

APPENDIX C

GENERAL GUIDELINES FOR THE UTILIZATION OF THE SERVICES OF LEGAL ASSISTANTS BY ATTORNEYS

Approved by Board of Directors
of State Bar of Texas
May, 1993

Preamble

In recognition of the evolving role of legal assistants as members of the legal services team, as well as the effect that legal assistants have on the delivery of legal services, the Board of Directors of the State Bar of Texas have approved the following general guidelines for the utilization of the services of legal assistants by attorneys.

Professional Conduct

GUIDELINE I: An attorney should ensure that a legal assistant under his or her supervision and direction does not give legal advice or otherwise engage in the unauthorized practice of law.

GUIDELINE II: An attorney should ensure that a legal assistant under his or her supervision and direction does not engage in conduct which may involve the attorney in a violation of the law and take reasonable measures to ensure that the legal assistant's conduct is consistent with the Texas Disciplinary Rules of Professional Conduct.

Professional Responsibility

GUIDELINE III: An attorney may, with the client's knowledge and consent, allow a legal assistant under his or her supervision and direction to perform certain functions to the extent the functions are authorized by statute, court rule or decision, administrative rule or regulation, controlling authority, Texas Disciplinary Rules of Professional Conduct, or these Guidelines.

GUIDELINE IV: An attorney should ensure that, in those situations in which a legal assistant subject to his or her supervision and direction is dealing with a court, administrative agency, the public, or other person, firm or corporation, the status of the legal assistant is specifically disclosed to the client, court, administrative agency, the public, or other person, firm or corporation at the outset.

Delegation of Services

GUIDELINE V: Except as otherwise provided by statute, court rule or decision, administrative rule or regulation, controlling authority, Texas Disciplinary Rules of Professional Conduct, or these Guidelines, an attorney may allow a legal assistant under his or her supervision and direction to perform delegated services in the representation of that attorney's clients, provided:

- A. The services performed by the legal assistant do not require the exercise of independent professional legal judgment; and,
- B. The attorney maintains a direct relationship with the client; and,
- C. The attorney directs and supervises the legal assistant in the performance of delegated duties; and,
- D. The client understands that the legal assistant is not an attorney; and,

- E. The attorney remains professionally responsible for such client and that client's legal matters, including all actions taken or not taken in connection therewith by the legal assistant, to the same extent as if such actions had been taken or not taken directly by the attorney.

GUIDELINE VI: An attorney may not delegate to a legal assistant:

- A. Responsibility for establishing an attorney-client relationship.
- B. Responsibility for establishing the amount of a fee to be charged for a legal service.
- C. Responsibility for a legal opinion rendered to a client.

Client Confidences

GUIDELINE VII: An attorney should instruct a legal assistant under his or her supervision and direction to preserve the sanctity of all confidences and secrets of a client and take reasonable measures to ensure that his or her legal assistant refrains from using any such confidences or secrets.

Conflicts of Interest

GUIDELINE VIII: An attorney 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 attorney.

Charge for Legal Services

GUIDELINE IX: An attorney may charge and bill a client for a legal assistant's time, but the attorney may not share legal fees with a legal assistant under his or her supervision and direction.

Sharing of Legal Fees

GUIDELINE X: An attorney may not split legal fees with a legal assistant nor pay a legal assistant for the referral of legal business. An attorney may compensate a legal assistant based on the quantity and quality of the legal assistant's work and the value of that work to a law practice, but the legal assistant's compensation may not be contingent, by advance agreement, upon the profitability of the attorney's practice.

Business Card Designation and Utilization

GUIDELINE XI: An attorney or firm may authorize a legal assistant under that attorney's or firm's supervision and direction to utilize a business card designating the status of the legal assistant and including the name, address, and telephone number of the attorney or firm. The attorney or firm should take reasonable measures to ensure that such business card is not used in a deceptive way nor for unethical solicitation.

Caveat

The American Bar Association Committee on Professional Ethics has issued several opinions with respect to legal assistants. Most notable of these is Opinion 316 which provides:

We do not limit the kind of assistance that a lawyer can acquire in any way to persons who are admitted to the Bar, so long as the non-attorneys do not do things that attorneys may not do or do the things that attorneys only may do.

