

The Hole In Superman's Cape

Sharon G. Robertson, ACP, NCCP

Belinda Ann Thomas, ACP, NCCP

SHARON G. ROBERTSON, ACP, NCCP, is a paralegal with North Carolina Prisoner Legal Services, Inc., working in the Western Office in Linville Falls, NC since 1989. Ms. Robertson is the Jail Paralegal for the Safe & Humane Jails Project. Ms. Robertson graduated from the University of Arizona with a Bachelor of Arts in Secondary Education (Social Studies), and received her Associates Degree in Paralegal Technology in 1985 from Central Piedmont Community College in Charlotte, North Carolina. In 1989 Ms. Robertson earned her Certified Legal Assistant designation from the National Association of Legal Assistants, and the NALA Civil Litigation Specialist designation in 1994, and the NALA APC Criminal Litigation designation in 2011. She is also a Certified Paralegal through the North Carolina State Bar. Ms. Robertson is a member of NALA (served as Affiliated Associations Director for two years and NALA Region II Director for four years); the North Carolina Paralegal Association (served as President and Chairman of the Board); and the Paralegal Division of the NC Bar Association (served as Chair, and currently serving on the Strategic Planning/Emerging Trends Committee and the 4ALL Task Force). She was a NALA Affiliates Award winner in 1998 and 2001. Ms. Robertson serves as a member of the Curriculum Advisory Board for the Paralegal Program at Western Piedmont Community College in Morganton, North Carolina.

Belinda Ann Thomas, ACP, NCCP, has been a family law paralegal with The Vernon Law Firm for 25 years. She received her CLA/CP in 1994, her specialty in Civil Litigation in 1996, and in Social Security Disability in 2006. She is also a Certified Paralegal through the North Carolina State Bar. She is a past president of the North Carolina Paralegal Association, the Alamance County Paralegal Association, and served on the North Carolina Bar Association's Paralegal Division Council. She currently serves as Region II Director for the National Association of Legal Assistants, the Advanced Certification Board and the North Carolina State Bar Certifying Board. She was a presenter for the Family Law Institute for NALA in 2012. She has spoken on alimony and equitable distribution for the North Carolina Bar Association, The North Carolina Paralegal Association, The National Business Institute, and other associations. She is a frequent speaker for NALA Campus Live and is an alumnus of the Member Exchange Program. She was a NALA Affiliates Award Winner in 2005.

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Presentation by
Belinda Thomas, ACP, NCCP
and
Sharon Robertson, ACP, NCCP

North Carolina Paralegal Association
2014 Annual Meeting
Wilmington, NC

The Hole in Superman's Cape



CAST OF CHARACTERS:

- ☞ Judge Perry White
Blinderzone
- ☞ Clark Kentrick, Esq.
- ☞ Paralegal Lois Laney
- ☞ Secretary Jenny Olson



ETHICS ISSUES

Problem #1

Does Lois signing documents for Clark and appearing in Court?



Unauthorized Practice of Law

ABA Guideline 1

A lawyer is responsible for all of the professional actions of a paralegal performing services at the lawyer's direction and should take reasonable measures to ensure that the paralegal's conduct is consistent with the lawyer's obligations under the Rules of Professional Conduct of the jurisdiction in which the lawyer practices.

Unauthorized Practice of Law

NALA

- ☞ NALA Canon 9. A paralegal must do all other things incidental, necessary, or expedient for the attainment of the ethics and responsibilities as defined by statute or rule of court.

- ☞ NALA Canon 10. A paralegal's conduct is guided by bar associations' codes of professional responsibility and rules of professional conduct.

North Carolina

Guideline 1. A lawyer is responsible for the professional conduct of a paralegal performing services at the lawyer's direction. A lawyer must take reasonable measures to ensure that the paralegal's conduct is consistent with the lawyer's obligations under the Rules of Professional Conduct.

Delegation of Tasks

ABA Guideline 2

Lawyer maintains responsibility for work product of the paralegal, a lawyer may delegate any task normally performed by the lawyer except those tasks proscribed to a nonlawyer by statute, court rule, administrative rule or regulation, controlling authority, the applicable rules of professional conduct of the jurisdiction in which the lawyer practices, or these guidelines.

