

LEGAL ASSISTANTS



GUIDELINES FOR THE
UTILIZATION OF LEGAL
ASSISTANT SERVICES

PREAMBLE

On May 28, 1976, the State Bar Board of Commissioners approved Guidelines for the Utilization of Legal Assistant Services as additional commentary to the former Code of Professional Responsibility. Effective October 1, 1988, the State Bar of Michigan adopted the Michigan Rules of Professional Conduct, superseding the prior code.

In August of 1991, the American Bar Association's House of Delegates adopted Model Guidelines for the Utilization of Legal Assistant Services, to serve as a guide to lawyers in the use and supervision of legal assistants. Based in part on the ABA Model Guidelines and the 1976 Michigan Guidelines, and after considering Michigan ethics opinions and case law, the Subcommittee on Professional Ethics drafted Proposed Guidelines to supersede the 1976 Guidelines. The revised Guidelines were approved by the Board of Commissioners on April 23, 1993.

Article 1, Sec 6, of the Bylaws of the State Bar of Michigan defines "legal assistant" for purposes of membership in the State Bar Legal Assistant Section as follows:

"Any person currently employed or retained by a lawyer, law office, governmental agency or other entity engaged in the practice of law, in a capacity or function which involves the performance under the direction and supervision of an attorney of specifically delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts such that, absent that legal assistant, the attorney would perform the task and which is not primarily clerical or secretarial in nature..."

While the Guidelines are directed primarily at the utilization of legal assistants as defined above, many of the same considerations would apply in the utilization and supervision of any other nonlawyer assistants. While the Guidelines necessarily discuss the conduct of legal assistants, they are directed at lawyers who use or supervise legal assistants. The Guidelines are intended to aid the lawyer in fulfilling responsibilities under the Michigan Rules of Professional Conduct.

Guideline 1: A Lawyer shall make reasonable efforts to ensure that the conduct of a legal assistant under the lawyer’s direct supervision is compatible with the lawyer’s professional obligations under the Michigan Rules of Professional Conduct. Such efforts should include training in the requirements of those Rules that most directly relate to communications with persons other than the lawyer’s clients.

Comment: The responsibilities described in the first sentence are intended to be identical to those imposed by MRPC 5.3. See also the Comment to MRPC 5.3. Although training would vary depending on the specific responsibilities of the legal assistants being trained, training efforts involving MRPC 1.6 (Confidentiality and Information), MRPC 3.3 (Candor Toward the Tribunal), MRPC 3.4 (Fairness to Opposing Party and Counsel), MRPC 3.5 (Impartiality and Decorum of the Tribunal), MRPC 3.6 (Trial Publicity), MRPC 4.1 (Truthfulness in Statements to Others), MRPC 4.2 (Communication with a Person Represented by Counsel), MRPC 4.3 (Dealing with an Unrepresented Person), and MRPC 4.4 (Respect for Rights of Third Persons) should be emphasized.

Guideline 2: A lawyer may ethically assign responsibility to a legal assistant for the performance of tasks relating to the representation of a client and the law firm’s delivery of legal services, commensurate with the experience and training of the legal assistant, and where the lawyer directly supervises the legal assistant and reviews the legal assistant’s work product before it is communicated outside the law firm, provided that:

- a. **The legal assistant’s participation as a nonlawyer is clear.**
 - b. **The legal assistant does not convey to persons outside the law firm the legal assistant’s opinion regarding the applicability of laws to the particular legal situation of another, the legal effect of acts or omissions of another, or the legal rights, responsibilities, or obligations of another person regarding their particular legal matter.**
 - c. **Drafts of legal documents prepared by a legal assistant are conveyed over the signature of the lawyer.**
 - d. **The legal assistant does not appear on behalf of any person or entity in proceedings before state or federal courts, administrative agencies, and tribunals, and including participation on behalf of another in depositions, discovery, and settlement ne-**
-
-

gotiation, except to the extent that a nonlawyer is authorized by law to represent the interests of another person or entity and the lawyer has obtained the other person's or entity's consent to the legal assistant's participation as representative in those proceedings.

Comment: A comprehensive list of duties which a legal assistant may undertake is impossible to compile, since the duties will vary according to the expertise of the legal assistant, the size of the law office, the nature of the law practice, the consent of the client, and changes in the laws of unauthorized practice.

In Michigan, it is not unauthorized practice of law for a nonlawyer to engage in legal research, investigation, client or witness interviews, or in other tasks in which the nonlawyer performs as a courier (*e.g.*, services of process, notary public) or conduit (*e.g.*, relay of offers of settlement, tracking case dockets, scheduling meetings).

