

**KENTUCKY BAR ASSOCIATION
RULES OF THE SUPREME COURT OF KENTUCKY**

PRACTICE OF LAW

SCR 3.700 Provisions relating to paralegals

PRELIMINARY STATEMENT: The availability of legal services to the public at a price it can afford is a goal to which the Bar is committed, and one which finds support in Canons 2 and 8 of the Code of Professional Responsibility. The employment of paralegals furnishes a means by which lawyers may expand the public's opportunity for utilization of their services at a reduced cost.

For purposes of this rule, a paralegal is a person under the supervision and direction of a licensed lawyer, who may apply knowledge of law and legal procedures in rendering direct assistance to lawyers engaged in legal research; design, develop or plan modifications or new procedures, techniques, services, processes or applications; prepare or interpret legal documents and write detailed procedures for practicing in certain fields of law; select, compile and use technical information from such references as digests, encyclopedias or practice manuals; and analyze and follow procedural problems that involve independent decisions.

PURPOSE: Rapid growth in the employment of paralegals increases the desirability and necessity of establishing guidelines for the utilization of paralegals by the legal community. This rule is not intended to stifle the proper development and expansion of paralegal services, but to provide guidance and ensure growth in accordance with the Code of Professional Responsibility, statutes, court rules and decisions, rules and regulations of administrative agencies, and opinions rendered by committees on professional ethics and unauthorized practice of law.

While the responsibility for compliance with standards of professional conduct rests with members of the Bar, a paralegal should understand those standards. It is, therefore, incumbent upon the lawyer employing a paralegal to inform him of the restraints and responsibilities incident to the job and supervise the manner in which the work is completed. However, the paralegal does have an independent obligation to refrain from illegal conduct. Additionally, and notwithstanding the fact that the Code of Professional Responsibility is not binding upon lay persons, the very nature of a paralegal's employment imposes an obligation to refrain from conduct which would involve the lawyer in a violation of the Code.

SUB-RULE 1

A lawyer shall ensure that a paralegal in his employment does not engage in the unauthorized practice of law.

SUB-RULE 2

For purposes of this rule, the unauthorized practice of law shall not include any service rendered involving legal knowledge or legal advice, whether representation, counsel or advocacy, in or out of court, rendered in respect to the acts, duties, obligations, liabilities or business relations of the one requiring services where:

- A. The client understands that the paralegal is not a lawyer;
- B. The lawyer supervises the paralegal in the performance of his duties; and
- C. The lawyer remains fully responsible for such representation, including all actions taken or not taken in connection therewith by the paralegal to the same extent as if such representation had been furnished entirely by the lawyer and all such actions had been taken or not taken directly by the lawyer.
- D. The services rendered under this Rule shall not include appearing formally in any court or administrative tribunal except under Sub-rule 3 below, nor shall it include questioning of witnesses, parties or other persons appearing in any legal or administrative action including but not limited to depositions, trials, and hearings.

SUB-RULE 3

For purposes of this Rule 3.700, the unauthorized practice of law shall not include representation before any administrative tribunal or court where such service or representation is rendered pursuant to a court rule or decision which authorizes such practice by nonlawyers.

SUB-RULE 4

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

SUB-RULE 5

A lawyer shall not form a partnership with a paralegal if any part of the partnership's activities consists of the practice of law, nor shall a lawyer share on a proportionate basis, legal fees with a paralegal.

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.

SUB-RULE 7

A lawyer shall require a paralegal, when dealing with a 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 the paralegal is a lawyer or is associated with a lawyer.

HISTORY: Amended by Order 89-1, eff. 8-28-89; prior amendment eff. 1-8-81; adopted eff. 1-1-80

COMMENTARY

Supreme Court

1979:

Sub-rule 1

The Kentucky Constitution, Section 109, creates one Court of Justice for the Commonwealth. Section 116 empowers the Kentucky Supreme Court to promulgate rules of practice and procedure for the Court of Justice. In addition, the Supreme Court has statutory authority to govern the conduct and activity of members of the Bar. KRS 21A.160.

Pursuant to constitutional and statutory authority, the Kentucky Supreme Court has adopted rules which govern the unauthorized practice of law. SCR 3.020 defines the practice of law in general and descriptive terms. SCR 3.470 provides that any attorney who aids another in the unauthorized practice of law shall be guilty of unprofessional conduct. SCR 3.460 delineates the procedure to be followed when a person or entity "not having the right to practice law" engages in the practice of law.

As of January 1, 1978, the American Bar Association Code of Professional Responsibility was accepted as a sound statement of professional conduct for members of the Kentucky Bar Association, with the exception of provisions which conflict with *Bates v. State Bar of Arizona*. SCR 3.130.

Canon 3 of the Code of Professional Responsibility provides that "A lawyer should assist in preventing the unauthorized practice of law." Further, "A lawyer shall not aid a non-lawyer in the unauthorized practice of law." DR 3-101(A). The rationale of this sub-rule may be found in EC 3-1 through EC 3-6 of the Code of Professional Responsibility.