Delegation of Tasks

NALA

NALA Canon 1. A paralegal must not perform any of the duties that attorneys only may perform nor take any actions that attorneys may not take.

NALA Canon 2. A paralegal may perform any task which is properly delegated and supervised by an attorney, as long as the attorney is ultimately responsible to the client, maintains a direct relationship with the client, and assumes professional responsibility for the work product.

North Carolina

Guideline 2. A lawyer shall not permit a paralegal to engage in the practice of law. To this end, a lawyer may not delegate the following responsibilities or activities to a paralegal: establishing a client-lawyer relationship and the terms of the relationship; giving oral or written legal advice or a legal opinion to a client; interpretation of legal documents for a client; or appearance in any court proceeding unless authorized by law.

Attorney-Client Relationship

NALA

NALA Canon 2. A paralegal may perform any task which is properly delegated and supervised by an attorney, as long as the attorney is ultimately responsible to the client, maintains a direct relationship with the client, and assumes professional responsibility for the work product.

NALA Canon 3. A paralegal must not: (a) engage in, encourage, or contribute to any act which could constitute the unauthorized practice of law; and (b) establish attorney-client relationships, set fees, give legal opinions or advice or represent a client before a court or agency; and (c) engage in conduct or take any action which would assist or involve the attorney in a violation of professional ethics or give the appearance of professional impropriety.

North Carolina

Guideline 3. A supervising lawyer is responsible for work product and for providing appropriate and active supervision to a paralegal. A lawyer may delegate to paralegal any task normally performed by the lawyer except as set forth in guideline 2.

Problem #2

- ☞ Can Lois retain clients on Clark's behalf ?
- ☞ Should Lois be setting fees?



Attorney-Client Relationship

ABA Guideline 3

A lawyer may not delegate to paralegal:

- (a) Responsibility for establishing an attorney-client relationship**
- (b) Responsibility for establishing the amount of a fee to be charged for a legal service**
- (c) Responsibility for a legal opinion rendered to a client.**

Billable Services

ABA Guideline 8

A lawyer may include a charge for the work performed by a paralegal in setting a charge and/or billing for legal services.

Fee Splitting & Compensation

ABA Guideline 9

A lawyer may not split legal fees with a paralegal nor pay a paralegal for the referral of legal business. A lawyer may compensate a paralegal based on the quantity and quality of the paralegal's work and the value of that work to a law practice, but the paralegal's compensation may not be contingent, by advance agreement, upon the outcome of a particular case or class of cases.

Fee Splitting & Compensation

NALA

NALA Guideline 5. An attorney may not split legal fees with a legal assistant, nor pay a legal assistant for the referral of legal business. An attorney may compensate a legal assistant based on the quantity and quality of the legal assistant's work and value of that work to a law practice.

North Carolina

Guideline 7. A lawyer may compensate a paralegal based on the quality and quantity of the paralegal's work but a legal fee may not be shared with a paralegal. The paralegal's compensation may not be contingent upon the outcome of a particular case or paid in exchange for referring clients.

Guideline 8. A lawyer may delegate management of a trust account to a paralegal or other nonlawyer employee but the lawyer remains professionally responsible for the safe keeping of the funds deposited in the account and for compliance with the recordkeeping and accountings required by the Rules of Professional Conduct.

Fees & Fee Splitting

NALA

NALA Canon 3. A paralegal must not: (a) engage in, encourage, or contribute to any act which could constitute the unauthorized practice of law; and (b) establish attorney-client relationships, set fees, give legal opinions or advice or represent a client before a court or agency; and (c) engage in conduct or take any action which would assist or involve the attorney in a violation of professional ethics or give the appearance of professional impropriety.

NALA Canon 4. A paralegal must use discretion and professional judgment commensurate with knowledge and experience but must not render independent legal judgment in place of an attorney. The services of an attorney are essential in the public interest whenever such legal judgment is required.

North Carolina

Guideline 2. A lawyer shall not permit a paralegal to engage in the practice of law. To this end, a lawyer may not delegate the following responsibilities or activities to a paralegal: establishing a client-lawyer relationship and the terms of the relationship; giving oral or written legal advice or a legal opinion to a client; interpretation of legal documents for a client; or appearance in any court proceeding unless authorized by law.