Readers should assure themselves that the general guidelines herein are still current and applicable at the time they are read. However, the Board of Directors of the State Bar of Texas can neither warrant that the guidelines will continue to be accurate, nor do they warrant them to be completely free of errors when published. Readers should verify the guidelines before relying on them.

COMMENTS TO GUIDELINES¹

Comment to Guideline I: Public policy denounces the unauthorized practice of law in order to protect the general public from legal services delivered from persons unqualified in the practice of law. Giving legal advice or counseling clients about legal matters is strictly forbidden. *Brown v. Unauthorized Practice of Law Committee*, 742 S.W.2d 34, 41 (Tex. App. -Dallas 1987, writ denied). See National Association of Legal Assistants, *Model Standards and Guidelines for Utilization of Legal Assistants Annotated Guideline VI*, section 1. (adopted 1984, revised 1991) [hereinafter referred to as "NALA Guideline"]; Colorado Bar Association *Guidelines for Legal Assistants Guideline 2*. (1986) [hereinafter referred to as "Colorado Guideline"]; *Report of the Connecticut Bar Association Special Inter-Committee Group to Study the Role of Paralegals Recommendation 6* (1985) [hereinafter referred to as "Connecticut Recommendation"]; *Standards and Guidelines for the Utilization of Legal Assistants in Kansas Guideline I* (1988) [hereinafter referred to as "Kansas Guideline"]; New Hampshire Supreme Court Administrative Rule 35, Sub-Rule 1. (1987) [hereinafter referred to as "New Hampshire Sub-Rule"]; New Hampshire Bar Association, *Guidelines For The Utilization By Lawyers Of The Services Of Legal Assistants Rule 1* (1977) [hereinafter referred to as "New Hampshire Guidelines Rule"]; see generally *Model Guidelines for the Utilization of Legal Assistant Services Guideline 3*, section (c) (1991) [hereinafter referred to as "ABA Model Guideline"].

Generally, an individual must be a licensed attorney of the State Bar to practice law in Texas. Certain exceptions exist which allow a nonlawyer to practice law in Texas. Legal assistants, however, do not fall within any of these exceptions. Tex. Const. art. 5, § 25; Tex. Gov't Code Ann. §§ 81.052 and 81.102 (Vernon 1988). Legal technicians, also known as independents, who engage in providing legal services without the supervision of an attorney, are subject to injunctive action pursuant to regulations prohibiting the

¹ • Miguel D. Wise, 1993

unauthorized practice of law. Tex. Gov't Code Ann. § 81.102 (Vernon 1988); *Unauthorized Practice Committee, State Bar of Texas v. Cortez*, 692 S.W.2d 47, 51 (Tex. 1985) *cert. denied*, 474 U.S. 980 (1985); *Stewart Abstract Co. v. Judicial Commission of Jefferson County*, 131 S.W.2d 686 (Tex. Civ. App - Beaumont 1939, no writ).

As the individual responsible for the legal services team, the attorney should ensure that members of the team do not engage in the unauthorized practice of law. *See* Model Rules of Professional Conduct Rule 5.5(b) (1983) [hereinafter referred to as "Model Rule"]; Rules Regulating the Florida Bar Rule 4-5.5(b) (1987) [hereinafter referred to as "Florida Rule"]; Iowa Code of Professional Responsibility DR 3-104(A)(iii) and EC 3-6(3) (as amended 1980) [hereinafter referred to as "Iowa Code"]; Kansas Guideline I; Rules of the Supreme Court of Kentucky Rule 3.700, Sub-rule 1. (1979) [hereinafter referred to as "Kentucky Sub-rule"]; New Hampshire Sub-Rule 1.; New Hampshire Guidelines Rule 1; New Mexico, Rules Governing Legal Assistant Services Rule 20-103 SCRA (1986) [hereinafter referred to as "New Mexico Rule"]; North Carolina State Bar, *Guidelines for the Utilization of Non-Lawyers in Rendering Legal Services* Guideline 1. (1986, revised 1992) [hereinafter referred to as "North Carolina Guideline"]; Rhode Island Supreme Court Provisional Order No. 18 - Use of Legal Assistants Guideline 1. (1983, revised 1990) [hereinafter referred to as "Rhode Island Guideline"]; South Carolina Bar, *Guidelines for the Utilization by Lawyers of the Services of Legal Assistants* Guideline I. (1981) [hereinafter referred to as "South Carolina Guideline"]; South Dakota Supreme Court Rule 92-5, Restatement of Ethical Considerations (4) (1992) [hereinafter referred to as "South Dakota Rule 92-5"]; *see generally* NALA Guideline VI, section 2.; National Federation of Paralegal Associations *Affirmation of Responsibility* Principle I [hereinafter referred to as "NFPA Principle"]; Legal Assistants Association of New Jersey, *Standards & Guidelines* Guidelines 1 and 9 (1991) [hereinafter referred to as "LAANJ Guideline"]; Legal Assistants of New Mexico *Statement of Professional Standards* Article III, section A. (1989) [hereinafter referred to as

