

RULES/ORDERS

From the New Mexico Supreme Court

NO. 04-8300

IN THE MATTER OF THE AMENDMENTS OF RULES 20-101, 20-102, 20-103, 20-104, 20-105, 20-106, 20-107, 20-108, 20-109, 20-110, 20-111, 20-112, 20-113, 20-114 GOVERNING PARALEGAL SERVICES, AND BOARD OF BAR COMMISSIONERS RULE 24-101 AND ADOPTION OF NEW RULES 20-115 GOVERNING PARALEGAL SERVICES AND BOARD OF BAR COMMISSIONERS RULE 24-101A

ORDER

WHEREAS, this matter came on for consideration by the Court upon the recommendation of the Board of Bar Commissioners to approve amendments of Rules 20-101, 20-102, 20-103, 20-104, 20-105, 20-106, 20-107, 20-108, 20-109, 20-110, 20-111, 20-112, 20-113, 20-114 Governing Paralegal Services, and Board of Bar Commissioners Rule 24-101 and adoption of new Rules 20-115 and 24-101A, and the Court having considered said recommendation and being sufficiently advised, Chief Justice Petra Jimenez Maes, Justice Pamela B. Minzner, Justice Patricio M. Serna, Justice Richard C. Bosson, and Justice Edward L. Chávez concurring;

NOW, THEREFORE, IT IS ORDERED that the amendments of Rules 20-101, 20-102, 20-103, 20-104, 20-105, 20-106, 20-107, 20-108, 20-109, 20-110, 20-111, 20-112, 20-113, 20-114 Governing Paralegal Services, and Board of Bar Commissioners Rule 24-101 hereby are APPROVED;

IT IS FURTHER ORDERED that new Rules 20-115 and 24-101A hereby are ADOPTED; and

IT IS FURTHER ORDERED that the amendments of the above-referenced rules and adoption of new Rules 20-115 and 24-101A shall be **effective immediately**;

IT IS FURTHER ORDERED that the Clerk of the Court hereby is authorized and directed to give notice of the amendments of the above-referenced rules and adoption of new rules 20-115 and 24-101A by publishing the same in the *Bar Bulletin* and NMRA.

DONE at Santa Fe, New Mexico, this 30th day of January, 2004.

Chief Justice Petra Jimenez Maes

Justice Pamela B. Minzner

Justice Patricio M. Serna

Justice Richard C. Bosson

Justice Edward L. Chávez

20-101. Purpose.

Increasing the availability of legal services to the public at a cost the public can afford is a goal of the legal profession and one which finds its support in Article 5 of the Rules of Professional Conduct. The employment of paralegals is a particularly significant means by which lawyers can render legal services more economically, in greater volume and with maximum efficiency while maintaining the quality of legal services. Rapid growth in the employment of legal assistants and paralegals and the trend in the legal community toward the use of the designation “paralegal” to identify highly-trained, highly-skilled legal support staff who engage in substantive legal work increases the necessity of providing guidelines for the qualifications and use of paralegals.

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

[Approved, effective September 1, 1981; as amended, effective January 30, 2004.]

20-102. Definitions.

As used in these rules:

A. a “paralegal” is a person who:

(1) contracts with or is employed by an attorney, law firm, corporation, governmental agency or other entity;

(2) performs substantive legal work under the supervision of a licensed attorney who assumes professional responsibility for the final work product; and

(3) meets one or more of the education, training or work experience qualifications set forth in Rule 20-115 NMRA of these rules; and

B. “substantive legal work” is work that requires knowledge of legal concepts and is customarily, but not exclusively, performed by a lawyer. Examples of substantive legal work performed by a paralegal include: case planning, development and management; legal research and analysis; interviewing clients; fact gathering and retrieving information; drafting legal documents; collecting, compiling, and utilizing technical information to make an independent decision and recommendation to the supervising attorney; and representing clients before a state or federal administrative agency if that representation is authorized by law. Substantive legal work performed by a paralegal for a licensed attorney shall not constitute the unauthorized practice of law. [Approved, effective September 1, 1981; as amended, effective January 30, 2004.]

COMMITTEE COMMENTARY

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

Persons not meeting the definition of a paralegal or attorneys who have been disbarred or suspended from the practice of law by the State of New Mexico or any other jurisdiction are discouraged from using the designation “paralegal”. Attorneys are also discouraged from using the designation “paralegal” to identify non-lawyer support staff unless such staff qualifies as a paralegal pursuant to these rules.

20-103. Conduct prohibited.