Billable Services

NALA

NALA Guideline 5.

§ In *Missouri v. Jenkins*, 491 U.S. 274 (1989), the US Supreme Court recognized the variety of tasks being performed by paralegals and noted that the use of paralegals encourages cost-effective delivery of legal services.

§ In *Taylor v. Chubb*, 874 P2d 806 (Okla. 1994), the Court ruled that attorney fees awarded should include fees for services performed by legal assistants and, further, defined tasks which may be performed by the legal assistant under the supervision of an attorney

North Carolina

Guideline 6. A lawyer may charge for the work performed by a paralegal provided the fee is not clearly excessive.

Problem #3

- ☞ What is Lois doing???
- ☞ Who is going to be responsible?



Paralegal Status

ABA Guideline 4

A lawyer is responsible for taking reasonable measures to ensure that clients, courts, and other lawyers are aware that a paralegal, whose services are utilized by the lawyer in performing legal services, is not licensed to practice law.

Paralegal Status

NALA

NALA Guideline 1. Legal Assistants should

- disclose their status as a legal assistant at the outset of any professional relationship with a client, other attorneys, a court or administrative agency or personnel thereof, or members of the general public
- preserve the confidences and secrets of all clients; and
- understand the attorney's Rules of Professional Responsibility and these Guidelines in order to avoid any action which would involve the attorney in a violation of the Rules, or give the appearance of professional impropriety.



Paralegal Status

NALA

NALA Canon 3. A paralegal must not: (a) engage in, encourage, or contribute to any act which could constitute the unauthorized practice of law; and (b) establish attorney-client relationships, set fees, give legal opinions or advice or represent a client before a court or agency; and (c) engage in conduct or take any action which would assist or involve the attorney in a violation of professional ethics or give the appearance of professional impropriety.

NALA Canon 4. A paralegal must use discretion and professional judgment commensurate with knowledge and experience but must not render independent legal judgment in place of an attorney. The services of an attorney are essential in the public interest whenever such legal judgment is required.

North Carolina

Guideline 2. A lawyer shall not permit a paralegal to engage in the practice of law. To this end, a lawyer may not delegate the following responsibilities or activities to a paralegal: establishing a client-lawyer relationship and the terms of the relationship; giving oral or written legal advice or a legal opinion to a client; interpretation of legal documents for a client; or appearance in any court proceeding unless authorized by law.

Paralegal Status

NALA

NALA Canon 5. A paralegal must disclose his or her status as a paralegal at the outset of any professional relationship with a client, attorney, a court or administrative agency or personnel thereof, or a member of the general public. A paralegal must act prudently in determining the extent to which a client may be assisted without the presence of an attorney.





Obstruction of Justice

∞ ∞



Obstruction of Justice



Definitions

- ∞ **obstruction of justice** n. an attempt to interfere with the administration of the courts, the judicial system or law enforcement officers, including threatening witnesses, improper conversations with jurors, hiding evidence, or interfering with an arrest. Such activity is a crime. <http://legal-dictionary.thefreedictionary.com>
- ∞ Criminal offense of interfering with the (1) administration or process of law, (2) withholding material information or giving false testimony, or (3) harming or intimidating a juror, witness, or officer of law. <http://businessdictionary.com>

Client Confidentiality

ABA Guideline 6

A lawyer is responsible for taking reasonable measures to enable that all client confidences are preserved by a paralegal.

Client Confidentiality

NALA

NALA Canon 7. A paralegal must protect the confidences of a client and must not violate any rule or statute now in effect or hereafter enacted controlling the doctrine of privileged communications between a client and any attorney.

NALA Guideline 1. Legal Assistants should

- disclose their status as a legal assistant at the outset of any professional relationship with a client, other attorneys, a court or administrative agency or personnel thereof, or members of the general public
- preserve the confidences and secrets of all clients; and
- understand the attorney's Rules of Professional Responsibility and these Guidelines in order to avoid any action which would involve the attorney in a violation of the Rules, or give the appearance of professional impropriety.