"LANM Article"]. A nonlawyer in the unauthorized practice of law may subject the lawyer to professional discipline. Tex. Disciplinary R. Prof. Conduct 5.05 (1989), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. (Vernon Supp. 1993) (State Bar Rules art. X, § 9). Comment to Guideline I., George C. Shoemaker, Jr., *The Legal Assistant: Guidelines for the Future*, 45 Tex. B.J. 326 (1982). Failure to monitor their conduct may subject the attorney to professional discipline. *See Attorney Grievance Commission of Maryland v. Goldberg*, 292 Md. 650, 441 A.2d 338, 342 (1982). The remaining nonlawyer members of the team are subject to injunctive actions. Comment to Guideline I., Shoemaker, *supra*, at 326.

Comment to Guideline II: The State Bar of Texas does not have authority to promulgate or enforce rules of conduct for legal assistants. *See* New Hampshire, comment to Sub-Rule 9. Therefore, the attorney is responsible for ensuring that the members of the legal services team will not involve the attorney in a violation of the Texas Disciplinary Rules of Professional Conduct. *See* Connecticut Recommendation 2.; State Bar of Georgia, Advisory Opinion 21 (1977, revised 1983) [hereinafter referred to as "Georgia Advisory Opinion 21"]; North Carolina Guideline 5.; Rhode Island Guideline 3.; *see generally* Tex. Disciplinary R. Prof. Conduct 5.03 (1989); LAANJ Guideline 10.

So that the attorney is not involved in a violation of the Texas Disciplinary Rules of Professional Conduct, the attorney should ensure that all members of the legal services team are familiar with the Disciplinary Rules of Professional Conduct. Comment to Guideline VII., Shoemaker, *supra*, at 328; *see* Model Rule 5.3; ABA Model, comment to Guideline 1; Connecticut Recommendation 2.; Florida Rule 4-5.3(a) and (b); Illinois State Bar Association Assembly, *Recommendations to Attorneys for the Use of Legal Assistants* Recommendation (A), section (5) (1988) [hereinafter referred to as "Illinois Recommendation"]; Iowa Code DR 3-104(C) and EC 3-6(6); Kansas Guideline III; The Missouri Bar, *Guidelines for Practicing with Paralegals*

Guideline III., sections (a) and (b) (1987) [hereinafter referred to as "Missouri Guideline"]; New Hampshire Sub-Rule 9.; New Hampshire Guidelines Rule 9; New Mexico Rule 20-114; North Carolina, comment to Guideline 4.; South Dakota Rule 92-5, Restatement of Ethical Considerations (2) and (7); NALA Guideline VIII, section 3.; *see also In the Matter of Martinez*, 107 N.M. 171, 754 P.2d 842, 843 (1988); *see generally* New York State Bar Association, *Guidelines for the Utilization of Legal Assistants by Attorneys* Guideline VIII (1976) [hereinafter referred to as "New York Guideline"].

