

WHY “WALK THE LINE”? EFFECTIVE, EFFICIENT, AND ETHICAL PRACTICES FOR IMMIGRATION PARALEGALS

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In law firms of all types, paralegals play a prominent role in client relations, case preparation, and file administration.¹ In few areas of the law is this truer than in immigration.

Paralegals in immigration law firms often find themselves walking the line between activities that are permissible for paralegals and those for which a

supervising attorney is responsible.² Setting a definitive line is very difficult but can be accomplished through the use of systems to define the scope of paralegals' duties, attributes to consider when hiring paralegals, how to make the best use of a paralegal's talents, and the ways paralegals, supervising attorneys, and clients can communicate.

This article offers suggestions on how paralegals can avoid crossing the line between permissible and impermissible practices,³ not through a review of laws governing unauthorized practice⁴ but through the study of better practices.

WHY NOT CROSS THE LINE?

It is often easier for a paralegal to reply directly and immediately to a client's question, offer analysis and strategy, make recommendations, and advise clients than to act as an intermediary between the client and the supervising attorney. Moreover, an experienced paralegal is often amply qualified to offer sound advice. Such action, however, simply is illegal.⁵ All states have laws that prohibit the unauthorized practice of law and restrict paralegals and

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¹ J. Broderick, *An Emerging Model: Legal Assistant as Colleague*, in *Leveraging with Legal Assistants: How to Maximize Team Performance, Improve Quality, and Boost Your Bottom Line* (Arthur G. Greene, ed., 1996).

² American Bar Association (ABA) Model Rules of Professional Conduct, Rule 5.3.

³ The unauthorized practice of law may be reported to the Office of Immigration Assistance Attorney General Hotline at (888) 587-0557. Illegal or unethical attorney practices may be reported to the ABA at www.abanet.org/cpr/regulation/scpd/disciplinary.html. The *ABA/NBA Lawyers Manual on Professional Conduct*, available at www.abanet.org, states, “A lawyer is subject to discipline if he or she assists a nonpayer in engaging in the unauthorized practice of law. For purposes of this prohibition, non-lawyers include not only those without legal training, but also disbarred, suspended, or out-of state lawyers not licensed in the jurisdiction.”

⁴ M. Lieberman, “Unauthorized Practice of Law by a Paralegal: What It Is and How to Avoid It,” DCBA Briefs Online (2002) March 27, 2006, available at www.dcba.org/brief/mayissue/2002/art40502.htm.

⁵ M. Newman & R. Ford, “Utilizing Immigration Paraprofessionals: The Ethical Considerations,” in *Ethics in a Brave New World*, 15–27 (J. Pinnix, ed., 2004).

other support staff from acting too independently. Violations can subject a supervising attorney to disciplinary sanctions and malpractice claims and a paralegal to charges of unauthorized practice of law.

It can also be costly and inefficient for paralegals to counsel clients, work on cases without adequate supervision, and otherwise engage in activities that are within the province of attorneys. For instance, a paralegal in preparing a petition or preparing for a hearing might be unsure of exactly what documents and information are required. In such cases, a paralegal who is not well supervised might waste valuable time and money by pursuing case strategies, research, or evidence that is superfluous, inappropriate or even harmful.

Similarly, though an attorney may *trust* that a paralegal, especially one with years of experience, will be vigilant about maintaining client confidentiality,⁶ but even a good paralegal may accidentally and innocently breach that confidence, thereby creating problems for the attorney-client relationship and exposing the attorney to ethical sanctions.

In order to prevent this, lawyers and law firms should have systems that help prevent unintended intrusions into the attorney's realm while also promoting effective and efficient paralegal practices.

Establishing Systems for Keeping Paralegals Effective, Efficient, and Ethical

Each immigration case should begin with a retainer agreement describing the legal services to be provided and the fees for those services. The agreement informs clients, attorneys, and paralegals of their respective roles and responsibilities. The document can include standard information about attorney-client relationships,⁷ confidentiality,⁸ dual representation,⁹ and the nature of nonattorney assistance on the case¹⁰ (that paralegals work under the supervision of an attorney and are therefore bound

by the ethical and legal responsibilities arising from the attorney-client relationship).¹¹ A copy reminds the paralegal of his or her limits and role within a particular case.

