INTRODUCTION

Ethical and unethical behavior exist in every profession. The role of legal ethics is to identify and remove inappropriate conduct from the legal profession. Honest legal practitioners strive to avoid ethical dilemmas. Unscrupulous persons are culled and expelled through disciplinary sanction from state supreme courts or disciplinary agencies.

This chapter discusses this extremely important aspect of paralegal work, namely, the real-world ethical concerns one encounters daily as a legal assistant. It is no exaggeration to say that legal ethics may be the most important area of study in the paralegal field. This chapter includes:

- The NALAs Code of Ethics and Model Standards applicable to paralegals
- The NFPA’s Model Code and Model Rules applicable to paralegals
- The ABA’s Code of Professional Responsibility and Model Rules applicable to paralegals

Hypothetical Problems
- Further Ethics Information
- What Paralegals Can and Cannot Do
THE NALA CODE OF ETHICS
AND MODEL STANDARDS

The National Association of Legal Assistants, Inc. (NALA) promulgated an ethics code designed specifically for paralegals. The Code of Ethics was issued in 1977. The NALA updated and improved this code in 1984 with its Model Standards and Guidelines for Utilization of Legal Assistants, which was revised in 1991, 1997, and 2005. The NALA guidelines can be found at http://www.nala.org/.

Restricted Duties
Paralegals shall not perform any duties that only lawyers may fulfill, nor shall paralegals perform activities that attorneys are prohibited from doing. For instance, paralegals may not engage in the unauthorized practice of law. Only attorneys licensed and in good standing with a state's bar licensing authority (usually the state bar or the state supreme court) may practice law. As explained in the Model Standards, this includes providing legal advice to clients, representing clients in court proceedings, contacting adverse parties on a client’s behalf, establishing legal fees, accepting clients’ cases on behalf of attorneys or the law firm, and preparing legal documents without attorney supervision.

Paralegal Representation before Administrative Agencies
Many state and federal administrative agencies permit nonlawyers, including paralegals, to represent parties appearing before the agencies in adjudicatory or rulemaking hearings. Such representation is not the unauthorized practice of law, because it is expressly permitted by administrative rules and regulations.

Some state courts refuse to recognize such administrative authorization, and there are common law decisions declaring nonlawyer client representation before administrative agencies, such as the Social Security Administration, to constitute unauthorized legal practice. These courts argue that only the judicial branch has authority to regulate the practice of law. State constitutions or, more often, state statutes vest this regulatory power most frequently in the state supreme court, which might delegate supervisory authority to a state bar agency. In the case of legislative declarations, the state legislature may simply amend its statutes, excluding administrative agency party representation regulations from the courts’ authority. However, when a state constitution plainly roots regulatory power over law practice in the courts, the legislature must pursue constitutional amendment procedures. This is a cumbersome process.

In most instances, however, the courts simply look the other way, allowing nonattorneys to represent clients before administrative agencies that have expressed a willingness to accept such circumstances.
Lay Representation in Justice or Small Claims Courts

Many state statutes permit nonlawyers to represent litigants before justices of the peace (commonly called justice courts) or small claims courts. The common law in most states narrowly construes such statutes, indicating that such lay representation is intended for (1) “one-time” appearances, (2) family or business employee representation, or (3) civil cases only. Thus, paralegals who attempt to carve themselves a niche by representing clients in justice or small claims courts on a regular basis would, under these courts’ interpretations, engage in unauthorized law practice.

Supervised Duties

Paralegals may perform any delegated tasks supervised by a licensed attorney. The supervising lawyer must remain directly responsible to the client, maintaining or establishing the attorney/client relationship and assuming full accountability for the legal services supplied. This provision permits paralegals to conduct initial consultations with clients, in which they gather factual information from the client. It also allows paralegals to complete legal research and writing tasks, investigate cases, compile evidence, arrange (but not conduct) discovery, and prepare materials for trial. However, at each phase, the attorney must guide and direct the paralegal’s efforts.

A paralegal should disclose his or her status as a paralegal (rather than a lawyer) at the outset of any professional relationship with clients, or when dealing with other attorneys, courts, administrative agencies, or the general public. The Model Standards also emphasize the supervising attorneys’ duty to monitor and train paralegals.

No Independent Legal Judgment

A paralegal may perform services for a lawyer, provided that those services do not require the exercise of independent legal judgment, and provided that the attorney supervises the paralegal’s efforts. Paralegals should act prudently so that they can determine the extent to which they may assist a client without an attorney’s presence. This is especially important during fact-gathering client consultations or when discussing details with clients on the telephone.

Protecting Client Confidences

Paralegals must protect client confidences. It is unethical for a paralegal to violate any statute controlling privileged communications. Examples of privileged communications include discussions between attorney and client, physician and patient, husband and wife, clergy and parishioner, and counselor and patient.
Clearly, when clients speak with attorneys and their staff, there is an expectation that confidences and disclosures shall remain inside the office. The rule of thumb for paralegals, like all law-office staff, is simply not to discuss sensitive client information with anyone. One should always consult with the supervising attorney to see if particular client information is privileged.

