

Rules Governing Legal Assistant Services

20-101. Purpose.

Increasing the availability of legal services to the public at a cost the public can afford is a goal of the legal profession and one which finds its support in Article 5 of the Rules of Professional Conduct. The employment of legal assistants is a particularly significant means by which lawyers can render legal services more economically, in greater volume and with maximum efficiency while maintaining the quality of legal services. Rapid growth in the employment of legal assistants increases the desirability and necessity of establishing guidelines for the use of legal assistants.

While the responsibility for compliance with the standards of professional conduct rests with members of the bar, legal assistants should know and understand those standards. A lawyer using the services of a legal assistant is obligated to inform the legal assistant of the restraints and responsibilities incident to the employment and to supervise the performance of the legal assistant. These guidelines are intended to promote the proper development and expansion of legal assistant services, and to provide guidance to both the lawyer and the legal assistant so that increased use of legal assistant services will be in accordance with the Rules of Professional Conduct, statutes, court rules and decisions, and rules and regulations of administrative agencies.

COMPILER'S ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 7 Am. Jur. 2d Attorneys at Law §§ 115, 216; 60 Am. Jur. 2d Penal and Correctional Institutions § 72.

7A C.J.S. Attorney and Client § 253.

20-102. Definitions.

As used in these guidelines:

A. "legal assistant" means a person, not admitted to the practice of law, who provides assistance to a licensed lawyer and for whose work product that licensed lawyer is ultimately responsible. The assistance may include, but is not limited to, record and statistical research; investigation; analysis of records, documents and facts; problem analysis; preparation of legal memoranda; assistance in drafting legal documents, interrogatories and correspondence; completion of forms which have been prepared by or under the supervision of the supervising attorney; location of reported decisions, cite checking and shepardizing; and interviews of clients and witnesses. These and other

types of assistance must be provided under the supervision and direction of a licensed attorney; and

B. practice of law, insofar as court proceedings are concerned, includes:

- (1) representation of parties before judicial or administrative bodies;
- (2) preparation of pleadings and other papers, incident to actions and special proceedings;
- (3) management of such actions and proceedings; and
- (4) noncourt-related activities, such as:
 - (a) giving legal advice and counsel;
 - (b) rendering a service which requires use of legal knowledge or skill; and
 - (c) preparing instruments and contracts by which legal rights are secured.

Committee commentary. - The definition of "legal assistant" is intended to cover those persons usually designated as "legal assistants", "paralegals" and "lawyers' assistants". The definition exemplifies the broad range of tasks which may be performed by a legal assistant. Other persons such as legal secretaries, law clerks and law graduates not admitted to practice in the State of New Mexico are also encompassed to the extent they perform the tasks contemplated by the definition. For a discussion of what constitutes "practice of law", see *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 85 N.M. 521, 514 P.2d 40 (1973).

20-103. Practice of law prohibited.

A "legal assistant" is not permitted to practice law.

A lawyer is responsible to ensure that a legal assistant for whose work the lawyer is responsible does not practice law.

Committee commentary. - Rule 16-505 of the Rules of Professional Conduct provides that "[a] lawyer shall not . . . assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law".

The rule is cited to emphasize that a legal assistant cannot practice law, any more than any other unlicensed person or entity can practice law. Furthermore, a lawyer who uses the services of a legal assistant has a professional responsibility to ensure that the legal assistant does not practice law and thereby involve the lawyer in any violation of the Rules of Professional Conduct.

Some activities which would involve the unauthorized practice of law if undertaken by the legal assistant include: (a) independently recommending a course of conduct or a particular action to a client; (b) evaluating for or speculating with a client on the probable outcome of litigation, negotiations or other proposed action; (c) independently outlining rights or obligations to a client; and (d) independently interpreting statutes, decisions or legal documents to a client.

A lawyer should ensure that legal assistants for whose work the lawyer is responsible are aware of 36-2-28 NMSA 1978, which imposes criminal penalties upon persons who are not licensed to practice law and who "practice or assume to act or hold himself out to the public as a person qualified to practice or carry on the calling of a lawyer. . .".

COMPILER'S ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Contracts by organizations, in business of providing evidence, witness, or research assistance to legal counsel in specific litigation, 15 A.L.R.4th 1255.

20-104. Disclosure required.

A lawyer will require the legal assistant for whose work the lawyer is responsible to disclose to all persons with whom the legal assistant communicates that the legal assistant is not a lawyer.

Committee commentary. - A lawyer will instruct legal assistants for whose work the lawyer is responsible to disclose at the beginning of any dealings with other persons that the legal assistant is not a lawyer. Even when acting in capacities in which nonlawyers are normally permitted to function, such as fact investigation, disclosure should always be made to all persons or agencies involved, since use of the employer's name in connection with the legal assistant's duties may lead third parties to believe that the legal assistant is a lawyer. Disclosure of nonlawyer status is equally applicable to oral communications, and common sense would indicate that a routine disclosure be made at the beginning of any conversation.