North Carolina

• Guideline 4. A lawyer is responsible for taking reasonable measures to ensure that client confidences are preserved and protected by a paralegal.

Examples of Obstruction of Justice

- ∞ attempt to interfere with the administration of the courts, the judicial system or law enforcement officers;
- ∞ tampering, altering, destroying, hiding or removing evidence
- ∞ interfering with an arrest
- ∞ providing transportation for the offender;
- ∞ hiding the person from authorities;
- ∞ warning a person that officers are looking for them
- ∞ something a person does to impede the administration of a court process or proper discharge of a legal duty
- ∞ interference with the work of police, investigators, regulatory agencies, prosecutors, or other (usually government) officials
- ∞ anything that hinders an investigation

Federal Courts – Obstruction of Justice 18 U.S. Code Chapter 73

- § 1501. Assault on process server
- § 1502. Resistance to extradition agent
- § 1503. Influencing or injuring officer or juror
- § 1504. Influencing juror by writing
- § 1505. Obstruction of proceedings before departments, agencies, and committees
- § 1506. Theft or alteration of record or process; false bail
- § 1507. Picketing or parading
- § 1508. Recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting
- § 1509. Obstruction of court orders
- § 1510. Obstruction of criminal investigations
- § 1511. Obstruction of State or local law enforcement
- § 1512. Tampering with a witness, victim, or an informant
- § 1513. Retaliating against a witness, victim, or an informant
- § 1514. Civil action to restrain harassment of a victim or witness
- § 1514A. Civil action to protect against retaliation in fraud cases
- § 1515. Definitions for certain provisions; general provision
- § 1516. Obstruction of federal audit
- § 1517. Obstructing examination of financial institution
- § 1518. Obstruction of criminal investigations of health care offenses
- § 1519. Destruction, alteration, or falsification of records in federal investigations and bankruptcy
- § 1520. Destruction of corporate audit records
- § 1521. Retaliating against a federal judge or federal law enforcement officer by false claim or slander of title

Obstruction of Justice

NORTH CAROLINA

☞ Common law offense

☞ Definition: “Obstructing justice consists of any act that prevents, obstructs, impedes or hinders public or legal justice, and it may take many forms.”

In re Kivett, 309 N.C. 635, 670 (1983)

North Carolina Law

Examples of Obstruction of Justice

ELEMENTS:

A person is guilty of this offense

- (1) unlawfully and willfully
- (2) obstructs justice.

PUNISHMENT

The punishment for committing this crime is:

Class 1 misdemeanor. G.S. 14-3(a).

If done with deceit and intent to defraud, the offense is a Class H felony. G.S. 14-3(b); *State v. Clemmons*, 100 N.C. App. 286, 292-93 (1990).

North Carolina Law

Examples of Obstruction of Justice

- attempting to prevent the convening of a grand jury, *id.*;
- supplying money to pay a fine and costs to a person who pled guilty to a criminal offense, knowing that the person pleading guilty was not the one actually charged with the offense, *State v. Preston*, 73 N.C. App. 174, 176 (1985);
- offering to pay money to a prosecuting witness in exchange for the witness requesting dismissal of a criminal charge, *Clemmons*, 100 N.C. App. at 290;
- interfering with police processing duties in connection with an impaired driving charge against a third person, *State v. Taylor*, ___ N.C. App. ___, 713 S.E.2d 82 (2011); and
- filing false campaign finance reports, *State v. Wright*, ___ N.C. App. ___, 696 S.E.2d 832, 835-36 (2010).

The Rest of the Story



The Destruction of Three Promising Legal Careers

Belinda Thomas

To: Sharon Robertson
Subject: RE: NALA & NCPA Presentation

2000 Formal Ethics Opinion 10 – Appearance of Non-Lawyer at Calendar Call (applies to either civil or criminal court)

2000 Formal Ethics Opinion 10

July 27, 2001

Appearance of Non-Lawyer at Calendar Call

Opinion rules that a lawyer may have a non-lawyer employee deliver a message to a court holding calendar call, if the lawyer is unable to attend due to a scheduling conflict with another court or other legitimate reason.

