

Model Guidelines For The Utilization Of Legal Assistant Services

The following advisory guidelines were adopted by the Idaho State Bar membership during the 1992 resolution process. These guidelines are an attempt to identify the proper role of a legal assistant, and to define the lawyer's supervisory role. Because the Model Guidelines are advisory only, they do not conflict with the Idaho Rules of Professional Conduct. There are 10 guidelines, covering a lawyer's supervisory and training responsibilities, the permissible scope of delegation, how legal assistants are held out to clients, the courts and the public, and guidelines for the billing of a legal assistant's time.

Preamble

State courts, bar associations, or bar committees in at least seventeen states have prepared recommendations¹ for the utilization of legal assistant services.² While their content varies, their purpose appears uniform: to provide lawyers with a reliable basis for delegating responsibility for performing a portion of the lawyer's tasks to legal assistants. The purpose of preparing model guidelines is not to contradict the guidelines already adopted or to suggest that other guidelines may be more appropriate in a particular jurisdiction. It is the view of the Standing Committee on Legal Assistants of the American Bar Association, however, that a model set of guideline for the utilization of legal assistant services may assist many states in adopting or revising such guidelines. The Standing Committee is of the view that guidelines will encourage lawyers to utilize legal assistant services effectively and promote the growth of the legal assistant profession.³ In undertaking this project, the Standing Committee has attempted to state guidelines that conform with the American Bar Association's Model Rules of Professional Conduct, decided authority, and contemporary practice. Lawyers, of course, are to be first directed by Rule 5.3 of the Model Rules in the utilization of legal assistant services, and nothing contained in these guidelines is intended to be inconsistent with that rule. Specific ethical considerations in particular states, however, may require modification of these guidelines before their adoption. In the commentary after each guideline, we have attempted to identify the basis for the guideline and any issues of which we are aware that the guideline may present; those drafting such guidelines may wish to take them into account.

Guideline 1: A lawyer is responsible for all of the professional actions of a legal assistant performing legal assistant services at the lawyer's direction and should take reasonable measures to ensure that the legal assistant's conduct is consistent with the lawyer's obligations under the ABA Model Rules of Professional Conduct.

Comment to Guideline 1:

An attorney who utilizes a legal assistant's services is responsible for determining that the legal assistant is competent to perform the tasks assigned, based on the legal

assistant's education, training, and experience, and for ensuring that the legal assistant is familiar with the responsibilities of attorneys and legal assistants under the applicable rules governing professional conduct.⁴

Under principles of agency law and rules governing the conduct of attorneys, lawyers are responsible for the actions and the work product of the non-lawyers they employ. Rule 5.3 of the Model Rules⁵ requires that partners and supervising attorneys ensure that the conduct of non-lawyer assistants is compatible with the lawyer's professional obligations. Several state guidelines have adopted this language. *E.g.*, Commentary to Illinois Recommendation (A), Kansas Guideline III(a), New Hampshire Rule 35, Sub-Rule 9, and North Carolina Guideline 4. Ethical Consideration 3-6 of the Model Code encouraged lawyers to delegate tasks to legal assistants provided the lawyer maintained a direct relationship with the client, supervised appropriately, and had complete responsibility for the work product. The adoption of Rule 5.3, which incorporates these principles, implicitly reaffirms this encouragement.

Several states have addressed the issue of the lawyer's ultimate responsibility for work performed by subordinates. For example, Colorado Guideline 1.c, Kentucky Supreme Court Rule 3.700, Sub-Rule 2.C, and Michigan Guideline I provide: "The lawyer remains responsible for the actions of the legal assistant to the same extent as if such representation had been furnished entirely by the lawyer and such actions were those of the lawyer." New Mexico Guideline X states "[the] lawyer maintains ultimate responsibility for and has an ongoing duty to actively supervise the legal assistant's work performance, conduct and product." Connecticut Recommendation 2 and Rhode Island Guideline III state specifically that lawyers are liable for malpractice for the mistakes and omissions of their legal assistants.