Comment to Guideline III: Although nonlawyers are restricted from engaging in the practice of law, certain circumstances allow lay appearances by virtue of statute, administrative rule or regulation, or court rule or decision. *See* LAANJ Guideline 2; LANM Article III, section C.; Colorado Guideline 1., section D.; Connecticut Recommendation 4.; Georgia Advisory Opinion 21; Iowa Code DR 3-104(A)(ii) and EC 3-6(3); Kansas Guideline II; Kentucky Sub-rule 3.; State Bar of Michigan, *Guidelines For The Utilization of Legal Assistant Services* Guideline II (1988) [hereinafter referred to as "Michigan Guideline"]; New Hampshire Sub-Rule 2.; New Hampshire Guidelines Rule 2; New Mexico Rule 20-107; North Carolina Guideline 2.; Rhode Island Guidelines 2. and 6.; South Carolina Guideline II.; South Dakota Rule 92-5, Utilization of Legal Assistants (1), section (f).

Authorization, however, does not obviate the supervising attorney of any responsibility for the competence and performance of the legal assistant. Comment to Guideline III., Shoemaker, *supra*, at 327; New York Guideline II; *see* Colorado Guideline 5., section C.; Kansas Guideline IV, section B.; New Hampshire Sub-Rule 3., section D.; New Hampshire Guidelines Rule 3, section D.; New Mexico Rule 20-110; Rhode Island Guidelines 2., sections (2) and (3); *see generally* ABA Model, comment to Guideline 2; Connecticut Recommendation 3.; Florida, comment to Rule 4-5.5.

Comment to Guideline IV: An attorney should instruct the legal assistant to disclose at the commencement of communications with any other entity that he or she is not an attorney. *See In the Matter of Martinez, supra*, at P.2d 843; LAANJ Guideline 3; Georgia Advisory Opinion 21; Illinois Recommendation (B); Michigan Guideline III, section 5.; New Mexico Rule 20-104; North Carolina Guideline 3.; Rhode Island Guideline 4.; South Carolina Guideline VII.; *see generally* LANM Article III, section D. If a lay appearance is authorized, the legal assistant shall disclose his or her status to the tribunal of said administrative agency or court. LAANJ Guideline 3; South Carolina Guideline VII. Routine early disclosure of the legal assistant's status is necessary to assure that there will be no misunderstanding as to the responsibilities and the role of the legal assistant. Comment to Guideline VI., Shoemaker, *supra*, at 328; Disclosure may be made in any way that avoids confusion. If the person dealing with the legal assistant already knows of his or her status, further disclosure is unnecessary. If at any time during any written or oral communication the legal assistant becomes aware that the other person may believe the legal assistant is an attorney, it should be made clear that the legal assistant is not an attorney. NALA, comment to Guideline V; *see* ABA Model Guideline 4; Colorado Guideline 1., section A.; Connecticut Recommendation 12.; Iowa Code DR 3-104(E) and EC 3-6(5); Kansas Guideline IX; Kentucky Sub-rule 7.; Michigan Guideline III, section 5.; Missouri Guideline IV., section (a); New Hampshire Sub-Rule 8.; New Hampshire Guidelines Rule 8; New York Guideline VII.; South Dakota Rule 92-5, Utilization of Legal Assistants (1), section (a) and Restatement of Ethical Considerations (6); *see generally* Iowa Code DR 3-104(B).

If a legal assistant is designated by an attorney as the individual in the office of that attorney or law firm to be contacted in a legal matter, disclosure of his or her nonlawyer status should be made at the time of such designation. Comment to Guideline VI., Shoemaker, *supra*, at 328.

Comment to Guideline V: An attorney shall insure that the legal assistant does not exercise independent legal judgment or otherwise practice law. *See* NALA Guidelines VII, section 1. and IX, section 9.; LAANJ Guideline 5, section 5.; Connecticut Recommendation 6.; Kansas Guideline I; New Hampshire Sub-Rules 1. and 3., section A.; New Hampshire Guidelines Rule 1 and 3, section A.; Rhode Island Guideline 2., section (1). Therefore all legal judgment exercised by the legal assistant must be supervised by an attorney. *See* Colorado Guideline 1., section F.

