995; 1991 and 1993 editions also available).

Endnote 4: See, e.g., NFPA's *Fees for Paralegals Services: Are They Recoverable? - An Update* (1989, rev. 1995); NFPA's *Model Act for Paralegal Fee Recoverability* (1995); and NFPA's *"Recovery of Paralegal Fees"* (1995).

Endnote 5: Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C.S. Sec. 1988; Sherman Anti-Trust Act and Clayton Act, 15 U.S.C.S. Dec. 1, et seq.; Employee Retirement Income Security Act of 1974, 29 U.S.C.S. Sec. 1001; U.S. Bankruptcy Code as amended 1978, 11 U.S.C.S. 330(a)(1); Annotation, Award of Attorneys' Fees pursuant to Sec. 520(d), 520(f), 525(e) or 703(c), *The Surface Mining Control and Reclamation Act of 1977*, 30 U.S.C.S. Sec. 1270(d), 1270(f), 1275(e), 1293(c).

Endnote 6: Alaska Supreme Court Civil R. 79, Fla. Stat. Sec. 57.104 (1993), NJ Court R. 4:42-9(b) (1989), Ind. Code Ann. Sec. 1-1-4-6 (Burns 1993) and Illinois P.L. 89-123 (1995).

Endnote 7: ABA Model Code of Professional Responsibility DR 2-106(A), DR 2-106(B) and EC 2-17; and ABA Model Rules of Professional Conduct 1.5(a).

Endnote 8: 19 F.3d 833 (3d Cir. 1994).

Endnote 9: 11 U.S.C. Sec. 330.

Endnote 10: See, *In re Wildman*, 72 B.R. 700, 731 (Bankr. N.D. Ill. 1987).

Endnote 11: *Busy Beaver*, 19 F.3d 833, at 848.

Endnote 12: 491 U.S. 274, n.9, 109 S.Ct. 2463, 2471, n.9, 104 L.Ed.2d 229 (1989).

Endnote 13: *Busy Beaver*, 19 F.3d 833, at 849. (Cf., *Baughman v. Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1217 (3d Cir. 1978).

Endnote 14: *Busy Beaver*, 19 F.3d 833.

Endnote 15: *Busy Beaver*, 19 F.3d 833, at 853.

Endnote 16: *Busy Beaver*, 19 F.3d 833, at 853, 854, citing *In re Lindy Bros. Builders, Inc. v. American Radiator and Std. Sanitary Corp.*, 487 F.2d 151, at 167 (3d Cir. 1973).

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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