Finally, the lawyer should ensure that legal assistants supervised by the lawyer are familiar with the rules governing attorney conduct and that they follow those rules. *See* Comment to Model Rule 5.3; Illinois Recommendation (A)(5), New Hampshire Supreme Court rule 35, Sub-Rule 9, and New Mexico, Statement of Purpose; *see also* NALA's Model Standards and Guidelines for the Utilization of Legal Assistants, guidelines IV, V, and VIII (1985, revised 1990) (hereafter "NALA Guidelines").

The Standing Committee and several of those who have commented upon these Guidelines regard Guideline 1 as a comprehensive statement of general principle governing

lawyers who utilize legal assistant services in the practice of law. As such it, in effect, is a part of each of the remaining Guidelines.

Guideline 2: Provided the lawyer maintains responsibility for the work product, a lawyer may delegate to a legal assistant any task normally performed by the lawyer except those tasks proscribed to one not licensed as a lawyer by statute, court rule, administrative rule or regulation, controlling authority, the ABA Model Rules of Professional Conduct, or these Guidelines.

Comment to Guideline 2:

The essence of the definition of the term legal assistant adopted by the ABA Board of Governors in 1986 is that, so long as appropriate supervision is maintained, many tasks normally performed by lawyers may be delegated to legal assistants. Of course, Rule 5.5 of the Model Rules, DR 3-101 of the Model Code, and most states specifically prohibit lawyers from assisting or aiding a non-lawyer in the unauthorized practice of law. Thus, while appropriate delegation of tasks to legal assistants is encouraged, the lawyer may not permit the legal assistant to engage in the “practice of law.” Neither the Model Rules nor the Model Code define the “practice of law.” EC 3-5 under the Model Code gave some guidance by equating the practice of law to the application of the professional judgment of the lawyer in solving clients’ legal problems. Further, ABA Opinion 316 (1967) states: “A lawyer can employ lay secretaries, lay investigators, lay detectives, lay researchers, accountants, lay scribes, nonlawyer draftsmen or nonlawyer researchers. In fact, he may employ nonlawyers to do any task for him except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal proceedings as part of the judicial process, so long as it is he who takes the work and vouches for it to the client and becomes responsible for it to the client.”

Most state guidelines specify that legal assistants may not appear before courts, administrative tribunals, or other adjudicatory bodies unless their rules authorize such appearances; may not conduct depositions; and may not give legal advice to clients. E.g., Connecticut Recommendation 4; Fla. EC 3-6 (327 So.2d at 16); and Michigan Guideline II. Also see NALA Guidelines IV and VI. But it is also important to note that, as some guidelines have recognized, pursuant to federal or state statute legal assistants are permitted to provide direct client representation in certain administrative proceedings. E.g., South Carolina Guideline II. While this does not obviate the attorney’s responsibility for the legal assistant’s work, it does change the nature of the attorney supervision of the legal assistant. The opportunity to use such legal assistant services has particular benefits to legal services programs and does not violate Guideline 2. See generally ABA Standards for Providers of Civil Legal Services to the Poor, Std. 6.3, at 6.17-6.18 (1986).

The Model Rules emphasize the importance of appropriate delegation. The key to appropriate delegation is proper supervision, which includes adequate instruction when assigning projects, monitoring of the project, and review of the completed project. The Supreme Court of Virginia upheld a malpractice verdict against a lawyer based in part on negligent actions of a legal assistant in performing tasks that evidently were properly delegable. Musselman v. Willoughby Corp., 230 Va. 337, 337 S.E.2d 724 (1985). See also C. Wolfram, Modern Legal Ethics (1986), at 236, 896. All state guidelines refer to the requirement that the lawyer “supervise” legal assistants in the performance of their duties. Lawyers should also take care in hiring and choosing a legal assistant to work on a specific project to ensure that the legal assistant has the education, knowledge, and ability necessary to perform the delegated tasks competently. See Connecticut Recommendation 14, Kansas Standards I, II, and III, and New Mexico Guideline VIII. Finally, some states describe appropriate delegation and review in terms of the delegated work losing its identity and becoming “merged” into the work product of the attorney. See Florida EC 3-6 (327 So.2d at 16).

