

NFPA Informal Ethics and Disciplinary Opinion No. 95-6

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: *What are the ethical implications, if any, of freelance paralegal solicitation of attorney clients?*

Facts: The paralegal (see Endnote 1) requesting this opinion is a freelance paralegal (see Endnote 2), retained by law firms and attorneys to perform paralegal work with supervision by or accountability to attorneys. He advises that he has been told informally by attorneys in his geographical locale that he may not advertise his contract paralegal services nor solicit attorney clients. (See Endnote 3.) The inquirer advises that he has been unsuccessful in his attempts to obtain a response to his inquiry(ies) on this subject posed to the Oklahoma bar ethics entities. (See Endnote 4.)

Opinion: Paralegals who are retained by an attorney, law firm or other attorney employer, referred to as "freelance paralegals," "contract paralegals" or "independent contractors" (hereafter, contract paralegals) and who perform paralegal work with supervision by or accountability to an attorney may properly solicit prospective attorney clients to whom they would provide such paralegal services. However, contract paralegals should comply with attorney advertising guidelines or advertising ethics rules governing the jurisdiction(s) in which the prospective attorney clients are situate.

Discussion: The economic advantages derived from employing both traditional and contract paralegals (also known as freelance paralegals and independent paralegals) are widely known within the legal and business communities. At a time when clients are concerned about the delivery of cost-effective legal services, attorneys who are able to provide clients with a higher caliber work product at a lower cost through the use of paralegals. It is a well-recognized fact that paralegal services may be obtained by the attorney through both traditional employment relationships as well as through a contractual relationship with paralegals. (See Endnote 5.) NFPA previously addressed the ethical obligations of contract paralegals in a prior opinion which is incorporated herein as though set forth at length. (See Endnotes 6 and 7.)

This inquirer poses a two-pronged question which goes beyond the general opinion previously rendered. The first question is whether it is proper for contract paralegals to solicit attorney clients, and if so, the proper and ethical methods for accomplishing that solicitation. Naturally, to prohibit contract paralegals from soliciting attorney clients through advertisements and other traditional marketing techniques and efforts would make it very difficult, if not impossible for contract paralegals to obtain clients. It may, in

fact, violate the contract paralegal's First Amendment rights to free speech as well preclude him/her from obtaining gainful employment in the vocation of his/her choice which is otherwise considered a legally and ethically permissible activity. (See Endnotes 8 and 9.)

Therefore, the right of a contract paralegal to solicit the consumers of their services, attorneys, outweighs the governmental or state's right to restrict the contract paralegal's right to advertise. However, the governmental and/or state's right to promulgate reasonable restrictions with respect to the time, place and manner of solicitation as the result of the state's special interest in regulating members of the legal profession may justify the application of rules to proscribe solicitation that is misleading, overbearing or involves other features of deception or improper influence. (See Endnote 10.)

Accordingly, NFPA believes that contract paralegals should be permitted to solicit attorney clients through advertisements and other traditional marketing techniques and efforts. To avoid giving any appearance of an impropriety, NFPA recommends that the contract paralegal carefully consider the readership of advertisements offering contract paralegal services. That is, if the paralegal is interested in obtaining attorney clients, the readership of publications in which the advertisements are published should be primarily attorneys rather than members of the public. However, NFPA does not prohibit a contract paralegal from advertising or marketing in publications or forums which are not comprised of primarily attorneys so long as the advertisement clearly states the paralegal's non-lawyer status and does not state or infer that the paralegal provides legal services directly to the public.

NFPA believes that proper advertising and marketing techniques and efforts should comply with attorney advertising guidelines or advertising ethics rules governing the jurisdiction(s) in which their prospective attorney clients are situated. (See Endnote 11.) As is stated in a majority of states' ethics and disciplinary opinions concerning paralegal identification on business cards and attorney letterhead, the document must not be deceptive and the paralegal's non-lawyer status must be clearly identified. (See Endnote 12.) Further, the information contained on those documents must not be a misrepresentation or be false, deceptive or misleading. Complying with these requirements also would be necessary for the contract paralegal's advertising and other marketing techniques and efforts.

The ABA Model Code of Professional Responsibility and ABA Model Rules of Professional Conduct set forth the factors which shall be considered in developing promotional materials, such as brochures, advertisements, legal directory listings and letterhead. (See Endnote 13.) Those which can be applied to paralegals are:

1. avoid false or misleading statements about the paralegals' fees, abilities and fields of paralegal practice;
2. include the contract paralegal's individual name, address and phone number regardless of whether a trade name is also stated;

3. avoid statements which may infer the nature or success of results which may be obtained; and
4. exclude comparisons of the contract paralegal's services to those of other paralegals (traditional or contract).