**Avoiding the Appearance of Impropriety**
Paralegals should avoid conduct that would be considered, or even simply appear to be, unethical. An example of this would be if a paralegal working for a government agency accepted a free lunch from an employer she was investigating.

**Integrity and Competency**
Paralegals shall maintain their integrity and a high degree of competency. This may require paralegals to complete continuing legal education, as most states now require of attorneys. Paralegals should “strive for perfection through education” to better assist the legal profession and the public.

**Lawyer Ethics Rule Application**
The Model Standards include paralegals within the coverage of the American Bar Association’s (ABA’s) ethics codes. The current version of the ABA regulations is the Model Rules of Professional Conduct, which replaced the Code of Professional Responsibility. All states have their own versions of these attorney ethics provisions, many of which are modeled directly upon the ABA versions. This is addressed in the ABA Code and Model Rules.

**Model Standards’ List of Permissible Activities**
The NALA’s Model Standards list permissible activities for paralegals to perform, provided that such items do not conflict with or contradict statutes, court rules, administrative rules and regulations, or the attorneys’ ethics codes. Guideline five details the particular functions a paralegal may perform under an attorney’s supervision.

**Legal Effect of NALA Rules**
It is important for the reader to note that the NALA’s ethics provisions have no force of law in and of themselves. The NALA is a private organization, and accordingly its promulgations are advisory. However, courts are likely to give considerable credence to NALA rules, as historically courts have accepted the ABA’s ethics codes as definitive statements of the law.
THE CASE OF THE NOT-SO-BRIGHT LIGHT REVISITED

This case is also referenced in Chapter 11, “Products Liability.” As regards this chapter, the key issue raised in the case concerns an attorney’s ethical obligation to disclose certain negative information to the court. Ideally, an attorney seeks to present evidence and court cases to persuade the court to find in his or her client’s favor. Here, the attorney’s obligation to advise of all relevant judicial determinations, even if negative, is discussed.

SMITH v. SCRIPTO-TOKAI CORP.
170 F.Supp.2d 533
United States District Court
W.D. Pennsylvania
November 2, 2001

Duty to Disclose Adverse Legal Authority to the Tribunal

Defendant’s motion for summary judgment has been pending since April 13, 2001. On September 21, 2001, the United States District Court for the Middle District of Pennsylvania issued a thorough opinion in Hittle v. Scripto-Tokai Corp., 2001 WL 1116556 (M.D.Pa.2001). That case is strikingly similar to this one. The Hittle court analyzed the same Court of Appeals decisions, predicting the same unsettled areas of Pennsylvania law. The Hittle court’s decision was clearly adverse to Scripto-Tokai’s position on the negligent design claim. Counsel did not bring this case to the court’s attention.

Pennsylvania Rule of Professional Conduct 3.3, Candor Toward the Tribunal, states:

(a) A lawyer shall not knowingly:

   (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel

This Rule is identical to the ABA’s Model Rule of Professional Conduct. The Rule serves two purposes. First, courts must rely on counsel to supply the correct legal arguments to prevent erroneous decisions in litigated cases. Second, revealing adverse precedent does not damage the lawyer–client relationship because the law does not “belong” to a client, as privileged factual information does.

Although there is not much case law interpreting this aspect of the Rule, the ABA issued a formal opinion, Formal Opinion 280, dated June 18, 1949. The Formal Opinion addressed the question: “Is it the duty of a lawyer appearing in a pending case to advise the court of decisions adverse to his client’s contentions that are known to him and unknown to his adversary?” The ABA opined as follows:

An attorney should advise the court of decisions adverse to his case which opposing counsel has not raised if the decision is one which the court should clearly consider in deciding the case, if the judge might consider himself misled by the attorney’s silence, or if a reasonable judge would consider an attorney who advanced a proposition contrary to the undisclosed opinion lacking in candor and fairness to him.

The ABA explained that this Opinion was not confined to authorities that were decisive of the pending case (i.e., binding precedent), but also applied to any “decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.” We note that the Pennsylvania Bar Association’s Pennsylvania Ethics Handbook § 7.3h 1 (April 2000 ed.), opines that for a case to be “controlling,” the opinion must be written by a court superior to the court hearing the matter, although it otherwise adopts the test set forth in the ABA Formal Opinion.

Because both the Pennsylvania and ABA standards are premised upon what “would reasonably be considered important by the judge,” we briefly explain why we prefer the ABA’s interpretation. The reason for disclosing binding precedent is obvious: we are

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required to apply the law as interpreted by higher courts. Although counsel might legitimately argue that he was not required to disclose persuasive precedent such as Hittle under Pennsylvania’s interpretation of Rule 3.3, informing the court of case law that is directly on-point is also highly desirable. The court considers Hittle to be important, because it involved the same facts, issues and law. Knowledge of such opinions may save considerable time and effort in the court’s own analysis.