A paralegal shall not:

A. provide legal advice;

B. represent a client in court except to the extent authorized by law;

C. select, explain, draft, or recommend the use of any legal document to or for any person other than the attorney who supervises the paralegal, unless the supervising attorney or judge, in the case of paralegals employed by the courts, so directs;

D. engage in conduct that constitutes the unauthorized practice of law;

E. contract with, or be employed by, a natural person other than an attorney to perform paralegal services except to the extent authorized by law;

F. in connection with providing paralegal services, induce a person to make an investment, purchase a financial product or service or enter a transaction from which income or profit, or both, purportedly may be derived;

G. establish the fees to charge a client for the services the paralegal or the attorney performs. Such fees shall be established by the attorney who supervises the paralegal’s work. This paragraph does not apply to fees charged by a paralegal in a contract to provide paralegal services to an attorney, law firm, corporation, governmental agency or other entity; or

H. perform any services for a consumer except as performed under the supervision of the attorney, law firm, corporation, government

agency, or other entity that employs or contracts with the paralegal. Nothing in this paragraph shall prohibit a paralegal who is employed by an attorney, law firm, governmental agency, or other entity from providing services to a consumer served by one of these entities if those services are expressly allowed by statute, case law, court rule or federal or state administrative rule or regulation. As used in this paragraph, "consumer" means a natural person, firm, association, organization, partnership, business trust, corporation or public entity. [Approved, effective September 1, 1981; as amended, effective January 30, 2004.]

COMMITTEE COMMENTARY

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

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

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

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

20-104. Disclosure required.

A lawyer will require the paralegal for whose work the lawyer is responsible to disclose to all persons with whom the paralegal communicates that the paralegal is not a lawyer. [Approved, effective September 1, 1981; as amended, effective January 30, 2004.]

COMMITTEE COMMENTARY

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

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

Rule 16-402 of the Rules of Professional Conduct prohibits a lawyer from communicating with a party the lawyer knows to be represented by a lawyer, unless the lawyer representing such third party consents. This rule also prohibits lawyers from causing other persons to make such communications, and thus applies equally to communications by paralegals with third parties. The lawyer's obligation is to ensure that paralegals do not communicate directly with parties known to be represented by an

attorney, without that attorney's consent, on the subject of such representation.

20-105. Confidentiality.

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

[Approved, effective September 1, 1981; as amended, effective January 30, 2004.]

COMMITTEE COMMENTARY

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

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

20-106. Client communications.

A lawyer will maintain active personal communication with the client. [Approved, effective September 1, 1981; as amended effective January 30, 2004.]

COMMITTEE COMMENTARY

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

20-107. Advocacy.

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

[Approved, effective September 1, 1981; as amended, effective January 30, 2004.]

COMMITTEE COMMENTARY

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

20-108. Duty to client.

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

[Approved, effective September 1, 1981; as amended, effective January 30, 2004.]

COMMITTEE COMMENTARY

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

20-109. Referrals.

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

[Approved, effective September 1, 1981; as amended, effective January 30, 2004.]

COMMITTEE COMMENTARY

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

20-110. Competency.

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

[Approved, effective September 1, 1981; as amended, effective January 30, 2004.]

COMMITTEE COMMENTARY

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

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

20-111. Business associations prohibited.

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

[Approved, effective September 1, 1981; as amended, effective January 30, 2004.]

COMMITTEE COMMENTARY

The lawyer may not enter into any ownership arrangement with a paralegal involving the practice of law.

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

However, Rule 16-504 NMRA of the Rules of Professional Conduct provides authorization for a lawyer or law firm to include paralegals in a retirement plan, even though the plan is based in whole or in

part on a profit-sharing arrangement, since such inclusion does not aid or encourage laymen to practice law.

20-112. Accountability.

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

[Approved, effective September 1, 1981; as amended, effective January 30, 2004.]

COMMITTEE COMMENTARY

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

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

20-113. Business stationery and cards.

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

[Approved, effective September 1, 1981; as amended, effective January 30, 2004.]

COMMITTEE COMMENTARY

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

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

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

20-114. Rules of Professional Conduct; compliance.

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

[Approved, effective September 1, 1981; as amended, effective January 30, 2004.]

COMMITTEE COMMENTARY

In order to avoid misconduct by the paralegal, acting as the agent of an attorney, a lawyer must ensure that paralegals for whose work the lawyer is responsible are familiar with the Rules of Professional Con-

duct. Without attempting an exhaustive listing of the activities encompassed by this guideline, the following are examples. A paralegal may not issue statements which, if made by a lawyer, would violate Rule 16-701 NMRA or 16-702 NMRA of the Rules of Professional Conduct concerning communications and advertising. A lawyer will not permit or condone activities of a paralegal for whose work the lawyer is responsible in communicating with jurors, contacting witnesses or communicating with a judge, when such activities, if engaged in by the lawyer, would violate Rule 16-304 NMRA (contact with witnesses) or Rule 16-305 NMRA (communicating with judges, jurors or other officials).

20-115. Paralegal qualifications.