Inquiry:

Attorney A is a criminal defense lawyer in a solo practice. He frequently has cases on the calendar simultaneously in juvenile court, district court, superior court, and administrative court. When a client's case is in court for a routine calendar call or an administrative status calendar call, Attorney A would like to send a non-lawyer member of his staff to the hearing to report to the court on his whereabouts and scheduling conflict. May Attorney A do so without violating the prohibition on assisting the unauthorized practice of law?

Opinion:

Yes, provided the nonlawyer employee is merely providing the court with information and does not request or argue for a particular action by the court.

Rule 5.5(b) prohibits a lawyer from assisting a person who is not a member of the bar in the performance of any activity that constitutes the unauthorized practice of law. G.S. § 1-11 provides that, "A party may appear either in person or by attorney in actions or proceedings in which he is interested." G.S. §84-4 permits only licensed North Carolina lawyers "to appear as attorney or counselor at law in any action or proceeding before any judicial body." See also G.S. §§84-2.1, 84-4, and 84-36. Nevertheless, when a lawyer has a conflicting commitment to appear in another court or when another legitimate conflict prohibits a lawyer's appearance in court for a client, the lawyer may send a nonlawyer employee to the court to inform the court of the situation. This is not assisting in the unauthorized practice of law.¹ In response to information about a lawyer's availability, the court may, on its own motion, determine that a continuance or other action is appropriate.

A lawyer should rely on a nonlawyer to notify the court of a scheduling conflict only when necessary. Moreover, Rule 5.3 requires a lawyer who supervises a non-lawyer assistant to make reasonable efforts to ensure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer. If a nonlawyer is present in court to provide information about the lawyer's scheduling conflict, the duty of supervision includes insuring that the assistant complies with court rules on decorum and attire.

Endnote

1. See *People v. Alexander*, 202 N.E. 2d 841 (Appellate Court of IL. 1964): "We agree with the trial judge that clerks should not be permitted to make motions or participate in other proceedings which can be considered as 'managing' the litigation. However, if apprising the court of an employer's engagement or inability to be present constitutes the making of a motion, we must hold that clerks may make such motions...without being guilty of the unauthorized practice of law."

2006 Formal Ethics Opinion 13 – Nonlawyer Signing a Lawyer's Name to a Pleading (applies to either civil or criminal courts)

2006 Formal Ethics Opinion 13

October 20, 2006

Nonlawyer Signing a Lawyer's Name to a Pleading

Opinion rules that if warranted by exigent circumstances, a lawyer may allow a paralegal to sign his name to court documents so long as it does not violate any law and the lawyer provides the appropriate level of supervision.

Inquiry:

Paralegal works in Law Firm. Supervising Attorney A would like Paralegal to sign Attorney A's name to pleadings in the event Attorney A is unavailable to do so. Paralegal would put her initials after the lawyer's signature so it is clear she is signing on the lawyer's behalf. Assume for purposes of this inquiry that Attorney A has either drafted the pleading herself or has closely supervised the form and substance of the pleading drafted by Paralegal.

May Attorney A delegate the signing of the pleadings to nonlawyer staff under these circumstances?

Opinion:

As a general matter, a lawyer should always sign court documents and pleadings and should only delegate the signing of her name to a nonlawyer when the lawyer is unavailable and no other lawyer in the firm is able to do so. Nonetheless, if exigent circumstances require the signing of a pleading in the lawyer's absence, a lawyer may delegate this task to a paralegal or other nonlawyer staff only if 1) the signing of a lawyer's signature by an agent of the lawyer does not violate any law, court order, local rule, or rule of civil procedure, 2) the responsible lawyer has provided the appropriate level of supervision under the circumstances, and 3) the signature clearly discloses that another has signed on the lawyer's behalf.¹

The following two rules are relevant to a lawyer's responsibilities under the circumstances.

Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a 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;

Rule 5.5 Unauthorized Practice of Law

(d) A lawyer shall not assist another in the unauthorized practice of law.

