

NFPA Informal Ethics and Disciplinary Opinion No. 96-2

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 concerning the unauthorized practice of law as it relates to paralegals communicating in cyberspace?*

Facts: The National Federation of Paralegal Associations, Inc. (NFPA) was the first national legal organization to establish a presence on the World Wide Web at <http://backup.paralegals.org>. In the earliest stages of developing resources and benefits available to NFPA members through this presence in cyberspace, the NFPA Ethics Board identified several ethical dilemmas which could be faced by paralegals in several forums for cybercommunications. It previously issued Opinion 96-1 regarding maintaining client confidentiality in cyberspace. Consequently, to continue its commitment to providing paralegals with information and resources to assist to maintain appropriate professional conduct, the NFPA Ethics Board issues this opinion with respect to the unauthorized practice of law as it relates to paralegals communicating in cyberspace.

Opinion: Paralegals communicating in cyberspace through any form of electronic communication shall not engage in the unauthorized practice of law. In addition, a paralegal's title shall be disclosed in each cybercommunication to avoid misunderstandings and misconceptions about the paralegal's role and responsibilities. In addition, due to the nature of cybercommunications and that paralegals may be communicating with intended and unintended parties and entities located in several jurisdictions, a paralegal's jurisdiction (state in which he/she is located) shall be disclosed in each cybercommunication to avoid misunderstandings and misconceptions about the jurisdiction(s) to which the communication may apply. Electronic communications may include, but are not limited to, communications transmitted or posted through E-mail (electronic mail), list serves, bulletin boards, World Wide Web Forms, forums and mailings and other public or semi-public forums located at websites, Internet Relay Chats, usenets and newsgroups.

Discussion: The economic advantages derived from conducting research, investigation and communications in cyberspace are becoming widely known within the legal and business communities. At a time when clients are concerned about the delivery of cost-effective legal services, attorneys and paralegals are able to provide clients with a higher caliber work product at a lower cost and/or more efficiently through the use of computer technology and the Internet. *₁

Recognizing its role to provide resources and benefits to its members as well as information about the paralegal profession to legal professionals and consumers, the National Federation of Paralegal Associations, Inc. (NFPA) became the first national legal organization to establish a presence on the World Wide Web at <http://backup.paralegals.org>. One of NFPA's earliest activities in this regard was to develop list serves (also known as list services), a method for individuals to communicate through sending an e-mail message to anyone registered for the list and to receive public and private responses to the message.

NFPA's list serves were developed to enable its members to communicate with each other about topics relevant to paralegals. The NFPA Board of Directors determined that the list serves would not be moderated or censored in any formal way so that registrants would be able to freely communicate about topics of their choice. *₂ In the earliest stages of list serve communications, the NFPA Ethics Board noted that one or more messages being transmitted by registrant(s) might present a problem with complying with all applicable legal authority governing the unauthorized practice of law.

Accordingly, to continue its commitment to providing paralegals with information and resources to assist to maintain appropriate professional conduct, the NFPA Ethics Board recognized that identifying and complying with the applicable authorit(ies) needed to be imposed on all cybercommunications since existing ethics rules and regulations do not yet adequately address the unique issues raised by the Internet. *₃ Hence, the Ethics Board conducted research on the topic of *cyberlegalethics* as it would apply to paralegals. *₄, *₅

There are several issues associated with the prohibitions against engaging in the unauthorized practice of law in cyberspace. The easiest one to identify is to prohibit paralegals from engaging in communications which would be considered the unauthorized practice of law in the jurisdictions in which the message originates. The gray lines develop when the cybercommunication is intentionally or unintentionally retrieved or seen by someone other than the intended parties to the communication. If the cybercommunication is posted on a public or quasi-public forum, the intended recipient potentially becomes the entire Internet world and the sender has no control over who may view the message.

The ethics of the legal profession, as well as the paralegal profession, are governed on a state-by-state basis. Therefore, since the Internet is a forum of communication without geographic boundary, it may be difficult to determine which state rules and opinions govern a paralegal's cybercommunications. Under normal circumstances (without inferring that the Internet is abnormal), paralegals might turn to the rules governing attorneys. In determining which rules apply to attorneys practicing in multi-jurisdictions, one author has suggested looking at three factors: (1) the state in which an attorney is admitted to practice; (2) the state in which the firm is seeking clients; and (3) the state in which the firm in fact practices. *₆

However, application of general ethics rules to the unique features of the Internet may not be practical when applied to the Internet; instead, the legal profession's use of the Internet

may well result in an entirely new system of rules and regulations. *7 Significant also is that the validity of state ethics rules is found in the need to protect consumers from overreaching and misleading representations. If paralegals mislead the public on the Internet, it will give rise to a greater need for regulation that will tend to limit the access to information the public now enjoys. *8, 9 So long as paralegals take steps to ensure that consumers, as well as professional colleagues, are not misled, perhaps there is no need to regulate a paralegal's participation in cyberspace.