Legal assistants often play an important role in improving communication between the attorney and the client. EC 3-6 under the Model Code mentioned three specific kinds of tasks that legal assistants may perform under appropriate lawyer supervision: factual investigation and research, legal research, and the preparation of legal documents. Some states delineate more specific tasks in their guidelines, such as attending client conferences, corresponding with and obtaining information from clients, handling witness execution of documents, preparing transmittal letters, maintaining estate/guardianship trust accounts, etc. See, e.g., Colorado (lists of specialized functions in several areas follow guidelines); Michigan, Comment to Definition of Legal Assistant; New York, Specialized Skills of Legal Assistants; Rhode Island Guideline II; and NALA Guideline IX. The two-volume Working with Legal Assistants, published by the Standing Committee in 1982, attempted to provide a general description of the types of tasks that may be delegated to legal assistants in various practice areas.

There are tasks that have been specifically prohibited in some states, but that may be delegated in others. For example, legal assistants may not supervise will executions or represent clients at real estate closings in some jurisdictions, but may in others. Compare Connecticut Recommendation 7 and Illinois State Bar Association Position Paper on Use of Attorney Assistants in Real Estate Transactions (May 16, 1984), which proscribe legal assistants conducting real estate closings, with Georgia “real estate job description,” Florida Professional Ethics Committee Advisory Opinion 89-5 (1989), and Missouri, Comment to Guideline I, which permit legal assistants to conduct real estate closings. Also compare Connecticut Recommendation 8 (prohibiting attorneys from authorizing legal assistants to supervise will executions) with Colorado “estate planning job description,” Georgia “estate, trusts, and wills job description,” Missouri, Comment to

Guideline I, and Rhode Island Guideline II (suggesting that legal assistants may supervise the execution of wills, trusts, and other documents).

Guideline 3:

A lawyer 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.

Responsibility for a legal opinion rendered to a client.

Comment to Guideline 3:

The Model Rules and most state codes require that lawyers communicate with their clients in order for clients to make well-formed decisions about their representation and resolution of legal issues. Model Rule 1.4. Ethical Consideration 3-6 under the Model Code emphasized that “delegation [of legal tasks to nonlawyers] 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.” (Emphasis added). Accordingly, most state guidelines also stress the importance of a direct attorney-client relationship. See Colorado Guideline 1, Florida EC 3-6, Illinois Recommendation (A)(1), Iowa EC 3-6(2), and New Mexico Guideline IV. The direct personal relationship between client and lawyer is necessary to the exercise of the lawyer’s trained professional judgment.

An essential aspect of the lawyer-client relationship is the agreement to undertake representation and the related fee arrangement. The Model Rules and most states require that fee arrangements be agreed upon early on and be communicated to the client by the lawyer, in some circumstances in writing. Model Rule 1.5 and Comments. Many state guidelines prohibit legal assistants from “setting fees” or “accepting cases.” See, e.g., Colorado Guideline 1 and NALA Guideline VI. Connecticut recommends that legal assistants be prohibited from accepting or rejecting cases or setting fees “if these tasks entail any discretion on the part of the paralegals.” Connecticut Recommendation 9.

