

## Opinion No. 1 of 2000

*Editor's Note: The opinions of the Legal Ethics Committee of the Indiana State Bar Association are issued solely for the education of those requesting opinions and the general public. The Committee's opinions are based solely upon hypothetical facts related to the Committee. The opinions are advisory only. The opinions have no force of law.*

This opinion addresses the application of Indiana Rule of Professional Conduct 8.4(c) to the following fact situation:

Plaintiff's counsel in a medical malpractice case contacted an attorney who represented the employer of a potential witness. Plaintiff's counsel tape recorded the telephone conversation without the knowledge or permission of the employer's counsel. The existence of the tape recording was revealed for the first time when the employer's counsel was called to testify during a hearing held ancillary to the malpractice case. The question presented is whether the surreptitious recording of a telephone conversation between attorneys under the circumstances described violates Rule 8.4(c) of the Rules of Professional Conduct.

### Analysis

As is stated in the preamble of the Rules of Professional Conduct, "A lawyer should demonstrate a respect for the legal system and for those who serve it including judges, other lawyers and public officials." The surreptitious recording of telephone conversations between counsel does not uphold the respect for the legal system that is called for in the Preamble and other rules. Moreover, the Committee perceives such conduct to be fundamentally deceitful and dishonest.

It is the opinion of the Legal Ethics Committee that when an attorney surreptitiously tape records a telephone conversation

with another attorney in connection with a pending legal matter a violation of Rule 8.4(c) of the Rules of Professional Conduct occurs. Although it is not illegal in the state of Indiana to tape record another person without that person's knowledge, it is unethical for an attorney to do this to another attorney in the context of a pending legal matter without informing him first. The reason is that it is professional misconduct for an attorney to engage in dishonesty, fraud, deceit or other misrepresentation. Indiana Rule of Professional Conduct 8.4(c). There is an implication of privacy attendant to a two-party telephone conversation. Irrespective of the purpose for which the eventual recordings are to be used, it is dishonest and deceitful for an attorney to tape-record another attorney during a telephone conversation regarding legal matters without informing the other attorney of such. Rule 8.4(c) applies to this type of case because the surreptitious tape recording, although not illegal, cuts directly to the core of the relationship between counsel and will have a chilling effect on discussions between them. Not only do these secret recordings violate standards of fairness, they undercut the need for candor in the legal profession and would inhibit the flow of communication in presumably private conversations among counsel.

Although not addressed in Indiana, numerous other bar associations have examined this issue. For example, the Alaska Bar Association came to the conclusion that a failure to notify all parties to a conversation that the conversation is being recorded constitutes a representation that the conversation is not being recorded. Consequently the Alaska Bar concluded that secretly recording the telephone conversation violates the

rule that a lawyer should not engage in deceitful conduct. Alaska Bar Association Opinion 78-1; 337, accord ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 337 (1974).

The Committee observes that attorneys often negotiate settlements, discuss the facts of a case, or discuss other matters "off the record" in order to facilitate the process of moving a case to a point where the best resolution can be accomplished. In a criminal case, defense counsel and prosecutors typically enter into candid discussions preliminary to a plea agreement between the parties. The same sort of candor between counsel is frequently helpful in civil matters. The mediation process is cloaked with limited confidentiality so that any statements made during the course of mediation (with some exclusions) are not available for use at a later point in trial. Alt. Disp. Resolution Rule 2.11. The protection provided to statements made in the mediation process serves to promote settlement through open discussion unrestrained by concern about the ramifications of those discussions in some other setting. For the same reason, when attorneys have discussions on the telephone or at other times, even when not in mediation, they are entitled to presume that a limited degree of privacy attends such conversations. The Committee believes that these candid and private conversations many times bring parties to a resolution that would not be had if counsel needed to be concerned about speaking "for the record." These considerations suggest that Rule 8.4(d)'s proscription against conduct prejudicial to the administration of justice may also be applicable to these facts, however the applicability of that rule is not

(continued on page 40)

## ATTORNEY ETHICS

*continued from page 39*

necessary to the Committee's decision.

