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Paralegals and Legal Ethics

AN ATTORNEY'S RESPONSIBILITIES

By Jason T. Vail

Until I had the opportunity to teach a legal ethics course for an American Bar Association-accredited paralegal studies program, I had only the vaguest idea of how ethics rules applied to the paralegals and legal assistants in my office. In retrospect, I should have known more. After all, working with paralegals and legal assistants is an integral part of most attorneys' practices, and, as it turns out, an attorney bears a significant duty to ensure compliance by his or her paralegal or legal assistant with ethics rules. Failure to meet this obligation can result in serious consequences for the attorney.

While attorneys are bound by the Model Rules of Professional Conduct (MRPCs), paralegals are not regulated by their own set of ethical rules. In 1991, the ABA adopted Model Guidelines for the Utilization of Legal Assistant Services and in 2003 substantively revised and renamed them Model Guidelines for the Utilization of Paralegal Services (www.abanet.org/legalservices/paralegals). The Model Guidelines are a code, like the MRPCs, and they pertain directly to paralegals. A few jurisdictions have adopted these Model Guidelines, and a few states regulate paralegals or require licensure. The National Federation of Paralegal Associations (NFPA) and National Association of Legal Assistants (NALA) are the two primary national professional paralegal associations, and membership in either is voluntary. Both organizations have codes of ethical conduct for their members that address similar issues as the ABA Model Guidelines.

The lack of a mandatory ethics code for paralegals means that it is incumbent upon attorneys to ensure their paralegals comply with the MRPCs. Under MRPC 5.3, an affirmative duty is imposed upon attorneys to ensure that any "nonlawyer employed or retained by or associated with a lawyer" engages in conduct that is consistent with the lawyer's own professional obligations, including conformity with the MRPCs. The rule imposes an affirmative duty on lawyers to supervise nonlawyers to make certain that the nonlawyer complies with the MRPCs. Should the paralegal violate any MRPC at the direction of the lawyer, or if the violation is ratified by the lawyer, or if the lawyer fails to take proper remedial action once the violation is known, the lawyer may be held responsible under the MRPCs. In a somewhat related rule, the lawyer also has a responsibility, under MRPC 5.5, to avoid assisting a nonlawyer in the unauthorized practice of law.

If the paralegal is not adequately supervised by the attorney and the paralegal engages in the unauthorized practice of law, thereby causing injury to a client, it is a matter of state law. In Washington State, the question of whether the paralegal acted negligently while engaged in the unauthorized practice of law will be measured against an attorney's standard of competence, even though the paralegal is not an attorney. Further, the legal negligence of the paralegal may be intertwined with a finding of legal negligence on the part of the attorney, and both may be found jointly liable for payment of damages. Note that your state's legal definition of "practice of law" may include exceptions for certain activities that paralegals can undertake without implicating unauthorized practice of law.

So remember that you may have a responsibility to ensure that your paralegal not only follows the same ethical rules that you do, but also avoids the unauthorized practice of law. If your paralegal has graduated from an ABA-accredited paralegal studies program, he or she will likely have taken a course in legal ethics and will understand the duties imposed by the MRPCs and the kinds of conduct that are ethically permissible. Still, caution is in order and every attorney should carefully supervise paralegals and support staff.

An attorney bears a significant duty to ensure compliance by his or her paralegal or legal assistant with ethics rules.

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Jason T. Vail is a staff attorney-legal editor with the Sargent Shriver National Center on Poverty Law in Chicago, Illinois, and has taught paralegals at Highline Community College in Seattle, Washington. He can be contacted at jasonvail@povertylaw.org.

The ABCs of Judgment Enforcement

By Latanishia Watters

So you have a judgment. Now what? Best case scenario: you receive a check in the mail from the debtor and it clears the bank. For the problematic judgment enforcement case, there are several strategies for tracking down assets and collecting your judgment.

Where's the money? There are several methods for determining not only what type of assets a debtor has, but where a debtor has hidden assets. The easiest method is to ask the debtor. Because you have a judgment, you have an advantage. Rule 69 of the Federal Rules of Civil Procedure allows a judgment creditor to serve discovery designed to ferret out information concerning assets of the debtor. Start with the debtor's tax returns, bank records, and real estate records. Rule 37 may be used to compel the debtor to respond to the discovery requests. If the debtor continues to be uncooperative, notice the debtor's deposition. This often gets the debtor's attention, particularly when the debtor is represented by counsel. If all else fails, move for a contempt order. The threat of jail is a great motivator.