The overall consideration in developing promotional materials should also include maintaining and preserving the dignity of and proper decorum in the legal profession. (See Endnote 14.) Some state advertising guidelines and ethics opinions also prohibit the use of drawings, animations, dramatizations, music or lyrics in television advertising.

In conclusion, contract paralegals offer a viable alternative to attorneys who are unable to employ full or part-time employees and/or the attorney's needs do not warrant hiring full or part-time paralegal employees. If there is a need for these services and qualified contract paralegals are able to meet those needs, one of the only methods to inform attorneys that the services are available is through attorney solicitation in advertisements and other traditional marketing efforts. Accordingly, within the parameters described herein, contract paralegals may solicit attorney clients and thereby assist to increase the availability of cost-efficient legal services.

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 ethical issues which arise in their careers. It is important that paralegals realize and understand their obligations to the attorney and the attorney's client 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: Freelance paralegals also are known as contract paralegals and independent contractors. NFPA defines a freelance paralegal as "a paralegal who works as an independent contractor with supervision by and/or accountability to a lawyer." Contract paralegals also 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.

Endnote 3: In the instance of contract paralegal work, the attorney is the client of the contract paralegal; hence, the use of the term, attorney client.

Endnote 4: The most likely reason that the paralegal inquirer is unable to obtain a response to his inquiries from the bar ethics entity is not because the bar does not desire

to address the matter, but rather because most bar ethics entities will not accept inquiries from anyone other than an attorney licensed to practice law in that jurisdiction. That was one of the reasons that NFPA developed a formalized Ethics Board and created NFPA's "Guidelines for Rendering Ethics and Disciplinary Procedures."

Endnote 5: See, *In re Opinion 24*, 128 N.J. 114, 607 A.2d 962 (Sup. Ct. 1992).

Endnote 6: See, NFPA Informal Ethics and Disciplinary Opinion No. 95-5, which in summary states that contract paralegals must adhere to and should aspire to the same principles for ethics and conduct of those set forth for traditionally-employed paralegals.

Endnote 7: Nothing in this opinion should be interpreted as promoting the use of paralegals, contract or traditional, to solicit clients for the attorney or that the paralegal should operate outside of the parameters of the applicable legal authority governing the unauthorized practice of law.

Endnote 8: See, *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 563 (1980); see also, *In re R.M.J.*, 455 U.S. 191, 205 (1982) ("relatively" uninformative advertising is protected speech as long as it is not misleading); *Bates v. State Bar of Arizona*, 433 U.S. 350, 374 (1977) (benefits of regulating the flow of information do not justify prohibition on advertising); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770, 773 (1976) (the need for free flow of commercial information outweighs the state's regulatory interest, citing ABA Annotated Model Rules, at R. 7.1, "First Amendment Considerations").

Endnote 9: See, ABA Informal Ethics Opinion 88-1526 (June 22, 1988), which notes the ABA's concern that paralegals could potentially lose the ability to earn a livelihood if they were prevented from working for different law firms, stating "[I]t is important that nonlawyer employees have as much mobility in employment opportunities as possible consistent with the protection of clients' interests ... [A]ccordingly, any restrictions on a nonlawyer's employment should be held to the minimum necessary to protect the confidentiality of client information."

Endnote 10: *Oklahoma Bar Ass'n v. Schaffer*. 648 P.2d 355 (Okla. 1982).

Endnote 11: See, NFPA Model Code of Ethics and Professional Responsibility, Canon 6 and ethical considerations thereof (1993). See also, Orlik, *Ethics for the Legal Assistant*, 3d ed. at 35 (1994).

Endnote 12: See, NFPA Ethics Opinion No. 95-2 concerning paralegal identification on attorney or law firm letterhead (August, 1995).

Endnote 13: ABA Model Code of Professional Responsibility DR 2-101 (A) and DR 2-101 (B); and ABA Model Rules of Professional Conduct 7.1 through 7.5.

Endnote 14: See, ABA/BNA Law. Manual on Prof. Conduct at 81:207-209 (1990) recognizing that these are aspirational goals which are not binding. Cf., NFPA Model Code of Ethics and Professional Responsibility, EC-3.1 (1993).

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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