PARALEGALS AND CONFIDENTIALITY

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Confidentiality is a core value in the attorney's practice of law, and permeates every action taken by the attorney. Issues such as an express wavier or implied waiver of the privilege, the scope and duration of the privilege, and related matters, are the subjects of reported decisions, books, law review articles, etc., too numerous to count.

As established in Kentucky case law, the confidentiality of information obtained by the attorney, and the privilege regarding attorney/client communications, applies with equal force to the attorney's support staff, including paralegals. As a result, the importance of recognizing and protecting such confidentiality, and being on guard concerning the attorney/client privilege, should be as much of a concern for paralegals as it is for the attorneys employing such paralegals.

A threshold distinction needs to be made between confidential information and the attorney/client privilege. The former is an ethical obligation and the latter is an evidentiary privilege.

As provided for in SCR 3.130(1.6), (Rule 1.6 of the Kentucky Rules of Professional Conduct), information obtained by the attorney relating to the representation of the client

is considered confidential information which the attorney may not reveal without committing an ethics violation. The Rule contains a number of exceptions in addition to the general exception of disclosures which are "impliedly authorized in order to carry out the representation." The express exceptions contained in Subparagraph B are:

1. To prevent the client from committing a criminal act which the lawyer believes is likely to result in 'imminent death or substantial bodily harm;'

2. To establish a claim or defense on behalf of a lawyer in the controversy between a lawyer and a client;

3. To establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;

4. To respond to allegations in any proceeding concerning the lawyer's representation of the client; or

5. To comply with other law or a court order.

The attorney/client privilege is contained in Kentucky's Rule of Evidence. As set forth in KRE 503, a client may refuse to disclose, and may prevent the attorney from disclosing, confidential communications between the attorney and the client. There are several exceptions to this privilege, namely:

1. Communications in furtherance of crime or fraud;

2. Claimants through the same deceased client;

3. Breach of duty by a lawyer or client;

4. Document attested by a lawyer;

5. Joint client.

Another important distinction between confidentiality under RPC 1.6 and the attorney/client under KRE 503, is that the confidentiality of RPC 1.6 may be lost regardless of whether or not the client consented to the waiver of the confidentiality. However, subject to the exceptions stated, the attorney/client privilege of KRE 503 may generally be waived only by the client.

REGULATIONS, GUIDELINES AND RESOURCES

The Kentucky Supreme Court has adopted regulations specifically regulating the practice of paralegals within Kentucky. The introductory portion of those regulations notes that a paralegal, although a lay person, has an obligation to refrain from conduct which would cause the supervising attorney to commit a violation of the Rules of Professional Conduct. Therefore, a working knowledge and some familiarity with the Rules of Professional Conduct applicable to attorneys is appropriate for paralegals. Additionally, various professional paralegal organizations at the state and national level have adopted standards of conduct and rules to be followed by their members. This has occurred both at the state level by the Kentucky Paralegal Association and at the national level by the National Federation of Paralegal Associations, Inc. and the National Association of Legal Assistants.

The following is a brief review of the regulations, guidelines and resources applicable to paralegals:

Supreme Court Rule 3.700,Provisions Relating to Paralegals: This Rule has been adopted by the Kentucky Supreme Court and sets out seven Sub-Rules. The Rules are written as a direction to attorneys in overseeing paralegal employees. However, these should be viewed as direct guidance to paralegals in the pursuit of their profession in the Commonwealth of Kentucky. If a paralegal was to deviate from the provisions of SCR 3.700, presumably the paralegal would be committing the unauthorized practice of law which may have a number of civil and criminal consequences.

Supreme Court Rule 3.130(5.3), Responsibilities Regarding Nonlawyer Assistance: This Rule is part of the Kentucky Rules of Professional Conduct which the Kentucky Supreme Court has adopted to govern attorneys in Kentucky. Again, as with SCR 3.700, a paralegal should be sensitive to the limitations of what an attorney may or not request a paralegal to do so that the paralegal does not run afoul of the UPL law and regulations.

Paralegal Standards of Conduct, Kentucky Paralegal Association: The Standards of Conduct consist of 12 Standards and a definition section. The Standards address such issues as competency, dealing with clients, confidentiality, conflicts of interest, pro bono service donation and advertising. The preamble to the Standards state that they are not intended to give rise to a legal cause of action in the event of a breach and are to be used solely for paralegal practice guidance and as a basis for regulating the professional conduct of KPA members.