EC 3-5 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.” Clients are entitled to their lawyers’ professional judgment and opinion. Legal assistants may, however, be authorized to communicate legal advice so long as they do not interpret or expand on that advice. Typically, state guidelines phrase this prohibition in terms of legal assistants being forbidden from “giving legal advice” or “counseling clients about legal matters.” See, e.g., Colorado Guideline 2, Connecticut Recommendation 6, Florida DR 3-104, Iowa EC 3-6(3), Kansas Guideline I, Kentucky Sub-Rule 2, New Hampshire Rule 35, Sub-Rule 1, Texas Guideline I,

and NALA Guideline VI. Some states have more expansive wording that prohibits legal assistants from engaging in any activity that would require the exercise of independent legal judgment. Nevertheless, it is clear that all states, as well as the Model Rules, encourage direct communication between clients and a legal assistant insofar as the legal assistant is performing a task properly delegated by a lawyer. It should be noted that a lawyer who permits a legal assistant to assist in establishing the attorney-client relationship, communicating a fee, or preparing a legal opinion is not delegating responsibility for those matters and, therefore, may be complying with this guideline.

Guideline 4: It is the lawyer’s responsibility to take reasonable measures to ensure that clients, courts, and other lawyers are aware that a legal assistant, whose services are utilized by the lawyer in performing legal services, is not licensed to practice law.

Comment to Guideline 4:

Since, in most instances, a legal assistant is not licensed as a lawyer, it is important that those with whom the legal assistant deals are aware of that fact. Several state guidelines impose on the lawyer responsibility for instructing a legal assistant whose services are utilized by the lawyer to disclose the legal assistant’s status in any dealings with a third party. See e.g., Michigan Guideline III, part 5, New Hampshire Rule 35, Sub-Rule 8, and NALA Guideline V. While requiring the legal assistant to make such disclosure is one way in which the attorney’s responsibility to third parties may be discharged, the Standing Committee is of the view that it is desirable to emphasize the lawyer’s responsibility for the disclosure and leave to the lawyer the discretion to decide whether the lawyer will discharge that responsibility by direct communication with the client, by requiring the legal assistant to make the disclosure, by a written memorandum, or by some other means. Although in most initial engagements by a client it may be prudent for the attorney to discharge this responsibility with a writing, the guideline requires only that the lawyer recognize the responsibility and ensure that it is discharged. Clearly, when a client has been adequately informed of the lawyer’s utilization of legal assistant services, it is unnecessary to make additional formalistic disclosures as the client retains the lawyer for other services.

Most state guidelines specifically endorse legal assistants signing correspondence so long as their status as a legal assistant is indicated by an appropriate title. E.g., Colorado Guideline 2; Kansas, Comment to Guideline IX; and North Carolina Guideline 9; also see ABA Informal Opinion 1367 (1976). The comment to New Mexico Guideline XI warns against the use of the title “associate” since it may be construed to mean associate-attorney.

Guideline 5: A lawyer may identify legal assistants by name and title on the lawyer's letterhead and on business cards identifying the lawyer's firm.

Comment to Guideline 5:

Under Guideline 4, above, an attorney who employs a legal assistant has an obligation to ensure that the status of the legal assistant as a non-lawyer is fully disclosed. The primary purpose of this disclosure is to avoid confusion that might lead someone to believe that the legal assistant is a lawyer. The identification suggested by this guideline is consistent with that objective, while also affording the legal assistant recognition as an important part of the legal services team.

Recent ABA Informal Opinion 1527 (1989) provides that non-lawyer support personnel, including legal assistants, may be listed on a law firm's letterhead and reiterates previous opinions that approve of legal assistants having business cards. See also ABA Informal Opinion 1185 (1971). The listing must not be false or misleading and "must make it clear that the support personnel who are listed are not lawyers."

Nearly all state guidelines approve of business cards for legal assistants, but some prescribe the contents and format of the card. E.g., Iowa Guideline 4 and Texas Guideline VIII. All agree the legal assistant's status must be clearly indicated and the card may not be used in a deceptive way. New Hampshire Supreme Court Rule 7 approves the use of business cards so long as the card is not used for unethical solicitation.

