LAWCLERK

COMPLIANCE WITH THE MODEL RULES

LAWCLERK was built for attorneys by attorneys who know that ethical compliance is of utmost importance. While much more detailed information is available at lawclerk.legal, the following chart highlights the tools and protections LAWCLERK has implemented to allow you to ethically outsource to your team of on-demand virtual associates.

MODEL RULE[2]	LAWCLERK'S COMPLIANCE WITH THE MODEL RULES
Rule 1.1 Competence	You should only outsource work that you are competent to supervise.
Rule 1.5 Fees	

> ***By encouraging the use of lower cost paralegals rather than attorneys wherever possible, permitting market-rate billing of paralegal hours encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes.***
> **– U.S. Supreme Court[3]**

For nearly thirty years, the U.S. Supreme Court has consistently recognized that paralegals, law clerks, and other paraprofessionals' services may be billed (and reimbursed by the prevailing party) at "prevailing market rates" verses at the rate actually paid to the paraprofessional."[4]

In *Missouri v, Jenkins*, the U.S. Supreme Court addressed whether paralegal and other paraprofessional services may be awarded at market rates under 42 U.S.C. § 1988. Specifically, the State of Missouri argued that paraprofessional time may only be awarded as a cost, meaning that attorneys could only recover for the amount actually paid to the paraprofessional and could not make any profit by using paraprofessional services. The U.S. Supreme Court unequivocally rejected Missouri's argument finding that paraprofessional time may be awarded at prevailing market rates. In reaching its decision, the Court noted the practical reality that "[a]ll else being equal, the hourly fee charged by an attorney whose rates include paralegal work in her hourly fee, or who bills separately for the work of paralegals at cost, will be higher than the hourly fee charged by an attorney competing in the same market who bills separately for the work of paralegals at 'market rates.'"

The Court also rejected Missouri's contention that awarding compensation for paraprofessionals at rates above cost would result in a windfall for the prevailing attorney. "Neither petitioner nor anyone else, to our knowledge, has ever suggested that the hourly rate applied to the

2. Every state other than California has implemented some form of the Model Rules and while California has not adopted the Model Rules, its professional conduct rules are generally consistent with the Model Rules.
3. See Missouri v. Jenkins, 491 U.S. 274 (1989).
4. See Richlin v. Chertoff, 553 U.S. 571, 570 (2008); see also Missouri v. Jenkins, 491 U.S. 274 (1989).

work of an associate attorney in a law firm creates a windfall for the firm's partners or is otherwise improper under § 1988, merely because it exceeds the cost of the attorney's services. If the fees are consistent with market rates and practices, the 'windfall' argument has no more force with regard to paralegals than it does for associates."

In 2008, the U.S. Supreme Court revisited the issue addressing whether the Equal Access to Justice Act, 5 U.S.C. § 504(a)(l), and 28 U.S.C. § 2412(d)(1)(A) allows a prevailing party in a case brought by or against the government to recover fees for paralegal services at market rates or only at the attorney's cost for such paraprofessional services.[5] In determining that paralegal services may be recovered at prevailing market rates, the Court rejected the contention that the statutes' varying use of the words "expenses" and "fees" changed the analysis. The Court explained that even if it agreed that the statutes referred to reasonable costs, one does not determine the reasonable cost of an engineering report from the perspective of what the engineering firm pays the engineer preparing the report. Similarly, one does not determine the reasonable cost of paraprofessional services from the perspective of what the attorney pays the paraprofessional.

Rather, the reasonable cost is determined by what expense is *incurred by the client*. "It seems more plausible that Congress intended all 'fees and other expenses' to be recoverable at the litigant's 'reasonable cost,' subject to the proviso that 'reasonable cost' would be deemed to be 'prevailing market rates' when such rates could be determined." Thus, whether the term "fees," "expenses," or "costs" is utilized in connection with paraprofessionals services, the analysis remains the same – paraprofessional services may be reimbursed at prevailing market rates not the cost paid by the attorney to the paraprofessional.

