ETHICAL CONSIDERATIONS FOR LAW CLERKS AND PARALEGALS

I. INTRODUCTION

It is a well-known doctrine that attorneys must perform their duties within the confines of certain ethical standards. Often overlooked, however, are the rules and obligations governing the behavior of law clerks and paralegals. Nowadays, it is common practice for law students to clerk for at least two firms during the summer. When clerks “split” their summers, a great potential arises for conflicts of interest problems and confidentiality problems, especially in situations where a clerk works at two firms that are involved in litigation with each other. What are the ethical obligations of such a clerk? The same potential problem is present for paralegals who often do independent work for different law firms. Another very real concern is the unauthorized practice of law by both law clerks and paralegals. This Article explores the different rules and regulations surrounding the conduct of clerks and paralegals. Section two of the article addresses the conflict of interest dilemma. Section three addresses the unauthorized practice of law situation. The fourth section addresses whether non-lawyers may be held liable for legal malpractice. Finally, the fifth section explores the issue of whether law clerks may be denied admission to the Bar for their conduct as clerks.

II. CONFLICTS OF INTEREST AND CONFIDENTIALITY

Legal assistants such as paralegals who are certified by the National Association of Legal Assistants (NALA) are bound by the Code of Ethics of the NALA. Canon 7 of this Code provides that “[a] legal assistant must protect the confidences of a client, and it shall be unethical for a legal assistant to violate any statute now in effect or hereafter to be enacted controlling privileged communications.”

Further, Canon 12 of the NALA’s Code of Ethics states that “[a] legal assistant is governed by the American Bar Association Model Code of Professional Responsibility [Model Code] and the American Bar Association Model Rules Of Professional Conduct [Model Rules].”

2. Id. at Canon 12.
a legal assistant is not subject to discipline under the Model Code, a lawyer is.\textsuperscript{3} Section DR 4-101(D) of the ABA Code of Professional Responsibility provides that "[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 . . . ."\textsuperscript{4} Finally, according to ABA Ethical Consideration 4-2:

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 files; and this obligates the 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.\textsuperscript{5}

Thus, the ultimate burden appears to be on the hiring attorney to make sure that his or her non-lawyer employees do not breach client confidentiality.

The District Court in \textit{Kapco Manufacturing Company, Inc. v. C & O Enterprises, Inc.}\textsuperscript{6} considered a motion to disqualify due to a conflict of interest. The Friedman firm, representing Kapco, brought the motion to disqualify because its secretary had left its employ to work for the Alexander firm which represented the defendant.\textsuperscript{7} While working for the Friedman firm, the secretary performed clerical duties and secretarial duties. She had complete access to all of the Kapco files relating to the litigation with the defendant.\textsuperscript{8} Although this situation involved a secretary transfer from one firm to an opposing firm, the court noted that the same potential conflict of interest problems were present in this case as in the typical attorney-transfer disqualification case.\textsuperscript{9} Thus, the court applied the Seventh Circuit's three-step analysis for disqualification motions in cases involving the transfer of an attorney from one firm to another:\textsuperscript{10}

First, we must determine whether a substantial relationship exists between the subject matter of the prior and present representations. If

\begin{itemize}
\item \textsuperscript{3} Vicki Voisin, \textit{Changing Jobs: Ethical Considerations For Legal Assistants}, 16 FACTS & FINDINGS (1989).
\item \textsuperscript{4} \textbf{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} DR 4-101(D) (1983).
\item \textsuperscript{5} \textbf{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} EC 4-2 (1983).
\item \textsuperscript{6} 637 F. Supp. 1231 (N.D. Ill. 1985).
\item \textsuperscript{7} \textit{id.} at 1232.
\item \textsuperscript{8} \textit{id.}
\item \textsuperscript{9} \textit{id.} at 1236.
\item \textsuperscript{10} 637 F. Supp. at 1236.
\end{itemize}
we conclude a substantial relationship does exist, we must next ascer-
tain whether the presumption of shared confidences with respect to
the prior representation has been rebutted. If we conclude this pre-
sumption has not been rebutted, we must then determine whether the
presumption of shared confidences has been rebutted with respect to
the present representation. Failure to rebut this presumption would
also make disqualification proper.\textsuperscript{11}