Some states do not permit attorneys to list legal assistants on their letterhead. E.g., Kansas Guideline VIII, Michigan Guideline III, New Hampshire Rule 35, Sub-Rule 7, New Mexico Guideline XI, and North Carolina Guideline 9. Several of these states rely on earlier ABA Informal Opinions 619 (1962), 845 (1965), and 1000 (1977), all of which were expressly withdrawn by ABA Informal Opinion 1527. These earlier opinions interpreted the predecessor Model Code and DR 2-102 (A), which, prior to Bates v. State Bar of Arizona, 433 U.S. 350 (1977), had strict limitations on the information that could be listed on letterheads. States which do permit attorneys to list names of legal assistants on their stationery, if the listing is not deceptive and the legal assistant's status is clearly identified, include: Arizona Committee on Rules of Professional Conduct Formal Opinion 3/90 (1990); Connecticut Recommendation 12; Florida Professional Ethics Committee Advisory Opinion 86-4 (1986); Hawaii, Formal Opinion 78-8-19 (1978, as revised 1984); Illinois State Bar Association Advisory Opinion 87-1 (1987); Kentucky Sub-Rule 6: Mississippi State Bar Ethics; Committee Opinion No. 93 (1984); Missouri Guideline IV; New York State Bar Association Committee on Professional Ethics Opinion 500 (1978); Oregon, Ethical Opinion No. 349 (1977); and Texas, Ethics Committee Opinion 436 (1983). In light of the United States Supreme Court opinion in Peel v. Attorney Registration and Disciplinary Commission of Illinois, ___ U.S. ___, 110 S. Ct. 2281 (1990), it may be that a restriction on letterhead

identification of legal assistants that is not deceptive and clearly identifies the legal assistant's status violates the First Amendment rights of the lawyer.

Guideline 6: It is the responsibility of a lawyer to take reasonable measures to ensure that all client confidences are preserved by a legal assistant.

Comment to Guideline 6:

A fundamental principle underlying the free exchange of information in a lawyer-client relationship is that the lawyer maintain the confidentiality of information relating to the representation. "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. 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." EC 4-2, Model Code.

Rule 5.3 of the Model Rules requires "a lawyer who has direct supervisory authority over the nonlawyer [to] make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." The Comment to Rule 5.3 makes it clear that lawyers should give legal assistants "appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to the representation of the client." DR 4-101(D) under the Model Code provides that: "A lawyer shall exercise reasonable care to prevent his employees, associates and others whose services are utilized by him from discharging or using confidences or secrets of a client..."

It is particularly important that the lawyer ensure that the legal assistant understands that all information concerning the client, even the mere fact that a person is a client of the firm, may be strictly confidential. Rule 1.6 of the Model Rules expanded the definition of confidential information "...not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."⁶ It is therefore the lawyer's obligation to instruct clearly and to take reasonable steps to ensure the legal assistant's preservation of client confidences. Nearly all states that have guidelines for the utilization of legal assistants require the lawyer "to instruct legal assistants concerning client confidences" and "to exercise care to ensure that legal assistants comply" with the Code in this regard. Even if the client consents to divulging information, this information must not be used to the disadvantage of the client. See, e.g., Connecticut Recommendation 3; New Hampshire Rule 35, Sub-Rule 4; NALA Guideline V.

Guideline 7: A lawyer 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 lawyer.

Comment to Guideline 7:

A lawyer must make “reasonable efforts to ensure that [a] legal assistant’s conduct is compatible with the professional obligations of the lawyer.” Model Rule 5.3. These professional obligations include the duty to exercise independent professional judgment behalf of a client, “free of compromising influences and loyalties.” ABA Model Rules 1.7 through 1.13. Therefore, legal assistants should be instructed to inform the supervising attorney of any interest that could result in a conflict of interest or even give the appearance of a conflict. The guideline intentionally speaks to other employment rather than only past employment, since there are instances where legal assistants are employed by more than one law firm at the same time. The guideline’s reference to “other interests” is intended to include personal relationships as well as instances where a legal assistant may have a financial interest (i.e., as stockholder, trust beneficiary or trustee, etc.) that would conflict with the client’s in the matter in which the lawyer has been employed.