NFPA addresses a paralegal's ethical responsibility regarding the unauthorized practice of law in its Model Code of Ethics and Responsibility (Model Code) at Canon 7 and ethical consideration thereto, incorporated herein as though set forth at length. Canon 7 of the Model Code states that, *[A] paralegal shall not engage in the unauthorized practice of law*. EC-7.1 (Ethical Considerations) further states that, *[A] paralegal shall comply with the applicable legal authority governing the unauthorized practice of law*. Naturally, these obligations are derived from state and federal laws and regulations prohibiting the unauthorized practice of law as well as the Rules of Professional Conduct and Code of Professional Responsibility prohibiting lawyers from aiding non-lawyers in activities which are considered the practice of law. *10 NFPA believes that this ethical obligation extends to any form of communication, including electronic communication in cyberspace, *e.g.*, e-mail, list serves, bulletin boards, World Wide Web forms, forums and mailings, Internet Relay Chats, usenets and/or newsgroups.

Unfortunately, there is no agreement about what constitutes the unauthorized practice of law nor the practice of law. Generally, but with some exceptions, it has been held that paralegals may not set or negotiate a client's fee; sign a legal document; represent a client in court or before a tribunal; and give legal advice. One of the largest areas of debate about giving legal advice which is relevant to cybercommunications is that involving providing legal information and legal forms, which is addressed in more detail below.

One method which would ensure that a paralegal's cybercommunications are not read as legal advice is properly disclosing that the author is a non-lawyer, specifically, a paralegal. Canon 6 of the NFPA Model Code is directly on point with this issue. It states, *[A] paralegal's title shall be fully disclosed*. EC-6.1 (Ethical Consideration) further states, *[A] paralegal's title shall clearly indicate the individual's status and shall be disclosed in all business and professional communications to avoid misunderstandings and misconceptions about the paralegal's role and responsibilities*. NFPA believes that this obligation should extend to all forms of cybercommunications. However, taking this obligation one step further to ensure that the geographical limitations on the paralegal's communication are disclosed may possibly avoid giving even the hint of an appearance of impropriety and resolve the inherent problems associated with state and international boundaries.

In the first of its kind, the South Carolina Ethics Committee opined that the operation of a law office via electronic media does not, by itself, violate any provision of the ethics rules. *11 In rendering this opinion, the Committee identified that advertisements may reach individuals in jurisdictions where the lawyer is not admitted to practice.

Consequently, the Committee requires that the advertisements must clearly identify the geographic limitations of the lawyer's right to practice. *12

Some states allow paralegals to provide computerized legal information finding that it does not constitute the practice of law.*13 Interestingly, and of considerable encouragement, is the aforementioned South Carolina Ethics Opinion 94-27 which states that providing legal articles at a web site is like a publishing venture from an ethics standpoint. In addition, Oregon Ethics Opinion 1994-137 (1994) opines that a lawyer may engage in joint venture with a non-lawyer to offer legal information to the public via a decision tree software that uses database to generate responses to consumers' questions, where interaction does not entail direct participation of any employee. *14, *15, *16

Adding disclaimers to cybercommunications is another method to avoid allegations that a paralegal's cybercommunications are considered engaging in the unauthorized practice of law or rendering legal advice. Many law firms and legal departments of corporations have done so. For instance, with respect to client e-mail communication, some have suggested disclaimers stating:

*Nothing in this e-mail message should be construed as a legal opinion.*17*

A suggested inadvertent disclosure disclaimer reads, in pertinent part:

*This e-mail communication is not intended as and should not be interpreted as legal advice or a legal opinion. The transmission of this e-mail communication does not create an attorney-client relationship between the sender and you. Do not act or rely upon the information in this communication without seeking the advice of an attorney. *18*

A suggested Web page disclaimer reads, in pertinent part as to legal advice:

*This Web page is a public resource of general information which is intended, but not promised or guaranteed, to be correct, complete and up-to-date. However, this Web page is not intended to be a source of advertising, solicitation or legal advice; thus the reader should not consider this information to be an invitation for an attorney-client relationship, should not rely on information provided herein and should always seek the advice of competent counsel in the reader's state ... Furthermore, the owner of this Web page does not wish to represent anyone desiring representation based upon viewing this Web page in a state where this Web page fails to comply with all laws and ethical rules of that state ... *19*