Another tool is to hire an investigator to locate assets of the debtor. An investigator can be particularly helpful for judgment debtors who abscond with assets. Hopefully, you have already consulted with your client and conducted a cost-benefit analysis of enforcing the judgment. The cost of collection of course should not exceed the judgment amount sought. If hiring an investigator is not an option, conduct your own search. Start first with your own client's files concerning the debtor, such as credit applications and credit reports. Next, make use of low-cost databases that allow you to search for assets, including Westlaw and ChoicePoint.

Executing on the judgment. While there are prejudgment remedies available, this article deals exclusively with postjudgment enforcement. Your first step is to obtain a certificate of judgment from the issuing court clerk and record the

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Escape Hatch to the Globe

By Robert Gaudet, Jr.

If you are tired of sitting in the office, calculating your time in increments, and having one week per year to travel the globe, then look into an escape hatch to the international world—the Fulbright grant.

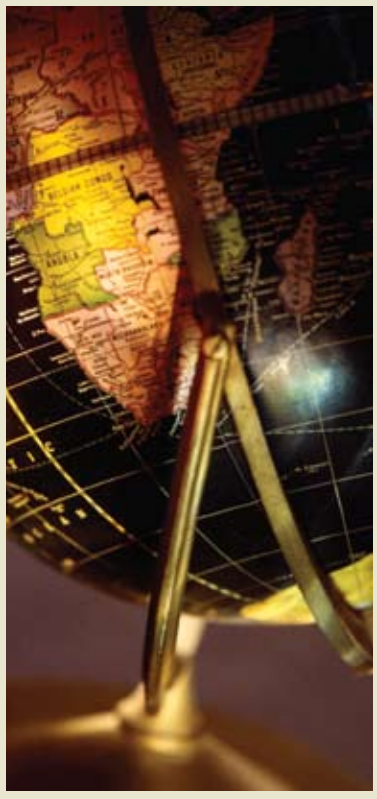
The Fulbright grant is a prestigious award that can not only be a boon to your credentials but also give you the perfect excuse to spend up to nine months living abroad. Once you are awarded the grant, there are few formal requirements aside from writing midyear and end-of-year reports. The rest of your time abroad is yours to study, research, and learn about your host country. The idea behind the Fulbright program, initiated by Senator William J. Fulbright, who once studied at Oxford, was for students to promote international peace and understanding.

The Fulbright grant is awarded to young professionals and college graduates. Young lawyers make strong candidates for the grant because they are organized and smart. However, they rarely submit applications. Jodie Kirshner, a 2006 graduate of Columbia Law School, received a Fulbright grant to the European Union to study corporate governance as a fellow at the Centre for Business Research at Cambridge University. She said of her experience, "In preparing myself for an academic job, the Fulbright was a key way to spend a year researching and writing."

But the scholarship is not just for academics. Anthony Milewski, a 2006 graduate of the University of Washington, received a Fulbright grant to Russia. He now practices law in the Moscow office of Skadden, Arps, Slate, Meagher & Flom LLP, and said, "The Fulbright Program gives students a year to explore their interests. I really wanted to study the Russian legal system, and was able to do so by enrolling at a law school in Moscow."

Ready to apply? First, find general information at http://us.fulbrightonline.org/thinking_general.html. You can apply as an "at-large" applicant or through your alma mater.

Second, find an advisor. If your alma mater does not provide such advice (or does a poor job of it) or is too far away, then do not despair. You can attend Fulbright application sessions at the nearest public university. The local university might offer useful comments on your particular application. A good advisor can give you a timetable and explain the formula for success.



Third, find the right country. You can only apply to one country per year. Some countries, such as Brazil, require prior knowledge of a foreign language. Others, such as the United Kingdom with 418 applicants for 25 grants in 2007–08 and Sweden with 52 applications for 10 grants, receive so many applications that the chance of success is limited.

Seek a country where professors, lecturers, PhD students, or practicing lawyers are willing to write you letters of invitation to bolster your application. You can acquire letters of invitation by looking at university Web sites for professors in your field of interest and e-mailing them. First introduce yourself, and, later, ask for contacts with interests similar to yours. Many people are surprisingly helpful. If you want to go to India, but the e-mail response from Indian professors is tepid, then simply choose another country.