Paragraph "a" reflects the current prohibition that nonlawyers may not hold themselves out as lawyers, MCL 600.916. It is the lawyer's responsibility to see that communications about services rendered by the law firm and its nonlawyers are not false, fraudulent, deceptive or misleading, MRPC 7.1, and that nonlawyer employees of the firm understand those limitations, MRPC 5.3. See Guideline 1. If the lawyer or legal assistant becomes aware that the role of the legal assistant is unclear, the lawyer and the legal assistant have an affirmative duty to clarify the legal assistant's role.

Paragraph "b" addresses the current prohibition against nonlawyers giving advice to other persons. In *State Bar v Cramer*, 399 Mich 116 (1976), the court held that although nonlawyers could provide legal forms and instructions, it was unauthorized practice of law for a nonlawyer to provide particularized advice tailored to the legal situation of another. Clearly a legal assistant may discuss with the supervisory lawyer the legal assistant's research, admissibility of evidence and the like. The lawyer, however, must exercise independent professional judgment regarding not only the precedential effect or impact of laws regarding the client's situation, but also the strategy and tactics to be employed to best achieve the client's objectives. See MRPC 1.2(a) and (b), 5.4(c). It is the lawyer's responsibility to counsel the client on those options and limits. See MRPC 1.4. Therefore, advice particular to the legal situation of the client must be determined by the lawyer. The legal assistant may communicate with others conveying the lawyer's advice when that communication has been approved by the lawyer.

Paragraph “c” addresses the propriety of a nonlawyer drafting legal documents. As long as the work product of the legal assistant is supervised and reviewed by the lawyer, and conveyed over the lawyer’s name, a legal assistant may draft preliminary pleadings, settlement agreements, contracts, wills or any other legal document. Drafts that have not been adopted by the lawyer should not be conveyed to anyone outside the law office. It is improper for a legal assistant to sign the lawyer’s name to a legal document, even with the lawyer’s direction and consent. See MRPC 4.1; MCR 2.114. The legal assistant may sign the lawyer’s name to correspondence at the direction of the lawyer, as long as the lawyer has authorized and reviewed the correspondence and the correspondence shows that the legal assistant signed the correspondence at the lawyer’s direction.

Paragraph “d” addresses the propriety of nonlawyers “appearing” on behalf of another person regarding the person’s legal matter. In *State Bar v Galloway*, 422 Mich 188 (1985), the court held that where there existed explicit statutory authority for a nonlawyer to represent the interests of others in certain administrative agency proceedings, such participation was not unauthorized practice of law. There is no distinction between an “appearance” in person and a verbal “appearance” or an “appearance” through written documents (*e.g.*, signed pleadings). Appointment as guardian, agent assignee, “next friend” or under a power of lawyer are insufficient to grant authority for a nonlawyer to represent the interests of another in the person’s legal matters.

Guideline 3: A lawyer may not delegate to a legal assistant:

- (a) Responsibility for establishing a lawyer-client relationship.**
- (b) Responsibility for establishing the fee arrangement with a client.**

Comment: The essential elements of any lawyer-client relationship are the agreement to undertake representation, the scope of that representation and the fee arrangement relating to that representation. In evaluating whether to undertake the representation, the lawyer must evaluate whether or not any circumstances exist which would require that the representation be declined. See MRPC 1.16. Rule 1.2 requires that the lawyer consult with the client regarding any limitations on the scope of representation. The lawyer must further obtain the agreement of the client, and in some cases written agreement, with respect to the fee arrangement relating to the representation. See MRPC 1.5. These matters are of such importance that they should be handled personally by the lawyer.

Legal assistants may play a valuable role by participating in initial client interviews, gathering background information from the client and others, preparing initial drafts of fee agreements, and performing other tasks incidental to establishment of the lawyer-client relationship. RI-123, RI-128. The lawyer may not delegate responsibility to a nonlawyer for deciding whether the representation will be undertaken.

Guideline 4: A lawyer may identify legal assistants by name and title on the lawyer's letterhead and on business cards identifying the lawyer's firm.

Comment: As long as the letterhead or business card accurately and clearly identifies the nonlawyer's status, it is not improper to include a nonlawyer's name and title on law firm communications. See Michigan ethics opinion RI-34 and Guideline 2a.

Guideline 5: In employing a legal assistant, or assigning a legal assistant to any particular client matter, a lawyer should take reasonable measures to ensure that no conflict of interest is presented arising out of the legal assistant's current or prior employment or from the legal assistant's other business or personal interests.