Model Disciplinary Rules and Ethical Considerations, National Federal of Paralegal Associations, Inc.: The NFPA is a professional organization comprised of paralegal associations and individual paralegals throughout the United States and Canada. The Model Rules were adopted in 1997. The Model Disciplinary Rules contain eight rules, with each rule containing a subpart, addressing such issues as competency, integrity, professional conduct, pro bono services, confidentiality, avoiding some conflicts of interest, and disclosure of the paralegals title and status.

Code of Ethics and Professional Responsibility, National Association of Legal Assistants: The Code consists of nine Canons generally addressing the same matters set out in the NFPA Model Disciplinary Rules and the KPA's Standards of Conduct.

A. PRESERVING CONFIDENTIAL INFORMATION

Sub-Rule 4 of SCR 3.700 provides, in full:

> "A lawyer shall instruct a paralegal employee to preserve the confidences and secrets of a client and shall exercise care if the paralegal does so."

Standard 4 of the KPA's Standards of Conduct, entitled Client and Firm Confidentiality, reads, in full:

> "Standard 4. CLIENT AND FIRM CONFIDENTIALITY
>
> (a) A paralegal shall not reveal information relating to the firm's representation of clients or firm internal operations except for disclosures that are impliedly authorized to perform paralegal services for supervising lawyers and clients except:
> (1) a paralegal may reveal such information to the minimum extent necessary to establish a claim or defense in a controversy with a supervising lawyer or client, or
> (2) to comply with law or court order.
>
> (b) A paralegal's duty of confidentiality to a firm and its clients is a continuing responsibility which is applicable even though a paralegal has changed employment or left paralegal practice."

Rule 1.5 adopted by the NFPA addresses this obligation of the paralegal in more detail, and reads, in full:

> "1.5 A PARALEGAL SHALL PRESERVE ALL CONFIDENTIAL INFORMATION PROVIDED BY THE CLIENT OR ACQUIRED FROM OTHER SOURCES BEFORE, DURING, AND AFTER THE COURSE OF THE PROFESSIONAL RELATIONSHIP.
> Ethical Considerations
> 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.

EC-1.5(b) A paralegal shall not use confidential information to the disadvantage of the client.

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

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.

EC-1.5(e) A paralegal shall keep those individuals responsible for the legal representations of a client fully informed of any confidential information the paralegal may have pertaining to that client.

EC-1.5(f) A paralegal shall not engage in any indiscreet communications concerning clients.

The NALA's Code of Ethics and Professional Responsibility addresses this issue in a much more abbreviated form in Canon 7 which reads, in full:

> "A legal assistant much protect the confidences of a client and must not violate any rule or statute now in effect or hereafter enacted controlling the doctrine of privileged communications between a client and an attorney."

As a general matter, issues of confidentiality are matters of common sense. In practice, certain general guidelines should be followed:

1. Do not discuss a client or the aspects of a client's case with any person who is not working on the case, no matter how innocent the discussion may be.

2. When talking with a client, either in person or by telephone, either within or outside the office, be sure that other persons are not overhearing what is being

discussed. Permitting a third party to participate in the conversation may constitute a waiver of confidentiality or any applicable privilege.

3. Any information the client provides to you must be provided to the attorney. The client may not put you in the position of telling you something and then telling you to not reveal that information to the attorney for whom you work.

4. Maintain confidentiality of the file by not having any open client files or other documents on your desk.

5. Remember that the client, and not you or the attorney you work for, may waive the attorney/client privilege.

6. You may communicate with a client through unencrypted e-mail. However, you should be sensitive to who may have access to the computer to which you send the e-mail. Again, sending a communication to a computer accessible to many people may constitute a waiver of the privilege.

7. If a situation arises where client confidences may be revealed, any such revelation should be narrow and limited solely to the purpose for the revelation.

B. HONORING ATTORNEY/CLIENT PRIVILEGE

As discussed in Section A, SCR 3.700 Sub-Rule 4, and the guidelines of various private organizations, including the KPA, direct that a paralegal should honor the attorney/client privilege to the same extent as the attorney is obligated to preserve that privilege.

Kentucky Rule of Evidence 503, regarding the attorney/client privilege, defines a "representative of the lawyer" as a person employed by the lawyer to assist the lawyer in

rendering professional legal services. Thereafter, when the privilege is set out in the Rule, the protection is extended to not only the lawyer, but also the "representative of the lawyer." Moreover, KRE 503(b)(2) provides that communications between the lawyer and the paralegal would be considered privileged communications.