Although the attorney shall maintain a "direct relationship" with the client, the legal assistant is not limited as long as the legal assistant is under the supervision of an attorney. *See generally* NALA Guideline IX. The legal assistant is therefore, not precluded from engaging in ex parte communications or meetings with clients. *See* LAANJ Guideline 11, section 1.; Colorado Guideline 4.; Georgia Advisory Opinion 21; The Legal Assistants (Joint) Committee of the Oregon State Bar Pamphlet, *The Lawyer and the Legal Assistant* (1988) [hereinafter referred to as "Oregon Pamphlet"]; Rhode Island Guideline 2. The attorney should at all reasonable times be available for consultation with the client. Comment to Guideline II., Shoemaker, *supra*, at 327; *see* Tex. Disciplinary R. Prof. Conduct 1.03 (1989); NALA Guideline VII, section 2.; LAANJ Guideline 5, section 3.; Colorado Guideline 1., section B.; Illinois Recommendation (A), section (1); Iowa Code EC 3-6(2) and (3); Kansas Guideline IV, section C.; New Hampshire Sub-Rule 3., section B.; New Hampshire Guidelines Rule 3, section B.; New Mexico Rule 20-106; New York Guideline III, section A.; North Carolina Guideline 6.; South Dakota Rule 92-5, Utilization of Legal Assistants (1), section (b).

Although delegation of duties is the key to the success of the legal services team, responsibility for work product generated for the client may never be delegated to the legal assistant by the supervising attorney. Therefore, the legal assistant must always be under the supervision and direction of the attorney. *See* State Bar of Texas, Comm. on Interpretation of the Rules, Op. 438 (*Texas Bar Journal*, June 1987); *Attorney Grievance*

Commission of Maryland, supra, A.2d at 342; LAANJ Guideline 5, section 4.; Connecticut Recommendations 1. and 3.; Georgia Advisory Opinion 21; Illinois State Bar Association Assembly, Guidelines for the Utilization of Legal Assistants Guidelines 1. and 4. (1979) [hereinafter referred to as "Illinois Guideline"]; Illinois Recommendation (A), section (2); Kansas Guideline IV, section D.; Kentucky Sub-rule 2., section B.; Kentucky Bar Association, Opinion No. KBA U-45 (1992); Michigan Guideline I, part (b); Minnesota Lawyer's Professional Responsibility Board Amended Opinion No. 8 (1980) [hereinafter referred to as "Minnesota Opinion"]; New Hampshire Sub-Rule 3., section C.; New Hampshire Guidelines Rule 3, section C.; New Mexico Rule 20-112; North Carolina Guideline 6.; Rhode Island Guideline 2., section (2); South Carolina Guideline III., section (b); *see generally* LAANJ Guideline 4; New Mexico, comment to Rule 20-110. The attorney shall monitor the work product of the legal assistant and periodically review it. *See* Colorado Guideline 1., section C.; South Dakota Rule 92-5, Utilization of Legal Assistants (1), section (c). The attorney shall never relinquish control of the client matter to the legal assistant. Comment to Guideline II, Shoemaker, *supra*, at 327; ABA Model Guideline 2; *see* NALA Guideline VII, section 3.; Iowa Code EC 3-6(2); New York Guideline III, section B.; ABA Opinion 316 (1967).

Under revised Guideline IV and V D., above, an attorney who utilizes a legal assistant has an obligation to ensure that the status of the legal assistant is specifically disclosed. Comment to Guideline II., Shoemaker, *supra*, at 327; *see* Colorado Guideline 1., section A.; Illinois Recommendation (A), section (4); Kansas Guidelines IV, section A. and IX; Kentucky Sub-rule 7.; Michigan Guideline I, part (a); South Carolina Guideline III., section (a); *see generally* ABA Model Guideline 3, section (c); LAANJ Guideline 5, section 1.; Connecticut Recommendation 12.

Since an attorney may only delegate selected duties, the attorney may never delegate responsibility. Consequently, the attorney is responsible for all acts or omissions of the legal assistant. *See* ABA Model Guideline 1; NALA Guidelines VII, section 4.; LAANJ Guideline 5, section 2.; LANM Article I, section C.; Colorado Guideline 1., section D.; Illinois Guideline 1.; Illinois Recommendation (A), section (4); Iowa Code EC 3-6(2); Kansas Guideline IV, section B.; Kentucky Sub-rule 2., section C.; Michigan Guideline I, part (c); Minnesota Opinion No. 8; New Hampshire Sub-Rule 3., section D.; New Hampshire Guidelines Rule 3, section D.; New Mexico Rule 20-112 and comment to Rule 20-110; New York Guideline III, section C.; North Carolina Guideline 6.; Rhode Island Guideline 2., section (3); South Carolina Guideline III., section (c); South Dakota Rule 92-5, Utilization of Legal Assistants (1), section (d); *see also In the Matter of Martinez, supra*, at P.2d 843; *see generally* Tex. Disciplinary R. Prof. Conduct 5.03(b)(1) (1989).