The Committee does not mean to suggest that attorneys may not make post-conversation records of counsel's remarks. Nor does the Committee believe that an attorney cannot take notes during a conversation with another lawyer.

However, the Committee believes that a tape recording is fundamentally different from other methods of memorializing the conversation and that the surreptitious tape recording of a conversation is dishonest and deceitful to the point of violating the proscription of Rule 8.4(C).

The Indiana Supreme Court has made it quite clear that attorneys are expected to assiduously avoid deceptive or discourteous conduct. *Fire Insurance Exchange v. Bell* (Ind. 1994) 643 N.E.2d 310, 312-13. Secretly tape recording a telephone conversation with another attorney falls short of this standard. ❧

## Opinion No. 2 of 2000

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### Issue

Is a lawyer within ethical bounds if he (or she) refers an existing client to another lawyer, with the main intention of creating a conflict on the part of the second lawyer, thereby disqualifying the second lawyer from representing clients with opposing interests?

### Facts

A number of lawyers have contacted the Committee regarding this issue, which is best laid out in a singular hypothetical: A lawyer who limits his practice to domestic relations discovered that other lawyers have referred their clients to him for consultations, intending to disqualify the lawyer from representing their clients' spouses. The Committee is not aware of how the lawyer discovered this, and thus is not in any manner commenting on the credibility of the allegations.

### Specific issues presented

Are the referring lawyers violating the Rules of Professional Conduct?

### Analysis

Are the referring lawyers violating the Rules of Professional Conduct?

In the view of the Committee, the answer is yes. The instinctive reaction to such a practice is that it is wrong. The conduct is not explicitly prohibited by a Rule directly on

point, and since lawyers exist to interpret rules to the benefit of their clients, some think that anything not expressly forbidden is acceptable.

The Rules of Professional Conduct are not equivalent to criminal law, and are not meant to be. Attorneys are obligated to abide by not only the letter but also the spirit of the Rules. Here the Committee would like to point out that deceptive behavior violates both the specific provisions of the Rules and their spirit. Most importantly to those who strive to uphold the lofty ideals of our profession, such behavior on the part of the individual lawyers dims the reputation of all of us.

In the case presented, the Committee concludes that a violation of both the Preamble to the Rules of Professional Conduct and Rule 4.4 has occurred.

#### The Preamble states:

Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and

public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.

...

Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.

The deceptive party, lawyer 2, is subverting the purposes of the Rules by aggressively using them as procedural weapons to disqualify the "victim" (for lack of a better word), lawyer 1. Lawyer 2 does not need an opinion by the Committee to tell him that, either. As the Preamble says, "[t]he Rules do not, however, exhaust the moral and ethical considerations that should inform [the] lawyer," but lawyer 2 is not listening to those moral and ethical considerations.

Lawyer 2 is also violating Rule 4.4, which says, "In representing a

*(continued on page 32)*

## ETHICS

*continued from page 31*

client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, ...” The sole purpose of lawyer 2’s behavior is to burden or delay his client’s spouse. If lawyer 2 is intentionally sending his client to lawyer 1 for the purpose of disqualifying lawyer 1 from some pending or future action, he can only be doing so because he does not want to go against lawyer 1. There is no “substantial purpose” to lawyer 2’s means, only an intent “to ... delay, or burden a third person,” the spouse, by preventing the spouse from hiring the attorney of his or her choice.

In the course of advising and representing their clients, each of us strives to do whatever the law allows to help them achieve their objectives. The temptation to give the clients what they want must be tempered by the obligations of all lawyers as officers of the legal system with “a special responsibility for the quality of justice” (Preamble, Rules of Professional Conduct). While lawyers are charged with a duty to represent clients with skill (Rule 1.1) and diligence (Rule 1.3), these requirements are limited by a lawyer’s duty to be honest (Rules 3.3(1), 4.1, 8.4(c)), to be fair to third parties (Rules 4.1 through 4.4), and to uphold the integrity of the profession and the judicial system (Rules 8.1 through 8.4). In short, if we expect the public to treat the legal system and lawyers with honor, then we must expect lawyers to act honorably. The Committee concluded that the behavior described by the facts of this case violates the standards set by the Rules of Professional Conduct. 52

## Opinion No. 3 of 2000

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This Opinion addresses the question of whether an attorney may utilize the services of a paralegal who is not a full or part-time employee of the attorney.