“Imputed Disqualification Arising from Change in Employment by Nonlawyer Employee,” ABA Informal Opinion 1526 (1988), defines the duties of both the present and former employing lawyers and reasons that the restrictions on legal assistants’ employment should be kept to “the minimum necessary to protect confidentiality” in order to prevent legal assistants from being forced to leave their careers, which “would disprove clients as well as the legal profession.” The Opinion describes the attorney’s obligations (1) to caution the legal assistant not to disclose any information and (2) to prevent the legal assistant from working on any matter on which the legal assistant worked for a prior employer or respecting which the employee has confidential information.

If a conflict is discovered, it may be possible to “wall” the legal assistant from the conflict area so that the entire firm need not be disqualified and the legal assistant is effectively screened from information concerning the matter. The ABA has taken the position that what historically has been described as a “Chinese wall” will allow nonlawyer personnel (including legal assistants) who are in possession of confidential client information to accept employment with a law firm opposing the former client so long as the wall is observed and effectively screens the nonlawyer from confidential information. ABA Informal Opinion 1526 (1988). See also Tennessee Formal Ethics Opinion 89-F-118 (March 10, 1989). The implication of this Informal Opinion is that if a wall is not in place, the employer may be disqualified from representing either party to the controversy. One court has so held. In re: Complex Asbestoses Litigation, No. 828684 (San Francisco Superior Court, September 19, 1989).

It is not clear that a wall will prevent disqualification in the case of a lawyer employed to work for a law firm representing a client with an adverse interest to a client of the

lawyer’s former employer. Under Model Rule 1.10, when a lawyer moves to a firm that represents an adverse party in a matter in which the lawyer’s former firm was involved, absent a waiver by the client, the new firm’s representation may continue only if the newly employed lawyer acquired no protected information and did not work directly on the matter in the former employment. The new Rules of Professional Conduct in Kentucky and Texas (both effective on January 1, 1990) specifically provide for disqualification. Rule 1.10(b) in the District of Columbia, which became effective January 1, 1991, does so as well. The Sixth Circuit, however, has held that the wall will effectively insulate the new firm from disqualification if it prevents the new lawyer-employee from access to information concerning the client with the adverse interest. Manning v. Waring, Cos, James, Sklar & Allen, 849 F.2d 222 (6th Cir. 1988). [As a result of the Sixth Circuit opinion, Tennessee revised its formal ethics opinion, which is cited above, and now applies the same rule to lawyers, legal assistants, law clerks, and legal secretaries.] See generally NFPA, “The Chinese Wall--Its application to Paralegals” (1990).

The states that have guidelines that address the legal assistant conflict of interest issue refer to the lawyer’s responsibility to ensure against personal, business or social interests of the legal assistant that would conflict with the representation of the client or impinge on the services rendered to the client. E.g., Kansas Guideline X, New Mexico Guideline VI, and North Carolina Guideline 7. Florida Professional Ethics Opinion 86-5 (1986) discusses a legal assistant’s move from one firm to another and the obligations of each not to disclose confidences. See also Vermont Ethics Opinion 85-8 (1985) (a legal assistant is not bound by the Code of Professional Responsibility and, absent an absolute waiver by the client, the new firm should not represent client if legal assistant possessed confidential information from old firm).

Guideline 8: A lawyer may include a charge for the work performed by a legal assistant in setting a charge for legal services.