The term "associate" is generally construed to mean a lawyer and should be avoided in referring to a legal assistant. A legal assistant, as an employee of a lawyer or law firm, is not an associate and the relationship of the legal assistant to the lawyer should be made clear in any oral or written communication. If at any time, in written or in oral communications, a misunderstanding of the legal assistant's nonlawyer status is suspected, the legal assistant will reiterate that the legal assistant is not a lawyer. This communication may be made in any way that avoids confusion.

Rule 16-402 of the Rules of Professional Conduct prohibits a lawyer from communicating with a party the lawyer knows to be represented by a lawyer, unless the lawyer representing such third party consents. This rule also prohibits lawyers from causing other persons to make such communications, and thus applies equally to communications by legal assistants with third parties. The lawyer's obligation is to ensure that legal assistants do not communicate directly with parties known to be represented by an attorney, without that attorney's consent, on the subject of such representation.

20-105. Confidentiality.

A lawyer has an affirmative obligation to ensure that the legal assistant for whose work the lawyer is responsible preserves the confidences and secrets of a client.

Committee commentary. - Rule 16-503 of the Rules of Professional Conduct provides in part:

a lawyer having direct supervisory authority over the nonlawyer [assistant] shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. . . .

The lawyer's responsibility is to instruct the legal assistant that all information concerning representation of a client (indeed, even the fact of representation, if not a matter of public record) must be kept strictly confidential.

20-106. Client communications.

A lawyer will maintain active personal communication with the client.

Committee commentary. - Maintaining active personal communication with the client does not preclude a legal assistant from meeting with or talking to the client, nor does it mandate regular and frequent meetings between the lawyer and client.

20-107. Advocacy.

A legal assistant may not act as an advocate on behalf of the client and cannot appear in court or any other tribunal, either in person or on record, as a representative of or advocate for the client, except to the extent authorized by law.

Committee commentary. - Only a lawyer may act as a representative of or advocate for a client. A legal assistant cannot appear, plead, try cases or argue in court on behalf of anyone other than the legal assistant pro se, or do anything in a representative capacity for a client unless specifically authorized by the Rules of Professional Conduct, statutes, court rules or decisions. Even when a legal assistant is permitted to appear and represent a client, if the legal assistant's employer is named as attorney of record, the legal assistant should disclose his nonlawyer status. See Rule 20-104, supra.

20-108. Duty to client.

A lawyer is responsible to ensure that no personal, social or business interest or relationship of the legal assistant impinges upon, or appears to impinge upon, the services rendered to the client.

Committee commentary. - If a lawyer accepts a matter in which the legal assistant may have a conflict of interest, the lawyer will exclude that legal assistant from participation in any services performed in connection with that matter. Furthermore, the lawyer must specifically inform the client that a nonlawyer employee has a conflict of interest which, was it the lawyer's conflict, would prevent further representation of the client in connection with the matter. The nature of the conflict should be disclosed. The lawyer will caution the legal assistant to inform the lawyer of any interest or association which might constitute or cause such a conflict, or which might give the appearance of constituting or causing such a conflict. In addition, no interest or loyalty of the legal assistant may be permitted to interfere with the lawyer's independent exercise of professional judgment.

20-109. Referrals.

The lawyer will not permit, encourage or influence the legal assistant for whose work the lawyer is responsible to recommend that the lawyer or the lawyer's firm be retained by any person or entity, nor shall the lawyer condone such activity on the part of a legal assistant.

Committee commentary. - Rule 16-702 of the Rules of Professional Conduct prohibits a lawyer from recommending to a nonlawyer who has not sought advice employment of the lawyer or his or her partners or associates, from giving anything of value for having recommended employment of the lawyer or from requesting others to promote the lawyer's services. These prohibitions apply with equal force to a legal assistant who attempts to influence others to select the legal assistant's employer.

20-110. Competency.

A lawyer is responsible to ensure that a legal assistant is competent to perform the work which the lawyer delegates to the legal assistant.

Committee commentary. - Rule 16-101 of the Rules of Professional Conduct requires a lawyer to represent a client competently. In order to fulfill this obligation, a lawyer must ensure that a legal assistant employed by the lawyer, and for whose work the lawyer is ultimately responsible, is able to competently perform the work assigned by the lawyer. This requires that the lawyer be aware of the abilities of a legal assistant and delegate to the assistant only those assignments which are within the assistant's capacity to perform competently.