Comment: Ethics rules concerning conflicts of interest limit a lawyer in undertaking representation which may be materially limited by the lawyer's responsibilities to another client, the lawyer's own interests, or to some third person [MRPC 1.7(b), 1.8, 1.13], which is directly adverse to a current client [MRPC 1.7(a)], or substantially related and materially adverse to representation of a former client [MRPC 1.9], or in which the lawyer formerly participated personally and substantially [MRPC 1.11, 1.12]. Recognizing that one important function served by these rules is the preservation of client confidences, courts have applied these same principles in the context of the hiring of legal assistants. See, e.g., *Kapco Mfg Co Inc v C & O Enterprises, Inc.*, 637 F Supp 1231 (ND Ill 1985); *Williams v Trans World Airlines, Inc.*, 588 F Supp 1037 (WD Mo 1984).

A lawyer should address the hiring of a legal assistant with the same care as the hiring of a new lawyer. See R-4, RI-115; ABA Op 88-1526. Information should be gathered regarding the legal assistant's other current and prior employment and outside interests. See C-216, legal assistant related to presiding judge. Where necessary, appropriate screening procedures should be timely implemented to prevent the involvement of the legal assistant in client matters which may give rise to a conflict of interest, and

waivers should be obtained from the affected clients. See RI-26, lawyer as advocate in matter where legal assistant is necessary witness.

Guideline 6: In establishing a fee arrangement with a client, a lawyer may include a reasonable charge for work performed by a legal assistant, provided that the client consents after consultation.

Comment: In cases involving fixed fees or contingent fees, the total fees are agreed upon in advance and there is not separate charge for legal assistant services. In matters charged on the basis of “fee for service” or “charge by the hour,” a lawyer may include separate charges for work performed by legal assistants or otherwise include legal assistant hours in calculating the amount of fees to be charged. In *Missouri v Jenkins*, 491 US 274 (1989), the court held in setting a reasonable lawyer’s fee under 28 USC §1988 that it was appropriate to include a charge for legal assistant services, and that it was appropriate to value such services at “market rates” rather than “actual costs” to the lawyer.

In such instances, the lawyer should disclose to the client, either at the outset of the representation or at the point during the representation when the lawyer determines a legal assistant should be used, that the lawyer proposes to use a legal assistant and obtain the client’s agreement to any charges. The total fees, whether including legal assistant charges or not, remain subject to the requirements of MRPC 1.5.

Guideline 7: A lawyer may not split legal fees with a legal assistant nor pay a legal assistant for the referral of legal business. A lawyer may compensate a legal assistant based on the quantity and quality of the legal assistant’s work and the value of that work to the law practice. A lawyer may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangements.

Comment: Although “fee-splitting” with nonlawyers has been prohibited traditionally, such prohibitions do not apply to compensation and retirement plans. See MRPC 5.4, 7.2(c). Compensation of nonlawyer employees may include “fixed” components (*e.g.*, salary) and “variable components (*e.g.*, bonus). See RI-143.

Guideline 8: A lawyer who employs a legal assistant should facilitate the legal assistant’s participation in appropriate continuing education and public service activities.

Comment: Guideline 1 addresses a lawyer’s responsibility to ensure the legal assistant’s understanding of and compliance with the Michigan Rules of Professional Conduct. The lawyer’s responsibility includes taking appropriate steps to ensure that the legal assistant remains competent in the fields of practice in which the legal assistant is assigned, MRPC 1.1, and that the legal assistant has opportunities to render public interest service, MRPC 6.1. The lawyer’s responsibility may be discharged in a number of ways, as shown by the following illustrative examples:

- (a) Encouraging and financially supporting the legal assistant’s attendance at appropriate continuing education programs;
- (b) Conducting in-house training programs for the legal assistant, or including legal assistants in appropriate in-house programs designed for lawyers;
- (c) Providing the legal assistant with access to appropriate publications concerning the substantive areas in which the legal assistant works;
- (d) Encouraging and financially supporting the legal assistant’s membership in appropriate professional organizations.

The working relationship between the lawyer and the legal assistant should extend to cooperative efforts on public service activities whenever possible. A legal assistant’s independent *pro bono* activities may be facilitated by granting time away from regular job duties and providing office logistical support.

Additional Resources from the State Bar of Michigan:

Michigan Rules of Professional Conduct;
Role of Nonlawyers in Law Practice;
Compilation of ethics opinions.