Comment to Guideline 8:

The U.S. Supreme Court in Missouri v. Jenkins, 491 U.S.274 (1989), held that in setting a reasonable attorney’s fee under 28 U.S.C. § 1988, a legal fee may include a charge for legal assistant services at “market rates” rather than “actual cost” to the attorneys. This decision should resolve any question concerning the propriety of setting a charge for legal services based on work performed by a legal assistant. Its rationale favors setting a charge based on the “market” rate for such services, rather than their direct cost to the lawyer. This result was recognized by Connecticut Recommendation 11, Illinois Recommendation D, and Texas Guideline V prior to the Supreme Court decision. See also Fla. Stat. Ann. § 57.104 (1991 Supp.) (adopted in 1987 and permitting consideration of

legal assistant services in computing attorney's fees) and Fla. Stat. Ann. § 744.108 (1991 Supp.) (adopted in 1989 and permitting recovery of "customary and reasonable charges for work performed by legal assistants" as fees for legal services in guardianship matters).

It is important to note, however, that Missouri v. Jenkins does not abrogate the attorney's responsibilities under Model Rule 1.5 to set a reasonable fee for legal services and it follows that those considerations apply to a fee that includes a fee for legal assistant services. Accordingly, the effect of combining a market rate charge for the services of lawyers and legal assistants should, in most instances, result in a lower total cost for the legal service than if the lawyer had performed the service alone.

Guideline 9: A lawyer may not split legal fees with a legal assistant nor pay a legal assistant for the referral of legal business. A lawyer 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 lawyer's practice.

Comment to Guideline 9:

Model Rule 5.4 and DR 3-102(A) and 3-103(A) under the Model Code clearly prohibit fee "splitting" with legal assistants, whether characterized as splitting of contingent fees, "forwarding" fees, or other sharing of legal fees. Virtually all guidelines adopted by state bar associations have continued this prohibition in one form or another.⁷ It appears clear that 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.

Having stated this prohibition, however, the guideline attempts to deal with the practical consideration of how a legal assistant properly may be compensated by an attorney or law firm. The linchpin of the prohibition seems to be the advance agreement of the lawyer so "split" a fee based on a pre-existing contingent arrangement.⁸ There is no general prohibition against a lawyer who enjoys a particularly profitable period recognizing the contribution of the legal assistant to that profitability with a discretionary bonus. Likewise, a lawyer engaged in a particularly profitable specialty of legal practice is not prohibited from compensating the legal assistant who aids materially in that practice more handsomely than the compensation generally awarded to legal assistants in that geographic area who work in law practices that are less lucrative. Indeed, any effort to fix a compensation level for legal assistants and prohibit greater compensation would appear to violate the federal antitrust laws. See, e.g., Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

Guideline 10: A lawyer who employs a legal assistant should facilitate the legal assistant's participation in appropriate continuing education and pro bono publico activities.

Comment to Guideline 10:

While Guideline 10 does not appear to have been adopted in the guidelines of any state bar association, the Standing Committee on Legal Assistants believes that its adoption would be appropriate.⁹ For many years the Standing Committee on Legal Assistants has advocated that the improvement of formal legal assistant education will generally improve the legal services rendered by lawyers employing legal assistants and provide a more satisfying professional atmosphere in which legal assistants may work. See e.g., ABA, Board of Governors, Policy on Legal Assistant Licensure and/or Certification, Statement 4 (February 6, 1986); ABA, Standing Committee on Legal Assistants, "Position Paper on the Question of Legal Assistant Licensure or Certification" (December 10, 1985), at 6 and Conclusion 3. Recognition of the employing lawyer's obligation to facilitate the legal assistant's continuing professional education is, therefore, appropriate because of the benefits to both the law practice and the legal assistants and is consistent with the lawyer's own responsibility to maintain professional competence under Model Rule 1.1. See also EC 6-2 of the Model Code.

The Standing Committee is of the view that similar benefits will accrue to the lawyer and legal assistant if the legal assistant is included in the pro bono publico legal services that a lawyer has a clear obligation to provide under Model Rule 6.1 and, where appropriate, the legal assistant is encouraged to provide such services independently. The ability of a law firm to provide more pro bono publico services will be enhanced if legal assistants are included. Recognition of the legal assistant's role in such services is consistent with the role of the legal assistant in the contemporary delivery of legal services generally and is consistent with the lawyer's duty to the legal profession under Canon 2 of the Model Code.