One additional reason to disclose contrary authority is to preserve counsel’s credibility. The same standard should apply to disclosure of negative authority as to counsel’s supplementation of the record with a favorable case. We think it likely that defense counsel would have brought Hittle to the court’s attention, and rightly so, had the result of that case been different. In this case, the argument in favor of disclosure was heightened by counsel’s unique position to be aware of the adverse authority.

In sum, the court is aware of the limitation on the duty of disclosure as interpreted by the Pennsylvania Bar Association. However, at least as applied to cases such as the one before the court, it would seem that the ABA position is by far the better reasoned one. Certainly, ABA Formal Opinion 280 comports more closely with this judge’s expectation of candor to the tribunal.

In accordance with the foregoing defendants’ Motion for Summary Judgment, Doc. No. 50, is DENIED…. The parties are directed to submit a revised case management order within twenty (20) days of the date of this Order. Defendants’ Motion to Strike Plaintiff’s Supplemental Pretrial Statement. Doc. No. 67, is DENIED.

**CASE QUESTIONS**

1. What is the distinction between the ABA’s position and that of the Pennsylvania Bar Association’s interpretation as to what is required by counsel?
2. What are two reasons provided for counsel to disclose contrary authority to the court’s attention?

**THE NFPA MODEL CODE AND MODEL RULES**

The National Federation of Paralegal Associations (NFPA) has also established ethical rules for appropriate paralegal conduct. These rules alone have no legal effect upon paralegals. There are procedures in place for the NFPA to sanction paralegals for misconduct. However, courts and bar authorities may incorporate them in their decisions, thus incorporating them into the common law or administrative law. The NFPA adopted its Model Code of Ethics and Professional Responsibility (Model Code) in 1993.

In 1997, the NFPA adopted the Model Disciplinary Rules (Model Rules) to facilitate the enforcement of the NFPA Model Code. The Model Rules are similar in content to the NALA’s Model Standards and Guidelines for Utilization of Legal Assistants. The NFPA Model Rules can be found at [http://www.paralegals.org/](http://www.paralegals.org/).

For each of the rules, the NFPA has also drafted ethical considerations that provide a set of standards relating to each of the rules. These ethical considerations set forth enforceable obligations for paralegals.

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THE ABA CODE OF PROFESSIONAL RESPONSIBILITY AND MODEL RULES

The American Bar Association (ABA) has promulgated its own set of ethical regulations for attorneys. Currently it follows the Model Rules of Professional Conduct (Model Rules), which replaced its older Code of Professional Responsibility (CPR). Many state bars and courts have adopted the ABA’s Model Rules and/or Code as legally binding and enforceable regulations against attorneys and their employees. Courts have ruled that the ABA’s standards apply to paralegals. Thus, paralegals should become familiar with the provisions of the ABA Model Rules and the CPR.

The ABA Model Rules cover the following topics: the lawyer/client relationship, the lawyer as a counselor and advocate, transactions with persons other than clients, law firms and associations, public service, information about legal services, and maintaining the integrity of the legal profession.

The ABA Code of Professional Responsibility

The CPR is divided into nine Canons, all of which broadly prescribe ethical conduct for lawyers. The ABA Code of Professional Responsibility Canons can be found at http://www.abanet.org/. Within the Canons are Disciplinary Rules (DRs) and Ethical Considerations (ECs), which provide more-detailed guidance on ethical issues. The DRs and ECs carefully discuss permissible attorney conduct. The ABA Model Rules, although they use different phraseology, address similar concerns. Although some states follow the CPR, most have adopted the Model Rules of Professional Conduct.

Ethics codes tend to be cut-and-dried when presented abstractly. It is more helpful to explore their application in real-world settings.

THE CASE OF THE FAILURE TO ACCOUNT

The following case shows the practice of law at its worst. The attorney used the clients’ confidences and funds to his own advantage.

DISCIPLINARY COUNSEL  v.  ROBERTSON

No. 2006-1638.
113 Ohio St. 3d 360, 865 N.E.2d 886
Supreme Court of Ohio
Submitted January 9, 2007
Decided May 16, 2007

In a four-count complaint, Disciplinary Counsel, charged respondent with multiple violations of the Disciplinary Rules.

Count I

Respondent admitted and we find that he violated DR 4-101(B)(3) (a lawyer shall not knowingly use a

(continues)
client confidence or secret to his own advantage), 5-101(A)(1) (a lawyer shall not accept employment if the exercise of professional judgment will or reasonably may be affected by the lawyer’s interests), 5-101(A) (a lawyer shall not enter into a business transaction with a client without full disclosure of the attendant risks), 9-102(B)(1) (a lawyer shall promptly notify a client upon the receipt of client funds of property), 9-102(B)(2) (a lawyer shall safeguard a client’s property in the lawyer’s possession), and 9-102(B)(3) (a lawyer shall maintain complete records of a client’s property in his possession) while representing an elderly female client.

Respondent assisted his client with her estate planning and acted under a power of attorney. In 2002, respondent kept a sum of cash and three jars of coins that the client’s former landlord had found after the client moved to a nursing home. Respondent paid at least some of the money to his client, but could not account for it, and by the time she died in November 2004, he no longer had the cash or the coins.