The Model Rules and related ethics opinions regarding how contract lawyers' fees may be billed are consistent with the U.S. Supreme Court's holdings in *Richlin* and *Jenkins* and further establish that paraprofessional services of freelance lawyers may be billed at prevailing market rates, irrespective of whether the freelance lawyers are working as lawyers or in a paraprofessional

5. Richlin v. Chertoff, 553 U.S. 571 (2008).

capacity. Model Rule 1.5, titled "Fees," provides in pertinent part:

> ***(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.*** The factors to be considered in determining the reasonableness of a fee include the following:

The ABA Standing Committee on Ethics and Professional Responsibility has given further guidance in its Formal Opinion 93-379, stating:

> The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.[6]

In its Formal Opinion 00-420, the ABA Standing Committee on Ethics and Professional Responsibility directly addressed the question of whether contract lawyers' services must be billed to the client at the rate paid to the contract lawyer or at prevailing market rates.[7] The answer – yes, attorneys may bill the services of contract lawyers to their clients at prevailing market rates as long as the rates satisfy Model Rule 1.5(a)'s reasonableness requirement.

Formal Opinion 00-420 concludes:

> ***Subject to the Rule 1.5(a) mandate that 'a lawyers fee shall be reasonable,' a lawyer may, under the***

6. ABA Comm. On Ethics and Prof' Responsibility Formal Op. 93-379 (Dec. 6, 1993) (Billing for Professional Fees, Disbursements and Other Expenses).
7. ABA Comm. On Ethics and Prof' Responsibility Formal Op. 00-420 (Nov. 29, 2000) (Surcharge to Client for Use of a Contract Lawyer).

> ***Model Rules, add a surcharge on amounts paid to a contract lawyer when services provided by the contract lawyer are billed as legal services. This is true whether the use and role of the contract lawyer are or are not disclosed to the client.*** The addition of a surcharge above cost does not require disclosure to the client in this circumstance, even when communication about fees is required under Rule 1.5(b). If the costs associated with contracting counsel's services are billed as an expense, they should not be greater than the actual cost incurred, plus those costs that are associated directly with the provision of services, unless there has been a specific agreement with the client otherwise.

In a 2008 opinion, the ABA Standing Committee on Ethics and Professional Responsibility affirmed its conclusion that contract lawyers may be billed to clients at prevailing market rates instead of the rate paid to the contract lawyer as long as the rate satisfies the reasonableness requirement of Model Rule 1.5.[8]

> In Formal Opinion No. 00-420, we concluded that a law firm that engaged a contract lawyer could add a surcharge to the cost paid by the billing lawyer provided the total charge represented a reasonable fee for the services provided to the client. This is not substantively different from the manner in which a conventional law firm bills for the services of its lawyers. The firm pays a lawyer a salary, provides him with employment benefits, incurs office space and other overhead costs to support him, and also earns a profit from his services; the client generally is not informed of the details of the financial relationship between the law firm and the lawyer. ***Likewise, the lawyer is not obligated to inform the client how much the firm is paying a contract lawyer; the restraint***

8. ABA Comm. On Ethics and Prof' Responsibility Formal Op. 08-451 (Aug. 5, 2008) (Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services).

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	is the overarching requirement that the fee charged for the services not be unreasonable. If the firm decides to pass those costs through to the client as a disbursement, however, no markup is permitted. In the absence of an agreement with the client authorizing a greater charge, the lawyer may bill the client only its actual cost plus a reasonable allocation of associated overhead, such as the amount the lawyer spent on any office space, support staff, equipment, and supplies for the individuals under contract. The analysis is no different for other outsourced legal services, except that the overhead costs associated with the provision of such services may be minimal or nonexistent if and to the extent that the outsourced work is performed off-site without the need for infrastructural support. Thus, the U.S. Supreme Court, the Model Rules, and the ABA Standing Committee on Ethics and Professional Responsibility have confirmed that attorneys can bill their clients for freelance lawyers' services, irrespective of whether the lawyer is acting in a paraprofessional capacity, as long as the rate is a reasonable fee consistent with prevailing market rates.
Rule 1.6 Confidentiality	LAWCLERK spent thousands of development hours to ensure that all communications and documents shared through LAWCLERK are safe and secure. LAWCLERK Uses Amazon Web Services and AES-256 encryption, which is also used by NASA. Unlike most practice management and document management software, even LAWCLERK's site administrators and developers cannot access your documents or communications, thereby preserving client confidentiality. In addition to the freelance attorney certifying their ethical