A lawyer who hires a legal assistant is responsible for carefully evaluating the legal assistant's education and experience to determine if the assistant can competently perform the tasks which it is contemplated will be assigned. Once a legal assistant is in the employ of a lawyer, the lawyer has a continuing obligation to closely supervise the work of the legal assistant. A lawyer may train a legal assistant to perform increasingly complex assignments under the supervision of the lawyer, and a process of gradually escalating the level of difficulty of the type or types of work assigned to the assistant may be used to raise the skill level of a legal assistant. Specialized instruction provided to a legal assistant, whether through the personal efforts of the lawyer who supervises the assistant or through other means such as seminars or classes, may be helpful in maintaining and raising the assistant's level of competence, but it remains the responsibility of the individual lawyer to determine the extent of the assistant's skills and to delegate to the assistant accordingly. In addition, a lawyer should explain to the legal assistant that the legal assistant has a duty to inform the lawyer of any assignment which the assistant regards as being beyond his capability.

20-111. Business associations prohibited.

A lawyer will not form a partnership or other entity with a legal assistant for the purpose of practicing law.

Committee commentary. - The lawyer may not enter into any ownership arrangement with a legal assistant involving the practice of law.

A lawyer will not share fees with a legal assistant. The compensation of a legal assistant may not include a percentage of profits, fees received generally or fees received specifically from a client who came to the lawyer or the firm by reason of acquaintance or other association with the legal assistant.

However, Rule 16-504 of the Rules of Professional Conduct provides authorization for a lawyer or law firm to include legal assistants in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, since such inclusion does not aid or encourage laymen to practice law.

20-112. Accountability.

The legal assistant is directly accountable to the lawyer. The lawyer maintains ultimate responsibility for and has an ongoing duty to actively supervise the legal assistant's work performance, conduct and product.

Committee commentary. - A legal assistant's duty is to inform the responsible lawyer of all significant actions and services performed in the course of the legal assistant's employment. Only the lawyer can perform professional legal services; only to the extent that the lawyer is fully informed of the actions of his or her legal assistants can the lawyer maintain ultimate responsibility for those actions. Finally, only by thorough supervision of the legal assistant can the lawyer ensure that the legal assistant is neither engaging in the unauthorized practice of law nor involving the lawyer in any violation of the lawyer's professional responsibilities.

Rule 16-503 of the Rules of Professional Conduct states that "a lawyer having direct supervisory authority over the nonlawyer [assistant] shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer".

20-113. Business stationery and cards.

The letterhead of a lawyer or law firm may not include the name of a legal assistant. However, a lawyer or law firm may permit its name to appear on the business card of a legal assistant, provided the legal assistant's capacity is clearly indicated.

Committee commentary. - Rule 16-705 of the Rules of Professional Conduct specifies what information may be given on a lawyer's letterhead.

A lawyer may permit a legal assistant to sign correspondence on his letterhead or on the letterhead of a law firm, as long as the nonlawyer status of the legal assistant is clearly disclosed by a title accompanying the signature, such as "legal assistant" or "paralegal". Moreover, the business card of a legal assistant may contain the name, address and telephone number of the legal assistant's employer, whether a firm or an individual lawyer. However, the card must on its face be clearly intended to identify the legal assistant and not the lawyer or law firm.

The distinction between business cards and letterheads was drawn in ABA [Comm. on Professional Ethics, Opinions, Nos.] 909 (1966) and 1000 (1967). The opinions distinguish business cards and letterheads on the basis that the card is the employee's, basically designed to identify the employee and to state by whom the person is employed, as a reinforcement of what one would expect an employee to convey in an oral statement, not the professional card of the lawyer or law firm. A lawyer who permits his or her name or the name of a law firm to appear on the business card of a legal

assistant is charged with the responsibility of ensuring that the card meets the same standards of dignity and accuracy as would be required for the lawyer's own card.

20-114. Rules of Professional Conduct; compliance.

A lawyer has an affirmative obligation to ensure that a legal assistant for whose work the lawyer is responsible does not engage in any activities which, if engaged in by the lawyer, would constitute a violation of the Rules of Professional Conduct.

Committee commentary. - In order to avoid misconduct by the legal assistant, acting as the agent of an attorney, a lawyer must ensure that legal assistants for whose work the lawyer is responsible are familiar with the Rules of Professional Conduct. Without attempting an exhaustive listing of the activities encompassed by this guideline, the following are examples. A legal assistant may not issue statements which, if made by a lawyer, would violate Rule 16-701 or 16-702 of the Rules of Professional Conduct concerning communications and advertising. A lawyer will not permit or condone activities of a legal assistant for whose work the lawyer is responsible in communicating with jurors, contacting witnesses or communicating with a judge, when such activities, if engaged in by the lawyer, would violate Rule 16-304 (contact with witnesses) or Rule 16-305 (communicating with judges, jurors or other officials).