ETHICAL COMMENTS ON GUIDELINES 2 & 3.

The second Guideline in the ABA Model Guidelines for the Utilization of Paralegals (“Model Guidelines”) reads: “[p]rovided the Lawyer maintains responsibility for the work product, a Lawyer may delegate to a paralegal 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 rule of professional conduct of the jurisdiction in which the lawyer practices, or these Guidelines.”

The thinking behind Guideline 2, and underlying all of the Model Guidelines, is that paralegals should be able to perform many of the functions that lawyers perform, as long as the paralegals do so under Lawyer supervision and that the lawyer maintains responsibility for the work product. In order for paralegals to function effectively, they must be assigned, and provided the ability to perform, substantive legal work. Guideline 2 makes this clear by allowing for a broad range of tasks that Lawyers may delegate to paralegals.

There are two primary concerns with delegating tasks to paralegals, concerns that shared by Lawyers and paralegals alike. These two concerns are: 1) the appropriate delegation of tasks and 2) that proper supervision is maintained.

The first concern, expressed in the Comments to Guideline 2, is “[w]hile appropriate delegation of tasks is encouraged and a broad array of tasks is properly delegable to paralegals, improper delegation of tasks will often run afoul of a lawyer’s obligations under applicable rules of professional conduct.” It is vital that the tasks being delegated are appropriate under the circumstances and allowable under the relevant laws, rules or applicable authority.

In particular, it is important that paralegals avoid the Unauthorized Practice of Law and that Lawyers make sure that paralegals do not commit the Unauthorized Practice of Law. The Unauthorized Practice of Law can have serious consequences, depending on the jurisdiction. The ABA Rules of Professional Conduct (RPC), Rule 5.5 defines the Unauthorized Practice of Law. By delegating a task that the paralegal is not permitted to handle, such as retaining a client or appearing before a Court, the Lawyer may be fomenting the Unauthorized Practice of Law on the part of the paralegal. In addition, Lawyers have an ethical duty to make sure that paralegals abide by the rules of conduct in their jurisdiction (see RPC 5.3 and ABA Model Guideline 4).

The second concern involves proper Lawyer supervision of the paralegal. It is vitally important that the Lawyer maintains control of the representation and properly supervises the work of the paralegal. This is done to protect the integrity of the Lawyer, to protect the attorney-client relationship and to avoid situations where the paralegal commits the Unauthorized Practice.
of Law by providing unsupervised direct services to clients. This can have serious ramifications for the lawyer, the paralegal and can harm the client.

The methods for proper supervision may vary from law firm to law firm, but generally include: supervising the individual actions of the paralegals, signing or countersigning paralegal correspondences, reviewing and editing paralegal work product, and providing for continuing education and training of paralegals. All of these tasks help Lawyers maintain proper control over the work product and supervision of the paralegals.

One way the Model Guidelines assist Lawyers and paralegals in determining what may be appropriately delegated is embodied in Model Guideline 3. Guideline 3 spells out three specific tasks that may not be delegated to paralegals.

Guideline 3: A Lawyer may not delegate to a 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.

The importance of these three tasks can be overstated. The first of the three tasks that may not be delegated is “establishing an attorney-client relationship.” Only the attorney and the client can establish the attorney-client relationship. This has its roots in RPC 5.4, “The Professional Independence of a Lawyer,” a non-lawyer cannot control the actions and decision-making of the lawyer. Only the Lawyer can decide whether or not to take on a legal matter, a non-lawyer, including a paralegal, cannot make this decision on behalf of the lawyer.

Related to the establishment of the attorney-client relationship is the setting of fees (Model Guideline 3(b)). Although the paralegal may “know” what the attorney charges for a specific legal matter, only the Lawyer may set the fee. This decision must remain under the control of the Lawyer, as indicated by RPC 1.5 (which sets the requirements involved in the charging of fees) and RPC 5.4.

It is well established that non-lawyers cannot give legal advice, as detailed by Guideline 3(c). The rendering of a legal opinion is legal advice and only attorneys may provide legal advice. This often puts the paralegal in an awkward position. For example, a paralegal is speaking to a client, the client asks a direct question, the answer to which would be providing legal advice. To make matters more difficult, in many instances, a properly educated, trained, and experienced paralegal may know the answer to the client’s direct question. The concern remains as to whether the paralegal should answer the question. The prudent course of action would be to refrain from answering the question and defer to the attorney.
Here is a hypothetical to illustrate the issues involved. Paralegal Ruth is working for Lawyer Abigail. Abigail primarily practices family law. When Abigail takes on an “uncontested, simple” divorce, she charges $1,000.00 as a flat fee. Potential client Pat calls and asks, “I need a divorce right away. My spouse is a jerk and kicked me out of the house. What do you charge for a simple divorce?” This question is fraught with problems. If Ruth states, “$1,000.00,” she is arguably quoting a fee. Pat says, “Great. I’ll take it. Me and my three minor kids will be right over.” Ruth responds, “Okay, your situation sounds easy enough. We will help you as soon as you get here.”

By quoting the amount to be charged, Ruth has arguably set a fee for Abigail’s representation of Pat. Since Pat has been kicked out of the house and has three minor children, it is doubtful that the divorce will be “simple.” By telling Pat that the firm would “help you as soon as” Pat gets there, Ruth has arguably established an attorney-client relationship, since establishment of the attorney-client relationship occurs when the client reasonable believes that it occurs, which may be prior to the signing any formal attorney-client agreement. Finally, it could be argued that Ruth provided legal advice concerning Pat’s case by commenting that the “situation sounds easy enough.”

While this is a fairly extreme example, similar situations happen in law offices across the country, especially offices that handle “routine” legal matters for a flat fee. What is considered “routine” or not is for the Lawyer to decide, not the paralegal. What seems routine on first glance, may turn out to be complex in the long run.

The best way to handle such a situation is to not quote the fee and to defer to the Lawyer. While this can be difficult and it may be tempting to answer the inquiry by stating the fee, resist the urge to do so.

Second, make sure that the Lawyer enters into the engagement with the client. Paralegals should not “sign up” clients, whether in the office or outside the office. Paralegals cannot be “runners” going to places of need (emergency rooms, courts, administrative hearing offices, etc.) to solicit and sign up potential clients. This is in violation of the RPC 7.3 and can result in both the Lawyer and, depending on the jurisdiction, the paralegal getting into trouble.

Finally, use a variation on the old adage, “If it sounds like it is too good to be true, it probably is,” when considering whether a statement is legal advice.

“If it sounds like legal advice and can be taken as legal advice, it probably is considered legal advice.” If what the client is asking requires an answer that sounds like it would be legal advice, it is recommended not to answer directly, but to defer the Lawyer.
Keeping in mind both Model Guidelines 2 and Model Guidelines 3 should help to ensure that paralegals keep on the right path regarding the tasks to be delegated. It is vitally important for Lawyers and paralegals that the Lawyer maintain proper supervision and retain responsibility for the firm’s, including the paralegal’s, work product. Finally, keeping in mind the tasks that may not be delegated to the paralegal will go a long way to avoiding ethical concerns, now and in the future.