Although KRE 503 expressly provides that the privilege not only applies to the lawyer but also to the "representative of the lawyer," the Kentucky Supreme Court re-emphasized the scope of the privilege in Wal-Mart Stores, Inc. v. Dickinson, Ky., 29 S.W.3d 796 (2000). The Court held that Kentucky had not yet decided the precise issue of whether the attorney/client privilege of KRE 503 applied with equal force to any information sought to obtained from a paralegal working with or for a party's attorney. In holding that the privilege did apply to a paralegal, the Court discussed the issue in broad terms, indicating the current state of the practice of law in which non-attorney personnel are used with more and more frequency. In particular, the Court held:

> "We believe that the privilege should apply with equal force to paralegals, and so hold. A reality of the practice of law today is that attorneys make extensive use of nonattorney personnel, such as paralegals, to assist them in rendering legal services. Obviously, in order for paralegals, investigators, secretaries and the like to effectively assist their attorney employers, they must have access to client confidences. If privileged information provided by a client to an attorney lost its privileged status solely on the ground that the attorney's support staff was privy to it, then the free flow of information between attorney and client would dry up, the cost of legal services would rise, and the quality of those same services would fall."

Although beyond the scope of this Section regarding confidentiality, the Supreme Court in

Wal-Mart v. Dickinson, also held that for the same reasoning, the work product prepared by the paralegal would be protected by the same work product privilege in CR 26 as would apply to any work product of the attorney.

In the area of criminal law, (as attorneys who practice criminal law already know), a prosecutor may not subpoena an attorney to appear before Grand Jury without prior judicial approval. This principle is set forth in RCr 6.24. The last sentence of that Rule also provides that a prosecutor may not subpoena a paralegal working for an attorney without the same judicial approval required in the case of subpoenaing an attorney.

CONCERNS REGARDING MEDICAL ISSUES

Many paralegals, especially those who work for attorneys with a personal injury practice, whether for the plaintiff or the defendant, are frequently in the position of requesting, obtaining and/or reviewing medical records of one or more of the parties to the lawsuit or the personal injury claim.

Typically, medical records of a client contain very sensitive information. Maintaining the security and confidentiality of such medical records is of paramount importance.

Even more significant issues of confidentiality attaches to psychiatric records or records regarding alcohol abuse or drug abuse, or even records regarding AIDS or HIV testing. These records are generally sensitive records. The enhanced confidentiality of such records is reflected in the fact that federal law, state and/or local law, and hospital regulations, will typically require a specific authorization for such records.

ADDRESSING OFFICE SHARING SITUATIONS

The ways in which attorneys may practice law are fairly limited. An attorney may either be in partnership with another attorney, an employee of another attorney or a firm, or "of counsel" with an attorney or a firm. The last category "of counsel" refers to a person who is not formally associated with the law firm or the attorney, but frequently associates or counsels with the firm or the lawyer in particular matters.

However, attorneys may frequently work out of the same common offices although they are not part of any law firm. This arrangement, generally referred to as "office sharing," creates its own set of ethical issues which the attorneys must be sensitive towards in their respective law practices. A frequent reason why attorneys may decide to "office share" is to save expenses by having all of the attorneys contribute towards certain common expenses. Although these expenses generally fall in the areas of rent, telephone, utilities, copy machines, another area of possible shared expenses is a secretary and/or paralegal.

In KBA E-406, the Kentucky Board of Governors adopted a Formal Ethics Opinion concerning the sharing of a legal secretary between lawyers not part of the same firm. The reasoning used by the KBA regarding a legal secretary would apply with equal force to other non-lawyer support personnel, such as a paralegal.

Question 3 in KBA E-406 asked if two attorneys sharing office space would be able to share a secretary under circumstances where they did not represent clients with any adverse interests. The KBA's answer was a "qualified yes." The Opinion noted that client confidences must be protected. The Opinion also noted that in such circumstances, the

attorneys risk an adverse party filing a Motion to Disqualify on the ground that both attorneys, even without any adverse interests being represented by the attorneys, still present some grounds for disqualification. If there truly was no adverse interest between the attorneys, sharing a paralegal would not typically be grounds for any disqualification. However, the risk would still remain that such a Motion may be filed.

A copy of KBA E-406, as well as many Formal Ethics Opinions and UPL Opinions from the Unauthorized Practice Committee of the KBA, may be found on the University of Kentucky School of Law website.

