

Ethics Board Opinion
11-01

CAVEAT: The following 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 a paralegal's duties, obligations and responsibilities to the client when a supervising attorney has been incarcerated?

FACTS: A local attorney has been arrested and is in jail on charges of embezzlement of client funds. The state bar seized client files and the office has been closed down. The attorney employed a few paralegals working as independent contractors. One of them is now meeting with other local attorneys to discuss the jailed attorney's clients and the possibility of referring those clients to other attorneys in order to ensure his own continuing work. I am concerned that he is crossing ethical boundaries by doing this.

OPINION: The circumstances presented place the paralegal in the untenable position of facing competing and multiple ethical considerations with respect to both his/her duties to the profession as well as to the client. The published NFPA ethical considerations and the ABA Model Rules provide general guidance in this matter. However, more specific guidance is provided by the rules of professional conduct promulgated by and the ethical opinions issued in the forum jurisdiction by the State Bar of California. Depending on various factors, the paralegal may ethically support a licensed attorney's distribution of the incarcerated attorney's client files to ensure proper representation of the client's legal matters.

DISCUSSION: The analysis of this inquiry begins with setting forth certain unknown variable factors. It is unclear by the initial inquiry whether the contract paralegal is undertaking these actions *sua sponte* or under the ultimate direction of the California Bar Association. In either case, the paralegal should proceed with the utmost caution and care of his/her ethical responsibilities.

If the paralegal has undertaken these actions on his or her own there is indeed cause for concern. There are three primary ethical tenets which should be considered.

The first and most obvious issue is embodied in the NFPA Ethical Considerations related to confidential information.

EC-1.5(a) A paralegal shall be aware of and abide by all legal authority governing confidential information in the jurisdiction in which the paralegal practices; and

EC-1.5 (c), A paralegal shall not use confidential information to the advantage of the paralegal or of a third person.

as well as

EC-1.5(d), a paralegal may reveal confidential information only after full disclosure and with the client's written consent; or, when required by law or court order; or, when necessary to prevent the client from committing an act that could result in death or serious bodily harm.

and the corollary set forth in the ABA Model Rule 1.6 Confidentiality Of Information.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

The keystone of the attorney-client relationship, and by extension of the attorney supervision of the paralegal, is complete and unfettered communication between an attorney and his or her client. Among the most serious ethical breaches is that of client confidentiality. If a client is unable to trust that conversations with the attorney are confidential, the veracity of the legal system may be called into question. Reading the foregoing rules together, the governing principle is to safeguard the clients' confidential information. That is not to say, however, that this position is not without certain caveats, as will be discussed in further detail below. In examining the extant fact pattern, the paralegal is on a narrow road to remain ethically sound. Absent attorney supervision of these acts, it may fall on the wrong side of the ethical boundary.

Additionally, it is unclear by the fact pattern presented exactly what type of information that may be shared between the paralegal and the supervising attorney(s). If the information is not confidential then the ethical considerations set forth above may not be implicated. Information that is publicly disclosed in court filings may not be considered confidential. For illustration purposes only, if the information shared is that the file is about a client who has plead not guilty to a crime it would likely not fall within the realm of confidential. On the other hand if the information relayed is that this client was charged with a felony and the initial attorney's trial strategy was revealed, confidentiality may indeed be breached.

The next issue that is presented concerns solicitation of business. The California Rules of Professional Conduct, Rule 1-400. Advertising and Solicitation, reads in relevant part:

(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the Constitution of the United States or by the Constitution of the State of

California. A solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited.

If the paralegal were to assist in soliciting business on behalf of the new attorneys, and he or she were not acting under the guidance of the California Bar, Rule 1-400 could be violated. In addition, if a financial arrangement existed between the paralegal and the new supervising attorneys, California Rules of Professional Conduct, Rule 1-320, could also be violated. That Rule reads, again in relevant part:

Rule 1-320. Financial Arrangements With Non-Lawyers.

(A) Neither a member nor a law firm shall directly or indirectly share legal fees with a person who is not a lawyer...

The final and most concerning ethical consideration relates to the Unauthorized Practice of Law (UPL). Perhaps the most egregious and frequent violation of ethical canons is UPL.

California Rules of Professional Conduct, state as follows:

Rule 1-300. Unauthorized Practice of Law.

(A) A member shall not aid any person or entity in the unauthorized practice of law.

The NFPA Model Rules and Ethical Canons provide further instruction as to a paralegal's duties:

EC-1.3(a) A paralegal shall refrain from engaging in any conduct that offends the dignity and decorum of proceedings before a court or other adjudicatory body and shall be respectful of all rules and procedures.

Without supervision of a licensed attorney, the paralegal may very well be committing UPL. An individual paralegal involved in case assignment and ultimate acceptance by an attorney, may be engaged in UPL. By the very act of reviewing and assessing cases, a paralegal would be exercising independent legal judgment.

The California Rules of Professional Conduct provide further practical guidance. While there is no exact on-point rule for the fact situation at bar, the Rules do provide a specific process for distribution of a law practice by either sale or purchase. Specifically Rule 2-300 Sale or Purchase of a Law Practice of a Member, Living or Deceased (attached as Appendix).

California State Bar Formal Opinion No. 1985-86 provides additional guidance for consideration of the instant fact pattern. (<http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=WfC01Vyqn5E%3D&tabid=841>).