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	compliance for each project, the freelance attorney also signs a Confidentiality and Non-Disclosure Agreement.
Rules 1.7 - 1.11 Conflicts	LAWCLERK employs a two-tier conflicts check process that works as follows: 1. LAWCLERK takes conflicts so seriously that its technology blocks a freelance lawyer from even applying for a project if the freelance lawyer had done work for the opposing party through the site - even if it were permitted to do so under the ethical rules. 2. As a second layer of protection, only after you have selected a freelance lawyer to work with do they see your confidential conflict list. At this point, the freelance lawyer must review the conflict list and confirm that they do not have any conflicts. 3. The freelance lawyer is also required to review and certify that they will comply with the conflict rules for each state in which you are barred. This additional layer of contractual obligation provides even more protection than required by the Model Rules. 4. In addition to contractual compliance with the ethical rules, the freelance attorney must also sign a Confidentiality and Non-Disclosure Agreement for each project. 5. The freelance attorney can only view documents and the communication hub for the project after clearing conflicts, certifying their ethical compliance, and signing the NDA.
Rules 5.3 & 5.5 Supervision and the Unauthorized Practice of Law	LAWCLERK allows you to work, at your election, with freelance attorneys both within and outside of your jurisdiction. To ensure compliance with the prohibition on the unauthorized practice of law, under LAWCLERK's terms and conditions, the freelance lawyers work in a paraprofessional capacity under your supervision. They are not going to court, they are not talking to your client, they are not signing pleadings, and they are not talking to opposing counsel. They are simply handling all of the time-consuming written work.

MODEL RULE

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The Model Rules balance the need for attorneys to utilize paraprofessional services while ensuring that the public is not unknowingly receiving legal advice from unqualified professionals. The Comments to Model Rules 5.3 and 5.5 provide that:

> This Rule [Model Rule 5.5] does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.
>
> A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information.

Supervision designed to ensure that nonlawyers do not provide legal advice or otherwise violate the Rules of Professional Conduct is the key to Model Rule 5.3. By precluding any contact with an attorney's clients, opposing counsel, and witnesses, LAWCLERK eliminates the greatest concern addressed by Model Rule 5.3. LAWCLERK also requires, as more fully set forth above, conflict checks, an acknowledgment that the freelance lawyer has reviewed and will comply with the applicable state's Rules of Professional Conduct, an agreement by the attorney to supervise the freelance lawyer, and an acknowledgement by the attorney that they are solely responsible for the freelance lawyer's work product. These restrictions and requirements are designed to satisfy not only the actual text of Model Rule 5.3, but the policy behind it.

Comment 3 to Model Rule 5.3 under the heading: "Nonlawyers Outside the Firm" expressly addresses the engagement of nonlawyers outside the firm and provides as follows:

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	A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

The addition of Comment 5.3(3) and the change from "nonlawyer assistants" to "nonlawyer assistance" in 2012 served to highlight that attorneys have an obligation to make reasonable efforts to ensure that nonlawyers that assist them act in a manner that is consistent with the attorneys' professional obligations, whether they are

employed or contractual paralegals, assistants within a law firm, or others engaged from outside the firm.[9]

Comment 2 to Model Rule 5.5 expounds as follows:

> The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. ***This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.***

Similar to the analysis under Model Rule 5.3, as the attorney has sole responsibility for the freelance lawyer's work product and the freelance lawyer is precluded from having any contact with an attorney's clients, opposing counsel, and witnesses, the freelance lawyer is precluded from providing legal advice to an attorney's client, thereby satisfying both the requirements imposed in Model Rule 5.3, as well as the policy behind the rule. Thus, by using LAWCLERK, an attorney can benefit from the skill and written work of a +20-year attorney from another state without running afoul of the prohibition on the unauthorized practice of law.

Beyond the Model Rules, the services provided by freelance lawyers to attorneys are consistent with the parameters set forth in the Second Edition of the American Jurisprudence addressing the services that may be provided by a law clerk:

> ***The functions of an unlicensed law clerk should be limited to work of a preparatory nature, such as research, investigation of details, assemblage of data, and like work that will enable the attorney/employer to carry a given matter to a conclusion***

9. See ABA Model Guidelines for the Utilization of Paralegal Services, n. 3, available at https://apps.americanbar.org/legalservices/paralegals/downloads/modelguidelines.pdf.