An employee manual or office policy that reviews these same issues should be required reading. Moreover, paralegals should be asked to sign or initial a document confirming that they have read and understand the manual. There should be opportunities for questions and a review of scenarios with supervising attorneys where such issues arise. The policy should incorporate procedures that help the paralegal understand how these issues can be raised and to whom concerns may be brought, and also provide channels for confidential inquiries about attorney behavior and ethics and the limits of a paralegal's role. Similarly, an attorney joining a law firm should have resources available that provide a common understanding of the role of the paralegal at the firm.¹²

The Paralegal and the Evidence

A paralegal can be highly effective at the outset of a case. A well-trained paralegal can even lead the client interview and be responsible for putting together a complete record of relevant facts, such as current and former immigration status, education, work experience, family relationships, police incidents, and other factors germane to the analysis of immigration cases. To ensure that the paralegal does this properly, attorneys should have standard checklists for client interviews with several pages calling for general information as well as questions geared for particular case types.¹³

Written instructions from the attorney on the checklist ensure appropriate supervision. For instance, a checklist for an H-1B case might identify such common tasks as obtaining a copy of the beneficiary's degree and any necessary translations; it might remind the paralegal to copy in the supervising attorney on correspondence and to document any substantive communications from the client.

⁶ R. Anteau & N. Wolff, "Keeping Secrets Secret: Safeguarding Client Confidentiality in Your Law Office," *ABA General Practice, Solo & Small Firm Division Magazine*, September 2000, www.abanet.org/genpractice/magazine/sept2000/sep2000anteau.html (accessed Mar. 27, 2006).

⁷ H. Vyas, "Ethical Issues for Immigration Lawyers," *Ethics in a Brave New World*, 4–14 (J. Pinnix, ed., 2004).

⁸ Anteau & Wolff, *supra* note 6.

⁹ B. Hake, "Dual Representation in Immigration Practice," *Ethics in a Brave New World* 28–35 (J. Pinnix, ed., 2004).

¹⁰ Newman & Ford, *supra* note 5.

¹¹ National Association of Legal Assistants, "Model Standards and Guidelines for Utilization of Legal Assistants-Paralegals," *NALA Model Standards 2005*, available at www.nala.org/98model.htm, (accessed March 27, 2006).

¹² *Id.* Among other limitations, paralegals cannot establish attorney-client relationships, set legal fees, give legal opinions or advice, or represent a client before a court.

¹³ For sample checklists and other helpful law office documents, see *AILA's Immigration Practice Toolbox*, Second Ed. (2006) with CD-ROM, available at www.ailapubs.org.

A Paralegal's Role in Spotting Legal Issues

Connected to his or her role in the collection of evidence, the paralegal detects issues that require research, legal advice, or other attorney intervention. To be effective in this role, the paralegal must sufficiently understand the law, and be able to locate and use statutes, regulations, and Web and other resources, such as AILA InfoNet. The supervising attorney and law firm must be clear that the paralegal must be familiar with the laws and regulations and keep informed of current developments.

This aspect of a paralegal's work does not encroach on the role of the attorney; rather, it equips the paralegal with an understanding of the law for more ready identification of issues that require the attorney's intervention.

The Paralegal's Role in Completing Forms

A common responsibility for immigration paralegals is to complete immigration forms. Though some may think of this as merely routine, anyone who has made an error on forms understands their critical importance. Some attorneys and paralegals will have clients sign a form in blank or allow a client to sign a form without fully explaining the contents and significance of the form. These practices are unacceptable practices and unethical; they can lead to future problems. Even if it is time-consuming to explain all parts of forms to clients, many mistakes, misunderstandings, and legal violations can be avoided if paralegals and attorneys take this step.

The Paralegal's Role in Providing Client Copies

Paralegals often transmit a copy of a draft final petition, or other filing to the client. The supervising attorney must ensure that this important task is done. To preserve confidentiality, prevent lost documents, and respect client preferences, the standard checklists should indicate to whom copies should be sent.