Comment to Guideline VI: The legal assistant cannot create the attorney-client relationship. The ABA Model Rules of Professional Conduct and most state codes require that attorneys communicate with their clients in order for clients to make well-informed decisions about their representation and resolution of legal issues. The direct personal relationship between client and attorney is necessary to the exercise of the attorney's trained professional judgment. Therefore, the responsibility for the establishment of an attorney-client relationship cannot be delegated by the attorney to the legal assistant. ABA Model Guideline 3; NALA Guideline VI, section 1.; Colorado Guideline 1., section B.; Connecticut Recommendation 9.; Oregon Pamphlet; South Dakota Rule 92-5, Utilization of Legal Assistants (1), section (b); Although Texas prohibits the legal assistant from establishing an attorney-client relationship, at least one state has subjected the attorney to liability for malpractice for the negligence of the legal assistant under the agency principle of apparent authority. *See DeVaux v. American Home Assurance Co.*, 387 Mass. 814, 444 N.E.2d 355, 359 (1983).

The attorney-client relationship is created by agreement to undertake representation and the related fee arrangement. Accordingly, legal assistants shall not accept or reject cases or set fees "if these tasks entail any discretion on the part of the paralegals." ABA Model, comment to Guideline 3; *see* NALA Guideline VI, section 1.; LAANJ Guideline 1; Colorado, comment to Guideline 1.; Connecticut Recommendation 9.; *see generally* Comment 1, Tex. Disciplinary R. Prof. Conduct 5.04 (1989); Oregon Pamphlet.

Legal assistants shall not exercise independent professional legal judgment or give legal advice. *Brown, supra*, at 41; *see Louisiana State Bar Association v. Edwins*, 540 So. 2d 294, 299 (La. 1989); LAANJ Guideline 1; Colorado, comment to Guideline 1.; Connecticut Recommendation 6.; Georgia Advisory Opinion 21; Illinois Guideline 2.; Board of Governors, Illinois State Bar Association Real Estate Law Section Council and Unauthorized Practice of Law Committee Re: Use of Attorney Assistants in Real Estate Transactions (1984); Kansas Guideline I; New Hampshire Sub-Rule 1.; New Hampshire Guidelines Rule 1; Rhode Island Guideline 5. Model Code of Professional Responsibility EC 3-5 (1980) [hereinafter referred to as "Model Code"] states: "[T]he essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment." *see* Iowa Code DR 3-104(A)(i) and EC 3-6(3). However, legal assistants may be authorized to communicate legal advice so long as they do not interpret or expand on that advice. ABA Model, comment to Guideline 3. Allowing the legal assistant to interpret or expand on legal advice may constitute aiding in the unauthorized practice of law. *See Louisiana State Bar Association, supra*, at 300.

Comment to Guideline VII: The free exchange of information in an attorney-client relationship relies on the understanding that the attorney maintains the confidentiality of information relating to their representation. Therefore, a lawyer should select, train, and prevent his or her legal assistant from disclosing or using confidences or secrets of a client. *See* State Bar of Texas, Comm. on Interpretation of the Rules, Op. 472 (*Texas Bar Journal*, May 1992)(citing attorney's obligations to ensure that Tex. Disciplinary R. Prof. Conduct 1.05 (1991) are fully complied with); Model Code EC 4-2; ABA Model Guideline 6; Colorado Guideline 1., section G.; Connecticut Recommendation 2.; Georgia Advisory Opinion 21; Illinois Recommendations (A), section (3) and (C); Iowa Code EC 3-6(6); Kansas Guideline V; Kentucky Sub-rule 4.; Michigan Guideline III, section 1.; Missouri Guideline III., section (d); New Hampshire Sub-Rule 4.; New Hampshire Guidelines Rule 4; New Mexico Rule 20-105; New York Guideline IV; Rhode Island Guideline 3.; South Carolina Guideline IV.; South Dakota Rule 92-5, Utilization of Legal Assistants (1), section (g) and Restatement of Ethical Considerations (8); Model Rule 5.3 comment; *see also* Tex. Disciplinary R. Prof. Conduct, 1.05 (1989); *see generally* NALA Guideline V, section 2.; NFPA Principle IV.; LAANJ Guideline 6; LANM Article IV. All information concerning representation of a client, even the fact of representation, if not a matter of public record, must be kept strictly confidential. Comment to Guideline IV., Shoemaker, *supra*, at 327.