Before permitting a paralegal or other nonlawyer staff member to sign the lawyer's name to any court document, the lawyer must carefully review pertinent case law, local rules, or rules of civil procedure to determine whether such delegation is permissible and therefore, compatible with the lawyer's professional obligations. Rule 5.3 (see above). If, for example, a pleading signed by the paralegal on the lawyer's behalf would be legally insufficient, then the lawyer cannot condone this practice. Nothing herein is intended to opine as to the legal sufficiency of a pleading signed on behalf of a lawyer.

In addition, the lawyer must exercise the appropriate level of supervision to avoid aiding in the unauthorized practice of law. Rule 5.5(d). The preparation of a pleading is the practice of law. G.S. §84-2.1 (2004). Nevertheless, a paralegal may prepare such a document under the close supervision of a lawyer. A lawyer must carefully and thoroughly review both the substance and form of a pleading prepared by a paralegal before filing the document with the court. Likewise, a lawyer may not permit her paralegal to sign the lawyer's name to a pleading, even in exigent circumstances, if the lawyer has not afforded the appropriate level of review and supervision.

Finally, the signature must evidence, on its face, that it is by another's hand to avoid misleading the court.

Endnote

1. A paralegal or paraprofessional may never sign and file court documents in her own name. To do so violates the statutes prohibiting the unauthorized practice of law.

Belinda Thomas

Subject:

FW: Ethics Question

Alice,

The presentation that Sharon and I are doing is loosely based on the case of a former attorney a former judge. Something we have thought about is this: Is it an ethical violation for a paralegal to disclose client names when being questioned by law enforcement in an investigation for obstruction of justice. What happens to client confidentiality then? We feel that we are going to get questions about this issue and want to be ready. Thanks for your help.

Belinda

That's an interesting question. The paralegal's duties flow from the lawyer's duties (see Rule 5.3) but the paralegal is not technically subject to the Rules of Professional Conduct and she is not subject to professional discipline by the State Bar. The real consequence for the paralegal of violating the Rules is losing her employment—when the employer is under investigation by the police, this may not be such a threat.

Since I can read your question in three ways, I will answer from all 3 perspectives:

- The paralegal is being investigated for obstruction of justice (perhaps along with the lawyer that she works for but maybe not). Rule 1.6(b)(6) allows a lawyer to reveal confidential client information “to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved”. This exception, which is applicable to the paralegal's conduct by reference, would allow the paralegal to disclose client names and confidential information but only as necessary to defend herself against a criminal charge. Note that comment [11] to Rule 1.6 states that the right to respond to a criminal or civil claim arises when an assertion of complicity has been made; the lawyer (and here the paralegal) is not required to await the commencement of a proceeding prior to disclosures to establish a defense.
- The lawyer is being investigated for obstruction of justice and the paralegal is being questioned as a witness; the clients may have been victims of the lawyer's illegal conduct. The paralegal should not rely upon the exception above to disclose client information. If the lawyer believes that confidential client information may exonerate him or her, the lawyer will make the disclosures; the paralegal should not make them for the lawyer.
 - If, however, the paralegal has client information that would inculcate the lawyer, Rule 1.6(b)(6)'s exception would not apply nor would the other exceptions to the duty of confidentiality in Rule 1.6(b). However, if the clients' interests will be advanced by the disclosures, I might recommend to the paralegal that she make the disclosures—perhaps after seeking the consent of the clients.
 - A paralegal must disclose non-privileged client information in response to a subpoena (she is compelled to do so by law—the exception to the duty of confidentiality in Rule 1.6(b)(1)). Information that is subject to the attorney-client privilege is a much narrower category of information than confidential information. The identity of a client would not be

privileged information, for example, and would have to be disclosed if the paralegal is subpoenaed to testify.

- The lawyer is being investigated and the clients may have conspired with the lawyer to break the law. The exception in Rule 1.6(b)(4) might be applicable except that it is really intended to allow a lawyer, whose services have been misused by the client, to take steps to amend the situation: a lawyer may disclose confidential client information “to prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services were used.” I would not recommend that a paralegal rely upon this exception in order to make disclosures. Of course, if the paralegal is no longer employed by the lawyer and she wishes to cooperate, she is not prohibited from doing so. And, of course, if she is subpoenaed to testify, she must disclose non-privileged information.

I hope that this makes sense and is helpful. If you would like to discuss, let me know.

Alice

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