The Paralegal's Role as Messenger

Paralegals from communicate legal advice from the supervising attorney to a client. As a messenger, the paralegal should be clear that the legal advice is from the attorney, *not* his or her own advice. Ideally, such communications should be in writing for record-keeping purposes.

Paralegals and attorneys can work together to identify the most effective and ethical ways for attorneys to communicate the necessary legal advice. For example, if a paralegal drafts a memo, e-mail, or letter to a client that communicates advice or guid-

ance, the document should first be reviewed by the supervising attorney for any necessary revision, and then should go out over the attorney's name.

Templates for documents, such as task, document, and information checklists; memoranda to the file; or letters confirming client communications can be helpful tools for paralegals. AILA's *Immigration Practice Toolbox* is an excellent resource for attorneys and firms seeking to improve their office templates. The use of case management software also is helpful for maintaining records, communicating with clients, and helping paralegals walk the line between the legitimate paralegal role and encroaching on the attorney's prerogative.

Hiring Paralegals: Skills to Look for

When hiring a paralegal, a number of factors must be considered: individual strengths, communication skills, the ability to handle deadlines and pressure, organization, compatibility with others, prioritization, and of course personal character, integrity, and honesty. Some can be taught; others are part of a person's character and can be difficult to judge or test. At the heart of the hiring decision is the question of whether and in what way a paralegal is going to contribute to the strength of a law firm.

Handling Diverse Strengths

Paralegals come from a wide variety of ethnic, linguistic, socioeconomic, and educational backgrounds and, thus bring different skills, talents, and attributes to a law firm. Recognizing his or her strengths is a key to optimizing a paralegal's effectiveness.

For example, paralegals who were raised in another culture have a specific knowledge and respect for the ways of that culture. This helps them understand complex interaction with others from that culture. Paralegals who can communicate with clients in their native languages facilitate an open dialogue.

Candidates hold paralegal certificates, associate's degrees, or bachelor's degrees in a variety of academic areas. A paralegal coming from an administrative or secretarial background might possess highly developed organizational skills. Recognizing the qualities, strengths, and talents that spring from such diversity is important for hiring decisions.

Handling Communication

Paralegals generally need strong communication skills and should be comfortable with person-to-person contact. Paralegals must be able to build relationships of trust so that clients will communicate

legally relevant information without feeling any distrust, anxiety, or shame. Here, an awareness of cultural issues that affect the nature and extent of communication can be helpful. For example, avoidance of eye contact is a sign of respect in some cultures; in others, it can be construed as reflecting insecurity or dishonesty.

Handling Clients

Supervising attorneys often rely on paralegals for routine communications with clients. This can lead to communication overload when anxious and frustrated clients engage in persistent patterns of frequent calls, e-mails, and unscheduled drop-ins.

In dealing with persistent and annoying client communications, a paralegal should realize that “clients are the purpose of our work, and not interruptions of it.” Paralegals must understand what is at stake for clients. Anticipating the concerns of clients and addressing them with periodic updates, returning telephone calls and e-mails, and being proactive in contacting clients helps prevent persistent or inappropriate demands for information.

Handling Workload

A paralegal must know when he or she is overwhelmed or can take on more work. Some idea of workload can be gleaned from a review of case management summaries, revenues generated, client and coworker feedback, the quality of the paralegal’s work, and how well records are kept. Just as paralegals should indicate when their workload is too great, they should indicate when they do not understand something, whether it is an attorney’s comments or instructions, a client’s answer, or some other communication.

Handling Problem Cases

Communication is extremely helpful to the ethical resolution of problem cases, whether the problems resulted from actions or inaction by the paralegal, the attorney, the government, the client, or some combination of these. At fault or not, a paralegal who senses that there is a problem must immediately alert the supervising attorney. This can be systematically accomplished using a simple internal-use form stating the date, description, and timing of the problem and suggestions for the problem’s resolution, initialed by the person submitting the form. Copies of the form can be placed in the client’s file and circulated as needed.

Handling Client Stress

Even when sympathetic to a client’s plight, a paralegal cannot act as a client’s therapist or confessor. The paralegal should not be the scapegoat or punching bag for a client who is frustrated and who wants to “vent” or blame the paralegal. Instead, a paralegal must be well equipped to defuse such situations and to manage pressure. A paralegal must remain sensitive to a client’s circumstances so that he or she can fairly manage the client’s expectations.