Opinion 1985-86 relates to the dissolution of a multi-attorney private law firm. That opinion enunciated two principles that are applicable.

First, within the context of Opinion 1985-86, the standard of care is defined as being that, “...the **interests of the clients must prevail over all competing considerations** if the practitioner’s withdrawal...is to be accomplished in a manner consistent with the professional responsibility” (emphasis added).

Under this principle the California Bar cited Rule 2-111(A), which imposes a requirement that attorneys involved provide an orderly transition of client matters [in the event of a withdrawal, etc.]. Furthermore, there are two supporting factors that may be relevant to the case at hand. The Bar noted that both counsel and opposing counsel have a fiduciary duty to the clients “who are affected by the withdrawal.” (relying, *inter alia*, on *Blackmon v Hale (1970) 1 Cal.3d 584*). Additionally, it was noted that clients must be provided a notice of the change in attorney employment, such that the client may make an informed decision of representation. In making such an informed choice, the clients have a right to select, “...the former firm, the withdrawing attorneys, or another lawyer...” The client also has a right to his or her files. Moreover, the Bar noted that, “...all members of the Bar involved directly in this change have a responsibility to see that the client receives the protections required by this rule [Rule 2-111(a)].”

The second principle relates to attorney solicitation, Rule 2-101. The Opinion reads, in relevant part, “...rule and the authorities interpreting the rule [2-101]...have permitted wide latitude to attorneys who wish to communicate directly with existing or potential clients...” However, this latitude is not unlimited. Rather, rule 2-101(B) and (C) prohibit attorneys from attempting to “influence the decision of the client with respect to the choice of counsel.” In its final analysis on this particular principle, the Bar noted that attorneys must attempt to balance the notice requirements vs. prohibitions on solicitation.

While it is unclear whether the attorneys assisting with the referrals are associated with the incarcerated attorney (e.g. members of a firm or partnership), the overriding principle is the best interests of the clients. Thus, the actions by the paralegal may be ethical; provided, however, that steps are taken to ensure that the confidences of the clients are protected and that the clients are afforded the opportunity to make an informed choice of counsel. Thus, the actions taken may be in furtherance of the goals stated in Opinion No. 1985-86, specifically serving the best interest of the client.

This opinion should be not be construed as granting an unfettered license for a paralegal to engage in unsupervised distribution of client files. Rather, it is intended to provide very general guidance for those paralegals who find themselves similarly situated. A paralegal should proceed with the utmost caution and a keen eye to the ethical considerations, lest he or she violate ethical duties to the client and to the profession. Most certainly, these actions should only be performed under the supervision of a licensed attorney.

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.

Appendix

California Rule of Professional Conduct, 2-300 Sale or Purchase of a Law Practice of a Member, Living or Deceased

All or substantially all of the law practice of a member, living or deceased, including goodwill, may be sold to another member or law firm subject to all the following conditions:

- (A) Fees charged to clients shall not be increased solely by reason of such sale.
- (B) If the sale contemplates the transfer of responsibility for work not yet completed or responsibility for client files or information protected by Business and Professions Code section 6068, subdivision (e), then:
 - (1) if the seller is deceased, or has a conservator or other person acting in a representative capacity, and no member has been appointed to act for the seller pursuant to Business and Professions Code section 6180.5, then prior to the transfer:
 - (a) the purchaser shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and
 - (b) the purchaser shall obtain the written consent of the client provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such 90-day period.
 - (2) in all other circumstances, not less than 90 days prior to the transfer:
 - (a) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall cause a written notice to be given to the client stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of any client papers and property, as required by rule 3-700(D); and that if no response is received to the notification within 90 days of the sending of such notice, the purchaser may act on behalf of the client until otherwise notified by the client. Such notice shall comply with the requirements as set forth in rule 1-400(D) and any provisions relating to attorney-client fee arrangements, and
 - (b) the seller, or the member appointed to act for the seller pursuant to Business and Professions Code section 6180.5, shall obtain the written consent of the client prior to the transfer provided that such consent shall be presumed until otherwise notified by the client if no response is received to the notification specified in subparagraph (a) within 90 days of the date of the sending of such notification to the client's last address as shown on the records of the seller.

(C) If substitution is required by the rules of a tribunal in which a matter is pending, all steps necessary to substitute a member shall be taken.

(D) All activity of a purchaser or potential purchaser under this rule shall be subject to compliance with rules 3-300 and 3-310 where applicable.

(E) Confidential information shall not be disclosed to a non-member in connection with a sale under this rule.

(F) Admission to or retirement from a law partnership or law corporation, retirement plans and similar arrangements, or sale of tangible assets of a law practice shall not be deemed a sale or purchase under this rule.

Discussion:

Paragraph (A) is intended to prohibit the purchaser from charging the former clients of the seller a higher fee than the purchaser is charging his or her existing clients.

"All or substantially all of the law practice of a member" means, for purposes of rule 2-300, that, for example, a member may retain one or two clients who have such a longstanding personal and professional relationship with the member that transfer of those clients' files is not feasible. Conversely, rule 2-300 is not intended to authorize the sale of a law practice in a piecemeal fashion except as may be required by subparagraph (B)(1)(a) or paragraph (D).

Transfer of individual client matters, where permitted, is governed by rule 2-200. Payment of a fee to a non-lawyer broker for arranging the sale or purchase of a law practice is governed by rule 1-320. (Amended by order of Supreme Court, operative September 14, 1992.)