Respondent also improperly borrowed money from his client. Respondent borrowed a total of $69,289.38. Respondent personally executed unsecured promissory notes for $40,000 and $28,000, payable on demand at an annual interest rate of five percent.

Just before the client’s death, Respondent deposited $70,391.88, which he had obtained by cashing in various investments, into the bank account established through the power of attorney.

Count II

Respondent admitted and we find that he violated DR 1-102 (A)(6) (a lawyer shall not engage in conduct that adversely reflects on the lawyer’s fitness to practice law), 4-101(B)(3), 5-101(A)(1), and 5-104(A) while representing the estate of another former client.

The client died in May 2002, and respondent served as attorney for his estate, of which the client’s son was a beneficiary. The estate contained approximately $550,000 in assets. After the client’s death, respondent persuaded the client’s son to establish a living trust for the estate assets and to appoint respondent and the son as cotrustees.

Between March 2003 and October 2004, respondent improperly withdrew $41,284.91 from the trust by drafting checks made payable to him or his creditors. The client’s son did not specifically recall granting permission for these withdrawals, but he also did not dispute that he may have agreed to lend respondent money. Respondent apparently considered this transaction an unsecured loan but did not document the agreement with promissory notes. Respondent admitted that he did not urge the son to seek independent counsel prior to the transaction or obtain the son’s consent only after full disclosure of the attendant risks.

Count III

Respondent admitted and we find that he violated DR 2-106(A) (a lawyer shall not charge or collect a clearly excessive fee), 9-102(B)(3), and 9-102(B)(4) (a lawyer shall promptly pay or deliver to the client all client funds and property in his possession) while representing a third client.

In January 2004, this client learned that she had been named beneficiary of an annuity, and she asked respondent to represent her in regard to the annuity. The client later received a check for $36,427 in death benefits. She endorsed the check on May 9, 2004, and respondent deposited the check in his client trust account. That same day, respondent wrote a $9,107 check to himself from the client trust account, which he claims was for services already performed and not charged and for undetermined services to be performed in the future. After the client died in February 2005, respondent could document having earned only $350 of his $9,107 fee.

Count IV

Respondent admitted and we find that he violated DR 9-102(B)(2) and 9-102(B)(3) in managing his client trust account. Before respondent closed his client trust account.
trust account in April 2004, checks were written on the account to pay an office supply company for client bookkeeping materials. Respondent conceded that he did not monitor his staff in managing these financial records.

**Sanction:** Indefinite suspension.

### CASE QUESTIONS

1. What would motivate an attorney to act as this attorney has?
2. If you worked for this attorney, what would you have done after discovering what the attorney was doing?

### HYPOTHETICAL PROBLEMS

Consider the following hypotheticals, which illustrate the various ethical precepts discussed in the first section. For convenience, assume that the courts would accept the NALA provisions as part of the common law pertaining to unethical conduct by legal professionals. Although these problems are hypothetical, they are captioned according to the format used in attorney disciplinary complaints or court contempt proceedings.

#### HYPOTHETICALS

**1. In Re Piper**

Leslie Piper is a paralegal in the law firm of Hawker, Hillary, Iscoff, & Prill. The firm represents Carl Ostrem in a matter involving fraud and misrepresentation. Frank Long had sold Ostrem a hot tub, indicating that it was brand new when, in fact, it had been previously used and repossessed. Piper telephoned Long, requesting a complete refund of Ostrem’s payment as well as “damages” for misrepresentation. When Long became angry and offensive, Piper threatened criminal prosecution against Long under the criminal fraud statute. Under the ABA’s Model Rules and CPR, it is impermissible for lawyers to coerce payment of civil obligations by threatening criminal action?

Has Piper acted unethically? Yes. Piper engaged in behavior prohibited by the ABA, CPR, and Model Rules by threatening criminal prosecution to settle Ostrem’s civil claims. An attorney could not have ethically made such statements; neither could Leslie.

* * *

**2. In Re Nover**

Bradley Nover is a paralegal working for the mortgage department of First National City State Bank. One of Nover’s duties is to file liens and mortgages at
the county recorder’s office. The department employs one attorney who is supposed to supervise its six paralegals, including Nover. However, because of the heavy workload, Nover often finds himself working solo. Nover left a draft of a mortgage release on the lawyer’s desk for review. It was returned the next day with no changes. Nover notified Lester Arnold, against whose land the mortgage had been filed. Arnold had just paid the full balance due on the mortgage. Nover told Arnold that the mortgage release would be mailed within the next few days. However, Nover failed to follow through, and the release was never filed. Several months later, when Arnold attempted to sell his realty, he discovered Nover’s error. Arnold sued the bank for slander of title.

Has Nover acted unethically? Yes. Nover should have filed the mortgage release after consulting with his supervising attorney and communicating with Arnold. Nover’s failure to do so resulted in tortious injury to Arnold. This demonstrates incompetent and improper professional conduct.