### Facts

The inquiring attorney questions the propriety of an individual offering paralegal services to multiple attorneys and law firms on a non-exclusive basis. The inquiry presumes that the paralegal would be employed on a case-by-case basis and subject to the direct supervision of a particular attorney in regard to the work assigned to the paralegal.

### Discussion

The Rules of Professional Conduct do not use the term "paralegal." However, they clearly contemplate that attorneys will be aided by nonlawyer assistants. The responsibilities of an attorney regarding nonlawyer assistants are explained in Rule 5.3(a) and (b) as follows:

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. ...

The Committee believes that a paralegal is one type of nonlawyer assistant who has through education, training or both acquired specialized legal skills sufficient to allow him or her to capably assist an attorney in carrying out such attorney's responsibilities to a client. Like all other nonlawyer assistants, paralegals may be utilized by attorneys only in conformity with the Rules of Professional Conduct. This includes not only Rule 5.3, but also Guidelines 9.1 through 9.10 regarding "Use of Legal Assistants."

Guideline 9.1 must be considered. It is as follows:

#### Guideline 9.1. Supervision

A legal assistant shall perform services only under the direct supervision of a lawyer authorized to practice in the state of Indiana and in the employ of the lawyer or the lawyer's employer. Independent legal assistants, to-wit, those not employed by a specific firm or by specific lawyers are prohibited. A lawyer is responsible for all of the professional actions of a legal assistant performing legal assistant services at the lawyer's direction and shall take reasonable measures to insure that the legal assistant's conduct is consistent with the lawyer's obligations under the Rules of Professional Conduct.

The inquiring attorney has properly noted that there is a superficial appearance of inconsistency between Rule 5.3 and Guideline 9.1. The former envisions that nonlawyers may be "employed or retained by or associated with a lawyer." The latter says that "(i)ndependent legal assistants, to-wit, those not employed by a specific firm or by specific lawyers are prohibited." The Committee believes that the proper interpreta-

tion of Guideline 9.1 focuses on the term "independent" meaning someone who is acting other than under the direct supervision of a lawyer. In this context a paralegal or other legal assistant who is acting under a lawyer's supervision would not be independent, even though the paralegal may not be actually "employed" in the traditional sense of an employment relationship. The Committee interprets Rule 5.3 and Guideline 9.1 to allow a paralegal to be temporarily retained by a lawyer other than as an employee; provided that the paralegal is subject to the lawyer's supervision and control.

The official comment to Rule 5.3 supports the Committee's interpretation. It says:

#### Comment

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

The key element in Rule 5.3 is that the lawyer maintains supervision and control over the work. Unauthorized practice of law must not be allowed. The degree of supervision required depends upon the nature of the work. The closer the work comes to the practice of law the more supervision is required.

*(continued on page 18)*

## ATTORNEY ETHICS *continued from page 17*

The Committee's interpretation also promotes the public interest in access to cost-effective legal services. The use of nonlawyer assistants allows for the efficient delivery of cost-effective legal services. Efficiency and cost savings are enhanced by employing legal assistants only when needed. The public has an interest in having unrestricted access to capable lawyers of their choice. Lawyers in small firms may not be able to afford to keep a good paralegal on staff. This may make it impossible for some attorneys to economically handle some types of cases. Thus, some lawyers would be unavailable to the public for certain cases due to staffing concerns. However, the use of what may be called "contract paralegals" may make it possible for more lawyers to afford required staff. The public would have more

available lawyers from which to choose.

It must be recognized that economic considerations are likely to persuade a contract paralegal to accept work with more than one law firm at a time. It is also conceivable that groups of paralegals could join together in various business structures to offer services to the legal profession in the same manner as court reporters or private investigators. These arrangements are pregnant with problems involving client confidentiality and conflicts of interest implicating Rules 1.6, 1.7 and 1.9. An attorney who hires a contract paralegal must be sensitive to these concerns.