MAINTAINING INTEGRITY AND PUBLIC RESPECT FOR THE LEGAL PROFESSION

The Kentucky Supreme Court, in adopting SCR 3.700, and in recent case law, i.e., Wal-Mart Stores, Inc. v. Dickinson, Ky., 29 S.W.3d 796 (2000), has recognized the important role of paralegals in the practice of law.

This formal recognition of the role of paralegals also includes a number of duties and responsibilities which are found applicable to most professions.

A. PERSONAL/PROFESSIONAL INTEGRITY AND CONDUCT

Compliance with SCR 3.700, and the Sub-Rules contained therein, and the above-mentioned Standards, Rules, etc., adopted by professional organizations, reflect an integrated approach towards maintaining integrity in the paralegal profession.

The reference to personal integrity and conduct is important since an attorney may be sanctioned by the Kentucky Supreme Court for private conduct not directly related to the

practice of law. By a parity of reasoning, a paralegal should be held to that same standard. As noted earlier, the preamble to SCR 3.700 expressly notes that the Rules of Professional Conduct applicable to attorneys also establish the standard of conduct for paralegals acting by and on behalf of their attorney employer.

The phrase"personal/professional integrity and conduct," is obviously a very broad phrase covering many different topics. However, a common thread running through all rules and regulations governing paralegals is the concept of supervision by an attorney. As noted by the KBA in KBA U-47, Kentucky does not recognize the concept of a "free-standing" paralegal.

B. MAINTAINING COMPETENCY THROUGH EDUCATION AND TRAINING

The Supreme Court in adopting SCR 3.700, regarding paralegals, did not impose any education or training requirement before a person may be a paralegal. The Sub-Rules in SCR 3.700 make it clear that the obligation is on the attorney, and always remains with the attorney, to be sure that any support personnel, including a paralegal, does not engage in the unauthorized practice of law, and acts with the same level of professionalism and ethics as does the attorney employing the paralegal.

As a result, it is left to the marketplace and to professional organizations, such as KPA, to impose on paralegals particular education and training requirements.

The absence of education and training requirements is directly related to the level of professionalism and respect accorded paralegals. An example of this problem is found

by briefly reviewing to other professions which are regulated by the same Board in Kentucky. Professional Engineers and Professional Land Surveyors are regulated by the same Board in Kentucky. One key difference between Engineers and Land Surveyors is that Engineers have specific education requirements which they must satisfy in order to become licensed in Kentucky. On the other hand, a Land Surveyor need not attend any formal land surveying schooling, and may become licensed based on experience in working with another land surveyor. Although unjustified, as a result of the absence of formal education requirements, Land Surveyors and Engineers have traditionally not been viewed as equal professionals. The absence of formal education and training requirements in order to be a paralegal under SCR 3.700 presents a similar problem with paralegals.

The KPA, at the state level, and the NFPA and the NALA, at the national level, all require either a certain educational level in order to become a member, and/or impose continuing education requirements on a member paralegal.

The KPA seeks to address this issue by its educational requirements to become a member, and the obligation to maintain competency through Standard 1 of its Standards of Conduct. The issues of competency concern such matters as the substantive areas of law in which the paralegal works and knowledge of SCR 3.700, regarding paralegals, and the Kentucky Rules of Professional Conduct, governing attorneys.

At present, three main mechanisms exist for a person to obtain and maintain competency in a particular paralegal field.

1. Education and experience in a particular non-lawyer

field and thereafter working for an attorney, e.g., a real estate agent becoming a real estate paralegal, or a person with medical training becoming a paralegal in a personal injury practice/medical malpractice practice.

2. Formal training and education, for example, the University of Louisville paralegal program.

3. Mentoring with a more experienced paralegal or associating with other paralegals.

4. Attending continuing education programs for paralegals.

C. CONDUCTING PRO BONO WORK

The Supreme Court has not imposed a mandatory pro bono obligation on attorneys in Kentucky. As provided for in Supreme Court Rule 3.130(6.1), a lawyer is "encouraged" to voluntarily render public interest legal service. The Rule continues by stating that this voluntary service may be satisfied by rendering a minimum of 50 hours of service per year by providing professional services at no fee or a reduced fee to persons of limited means and/or by providing financial support to organizations that provide such legal services.

Many attorneys in Kentucky provide free or reduced rate legal services to persons as part of their regular law practice, and would do so regardless of the language of RPC 6.1.