3. **In Re Quentlen**

Sandra Quentlen is a paralegal employed at the law firm of Bingham, Dingham, & Clingham. She works for three personal injury (P.I.) attorneys in the firm. During the first few months of her training, Quentlen spent much time discussing procedural and substantive legal questions with her supervising attorneys, particularly when she had questions concerning the appropriate discovery forms to use in different circumstances. After six months, however, Quentlen became sufficiently adept at handling discovery that the attorneys simply turned over the client files to her after the initial consultation. Quentlen then proceeded to handle each P.I. file herself, with the attorneys simply signing the appropriate documents. Quentlen met with clients and witnesses, she drafted and filed all interrogatories and motions for discovery, and she handled all witness interviews.

Has Quentlen acted unethically? Yes. Without her lawyers’ active supervision, Quentlen has engaged in the unauthorized practice of law by single-handedly coordinating discovery. She has exercised independent legal judgment in preparing and filing discovery documents. She may also have used independent legal judgment in advising clients or discussing legal questions with witnesses. She met with litigants without disclosing her status as a legal assistant.

4. **In Re Madisson**

Oscar Madisson is a paralegal in the insurance department of Indemnicorp, a large insurance corporation. His duties consist of researching recent developments in tort law pertaining to insurance. He has been employed by
Indemnicorp for five years performing these tasks. However, he has not enrolled in any paralegal courses at the local university (which has a legal administration program) since he graduated from the institution six years ago. Unbeknownst to Madisson, the state legislature enacted new legislation substantially revising tort liability for municipal employees. Madisson advised one of the corporation's officers to settle an insurance claim, based upon the old municipal tort liability statute. As a consequence, the insured sued the company for negligence.

Has Madisson committed an ethical faux pas? Clearly. Madisson failed to remain abreast of current developments in the law. His carelessness would also render Indemnicorp liable, under respondeat superior, for his negligence.

* * *

5. In Re Walkinski

Donna Walkinski is a paralegal working at the law firm of Cedar, Pine, Maple & Elm. One of her tasks is to handle initial client consultations. Walkinski met with John and Beverly Parker, both of whom wished to file an action against Michael Denton for cutting down several trees on the Parkers' land without permission. The following conversation excerpts transpired between Walkinski and the Parkers:

WALKINSKI: “Hello, my name is Donna Walkinski. I'll be meeting with you today to discuss that lawsuit you want to file against Denton.” [Walkinski then took the Parkers to the conference room.]

WALKINSKI: “Now let me explain what we'll be doing today. I need to obtain some factual information to use when I prepare your court complaint.” [Walkinski then proceeds to ask various factual questions.]

J. PARKER: “After we complained to Denton about cutting down the trees, he offered to give us the wood for our fireplace. We took it. Does that affect our legal rights?”

WALKINSKI: “No. Denton committed trespass to land by cutting the trees. You can still recover damages for the value of the trees.”

B. PARKER: “We sold the cut wood. Would we have to deduct that from what we ask for in court?”

WALKINSKI: “No. Getting the wood doesn't matter at all, as a matter of law.” [At the end of the meeting, Walkinski mentioned the following.]

WALKINSKI: “It will take me several days to prepare these pleadings. I will give you a call when they're ready, so you can come back and we will review them and sign them.”

PARKERS: “Thank you. We'll make an appointment for next week as we leave.”

Walkinski engaged in the unauthorized practice of law. She made no mention of her status as a paralegal to the Parkers. In fact, the Parkers may
easily have believed Walkinski to be a licensed attorney, given her conduct during the consultation. Furthermore, Walkinski provided the clients with independent legal advice, which, incidentally, was incorrect.

**6. IN RE LARKEN**

Diana Larken is a paralegal employed at the law firm of Tried, True, Tested & Tempered. One day she telephoned Simms O’Connor, a dishwasher employed at The Living End, a restaurant against which one of Tried’s clients, Amanda Marcia, had several tort claims, including negligence, negligent infliction of emotional distress, and battery. Marcia had contracted food poisoning after eating at the restaurant. Larken telephoned O’Connor to see if he would be willing to make a statement in the case. The following conversation ensued:

LARKEN: “Do you remember anything about the food they were serving that night?”
O’CONNOR: “Yeah, well, the boss wouldn’t like me saying this, but there was an awful stench back there [in the kitchen] when they were cooking something.” LARKEN: “Was it the pork? Did anyone say anything to the manager or the cook about it?”
O’CONNOR: “I don’t rightly know if it was pork or not. I don’t remember anyone talking about it. But the smell was pretty bad. Everybody back there must have noticed it.”
LARKEN: “The doctors weren’t sure whether the pork made our client sick or something else, so it’s important that we know for sure whether the smell came from spoiled pork.”
O’CONNOR: “I really don’t know for sure. I’m the dishwasher, so I don’t work much with the food before it’s cooked and eaten. After some folks get done with a meal, it’s hard to tell what was on the plate.”
LARKEN: “Thanks for your help. I’ll be in touch if I need any more information.” O’CONNOR: “Sure, glad to help out.”

Larken disclosed client confidences when she told O’Connor about the physicians’ uncertainty as to the cause of Marcia’s ailment. This admission could be fatal to Marcia’s case, in the event O’Connor related the statement to the restaurant management.