The court first noted that there was an obvious substantial relation-
ship between the secretary's work at the Friedman firm and her work at
the Alexander firm.\textsuperscript{12} Next, the court concluded that the secretary had
not rebutted the presumption of shared confidences in regards to her
employment at the Friedman firm because she could not deny the fact
that at Friedman she had access to and obtained confidential information
about Kapco's litigation with the defendant.\textsuperscript{13} However, the court finally
concluded that the secretary had presented enough evidence to rebut the
presumption that she had shared this confidential information with her
new employer.\textsuperscript{14} In making this decision, the court noted that the evi-
dence clearly established that no one at the Alexander firm had received
any information from the secretary concerning the litigation between the
defendant and Kapco.\textsuperscript{15} Thus, the court refused to grant the plaintiff's
motion to disqualify because it had failed to meet the Seventh Circuit's
three-part test.

Based upon the court's reasoning in Kapco, a non-lawyer who
changes employment from one law firm to another while both firms are
representing clients with adverse interests may protect both himself and
the firm by taking great pains not to share any confidential information.
The main burden, however, appears to be on the law firm to make sure
that the new employee is "shielded" from any litigation involving his or
her old firm.

The District Court in Williams v. Transworld Airlines, Inc.\textsuperscript{16} was
not as forgiving as the court in Kapco. In Williams, TWA filed a motion
to disqualify the plaintiffs' attorneys on the basis that the plaintiffs also

\begin{enumerate}
\item \textit{id.} (quoting Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983)).
\item \textit{id.} at 1237.
\item \textit{id.}
\item \textit{id.} at 1239.
\item \textit{id.} at 1237-1238.
\item 588 F. Supp. 1037 (W.D. Mo. 1984).
\end{enumerate}
represented Campbell Schanck. Schanck, a TWA employee, had assisted one of TWA's attorneys with the defense of plaintiffs' claims. TWA alleged that the plaintiffs' attorneys had an unfair advantage because they had access to confidential information which Schanck had learned while assisting TWA's lawyers with the litigation at issue. The court focused primarily upon the dictates of Canon 9 of the Model Code which provides that lawyers "should avoid even the appearance of professional impropriety." The court in Williams interpreted this Canon to require disqualification when "there is some reasonable possibility that some specifically identifiable impropriety did, in fact, occur." The court further noted that the dictates of Canon 9 apply to non-lawyers because otherwise "[e]very departing secretary, investigator, or paralegal would be free to impart confidential information to the opposition without effective restraint."

Additionally, the court noted that to allow the plaintiffs' attorneys to continue to represent the plaintiffs would result in an appearance of impropriety because "a presumption arises that confidences have been imparted by Campbell Schanck to [plaintiffs' attorneys]." The court was of the opinion that non-lawyers would be more likely than lawyers to disclose confidential information. Thus, the court held that plaintiffs' counsel should be disqualified from their representation of Williams due to their relationship with a non-lawyer who had formerly worked for the defendant. Based upon the court's ruling in Williams, a non-lawyer who is interested in changing firms must first make sure that the potential new firm is not involved in a suit against his current firm. Otherwise, the non-lawyer runs the risk of creating a situation in which his new firm may be disqualified.

A New York state appellate court reached the same conclusion through different reasoning in Glover Bottled Gas Corp. v. Circle M. Beverage Barn, Inc. Glover involved a defense attorney's hiring of a

17. Id. at 1038.
18. Id.
19. Id. at 1040.
20. Id. (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1983)).
22. Id. at 1044.
23. Id. at 1043.
24. Id. at 1046.
paralegal who had previously worked for the plaintiff's attorney.26 While working for the plaintiff's attorney, the paralegal had worked on the litigation against the defendant and performed such jobs as interviewing the plaintiff's manager concerning the facts of the case against the defendant.27 The plaintiff filed a motion to disqualify defendant's attorneys on the ground of conflict of interest in violation of the Model Code. According to the court, "[w]hile the Code of Professional Responsibility does not apply to non-lawyers, it does place a burden on attorneys to insure [sic] that their employees conduct themselves in accordance with the [C]ode [of Professional Responsibility]."28 Thus, the court held that disqualification of the defendant's attorneys was proper.29

Thus, unlike the Missouri court in Williams, the New York court in Glover Bottled Gas held that the Code did not apply to non-lawyers. However, both courts ordered the disqualification of a firm which hired a non-lawyer who had worked for the opposing side in the pending litigation and had access to confidential information. Unlike the court in Williams, however, the court in Glover left open the possibility that a firm may avoid disqualification if it takes adequate steps to "shield" the legal assistant from working on a case that involves the legal assistant's former firm.