Rule 1.6 requires that client confidentiality be maintained. A legal assistant may acquire information about a client's transactions, attorney strategies, thought

processes, work products and privileged information. The lawyer is responsible to see that the assistant maintains confidentiality. (See Guideline 9.6.) This responsibility does not end at the conclusion of the term of a legal assistant's temporary engagement. (See Guideline 9.10(f).)

It can be expected that most attorneys who employ a full-time or permanent part-time legal assistant impose a duty of confidentiality upon the legal assistant as part of the terms of employment. The attorney should cover this point in writing, whether in the employment application, an employee handbook, and employment letter or otherwise. Similarly, the attorney who hires a contract paralegal should take steps to formally impose a duty of confidentiality on the paralegal consistent with the lawyer's obligations under Rules 1.6, 5.3 and Guideline 9.6. As part of this process the lawyer should address issues such as where client records and paralegal work product are to be kept. The return of the records to the lawyer or client and any restrictions on the paralegal's use of facilities (e.g., a separate office) outside the lawyer's office should also be covered.

Just as a lawyer must address confidentiality with a contract paralegal, that lawyer must also take action to deal with conflicts of interest. The language of conflict of interest rules (principally Rules 1.7, 1.8, 1.9, 1.10 and 1.11) do not address the interest of a lawyer's staff or independent contractors. However, the Committee concludes that the purposes of both the conflict of interest rules and the confidentiality rules would be subverted by allowing an attorney to engage a contract paralegal to work on a particular client matter when such paralegal is simultaneously working for a firm which represents an

opposing party. Such a practice would also be inconsistent with the lawyer's duty under Guideline 9.6 to take reasonable measures to ensure that all client confidences are preserved by a legal assistant."

The requirement that a lawyer take steps to prevent a contract paralegal from "working both sides" is reinforced by Guideline 9.10 which states:

#### **Guideline 9.10.**

##### **Legal Assistant Ethics**

All lawyers who employ legal assistants in the state of Indiana shall assure that such legal assistants conform their conduct to be consistent with the following ethical standards:

- (a) 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 direct relationship with the client, and assumes full professional responsibility for the work product.
- (b) A legal assistant shall not engage in the unauthorized practice of law.
- (c) A legal assistant shall serve the public interest by contributing to the delivery of quality legal services and the improvement of the legal system.
- (d) A legal assistant shall achieve and maintain a high level of competence, as well as a high level of personal and professional integrity and conduct.
- (e) A legal assistant's title shall be fully disclosed in all business and professional communications.
- (f) A legal assistant shall preserve all confidential information provided by the client or acquired from other sources before, during, and after the course of the professional relationship.
- (g) A legal assistant shall avoid conflicts of interest and shall disclose any possible conflict to the employer or client, as well as to the prospective employers or clients.
- (h) A legal assistant shall act within the bounds of the law, uncompromisingly for the benefit of the client.
- (i) A legal assistant shall do all things incidental, necessary, or expedient

for the attainment of the ethics and responsibilities imposed by statute or rule of court.

(j) A legal assistant shall be governed by the American Bar Association Model Code of Professional Responsibility and the American Bar Association Model Rules of Professional Conduct.

The Committee notes for comparison American Bar Association Opinion 88-1526 which permits paralegals formerly employed by a firm with a matter adversarial to a second firm to become employed by the second firm provided that there is an effective inquiry process, a consent obtained from the adversary and the client and an effective ethical wall is utilized to prevent the improper transmission of information. Under the Rule a contract paralegal could in very limited circumstances move sequentially from one side of the case to another. However, the problems inherent in concurrent employment by adverse attorneys are so great that such an agreement must be seen as prohibited.

#### **Conclusions**

The Committee concludes that an attorney may properly engage a contract paralegal to assist with client matters provided that such attorney (a) maintains proper supervision and control over the paralegal's work and (b) takes such action as may be necessary to satisfy the requirements of Guidelines 9.1 through 9.10. The Committee believes that such steps should certainly address specifically the issues of client confidentiality and conflicts of interest. 42