**7. IN RE DENNISON**

Paul Dennison is a paralegal employed by Bartram J. Hollingsworth III, attorney at law. One of Hollingsworth’s clients is Aslo, Simon & Conley, an investment firm. Hollingsworth instructed Dennison to telephone Doubleday Savings...
Bank to discuss a computer inaccuracy on one of Aslo’s commercial investment accounts. Hollingsworth feared that Aslo might possibly be liable for defamation by computer. Dennison spoke with Ernest Duley, commercial investment coordinator, who himself was a paralegal, with whom Dennison attended college. Dennison mentioned the error to Duley. Duley inquired about the high frequency of withdrawals and deposits in the account. Dennison replied that Aslo had to cover “unexpected exigencies.” Duley asked Dennison to elaborate. Dennison mentioned that Aslo had been the primary financing partner in the recent Southside Mall fiasco, in which both Aslo and several of their investment clients “lost a bundle.” Dennison told Duley that, as a result, funds from Aslo’s client investment accounts had had to be temporarily diverted. Duley warned that this “revenue dunking” was illegal comingling of client and nonclient funds. Dennison laughed, saying, “I guess we can’t slip things past you, can we?” Later, Duley recommended to the bank’s executive vice president to report Aslo’s conduct to the attorney general’s office.

Dennison acted unethically. Like Larken in the previous hypothetical, Dennison disclosed confidential client information (i.e., the Southside Mall losses, the comingling of funds). Furthermore, Dennison’s involvement in illegal comingling violated the NALA and ABA rules precluding legal professionals from engaging in unlawful or inappropriate activities.

FURTHER ETHICS INFORMATION

The American Bar Association, as well as some state bars, issues ethics opinions to attorneys advising them of appropriate or inappropriate conduct under certain factual circumstances. State courts also report opinions involving attorney discipline that discuss ethical considerations. Although these cases involve attorneys, many also address legal ethics involving paralegals or legal secretaries. The NALA and the NFPA have also collected ethics opinions and court cases directly involving paralegal ethics problems. State paralegal associations may also have researched such cases. One is encouraged to contact these sources for additional ethics information pertinent to one’s jurisdiction.

The following cases may be of particular interest to paralegals:

Akron Bar Assn. v. Green, 673 N.E.2d 1307 (Ohio 1997)
State Farm Mutual Automobile Ins. Comp. v. Edge Family Chiropractic, No. 1D10-0565, June 25, 2010
Taylor v. Chubb, 874 P.2d 806 (Okla. 1994)
The Case for Recusal

Not only are attorneys and paralegals bound by a code of ethics, but there are codes of judicial ethics that apply to judges as well. This case resulted from the headline-making tragedy where two dogs attacked and killed a woman. In addition to the criminal case brought against the owners of the dogs, there was an administrative hearing to determine the fate of Hera, one of the dogs. This appeal focuses on whether a police officer, whose department conducted the criminal investigation against the dog owners, could serve as an impartial hearing officer in the administrative hearing concerning the dog. Note: A recusation, or recusal, is the process by which a judge is disqualified (or disqualifies himself or herself) from hearing a lawsuit because of prejudice or because the judge is interested.

**Knoller v. City and County of San Francisco**

2001 WL 1295407

Court of Appeal, First District, Division 2, California


In this appeal, appellants contend they were denied a fair hearing before an impartial hearing officer. Specifically, they argue that because the hearing officer was a sergeant in the San Francisco Police Department—the very police department which instituted criminal charges against appellants stemming from a fatal dog attack involving Hera—the entire hearing process was irreparably tainted with bias and unfairness....

On January 26, 2001, two dogs, Bane and Hera, were involved in a vicious attack that resulted in the death of Diane Whipple, a fellow tenant in appellants’ apartment building. Appellant Knoller, who was present during the attack, immediately signed documents giving ownership of Bane to San Francisco’s Animal Care and Control (ACC), but refused to do so for Hera. Officers from the ACC [held an] administrative hearing to determine whether the dog was “vicious and dangerous” within the meaning of Health Code section 42.3.

The administrative hearing took place on February 13, 2001. The hearing officer was San Francisco Police Sergeant William Herndon, who had conducted vicious and dangerous dog hearings for more than eight years. Before the hearing commenced, appellants filed a challenge to Sergeant Herndon acting as the hearing officer, claiming he could not judge the evidence impartially. However, he refused to disqualify himself from the proceedings.

***

David Moser, a former tenant in appellants’ apartment building testified that in June 2000, Hera bit him on the buttocks as he exited an elevator.... One of the ACC officers described her as “crazed.” The other ACC officer described her as “extremely aggressive.”

Based on the evidence presented at the hearing, Sergeant Herndon concluded that Hera was a vicious and dangerous dog and that she must be destroyed to protect the health, safety and welfare of the community. Additionally, appellants were prohibited from “owning, possessing, controlling or having custody of any dog” for a three-year period.