Comment To Guideline VIII: An attorney shall ensure that the legal assistant's conduct is compatible with the professional obligations of the lawyer. State Bar of Texas, Comm. on Interpretation of the Rules, Op. 472 (*Texas Bar Journal*, May 1992)(citing attorney's obligations to ensure that Tex. Disciplinary R. Prof. Conduct 1.06 (1990) and 1.09 (1991) are fully complied with); Model Rule 5.3. These obligations include the duty to exercise independent professional judgement on behalf of a client "free of compromising influences and loyalties". Model Rules 1.7 through 1.13.

Accordingly, legal assistants shall be instructed to inform the supervising attorney of any interests that would result in a conflict of interest or give the appearance of a conflict. ABA Model Guideline 7; *see* LAANJ Guidelines 13 and 14; LANM Article V, section B.; Connecticut Recommendation 13.; Kansas Guideline X; New Mexico Rule 20-108; South Dakota Rule 92-5, Restatement of Ethical Considerations (9). It is possible to create a "Chinese wall" between the legal assistant and the conflict area so that the entire firm need not be disqualified so long as the wall is observed and effectively screens the legal assistant from confidential information. ABA Informal Opinion 1526 (1988); New Mexico, comment to Rule 20-108; North Carolina Guideline 7.; *see also* Tennessee Formal Ethics Opinion 89-F-118 (March 10, 1989). If all is not in place, the employer may be disqualified from representing either party to the controversy. *In re: Complex Asbestos Litigation*, No. 828684 (San Francisco Superior Court, September 19, 1989); North Carolina, comment to Guideline 7.

Comment To Guideline IX: In setting a rate for legal services, an attorney may charge for the legal assistant's time. *Gill Savings Association v. International Supply Company, Inc.*, 759 S.W.2d 697, 702 (Tex. App. - Dallas 1988, writ denied). *See* Connecticut Recommendation 11.; South Dakota Rule 92-5, Restatement of Ethical Considerations (10). However, Tex. Disciplinary R. Prof. Conduct 5.04 (1989) forbids the sharing of a fee with a nonlawyer. *See* Kentucky Sub-rule 5. The compensation of a legal assistant may not include a percentage of the fees received by his or her employer, or any remuneration, directly or indirectly for referring matters of a legal nature to the employer. Comment to Guideline V., Shoemaker, *supra*, at 327 through 328. The U.S. Supreme Court, however, has resolved any question concerning the propriety of setting a rate for legal services based on work performed by legal assistants. *Missouri v. Jenkins*, 109 S.Ct. 2463, 2472 (1989). Its rationale favors setting a charge based on the "market rate" for such services, rather than the direct cost to the lawyer. *See* ABA Model, comment to Guideline 8.

Comment to Guideline X: Tex. Disciplinary R. Prof. Conduct 5.04 (1989) prohibits the "splitting" of fees with nonlawyers, whether categorized as splitting of contingent fees, "forwarding" fees, or other sharing of legal fees. *See* State Bar of Texas, Comm. on Interpretation of the Canons of Ethics, Op. 153 (1957), 18 *Baylor L. Rev.* 260 (1966); LAANJ Guideline 7; LANM Article III, section E.; Connecticut Recommendation 10.; Kansas Guideline VI; Michigan Guideline III, section 2.; New Mexico, comment to Rule 20-111; North Carolina Guideline 8.; Rhode Island Guideline 9.; South Carolina Guideline V. A legal assistant may not be compensated on a contingent basis for a particular case or paid for "signing up" clients for a legal practice. ABA Model, comment to Guideline 9; Missouri Guideline II., section (a); New York Guideline V; South Dakota Rule 92-5, Restatement of Ethical Considerations (11).