The paralegal and the supervising attorney must never inflate a client’s expectations. An example of setting client expectations is a paralegal informing a client that he or she will call the client in a set amount of days to inform the client of the case status. This gives the client a date to look forward to and may encourage the client to refrain from making premature inquiries.

Handling Priorities and Multitasking

Contrary to popular belief, multitasking is inefficient.¹⁴ An immigrant of sorts himself, the Syrian-born Publilius Syrus of Rome said, “To do two things at once is to do neither.”¹⁵ When a paralegal has an overlong “to do” list, it is difficult to know which task to do first. When every case and every task is important, the paralegal must determine the order in which to execute the tasks by effectively communicating with his or her supervising attorney, by employing common sense assessments, and by understanding the “process flow”¹⁶ in various immigration procedures.

¹⁴ “Multitasking and Task Switching,” *NALA Model Standards*, University of Michigan Brain, Cognition and Action Laboratory, available at www.umich.edu/~bcalab/multitasking.html; P. Anderson, “Study: Multitasking Is Counterproductive,” *CNN.com/Career* (Aug. 5 2001), available at <http://archives.cnn.com/2001/CAREER/trends/08/05/multitasking.focus/index.html>, accessed March 27, 1006.

¹⁵ “Publilius Syrus.” *Wikiquote.*, available at http://en.wikiquote.org/wiki/Publilius_Syrus (accessed Mar. 27, 2006).

¹⁶ Process flow refers to the standard steps that must be taken in a particular type of immigration case and the order in which the steps are generally taken, which are usually determined by immigration law and procedure, firm procedures, government processing times, and similar factors. An understanding of process flow helps paralegals gain perspective about where a specific case stands in the case type’s typical process flow. Paralegals can help attorneys strategize how to make processes for different case types flow most efficiently. For instance, they can draw up charts, diagrams, and other explanatory models to identify current process

Immigration case management software is a highly useful tool for organizing tasks. Some programs allow the user to assign a value or due date to a task to designate its priority. Regardless of the software selected, implementation can be a long and challenging process that requires both attorneys and paralegals to participate.

Training Paralegals and Keeping Them Effective

Internal Training

Throwing paralegals into the pool and seeing who can swim is not the best training practice. A training program for inexperienced paralegals should review U.S. immigration policy and law, and introduce governing regulations, manuals, and common research materials. Paralegal training will also usually include having the new paralegal “shadow” a more seasoned paralegal and gain hands-on experience by helping with tasks under close supervision and instruction.

Whether the paralegal is a new hire or a staff member being trained to assist in new ways, larger immigration law firms can coordinate the paralegal’s training with several different staff members, with each training the paralegal in a different area of specialization. Whatever the firm size or the paralegal’s experience, there should be one-on-one training with at least daily opportunities for the paralegal to present questions in an organized fashion.

External Training

Besides internal training, there are numerous organizations that offer educational programs and resources for training paralegals. Although such programs add cost to the training process, they are usually an excellent investment in a new paralegal.

Many state bar associations offer seminars on the fundamentals of U.S. immigration law. Although they may be often intended for attorneys from other fields with an interest in immigration law, they are often appropriate for paralegals who want to know more about immigration law and procedure.

Every year, AILA conducts conferences that cover immigration law fundamentals and also periodically offers seminars for immigration paralegals. AILA offers topic-specific conferences hosted by

local chapters, an annual conference, Web conferences, and teleconferences.

Continuous and Regular Training

Continuous training is essential because immigration laws constantly change. The following suggestions can help maintain paralegal skills at high level and help attorneys who work with them:

- Updates on procedural changes should be forwarded to all staff, centrally printed, and organized by topic and date for easy firm-wide access.
- Paralegals should periodically conduct research, perhaps using AILA’s InfoNet and reviewing statute and regulations, featured articles in *Interpreter Releases*, U.S. Citizenship and Immigration Services (USCIS) memos, etc.
- Attorneys should periodically hold staff meetings to review immigration procedure questions.
- Attorneys can ensure that appropriate opportunities for external professional development for paralegals, recognizing the value these add firm-wide; paralegals can debrief other staff members and take detailed notes for firm-wide distribution.