III. THE UNAUTHORIZED PRACTICE OF LAW

Another real concern in the legal profession today is the unauthorized practice of law by legal assistants such as paralegals and clerks. Concern about the unauthorized practice of law is evidenced by the fact that six of the twelve canons of the NALA's Code of Ethics and Professional Responsibility specifically address this issue. These six canons define exactly what constitutes the unauthorized practice of law30 and

26. Id. at 441.
27. Id.
28. Id.
29. Id.
30. The first six canons of the NALA's Code of Ethics are as follows:

   Canon 1. A legal assistant shall not perform any of the duties that lawyers only may perform nor do things that lawyers themselves may not do.

   Canon 2. A legal assistant may perform any task delegated and supervised by a lawyer so long as the lawyer is responsible to the client, maintains a relationship with the client, and assumes full profession-
place the burden upon the legal assistant to make sure that he or she does not engage in the unauthorized practice of law.

Case law abounds with different definitions of the "unauthorized practice of law." For example, the Supreme Court of Maryland examined the issue in Attorney Grievance Commission of Maryland v. Hallmon. In Hallmon, the Attorney Grievance Commission of Maryland brought charges against Hallmon, an attorney, for violating the Maryland Lawyers' Rule of Professional Conduct prohibiting lawyers from assisting an unlicensed individual in the unauthorized practice of law. Hallmon entered into an arrangement with a Maryland attorney named Eric Cloud whereby Hallmon would represent Cloud's clients who required counsel admitted to the Bar in Maryland. Cloud's wife, Carole, served as Cloud's office manager. She had graduated from law school but had never been admitted to practice law in any jurisdiction. Hallmon utilized Carole Cloud's services when he represented a church in Maryland for Eric Cloud. Hallmon represented the church at a "special exception" hearing for a proposed decrease in the required number of parking spaces at the church. In preparation for this hearing, Carole Cloud prepared both the application for the exception and the statement of justification for the special exception. On both of these papers, Carole Cloud signed Hallmon's name and placed her initials behind the signature.

al responsibility for the work product.

Canon 3. A legal assistant shall not engage in the practice of law by giving legal advice, appearing in court, setting fees, or accepting cases.

Canon 4. A legal assistant shall not act in matters involving professional judgment as the services of a lawyer are essential in the public interest whenever the exercise of such judgment is required.

Canon 5. A legal assistant must act prudently in determining the extent to which a client may be assisted without the presence of a lawyer.

Canon 6. A legal assistant shall not engage in the unauthorized practice of law and shall assist in preventing the unauthorized practice of law.

32. Id. at 512.
33. Id.
34. Id.
35. 681 A.2d at 513.
36. Id.
37. Id.
ly, Hallmon had voiced his approval for these papers after reviewing them with Carole Cloud over the phone.\textsuperscript{38}

The court began its analysis by noting that section 10-101(h)(1) of the Maryland Code of the Business Occupations and Professions Article defines the phrase "practice law" as encompassing any of the following activities: "(i) giving legal advice; (ii) representing another person before a unit of the State government or of a political subdivision; or (iii) performing any other service that the Court of Appeals defines as practicing law."\textsuperscript{39} The court then reviewed the current status of the law in Maryland, citing the general rule that "[t]o determine whether an individual has engaged in the practice of law, the focus of the inquiry should be on whether the activity in question required legal knowledge and skill in order to apply legal principles and precedent."\textsuperscript{40} The court concluded that Carole Cloud's work did not constitute the practice of law because it mainly involved information-gathering and communicating contacts.\textsuperscript{41} However, Hallmon got into trouble because he was unaware of details at the hearing and continually deferred to Carole Cloud to answer all of the questions.\textsuperscript{42} According to the court, "[T]he hearing record demonstrates by clear and convincing evidence an abdication of supervision by Hallmon and that the lay legal assistant was unauthorizedly practicing law."\textsuperscript{43} It should be noted that no disciplinary action was taken against Carol Cloud. Hallmon, on the other hand, was suspended from the practice of law for ninety days due to his lack of supervision of a law clerk.\textsuperscript{44}