Applying the unauthorized practice rules from more than one jurisdiction can create additional complications for cyberspace communications. While several bar associations are investigating the issues concerning unauthorized practice of law in cyberspace and

rendering legal advice on line, few have issued formal opinions directly on point; most are dealing with attorney advertising, solicitation and related issues first, *e.g.*, Pennsylvania, Georgia, Texas, California, New Jersey. E-mails which are considered private present the least amount of challenges with respect to paralegals only [emphasis added] as it relates to the unauthorized practice of law. To date, the courts have ruled that there is a reasonable expectation of privacy in private e-mails. *20

However, the Internet *inter alia* has been determined to be a public medium in a case challenging the Texas State Bar Association's rules limiting lawyers' advertising activities in the public media. *21 In fact, an opinion concerning a securities fraud action included dicta that the *information superhighway* is a source of information in the public domain. *22 Hence, such a conclusion about privacy of e-mails cannot be drawn on list serves and certainly does not exist in other forms of public or quasi-public communications, which, in some cases, are searchable using a variety of Internet search engines.

Because each state has its own view of what constitutes unauthorized practice, it complicates how ethical obligations should apply to paralegals who answer questions posed on the Internet. *23 Accordingly, answering a question in a public or quasi-public forum can present many problems for paralegals. Reserving for later the issues of ensuring that there are no potential conflicts of interest with existing clients and disclosure of confidential information, the information can be relied upon by lay people who are neither lawyers nor paralegals. *24 One method to avoid violating any UPL statutes is to avoid giving legal advice even if it is permitted in your jurisdiction. Another method to avoid violating any UPL statutes is to avoid giving legal advice that is tailored to the particular facts presented by the questioner

In fact, answering legal questions on-line has been addressed by the Tennessee Supreme Court Board of Professional Responsibility. That opinion concludes that the ethics rules on advertising and solicitation do not apply when an attorney responds through private e-mail seeking legal advice. *25 Although paralegals do not need to be concerned with the attorney's concerns of creating an attorney-client relationship since only the attorney may create such a relationship, they should be cautious about what they do online; if it looks, tastes and smells like legal advice, then a court may decide that it's legal advice. *26, *27

Albeit laden with unresolved disputes concerning the unauthorized practice of law and rendering legal advice online, NFPA still strongly believes that cyberspace presents extraordinary opportunities to conduct paralegal work in a cost-efficient manner benefiting both the legal profession and public it serves. In the absence of methods to undeniably secure Internet communications or regulations governing those communications, NFPA believes that the same standards which govern other communications, govern those conducted by and engaged in by paralegals in cyberspace. By NFPA recognizing a paralegal's ethical obligations in cyberspace, it continues to recognize the profession's responsibilities to the public, the legal community and colleagues.

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 client so that the client receives both high caliber and cost efficient legal services.

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.

Issued: December 30, 1996.

*1) The *Internet* as used herein includes any form of cyberspace communication including, but not limited to, those collectively referred to as the World Wide Web and the Information Superhighway.

*2) However, list serve participation may be withdrawn for bringing topics not related to paralegals and their profession, using profanity, verbally attacking or slandering another or using the list serve to solicit business by wholesale mass marketing.

*3) "About Legaethics.com" (The Practicing Attorney's Home Page), <http://www.legaethics.com/info.htm>, Internet Legal Services (1996).

*4) *Cyberlegaethics* refers to ethical rules governing conduct of legal professionals in cyberspace.

*5) *See also*, NFPA Informal Ethics and Disciplinary Opinion No. 96-1, National Federation of Paralegal Associations, Inc. (Dec. 30, 1996); and Kligerman, S.D., *Cyberlegaethics ... Cyber Who ???*, National Paralegal Reporter, (Summer, 1997).

*6) Hornsby, W.E., Jr. [staff counsel to the ABA Commission on Advertising, ABA Legal Services Divn.], *The Ethical Boundaries of Selling Legal Services in Cyberspace*, Nat'l L.J. (199); also available at <http://www.computerbar.org/netethics/abawill.htm>.

*7) Read, T.K., *Pushing the Advertising Envelope: Building Bill Board In the Sky Along the Information Superhighway* (Apr. 1995), slated for publication by the Western State University School of Law, Law Journal (Winter 1996); also available at <http://www.computerbar.org/netethics/read.htm>.

*8) *Interview: The ILPN talks with Will Hornsby* [staff counsel to ABA Commission on Advertising, ABA Legal Services Divn.] *about Internet Ethics*, Internet Legal Practice

Newsletter, No. 5 (Nov. 18, 1996); also available at <http://www.collegehill.com/ilp-news/hornsby1.html>.