Retention: Keeping the Job Interesting

Goals and Reviews

It is important to have plans that encourage retention, measure success, and ensure adherence to ethical standards. Paralegals should work with their supervising attorneys to identify short- and long-term goals, perhaps quarterly and annual goals, and should be regularly reviewed by supervising attorneys. Firms may consider the use of self-evaluation and firm evaluation questionnaires as part of a paralegal’s performance review to facilitate open discussions of job-related issues.

The Big Picture

Attorneys should step back to consider the big picture by analyzing ethical practices, process flow, the use of case management software, the design and use of systems for improving productivity, diversifying assignments, cross-training, and other ideas to keep a paralegal interested in the job. Paralegals should be part of the process of analyzing the big-picture issues. Who better to help search for, propose, and implement new and better ways of accomplishing tasks and projects and resolving problems than paralegals themselves?

Even a paralegal’s simple suggestion that an attorney estimate how long it will take to review the

flow and analyze how to streamline processes and eliminate unnecessary steps.

paralegal's work product can do wonders for the firm's big picture, because the paralegal can more efficiently prioritize work, estimate case preparation time, update clients, and avoid stress and delays.

Looking at the big picture may also allow paralegals to consider how they may become involved in new tasks and cases. In complicated situations requiring legal advice, more experienced paralegals can draft correspondence, which can then be finalized, signed, and transmitted by supervising attorneys. Attorneys may consider offering paralegals conceptual revisions, rather than word-for-word corrections, so that paralegals can offer their own solutions for attorney consideration. Paralegals can be helpful in client receptions and other business development activities. Paralegal support also should be taken into account; a paralegal's ability to rely on other support staff, even if only occasionally when the workload is particularly large, can go a long way toward relieving and retaining the paralegal. Part of the big picture approach in mid-sized and large firms may be to analyze flexibility to shift work between paralegals in the interest of fairness and efficiency.

What It's Worth: Compensation

Paralegal compensation varies significantly depending on years of experience; there is a wealth of information on the Internet about standard paralegal pay.¹⁷ Aside from standard compensation, paralegals also may benefit from bonuses, tuition reimbursement, attendance at immigration courses, and standard transportation benefits.

Most paralegal positions are not exempt from the overtime protection requirement of the Fair Labor Standards Act (FLSA) and, thus, qualify for overtime pay for all hours worked over 40 in a workweek.¹⁸ However, at present, in addition to a salary of at least \$23,660 per year or \$455 per week,¹⁹ a professional position may be exempt from FLSA overtime protection if the position meets the following DOL-prescribed criteria:

- The employee's primary duty must be the performance of work requiring advanced knowledge;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.²⁰

Regardless of the specifics of their compensation, paralegals should not be rewarded for excessive independence, since that might encourage paralegals to avoid the necessary supervision.

CONCLUSION

Drawing the line between ethical and unethical paralegal practices is beyond challenging. Thankfully, what is known of this line can be reinforced through systems that safeguard the ethical partnership between attorneys and paralegals. These systems hinge upon understanding the scope of paralegal duties, the strengths and limitations of each paralegal, fair paralegal compensation, and issues essential to paralegal hiring, training, and development. Through this understanding, the practice of immigration law as a whole can be made more efficient, effective, and, ethical.

¹⁷ For example, the National Federation of Paralegal Association offers a Paralegal Compensation and Benefits Report available at www.nfpa.org.

¹⁸ "Exempt/Non-Exempt," *WSPA Paralegal Compensation* (Feb. 21, 2006), www.wspaonline.com/exempt.htm (accessed Mar. 27, 2006).

¹⁹ "DOL's Fair Pay Overtime Initiative," *Fair Pay*. U.S. Department of Labor Employment Standards Administration Wage and Hour Division, at www.dol.gov/esa/regs/compliance/whd/fairpay/ (accessed Mar. 27, 2006).

²⁰ Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA), Fair Pay Fact Sheet by Exemption, available at www.dol.gov/esa/regs/compliance/whd/fairpay/fs17d_professional.htm. Other DOL FairPay Fact Sheets describe further potential grounds for FLSA exemption.