Fourth, take the time to draft a high-quality proposal of two pages and a concise personal statement of one page. Proposals should contain three different sections that explain (1) your personal background and why you are suitable for the proposal; (2) the temporal stages of your proposed research or study, e.g., an LLM program and how it will proceed; and (3) how your study will increase mutual understanding between the United States and another country.

Fifth, get three letters of recommendation from your law school professors, community leaders, lawyers, or people familiar with your work. It is not necessary to get a reference from your current employer, particularly if you wish to remain discreet.

Screening committees in the United States and the host country review applications prior to awarding any grant. What do the overseas committees look for? According to Eric Jönssson, executive director of the Swedish Fulbright Commission, his committee generally looks for an "outstanding academic record; preparation in the chosen field; any other personal qualifications which make them an outstanding candidate for study in Sweden; demonstration of exceptional promise and commitment to graduate study; adaptability to a foreign situation; [and ability to] represent the Fulbright program during and after their time in Sweden."

Applications are due in the fall, so give yourself an entire summer, working after office hours, to get this done. It will be worth it, months later, when you are roaming around a foreign country with your newfound freedom as an ambassador of goodwill. In today's global environment of cross-border transactions, international clients, and multinational law firms, spending a year studying another country's laws will do more than recharge your batteries. It will make you a better lawyer.

Robert Gaudet, Jr., vice-chair of the ABA International Law Section Human Rights Committee, studies class actions in Europe with the support of a Fulbright grant to the European Union. He can be contacted at Robert_gaudet@stanfordalumni.org.

Judgment Enforcement

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judgment in the county where the debtor resides and/or owns property. Once recorded, the judgment becomes a lien on all of the debtor's property in the location of the recordation. You should record the judgment in all locations where the debtor has property. Out-of-state judgments must be domesticated or registered in the state where the debtor or property is located. Depending on the type of judgment (federal v. state), this can be a simple process of paying a small fee and filling out a form. Registering state court judgments, however, oftentimes require additional steps, including seeking admission to practice *pro hac vice*. This process is made easier by states that have adopted the Uniform Enforcement of Foreign Judgments Act, which provides for the enrollment of judgments from sister states.

Garnishment. Rule 64 provides that garnishment is one of the methods available to seize property. Garnishment is appropriate when a third party is holding nonexempt money or personal property of the debtor. This property may include wages, debts, royalties, or any liability owed on a contract. Garnishments have certain restrictions. For example, wages that may be garnished are limited to 25 percent of the debtor's disposable earnings. In addition, the debtor may elect exemptions under both state and federal laws. To initiate a garnishment, you must issue a writ of garnishment to the garnishee, as well as notice to the judgment debtor of the opportunity to be heard and claim exemptions.

Writ of execution against property. Generally, all nonexempt personal and real property that a debtor owns or has an interest in is subject to execution. The state where the property is located controls the type of property subject to execution and the manner of providing notice of execution. Before attempting to execute against property, determine what exemptions are applicable, particularly homestead exemptions, as well as any liens that may encumber the property. Your client's lien is subject to any previously existing liens.

A writ of execution only encumbers specifically identified, tangible personal or real property. Some states also allow corporate stock to be reached by execution. Once initiated, the writ is served and the property is seized by the sheriff or U.S. marshal in the county where the property is located. Consult your state's laws concerning other execution requirements. Alabama law in particular has specific procedures for sale upon execution, including the day of the week on which the property can be sold or auctioned, the publication of the notice in a newspaper, and where the notice must be posted at the courthouse.

Beware. Be aware of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692, as well as applicable state laws. The FDCPA applies to the litigating activities of attorneys who regularly collect or attempt to collect consumer debts.

In addition to the applicable statutory provisions, beware of fraudulent transfers. Fraudulent transfers often precede the debtor's downfall. These may include gifts or loans to spouses, relatives, and company insiders, as well as transfers or sales for inadequate consideration. These fraudulent transfers may be set aside and the assets recovered.

Practically speaking, one's enforcement efforts should take into consideration the type of debtor (individual v. corporate), the amount of the judgment, the assets the debtor has or may have hidden, and, in the case of an individual, whether he or she can be located.