The Standing Committee on Legal Assistants of the American Bar, May 1991.

ENDNOTES:

¹ An appendix identifies the guidelines, court rules, and recommendations that were reviewed in drafting these Model Guidelines.

² On February 6, 1986, the ABA Board of Governors approved the following definition of the term "legal assistant":

A legal assistant is a person, qualified through education, training, or work experience, who is employed or retained by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the ultimate direction and supervision of an attorney, of specifically delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.

In some contexts, the term “paralegal” is used interchangeably with the term legal assistant.

³ While necessarily mentioning legal assistant conduct, lawyers are the intended audience of these Guidelines. The Guidelines, therefore, are addressed to lawyer conduct and not directly to the conduct of the legal assistant. Both the National Association of Legal Assistants (NALA) and the National Federation of Paralegal Associations (NFPA) have adopted guidelines of conduct that are directed to legal assistants. See NALA, “Code of Ethics and Professional Responsibility of the National Association of Legal Assistants, Inc.” (adopted May 1975, revised November 1979 and September 1988); NFPA, “Affirmation of Responsibility” (adopted 1977, revised 1981).

⁴ Attorneys, of course, are not liable for violations of the ABA Model Rules of Professional Conduct (“Model Rules”) unless the Model Rules have been adopted as the code of professional conduct in a jurisdiction in which the lawyer practices. They are referenced in this model guideline for illustrative purposes; if the guideline is to be adopted, the reference should be modified to the jurisdiction’s rules of professional conduct.

⁵ The Model Rules were first adopted by the ABA House of Delegates in August of 1983. Since that time many states have adopted the Model Rules to govern the professional conduct of lawyers licensed in those states. Since a number of states still utilize a version of the Model Code of Professional Responsibility (“Model Code”), which was adopted by the House of Delegates in August of 1969, however, these comments will refer to both the Model rules and the predecessor Model Code (and to the Ethical Considerations and Disciplinary Rules found under the canons in the Model Code).

⁶ Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct (1990) provides a different formulation, which is equally expansive:

“Confidential information” includes both “privileged information” and “unprivileged client information.” “Privileged information” refers to the information of a client protected by the lawyer-client privilege of Rule 503 of the Texas Rules of Evidence or of Rule 503 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 501 of the Federal Rules of Evidence for United States Courts and Magistrates. “Unprivileged client information” means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.

⁷ Connecticut Recommendation 10; Illinois Recommendation D; Kansas Guideline VI; Kentucky Supreme Court Rule 3.700, sub-rule 5; Michigan Guideline III, part 2; Missouri Guideline II; New Hampshire Rule 35, Sub-Rules 5 and 6; New Mexico Guideline IX; Rhode Island Guideline IX; Rhode Island Guideline VIII and IX; South Carolina Guideline V; Texas Guideline V.

⁸ In its Rule 5.4, which will become effective on January 1, 1991, the District of Columbia will permit lawyers to form legal service partnerships that include non-lawyer participants. Comments 5 and 6 to that rule, however, state that the term “nonlawyer participants” should not be confused with the term “nonlawyer assistants” and that “[n]onlawyer assistants under Rule 5.3 do not have managerial authority or financial interests in the organization.”

⁹ While no state has apparently adopted a guideline similar to Model Guideline 10, parts 4 and 5 of NALA Guideline VIII suggest similar requirements. Sections III and V of NFPA’s “Affirmation of Professional Responsibility” recognize a legal assistant’s obligations to “maintain a high level of competence” (which “is achieved through continuing education...”) and to “serve the public interest.” NFPA has also published a guide to assist legal assistant groups in developing public service projects. See NFPA, “Pro Bono Publico (for the Good of the People)” (1987).