An attorney may include nonlawyer employees in a retirement plan even though the plan is based in whole or in part on a profit-sharing arrangement. Tex. Disciplinary R. Prof. Conduct 5.04(3) (1989); *see* LAANJ Guideline 7; LANM Article III, section E.; Florida Rule 4-5.4(3); New Hampshire Sub-Rule 6.; New Hampshire Guidelines Rule 6; New Mexico, comment to Rule 20-111; North Carolina, comment to Guideline 8.

Comment to Guideline XI: The utilization of business cards is consistent with the objective to avoid misunderstanding or miscommunication regarding the identity of the legal assistant, while also affording the legal assistant recognition as an important part of the legal services team. *See* ABA Model, comment to Guideline 5; ABA Informal Opinion 1527 (1989); *see generally* New York State Bar Association, Ethics Opinion 640. The attorney who permits his or her name or the name of a law firm to appear on the legal assistant's business card is responsible for ensuring that the card conforms to the standards of dignity and accuracy which would be required for the attorney's own card. State Bar of Texas, Comm. on Interpretation of the

Canons of Ethics, Op. 403, (*Texas Bar Journal*, January 1982); *see generally* Connecticut Recommendation 12.; Georgia Advisory Opinion 21; Kansas Guideline VIII; Missouri Guideline IV., section (b); Minnesota Opinion No. 8; New York Guideline VI; North Carolina Guideline 9. The business card of a legal assistant which includes the name of the attorney or firm shall be approved, in form and substance, by the supervising attorney or the firm. Comment to Guideline VIII., Shoemaker, *supra*, at 328; *see* New Mexico, comment to Rule 20-113; Rhode Island Guideline 7.; South Carolina, comment to Guideline VI.; *see generally* LAANJ Guideline 11, section 9.; LANM Article II, section C.; Colorado Guideline 3.; Iowa Code EC 3-6(4); Kentucky Sub-rule 6.; South Dakota Rule 92-5, Utilization of Legal Assistants (3). A business card may be used as long as the card is not used for unethical solicitation. *See* New Hampshire Sub-Rule 7.; New Hampshire Guidelines Rule 7.

Although not addressed in this Guideline, a State Bar opinion states that the Texas Code of Professional Responsibility does not prohibit the accurate and dignified listing on an attorney or law firm's letterhead of the name and any certification of a legal assistant with a further designation that the person is a legal assistant and is not licensed to practice law. State Bar of Texas, Comm. on Interpretation of the Rules, Op. 436, 49 Tex. B.J. 1085 (1986)(overruling Committee Opinion 390 (*Texas Bar Journal*, April 1978) of the State Bar of Texas prohibiting the listing of the name of a legal assistant's name on a law firm's letterhead); *See* ABA Model Guideline 5; Connecticut Recommendation 12.; Missouri Guideline IV., section (b); Minnesota Opinion No. 8; North Carolina Guideline 9. (1992); South Dakota Rule 92-5, Utilization of Legal Assistants (3); *but see* LANM Article II, section C.; Colorado Guideline 3.; Georgia Advisory Opinion 21; Kansas Guideline VIII; Michigan Guideline III, section 4.; New Hampshire Sub-Rule 7.; New Hampshire Guidelines Rule 7; New Mexico Rule 20-113; New York Guideline VI; South Carolina Guideline VI.; *but cf.* Iowa Code EC 3-6(4).

Furthermore, a State Bar opinion may authorize the inclusion of the legal assistant's name, who is a full-time employee, on an outside sign for the law firm, provided the person is designated as a legal assistant and it is indicated on the sign that the person is not licensed to practice law. *Compare* State Bar of Texas, Comm. on Interpretation of the Rules, Op. 437 (*Texas Bar Journal*, November 1986) *with* State Bar of Texas, Comm. on Interpretation of the Rules, Op. 426 (*Texas Bar Journal*, September 1985); *see also* Minnesota Opinion No. 8; *but see* Georgia Advisory Opinion 21.