Latanishia Watters is a senior associate in the Commercial Litigation Section of Haskell Slaughter Young & Rediker, LLC, in Birmingham, Alabama. She can be contacted at ldw@hsy.com.

Software Sharing Through New Licensing Model

By Nicole James

Computer software can be copied and reproduced for very little cost. The source code of proprietary software (or closed source) is hidden from the public to prevent reproduction or resell, e.g., Microsoft operating system. Open source software, on the other hand, is made available to the general public with either relaxed or nonexistent copyright restrictions. Open source code is embedded in many products, such as handheld devices, portable music players, digital video recorders, and home security systems.

One of the most commonly used open source licenses is the GNU General Public License (GPL) (www.gnu.org/licenses/gpl-faq.html). The GPL is "free" not in terms of cost but because a recipient is "free" to copy, modify, and distribute any software that is subject to the GPL. Anyone who redistributes the software, with or without changes, must pass along the freedom to further copy and change it. For example, with a GPL license, you can install the software on as many machines as you want, and you can make copies of the software and give it to as many people as you want. This file sharing between users is useful for business collaboration. However, attorneys should caution their clients to seek legal advice before making use of any GPL source code, particularly if the client does not intend for the end-product to be open source software.

On June 29, 2007, version 3 of the GPL (GPLv3) was released. The GPLv3 is the first update to the license since 1991 and has a broader scope than the previous version. The previous version of the GPL did not permit developers to add or remove terms of the license. Under GPLv3, a licensor may modify certain terms that disclaim warranties, preserve notice, impose limits on the use of past licensors and authors for publicity purposes, or require licensors to disclaim or indemnify the original license grantors. Specifically, the GPLv3 protects users from patent litigation and from certain technological developments.

Whenever a user conveys software covered by the GPL that he or she has written or modified, the user must provide every recipient with any patent licenses necessary to exercise the rights that the GPL gives them. If any licensee tries to use a patent suit to stop another user from exercising those rights, that individual's license will be terminated. This allows users and developers the ability to work with the GPLv3-covered software without worrying that another contributor will try to sue them later for patent infringement.

The GPLv3 also changed the provisions of version 2 of the license that pertain to tivoization (discussed below). The GPLv3 requires that the user be provided with whatever information or data is necessary to modify that software. Such information may include a set of instructions, special data such as cryptographic keys, or information about how to bypass integrity checks in the hardware. The requirement to provide all necessary information or data needed to make modifications only applies to products that are expected to be used by consumers.

The GPLv3 prohibits the practice of providing the source code for GPL-covered software in compliance with version 2 of the GPL but not giving the user the freedom to modify the software. This practice is known as tivoization. Some users assert that tivoization is fundamentally inconsistent with the purpose of the GPL, which is to provide users the freedom to change the software and to protect that right. One of the reasons GPLv3 is widely debated is the addition of the anti-tivoization provisions.

Despite benefits that the GPLv3 may provide, commercial software vendors and individual software developers that use open source code may hesitate to use GPLv3 licensed code because of the updated tivoization provisions. On the other hand, vendors and their customers that reuse source code to create modifications in order to provide features that were originally not included may benefit from the updates because all information that is necessary to make modifications will be provided. This allows the user flexibility, whether the company uses the modifications internally or when incorporating such modifications into products that are marketed to its customers. The addition of the anti-tivoization provisions may be undesirable for companies that want to maintain some control over the use of their products. A company may need to maintain control to keep its products standardized to minimize the difficulty in servicing the product or to reduce competition.

Proponents of the GPLv3 assert that the updated version only provides clarification and serves to prohibit others from

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YLD CALENDAR & CONFERENCES

APR. 10, 2008

INSTITUTE FOR THE YOUNG BUSINESS LAWYER | DALLAS, TX
www.abanet.org/buslaw/meetings/2008/spring/ybl.shtml

APR. 16–19, 2008

ABA YLD SPRING CONFERENCE IN CONJUNCTION WITH ABA DAY AND THE ABA SECTION OF LITIGATION ANNUAL CONFERENCE | WASHINGTON, D.C.
For more details, visit www.abanet.org/yld/spring08/home.shtml

- Expand your network: Meet 300 young lawyers from around the country.
- Sharpen your legal skills: Earn CLE credits.
- Discuss how the profession can become more inclusive by attending the "Diversity: The Next Generation" Summit.
- Help local first responders: Do pro bono work by implementing Wills for Heroes.