***

Appellants’ primary contention is that they were denied a fair hearing before an impartial hearing officer. It is uncontested that the hearing officer who presided over the administrative hearing, Sergeant Herndon, was employed by and subject to the supervision and control of the San Francisco Police Department. It is further uncontested that during the administrative proceedings, the San Francisco Police Department was conducting the investigation that led to the filing of criminal charges against appellants stemming from the dog attack that killed Diane Whipple. Appellants contend that, because there was an ongoing criminal investigation at the time the hearing was conducted and the investigating body employed the decision maker, they were deprived of a neutral hearing officer as required by the due process clause of the state and federal constitutions....
Appellants are correct that if there is to be a fair hearing, it must be presided over by an impartial trier of fact. However, contrary to appellants’ argument, the standard of impartiality required in administrative hearings is different from that required of judicial bench officers, and has been met here.

The standards of impartiality affecting the ability of judicial officers to preside over adjudicative proceedings appear in both the Code of Civil Procedure and the California Code of Judicial Ethics (the Ethics Code). As potentially applicable here, Code of Civil Procedure section 170.1, subdivision (a)(6)(C) requires disqualification whenever “a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. Bias or prejudice toward a lawyer in the proceedings may be grounds for disqualification.” It has been held that a trial judge may not sit in a matter in which the judge formerly participated in the investigation or charging of the incident in question. However, by its own terms, the disqualification statutes (Code Civ. Proc., § 170 et seq.) apply only to “judges of the municipal and superior courts, and court commissioners and referees.”

Similarly, Canon 3E of the Ethics Code requires voluntary disqualification “in any proceeding in which disqualification is required by law.” Yet once again, those affected by the canons are limited to “officer[s] of the state judicial system and who performs judicial functions…. ” Clearly, administrative hearing officers are not bound by the Ethics Code.

In the administrative context, a decision maker’s familiarity with the facts of a case gained in the participation of the investigation that led to the action in question does not disqualify that person in the absence of a strong showing that he or she is incapable of judging the particular controversy fairly on the basis of its facts.

Thus, rather than requiring disqualification solely because “a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial” (Code Civ. Proc., § 170.1, subd. (a)(6) (C)), to establish bias or prejudice of an administrative hearing officer, appellants must “set forth legally sufficient facts to demonstrate the bias of the judicial officer,” and must further show that “such bias will render it probable that a fair trial cannot be held before that judge.”

On this record, we conclude appellants have wholly failed to meet the higher standard necessary to establish bias or prejudice on the part of the hearing officer who presided over the administrative proceedings to determine Hera’s fate.

Appellants’ showing on this issue is entirely conjectural, and simply inadequate to overcome the presumption [that] Sergeant Herndon was capable of deciding the matter conscientiously, fairly, and with honesty and integrity. This presumption of impartiality is bolstered by a declaration Sergeant Herndon filed in the trial court indicating he had “not participated in, or had any involvement with, the San Francisco Police Department’s investigation” of possible criminal liability for the death of Diane Whipple.

When all is said and done, appellants have simply proposed a per se prohibition against police officers serving as hearing officers in vicious and dangerous dog hearings when there is a criminal investigation pending involving the dog. However, courts have consistently rejected the notion that strict separation of functions must be observed in order for an administrative adjudication to comport with due process guarantees.

... Therefore, it was not error for Sergeant Herndon to refuse to disqualify himself.

** * **

CASE QUESTIONS

1. Give an example of the facts that would have been needed to have required Sergeant Herndon to recuse himself from the case.

2. Does your state have codes of ethics for attorneys, paralegals, and judges? If so, give a brief description of the applicable provisions of the codes that address bias and impartiality.
Both attorneys involved in this fatal dog-mauling case have since lost their licenses to practice law. In 2002 both were convicted of involuntary manslaughter and owning a mischievous animal causing death, after their two huge dogs attacked and killed a resident in their apartment building. At that time they were placed on interim suspension from the practice of law. Marjorie Knoller resigned from the bar with criminal charges pending against her in January 2007, after a state appeals court reinstated the murder conviction. Knoller has appealed this to the California Supreme Court and was sentenced to 15 years to life. Her husband, Robert Noel, who was sentenced to four years in state prison, was disbarred in February 2007 after refusing to notify his clients, opposing counsel, and other interested parties that he had been suspended from the practice of law.

**WHAT PARALEGALS CAN AND CANNOT DO**

These are just sample lists. See if you can think of additional duties a paralegal might or might not be authorized to handle.

**Can Do:**

1. Interview clients.
2. Locate and interview witnesses.
3. Answer telephone calls.
4. Respond to correspondence.
5. Perform legal research and prepare memoranda of law for attorney review.
6. Conduct case investigations.
7. Draft legal documents and pleadings for attorney review.
8. Prepare discovery requests and responses for attorney review.
10. Attend court with an attorney.
11. Request adjournments and scheduling changes for cases depending on the jurisdiction and court.
12. Assist clients in filling out forms.
13. Prepare trial notebook for attorney review.
14. Manage and organize case documents.