The foregoing authorities demonstrate that paralegals cannot, any more than any other person or entity, engage in the unauthorized practice of law. Members of the Bar who employ paralegals incur a professional responsibility to ensure that their paralegal employees do not transgress the rules governing the practice of law contained in these authorities and thereby involve their employers in violations of their own professional responsibilities. A lawyer may, however, allow a paralegal to perform services involving the practice of law, provided that such services comply with the requirements of Sub-rule 2 and Sub-rule 3.

Sub-rule 2

The Code of Professional Responsibility, in particular EC 3-6, recognizes the value of utilizing the services of paralegals under certain conditions:

"A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal services more economically and efficiently."

Maintaining a "direct relationship" with the client does not preclude a paralegal from meeting with the client nor does it mandate regular and frequent meetings between the lawyer and client. However, when it appears that consultation between the lawyer and the client is necessary, the lawyer should talk directly to the client.

Sub-rule 3

Notwithstanding the restrictions imposed upon nonlawyers with respect to engaging in the practice of law, exceptions exist by virtue of statute, administrative rule or regulation, or court rule or decision. Under certain circumstances, lay representation of parties does not constitute the unauthorized practice of law. For example, the Federal Administrative Procedure Act, Title 5, U.S.C. Section 555(b) authorizes federal administrative agencies to permit nonlawyers to represent parties in proceedings before the agencies. Such lay representation is also provided for in statutes and regulations governing administrative proceedings involving the Public Assistance (A.FDC), Medicaid, and Food Stamp Programs. See, 42 U.S.C. Section 601, Section 602 (1977); 42 U.S.C. Section 1396 (1977); 7 U.S.C. Section 2019 (1977); and the implementing regulations, 45 C.F.R. Section 205.10(a), and 7 C.F.R. Section 271.1(a)(1) (1977).

The Kentucky Department for Human Resources has implemented these federal regulations. Lay representation is specifically provided for in regulations governing hearings and appeals in certain programs. 904 KAR 2:055, Section 1-12.

The United States Supreme Court has held that federal law controls the administration of federal grant-in-aid programs. See, *Ying v. Smith*, 392 U.S. 309, 332-333 (1968); *Rosado v. Wyman*, U.S. 397, 421-422 (1970). Additionally, the court has held that in federally regulated areas, federal statutes and regulations prevail over a state's power to define and regulate the practice of law. See, *Sperry v. Florida*, 373 U.S. 379, 385 (1963); and *Keller v. State Bar of Wisconsin*, 374 U.S. 102 (1963), citing *Sperry*.

Sub-rule 4

This sub-rule reiterates the Code of Professional Responsibility. Canon 4, DR 4-101(D) provides in part that:

"(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client. ..."

This obligation is emphasized in EC 4-2 under Canon 4:

"... It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise

care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved."

Sub-rule 5

This sub-rule is based on the express provisions of DR 3-102(A) and DR 3-103(A) of the Code of Professional Responsibility. In accordance with these provisions, the compensation of a paralegal may not include a percentage of the fees received by his employer, or any remuneration, directly or indirectly, for referring matters of a legal nature to the employer.

DR 3-103(A) provides that: "A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." The rationale is found in EC 3-8: "Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman..... However, "A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement." DR 3-102(A)(3).

This Disciplinary Rule also reflects the rationale of EC 3-8:

"Since a lawyer should not aid or encourage a layman to practice law, he should not ... share legal fees with a layman."

"Profit-sharing retirement plans of a lawyer or law firm which include non-lawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with laymen are permissible since they do not aid or encourage laymen to practice law."

Sub-rule 6

The Code of Professional Responsibility, in particular DR 2-102(A)(4), provides direction concerning the information which may be provided on a lawyer's letterhead. In keeping with the spirit of DR 2-102(A)(4), paralegals may be listed on the letterhead if there is a clear indication of their status, i.e., they are not lawyers. These names should properly be listed under the separate heading of "Paralegals."

A paralegal may have a business card with the lawyer's name or law firm's name on it, provided the status of the paralegal is clearly indicated. It is not necessary that any lawyer's name appear on such business card. The card is designed to identify the paralegal and to state by whom the paralegal is employed. The business card of a paralegal shall be approved, in form and substance, by the lawyer-employer.

Sub-rule 7

A lawyer should instruct a paralegal employee to disclose at the beginning of any dealings with a client that he is not an attorney. Whenever any person dealing with a paralegal has reason to believe that the paralegal is a lawyer or associated with a lawyer, the paralegal shall make clear that he is not a lawyer. Even if a paralegal appears before an administrative agency or court in which a lay person is entitled to represent a party, the paralegal should nevertheless disclose his status to the tribunal. Routine early disclosure of nonlawyer status is necessary to ensure that there will be no misunderstanding as to the responsibilities and role of the paralegal. Disclosure may be made in any way that avoids confusion. Common sense suggests a routine disclosure at the outset of communication.

If a paralegal is designated as the individual in the office of a lawyer or law firm who should be contacted, disclosure of his or her nonlawyer status should be made at the time of such designation.