APR. 16, 2008

ETHICAL ISSUES IN TRUSTS AND ESTATES
www.abanet.org/cle/programs/t08eit1.html

APR. 23, 2008

FAMILY LAW DISCOVERY: THE BASICS AND BEYOND
www.abanet.org/cle/programs/t08fld1.html

APR. 24, 2008

FUNDAMENTALS ON PHYSICIAN REPRESENTATION
www.abanet.org/cle/programs/t08fpr1.html

APR. 30, 2008

CHILD ADVOCACY AWARD DEADLINE
www.abanet.org/yld/awardschildadvocacy.html

MAY 1, 2008

LAW DAY: THE RULE OF LAW
www.abanet.org/publiced/lawday

Visit the ABA YLD Calendar for additional information:
www.abanet.org/yld/meetings.html

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321 N. Clark Street
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Discussion Deemed Key to Diversity

By Keathan B. Frink

Increasing diversity is at the forefront of the legal community. Due to America's ever-changing population, lawyers reflecting our diverse country are needed now more than ever. Unfortunately, diversity in any field is not easily achieved for many reasons, not the least of which is a lack of communication and understanding within the profession.

Many are reluctant to accept people with different backgrounds, beliefs, experiences, and cultural practices. Their reluctance may be due to a fear of the unknown. Unfortunately, this fear hinders one's ability to talk with another individual and learn about the person's race, culture, ethnicity, life experiences, or disabilities. It is only through communication that we can learn about each other, overcome our fear of change, and embrace diversity in the legal profession.

How can we as attorneys talk openly about diversity and explore our differences? Below are just a few suggestions.

Talk with attorneys with diverse backgrounds in your office. While in the office attorneys are busy billing hours, working on their files, and simply practicing law. Attorneys do, however, also need to eat lunch. Invite another associate, summer associate, or partner out to lunch and simply talk. Do not be afraid to ask questions and simply get to know him or her. Keep an open mind, and remember to listen twice as much as you speak.

Attend a specialty bar meeting. Whether you choose a meeting of the local affiliate of the National Bar Association, National Asian-Pacific American Bar Association, Hispanic National Bar Association, National Lesbian and Gay Law Association, or another specialty bar, all of these organizations will welcome you and give you an opportunity to learn about their members. Of course this may require you to step out of your comfort zone, but you may find the experience of attending the meeting very rewarding and informative. You can learn about the issues important to its members, and you may even find yourself joining their cause.

Attend the ABA Young Lawyers Division "Diversity: The Next Generation" Summit Saturday, April 19, 2008, at the ABA YLD Spring Conference in Washington, D.C. The YLD and other entities within the ABA will engage in an open discussion on diversity in the legal profession. This discussion will explore solutions and determine how young lawyers can ensure that the profession is as diverse as the community it serves, and fosters an inclusive legal community. Your participation could help the YLD create long-term diversity goals through resolutions drafted for the YLD Assembly. Visit www.abanet.org/yld/spring08/diversitysummit.html to learn more and to register for the Diversity Summit.

These are just a few suggestions for opening the lines of communication as it relates to diversity in the legal profession. Open communication can lead to understanding differences among people. Understanding people who are different and diverse creates comfort with those people. When we are comfortable with different people we are more willing to work with them, which results in a diverse legal profession. So let's talk!

Keathan Frink is with the Law Office of Keathan B. Frink, P.A. in Fort Lauderdale, Florida, and can be contacted at kfrink1@yahoo.com.

Software Sharing

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taking away the rights that the license already provides—whether through patent law or technological developments. Others assert that the legal and market impact of GPLv3 is uncertain. Before your clients shift to this new licensing model, you should analyze the effect that the updates may have on your client's business and ensure that the updated GPL is in line with your client's business model. You should ask questions that will help the client maximize the productivity of using open source while minimizing any potential risks. For example, how will the client use the source code? What type of products will include open source code? Will the open source code incorporate the client's trade secrets or proprietary materials?

Nicole James, an associate with Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, in Nashville, Tennessee, can be contacted at lnjames@bakerdonelson.com.