*9) However, nothing to these opinions is not intended to suggest that the NFPA Ethics Board adopts a suggestion that would require paralegals to be familiar with laws and ethical obligations in all jurisdictions nor that paralegals will mislead the public on the Internet.

*10) American Bar Association Model Rule of Professional Conduct 5.5 and Model Code of Professional Responsibility DR.

*11) South Carolina Ethics Opinion 94-27, 11 Law.Man.Prof. Conduct 67 (1995).

*12) *See also, How Do Advertising Rules Apply to Lawyers on the 'Net?*, 12 Law.Man.Prof. Conduct 37.

*13) *E.g.*, Oregon State Bar Bulletin (April 1995) (citing OSB Legal Ethics Opinion 1994-137) stating that merely providing access to computerized legal information would not constitute practice of law because there was no personalized legal advice.

*14) *See also*, North Carolina Ethics Opinion 115 (1991) and Oregon Ethics Opinions 1991-107 (1991), but note their applicability to lawyers, not paralegals.

*15) *But see*, Krakaur, P.J., *Issues: Legalethics.com at Unauthorized Practice of Law, Internet Legal Services* (1996), <http://www.legalethics.com/Issues.htm#upl>.

*16) However, it should be noted that several states prohibit attorneys from participating in or forming a partnership with a non lawyer. Rules of Professional Conduct 5.4. In these instances, paralegals may not be permitted to enter into such a partnership to operate an on-line legal information system and/or, if permitted, provide those services in a state in which it is impermissible.

*17) BNA interview of Graham, I.T. and Lamoureaux, J.P., McKenna & Cuneo, Washington, D.C., concerning results of informal and unscientific survey posted on Net-Lawyers list serve at <http://www.webcom.com/~lewrose/netlawyers/> (Jan. 26, 1996), at Rogers, J.C., *Analysis: Ethical and Malpractice Concerns Cloud E-Mail, On-Line Legal Advice*, ABA/BNA Lawyers' Manual on Professional Conduct (1996); also available at <http://www.bna.com/hub/bna/legal/adnew2.html>. *See also*, disclaimers at CyberLaw and CyberLex, <http://www.cyberlaw.com/>, and Legaldot Net, <http://www.legal.net/esquire.htm#attorneys>.

*18) Krakaur, P., *Blasting Off Into Cyberspace -- Surfing the Net's Ethical Issues, Three Draft Disclaimers*, "The Second Annual Statewide Ethics Symposium of the State Bar of California Committee on Professional Responsibility and Conduct" (May 11, 1996). [Disclaimers at <http://www.legalethics.com/draft.htm> incorporated herein as though set forth at length; for discussion, educational and informational purposes only.]

*19) Kuester, J.R., *Attorney Sites Can Avoid Violations of Ethics Rules*, National Law Journal Vol. 18, No. 50, p. B11 (Aug. 12, 1996); also available at <http://www.computerbar.org/netethics/nlj.htm>.

*20) *See, U.S. v. Maxwell*, 42 M.J. 568 (US Air Force CtCrimApp 1995), as to application of Fourth Amendment search and seizure purposes.

*21) *Texans against Censorship, Inc. v. State Bar of Texas*, 888 F. Supp. 1328 (E.D. Tex. 1995).

*22) *Whirlpool Financial Corp. v. GN Holdings, Inc.*, 67 F.3d 605 (7th Cir. 1995). [Interestingly, but a matter reserved for later discussion, the court held also that since the reasonable investor is presumed to have information in the public domain, and that the *information superhighway* is a source of such information, a duty to investigate the resources on the Internet exists.]

*23) Lanctot, C.J. and Maule, J.E., *The Internet -- Hip Or Hype? Legal Ethics and the Internet*, Villanova University Law School (19__); also available at <http://www.law.vill.edu/vcilp/MacCrate/mcle/lanctot.htm#unauth>.

*24) *See, e.g., Shely, LC. Lawyer Ethics and Technology: Arizona*, State Bar of Arizona Convention (June, 1996); also available at <http://www.legalethics.com/states/ariz.html>.

*25) Tennessee Advisory Ethics Opinion 95-A-576 (1995).

*26) *But see, Friedman, The Creation of the Attorney-Client Relationship: an Emerging View*, 22 Cal. W.L. Rev. 209 (1986) warning against giving advice in informal settings to avoid a court ruling that a professional relationship has been established. *See also, Law.Man.Prof. Conduct* 55:305-06.

*27) Resnick, *A Shingle in Cyberspace*, Nat'l. L.J. (9/27/93) quoting Rotunda, R.D., Professor of Professional Responsibility at the University of Illinois College of Law.