A paralegal shall meet one or more of the following educational, training or work experience qualifications:

A. graduation from a paralegal program that is:

- (1) approved by the American Bar Association;
- (2) an associate degree program;
- (3) a post-baccalaureate certificate program in paralegal studies; or
- (4) a bachelor's degree program;

B. graduation from a post-secondary legal assistant program which consists of a minimum of sixty (60) semester hours or equivalent, as defined by the American Bar Association *Guidelines for the Approval of Paralegal Education Programs*, of which at least eighteen (18) semester hours or equivalent are general education courses and eighteen (18) semester hours or equivalent are legal specialty courses;

C. a bachelor's degree in any field plus two years of substantive law-related experience under the supervision of a licensed attorney. Successful completion of at least fifteen (15) semester hours of substantive paralegal courses may be substituted for one year of law-related experience;

D. graduation from an accredited law school and not disbarred or suspended from the practice of law by the State of New Mexico or any other jurisdiction;

E. certification by the National Association of Legal Assistants, Incorporated, the National Federation of Paralegal Associations, Incorporated or other equivalent national or state competency examination plus at least one (1) year of substantive law-related experience under the supervision of a licensed attorney; or

F. A high school diploma or equivalent plus seven (7) years of substantive law-related experience under the supervision of a licensed attorney.

[Approved, effective January 30, 2004.]

COMMITTEE COMMENTARY

Paralegals are encouraged to meet the minimum continuing legal education requirements established for attorneys in Rule 18-201 NMRA.

24-101. Board of Bar Commissioners.

(Paragraph A has not been amended)

B. **Divisions created.** The Supreme Court of New Mexico does hereby create the following divisions of the state bar:

(1) a young lawyers division. Membership in the Young Lawyers Division shall consist of all members of the State Bar of New Mexico in good standing under thirty-six (36) years of age and those members who have been admitted to the practice of law in any state less than three (3) years. Membership shall terminate automatically at the adjournment of the annual convention of the state bar next after a member attains thirty-six (36) years of age or three (3) years after admission to the practice of law in any state, whichever occurs last. The Young Lawyers Division shall adopt bylaws applicable to its division which shall be approved by the Board of Bar Commissioners. Such bylaws shall not be inconsistent with these rules. The bylaws of the young lawyers division shall establish the process for the election of its officers and directors;

(2) a senior lawyers division. Membership in the Senior Lawyers Division shall consist of all members of the State Bar of New Mexico in good standing who are fifty-five (55) years of age or older and who have practiced law for twenty-five (25) years or more. The senior lawyers division shall adopt bylaws applicable to its division which shall be approved by the Board of Bar Commissioners. Such bylaws shall not be inconsistent with these rules. The bylaws of the senior lawyers division shall establish the process for the election of its officers and directors; and

(3) a paralegal division. A person may become a member of the paralegal division if the person meets the requirements of Rule 24-101A NMRA of these rules.

The paralegal division shall adopt bylaws applicable to its division which shall have been approved by the Board of Bar Commissioners. Such bylaws shall not be inconsistent with these rules. The bylaws of the paralegal division shall establish the process for the election of its officers and directors.

(Paragraphs C through J have not been amended)

[As amended, effective January 1, 1987; July 1, 1987; June 1, 1992; October 1, 1992; December 1, 1993; June 15, 1994; February 7, 1995; June 8, 1998; April 17, 2000; August 14, 2000; January 30, 2004.]

NEW RULE:

24-101A. Paralegal division.

A. **Membership.** A person is eligible to become a member of the paralegal division of the state bar if the person meets the qualifications set forth in this rule and bylaws approved by the Board of Bar Commissioners.

B. **Employment qualifications.** A person may become a member of the paralegal division if the person:

- (1) contracts with or is employed by an attorney, law firm, corporation, governmental agency or other entity;
- (2) performs substantive legal work as defined in Rule 20-102 NMRA; and
- (3) meets one or more of the qualifications described in Paragraph C of this rule.

C. **Educational and experience qualifications.** In addition to the employment qualifications set forth in Paragraph B of this rule, an applicant for membership to the paralegal division, shall meet one or more of the following educational or experience qualifications:

- (1) graduation from a paralegal program that is:
 - (a) approved by the American Bar Association;
 - (b) an associate degree program;
 - (c) a post-baccalaureate certificate program in paralegal studies; or
 - (d) a bachelor's degree program;
- (2) graduation from a post-secondary legal assistant program which consists of a minimum of sixty (60) semester hours or equivalent, as defined by the American Bar Association *Guidelines for the Approval of Paralegal Education Programs*, of which at least eighteen (18) semester hours or equivalent are general education courses and eighteen (18) semester hours or equivalent are legal specialty courses;
- (3) a bachelor's degree in any field plus two years of substantive law-related experience under the supervision of a licensed attorney. Successful completion of at least fifteen (15) semester hours of substantive paralegal courses may be substituted for one year of law-related experience;
- (4) graduation from an accredited law school and not disbarred or suspended from the practice of law by the State of New Mexico or any other jurisdiction; or
- (5) certification by the National Association of Legal Assistants, Incorporated, the National Federation of Paralegal Associations, Incorporated or other equivalent national or state competency examination plus at least one (1) year of substantive law-related experience under the supervision of a licensed attorney.

[Approved, effective January 30, 2004.]