The KPA, in Standard 10 of its Standards of Conduct, addresses the issue of pro bono services, and is expressly complimentary to the Supreme Court's "suggestion" of pro bono services by attorneys set forth in RPC 6.1. Standard 10 reads, in full:

"Standard 3. DONATED PARALEGAL SERVICE

> A paralegal should voluntarily donate paralegal service as a matter of public service. Paralegals are encouraged to donate 25 hours of service a year. Donated service must be performed under the supervision of a lawyer. Normally, a paralegal should coordinate donated service with that of the employing lawyer. This will permit best use of a paralegal's donated service and assist the supervising lawyer in meeting the Kentucky Bar Association's goal of 50 hours annually of donated lawyer service."

D. REQUIREMENT FOR DISCLOSURE OF TILE

A persistent concern in the Sub-Rules set out in SCR 3.700, is that the paralegal disclose his or her paralegal status when engaging in paralegal functions.

Sub-Rule 2(A) provides that one of the requirements so that the paralegal's actions does not constitute the unauthorized practice of law, is that the "client understands that the paralegal is not a lawyer."

The issue of the attorney's stationary is addressed in Sub-Rule 6:

> "The letterhead of a lawyer may include the name of a paralegal where the paralegal's status is clearly indicated: a lawyer may permit his name to be included in a paralegal's business card, provided that the paralegal's status is clearly indicated."

Lastly, Sub-Rule 7 requires a disclosure to a client, the Court and/or an administrative agency, another attorney or the public generally. This Sub-Rule reads, in full:

> "A lawyer shall require a paralegal, when dealing with the client, to disclose at the outset that he is not a lawyer. A lawyer shall also require such a disclosure when the

> paralegal is dealing with a Court, administrative agency, attorney or the public, if there is any reason for their believing that a paralegal is a lawyer or is associated with a lawyer."

Although Sub-Rule 7 appears to compel disclosure only if there is some reason for a Court or administrative agency to believe that the paralegal is a lawyer, the Commentary to Sub-Rule 7 emphasizes that there is an affirmative obligation on the paralegal to disclose their status. The Commentary notes that if a paralegal appears before an administrative agency or a Court where a lay person is entitled to represent a party, the paralegal should nevertheless disclose his status as a paralegal to the tribunal.

The KBA, in KBA U-47, emphasized the need for the paralegal to make it clear, when dealing with a client, that the paralegal is not a lawyer.

Standard C of the KPA's Standards of Conduct provides, in part, that "it shall be made clear to a client that a paralegal is not a lawyer." This same concept of disclosure is reflected in Rule 1.7 of the NFPA's Model of Disciplinary Rules, and Canon 5 of the NALA's Code of Ethics and Professional Responsibility.

E. PRECAUTIONS TO TAKE WHEN ASSISTING A CLIENT WITHOUT AN ATTORNEY PRESENT

Occasionally, the investigative function of the practice of law and similar matters regarding client contacts which occur outside of the attorney's office, frequently expose the paralegal to client contact without the attorney being present. This issue may also arise in situations where the client comes to the attorney's office to provide information, such as in a bankruptcy case in a bankruptcy law practice, or a personal injury matter in a personal

injury law case, and the attorney is not present when the paralegal meets with the client. In such instances, a number of dangers may arise if the paralegal is not cautious. Client confusion as to the paralegal's status, the client's questions seeking legal advice, and related matters, may cause a problem unless the paralegal appropriately confers with the attorney in relation to the meeting with the client.

The Supreme Court, in Sub-Rule 2(B) of SCR 3.700, generally requires that the attorney supervise the paralegal in the performance of the paralegal's duties.

The KBA expressly addressed this issue in KBA U-47. In that Opinion, the issue was the ethical duties and responsibilities of an attorney when the attorney's paralegal is outside of the office talking to clients and the paralegal's supervising attorney is not present. In particular, the supervising attorney's question was whether the paralegal would be engaged in the unauthorized practice of law if:

1. It was made clear that the paralegal was not a lawyer;

2. The lawyer discusses specific issues with the paralegal both before the paralegal/client discussion and afterwards;

3. The attorney accepts full responsibility for the paralegal's actions and advice.

The KBA, in KBA U-47, concluded that the paralegal under such a situation would not be engaged in the unauthorized practice of law, and would properly be able to meet with the client outside of the office and without the attorney being present. As set forth in that Opinion, the key is the attorney's supervision of the paralegal's actions.