Further, the District Court in \textit{Monroe v. Horwitch}\textsuperscript{45} addressed an independent paralegal's contention that the Connecticut statute forbidding the unauthorized practice of law constituted, among other things, a violation of her Fourteenth Amendment right to equal protection.\textsuperscript{46} The court initially noted that the unsupervised paralegal's preparation of papers for parties representing themselves in uncontested divorce actions

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 514 (quoting In re Discipio, 645 N.E.2d 906, 910 (1994)).
\item \textit{Hallmon}, 681 A.2d at 516.
\item Id. at 518.
\item Id.
\item Id. at 520.
\item 820 F. Supp. 682 (D. Conn. 1993).
\item Id. at 683.
\end{enumerate}
\end{footnotesize}
constituted the practice of law.\textsuperscript{47} In making this decision, the court noted that the "'[p]reparation of instruments, even with preprinted forms, involves more than a mere scrivener's duties' and, therefore, constitutes the practice of law.'\textsuperscript{48} The court held that the Connecticut statute prohibiting the unauthorized practice of law did not violate the independent paralegal's Fourteenth Amendment right to equal protection because the prevention of such unsupervised legal work is rationally related to the goal of public protection.\textsuperscript{49}

The New Jersey Supreme Court conducted a detailed analysis of the work of paralegals in \textit{In re Opinion No. 24 of the Commission on the Unauthorized Practice of Law}.\textsuperscript{50} The court considered a group of independent paralegals' petition for review of The New Jersey Supreme Court Committee on the Unauthorized Practice of Law's recent opinion that independent paralegals are \textit{per se} engaged in the unauthorized practice of law because they are not adequately supervised by attorneys.\textsuperscript{51} In holding that independent paralegals were not \textit{per se} involved in the unauthorized practice of law, the court noted that the ABA definition of "paralegal" includes independent paralegals and that the language in Model Rule 5.3 applied to independent paralegals as well.\textsuperscript{52} Model Rule 5.3 places the responsibility on the attorney for misconduct by non-lawyer employees.\textsuperscript{53} However, as the court stated, "[A]lthough fulfilling the ethical

\textsuperscript{47} \textit{Id.} at 686.

\textsuperscript{48} \textit{Id.} (quoting State v. Buyers Service, Co., 357 S.E.2d 15, 17 (S.C. 1987)); \textit{see also} McGiffert v. State ex rel. Stowe, 366 So. 2d 680, 683 (Ala. 1979) ("It would seem to be clear that only a licensed lawyer may obtain an uncontested divorce for another person without violating the statute.").

\textsuperscript{49} \textit{Id.} at 687 (citing Lawline v. American Bar Ass'n, 956 F.2d 1378, 1385-86 (7th Cir. 1992)).

\textsuperscript{50} 607 A.2d 962 (1992).

\textsuperscript{51} \textit{Id.} at 963.

\textsuperscript{52} \textit{Id.} at 968.

\textsuperscript{53} Model Rule 5.3 provides in pertinent part:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.
requirements of RPC 5.3 is primarily the attorney’s obligation and responsibility, a paralegal is not relieved from an independent obligation to refrain from illegal conduct and to work directly under the supervision of the attorney. 54 Thus, the court held that a paralegal, whether independent or employed full-time by a firm, does not engage in the unauthorized practice of law as long as he or she makes sure that they are working under adequate supervision from an attorney. 55

IV. MAY A NON-LAWYER BE HELD LIABLE FOR LEGAL MALPRACTICE?

This issue is similar to other non-lawyer liability issues in that case law is divided on the issue. The Supreme Court of Washington addressed this issue in Bowers v. Transamerica Title Insurance Co. 56 In Bowers, a non-lawyer escrow agent prepared an unsecured promissory note for the sellers of a parcel of land. 57 Shortly thereafter, the buyer went into bankruptcy. As unsecured creditors, the plaintiffs suffered a loss of $35,000. 58

The plaintiffs brought suit, alleging that the escrow agent was liable for legal malpractice because she failed to explain to the plaintiffs the problems that may result from an unsecured sale of real property. 59 The court initially noted that the escrow agent’s conduct constituted the unauthorized practice of law. 60 The court further held that the agent was liable for malpractice, stating that "a layman who attempts to practice law is liable for negligence." 61 The majority felt that a non-lawyer practicing law owed the same duty of care as a licensed lawyer. 62