**Cannot Do:**

1. Accept cases.
2. Give legal advice.
3. Set fees.
4. Exercise independent legal judgment for others.
5. Make court appearances.
6. Represent clients at trial.
7. Prepare and execute legal documents.

## SUMMARY

The NALA has issued an ethics code and guidelines applicable to paralegals. These rules broadly summarize the activities in which paralegals may ethically engage. The NALA’s Code and Model Standards declare that paralegals may not engage in the unauthorized practice of law, shall disclose their status, shall perform delegated duties under attorneys’ supervision, shall not apply independent legal judgment, shall protect client confidences, shall maintain professional integrity and educational competence, and shall comply with the various rules and statutes regulating attorneys’ conduct.

The NFPA, another national paralegal organization, has also issued a code of ethics and guidelines applying to paralegals. These emphasize the paralegal’s role in working to provide legal services to the highest standards of ethics and professional integrity.

The ABA’s Code of Professional Responsibility and Model Rules of Professional Conduct apply to paralegals. These rules provide both broad and particular guidance to attorneys and their staff regarding unethical behavior.

Hypothetical problems provide the best illustrations of unethical versus ethical conduct among paralegals. One should consult the state bar, the ABA, and paralegal associations, as well as the NALA and the NFPA for further information concerning paralegal ethics practices.

## PROBLEMS

1. You just started working as a paralegal in a new law firm specializing in complex negligence cases. The attorneys are interested in using every kind of advertising that is permissible in your state. They would like giant billboards, television advertisements with paid actors, and colorful advertisements splashed across the outside of the city buses. The attorneys pride themselves on their expertise, and in addition to the information that is found on their letterhead, they would like each advertisement to say, “TOP GUNS, you tried the rest, but we are the best.” Which of the nine Canons of the ABA Code of Professional Responsibility would most directly affect your research of this issue? Why?

2. A movie celebrity comes to your firm for legal representation concerning a drinking-and-driving automobile accident. You can’t wait to get home so you can call your best friend and tell your significant other about who just walked into your office and all about the accident. Then you start to think about the NFPA and the Model Disciplinary Rules. What rule should you consider before talking about your work with friends and family? What possible harm could result from violating a Disciplinary Rule?

3. After five years as a paralegal, you have earned the complete respect and admiration of the senior partner in your firm. She tells you that from now on you will each handle half of the cases in the office from start to finish. The partner tells you that she does not do trial work; if a case has to be tried, she will make a referral to a colleague.
at the appropriate time. Which of the guidelines
in the NALA Model Standards would assist you
in deciding if this suggested work arrangement is
ethical for a paralegal? Explain your answer.

4. You are hired by a law firm specializing in prod-
ucts liability cases to perform legal research and
draft documents. Based on the NALA Model
Standards, are there any limits or conditions to
your performing these tasks? What would be
the harm if you did not adhere to the applicable
NALA guideline?

5. As a paralegal working for a single practitioner, you
are responsible for answering all incoming calls.
The attorney generally takes a fee of one-third
of whatever is collected for negligence actions.

A potential client calls explaining that he was just
in an extremely serious multicar collision, and
wants to know how much the attorney charges.
The attorney is on the telephone, has two clients
waiting in the waiting area, one call on hold, and
a client sitting in the conference room. The caller
tells you that he does not have all day, and can’t
wait for the attorney to call him back. You are
afraid that the attorney might lose this new case
if you do not provide an answer to the caller. You
know for certain that the attorney had taken a fee
of one-third of the recovery from his last 10 neg-
ligence cases. In order to be helpful, you tell the
client the fee will be one-third of whatever the at-
torney collects. Have you done anything wrong
based upon the NALA Model Standards? Explain.

**REVIEW QUESTIONS**

1. Which two organizations have designed ethics
provisions specifically addressing paralegals?
2. In the ethics codes discussed here, what activities
are specifically authorized? Under which ethics
code are these listed?
3. What is the unauthorized practice of law? What
types of actions can it include?
4. Under what circumstances are paralegals permit-
ted to represent clients? What are some courts’
reactions?
5. When can paralegals perform legal tasks? What
restrictions apply under the ethics codes?
6. What must paralegals recall when dealing with
clients, adverse parties, witnesses, or the general
public?
7. What would you do if you observed a partner in
your law firm engaging in an unethical act?

**HELPFUL WEBSITES**

To learn more about paralegal ethics, the following
sites can be accessed:

**NALA, NFPA, and ABA**
http://www.nala.org
http://www.paralegals.org
http://www.abanet.org

**Ethics**
http://www.legalethics.com
http://www.findlaw.com
http://www.paralegalgateway.com

**Law Schools**
http://www.hg.org/schools
Law Firms
http://www.findlaw.com
http://www.martindale.com

Continuing Legal Education
http://www.ALI-ABA.org
http://www.aafpe.org

Discussion Groups
http://www.lib.uchicago.edu

Yahoo’s Law Guide
http://www.yahoo.com/Government/Law

New York State Law Journal
http://www.nylj.com

CNN Interactive
http://www.cnn.com/

Legal Forms
http://www.lectlaw.com