54. 607 A.2d at 969.
55. Id. See also Board of Commissioners of the Utah State Bar v. Petersen, 937 P.2d 1263, 1269 (Utah 1997) (holding that an independent paralegal was not engaged in the unauthorized practice of law as long as she worked under the supervision of an attorney).
57. Id. at 197.
58. Id.
59. Id.
60. Id. at 197-98.
61. 675 P.2d at 198 (citing Mattieligh v. Poe, 356 P.2d 328 (Wash. 1960)).
62. Bowers, 675 P.2d at 198 (citing Burien Motors, Inc. v. Balch, 513 P.2d 582 (Wash. 1973)). See also Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 652 P.2d 962, 964 (Wash. Ct. App. 1982) ("Non-lawyers are held to the stan-
The Supreme Court of Nevada adopted the reasoning of the Bowers court in Busch v. Flangas. Believing Mr. Potter to be a lawyer, Mrs. Busch contacted him for assistance in selling her bakery shop. Mr. Potter was actually a law clerk employed by Mr. Flangas. Mr. Potter prepared all of the necessary documents but forgot to file a UCC-1 financing statement that was necessary to perfect Mrs. Busch’s security interest in the bakery equipment until she received final payment. The buyer of the bakery equipment failed to make payments and eventually went into bankruptcy. Mrs. Busch subsequently lost her interest in the bakery equipment because she was an unsecured creditor. She then sued both Potter, the clerk, and Flangas, the attorney, for legal malpractice. The district court granted summary judgment for Potter because it determined that the document at issue did not require a UCC filing because it was a lease rather than a secured sales transaction. After determining that the document was in fact a secured sales agreement, the Supreme Court of Nevada overturned the district court’s grant of summary judgment with the admonition that “[a]lthough Potter is not an attorney, he can be subject to a legal malpractice claim if he attempts to provide legal services.”

Ohio courts have taken a different stance towards a non-lawyer’s liability for legal malpractice. For example, in Palmer v. Westmeyer, the Court of Appeals of Ohio specifically held that a paralegal could not be held liable for legal malpractice. Moreover, an Illinois Court of Appeals in Divine v. Giancola addressed a complaint seeking to recover assets that had been given to a lawyer’s paralegal by one of the lawyer’s clients. The complaint alleged that the paralegal breached a fiduciary duty to the client, an elderly man, through undue influence and fraud.

64. Id. at 439.
65. Id.
66. Id.
67. Id.
68. 837 P.2d at 439.
69. Id.
70. Id. at 440.
72. Id. at 1209.
74. Id. at 585.
court held that paralegals owe no fiduciary duty to their employer-lawyer's clients, explaining that "paralegals do not independently practice law, but simply serve as assistants to lawyers. They are not equal or autonomous partners." Thus, under Illinois law, a non-lawyer may not be held liable for legal malpractice.

V. MAY A LAW CLERK BE DENIED ADMISSION TO THE BAR?

Unfortunately, research has not revealed any documented cases addressing the issue of whether a law clerk can be denied admission to a state bar. Discussions with various state bar associations have indicated that there are no cases on this issue because the state bar associations do not have jurisdiction over a law student. These associations only have jurisdiction over licensed lawyers. Further, written opinions documenting denial of admission to a law student would breach the applicant's right to confidentiality in the admissions process. However, common sense tells us that a clerk who is found liable for legal malpractice or breach of confidentiality would have a difficult time gaining admission to a state bar association.

VI. CONCLUSION

The case law is divided on the ethical obligations of law clerks and paralegals. The ultimate burden appears to be on the employing attorney or law firm. However, in the interest of his career, a law clerk or paralegal should do everything in his power to avoid disclosing client confidences and creating conflict of interest situations. Further, the law clerk or paralegal should make sure that he is adequately supervised by an attorney and thus not engaging in the unauthorized practice of law. Some states hold non-lawyers such as clerks and paralegals to the same standard as lawyers. In such states, a paralegal or clerk may be held liable for legal malpractice. Common sense tells us that a law clerk who has breached client confidentiality or who has been found liable for legal malpractice would probably have a difficult time gaining admission to a state bar association.

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75. Id. at 588.