> ***through his or her own examination, approval, or additional effort; the activities of a law clerk do not constitute the practice of law so long as they are thus limited.*** *[footnote omitted] On the other hand, an unlicensed law clerk who engages in activities requiring legal knowledge or training, such as handling probate matters, examination of abstract titles, and preparation of wills, leases, mortgages, bills of sales, or contracts,* ***without supervision from his or her employer,*** *thereby engages in the unauthorized practice of law.[10]*

Further, while paralegals and legal assistants may not serve as freelance lawyers with LAWCLERK, the guidelines, rules, and case law analyzing the services that may be provided by legal assistants and paralegals is nonetheless instructive as to what services may be employed by a paraprofessional without engaging in the unauthorized practice of law. For instance, the National Association of Legal Assistants (NALA) has formulated its Code of Ethics and Professional Responsibility (the "NALA Code"), as well as Model Standards and Guidelines for Utilization of Paralegals (the "NALA Guidelines") that its members must follow to remain a member in good stating with the organization.[11] Most applicable here, the NALA Guidelines, citing to Model Rule 5.3, provide that "a paralegal is allowed to perform any task which is properly delegated and supervised by a lawyer, as long as the lawyer is ultimately responsible to the client and assumes complete professional responsibility for the work product."

The NALA Code further instructs that the attorney and not the paralegal must form and maintain the direct relationship with the client and that the paralegal is prohibited from: (i) engaging in, encouraging, or contributing to any act that could constitute the practice of law; (ii) establishing attorney-client relationships, setting fees, giving legal opinions or advice, or representing a client before a court or agency unless specifically authorized by that court or agency; and (iii) engaging in conduct or taking any action that would assist or involve the lawyer in a violation of professional ethics or giving the appearance of

10. 7 Am. Jur. 2d Attorneys at Law § 130 (emphasis added).

11. NALA Code, available at https://www.nala.org/sites/default/files/codeofethics.pdf; see also NULA Guidelines, available at https://www.nala.org/sites/default/files/modelstandards.pdf.

impropriety. However, such restrictions do not alter the requirement that a paralegal must use discretion and professional judgment commensurate with his knowledge and experience, but must not render independent legal judgment in place of a lawyer; rather, any legal opinion may only be rendered to the attorney.

The ABA Standing Committee on Paralegals has additionally prepared its Model Guidelines for the Utilization of Legal Assistant Services (the "ABA Guidelines"). While the ABA Guidelines refer to paralegals, the term is intended to include legal assistants.[12] ABA Guideline No. 2 states that ***"[p]rovided the lawyer maintains responsibility for the work product, a lawyer may delegate to a paralegal any task normally performed by the lawyer"*** unless there is a statute, court rule, administrative rule or regulation, controlling authority, the applicable rule of professional conduct of the jurisdiction in which the attorney practices, or the Guidelines that expressly precludes the attorney from delegating the specific task to a nonlawyer. The ABA Guidelines then identify three responsibilities that may not be delegated to a paralegal: (i) responsibility for establishing a lawyer-client relationship; (ii) responsibility for establishing the amount of a fee to be charged for a legal service; and (iii) responsibility for a legal opinion rendered to a client. Conversely, the preparation of factual investigation and research, legal research, and the preparation of legal documents are identified as tasks that may be delegated to paralegals subject to appropriate attorney supervision.

Consistent with the foregoing legal authorities and guidelines, LAWCLERK requires the attorney to supervise the freelance lawyer and to maintain responsibility for the freelance lawyer's work product. However, LAWCLERK is far more restrictive than the foregoing guidelines for paralegals, law clerks, and legal assistants and more protective of the public as it precludes freelance lawyers from engaging in any contact with clients, opposing counsel, or witnesses. Thus, by using LAWCLERK, you can take advantage of LAWCLERK's nationwide network of skilled freelance lawyers and grow and improve your practice while being compliant with the prohibition on the unauthorized practice of law.

12. See ABA Guidelines, at Preamble and n. 1, available at https://apps.americanbar.org/legalservices/paralegals/downloads/modelguidelines.pdf.

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Model Rule 5.4 Fee Sharing	Model Rule 5.4 provides that "[a] lawyer or law firm shall not share legal fees with a nonlawyer," subject to several enumerated exceptions. The stated basis for the rule is to ensure the professional independence of lawyers. There is no fee sharing when using LAWCLERK. The attorney's fees (and any profits) received from the client are not shared with either LAWCLERK or the freelance lawyers. Rather, LAWCLERK is paid a service fee for the services provided by LAWCLERK, including without limitation access to LAWCLERK's blog and online community, the LAWCLERK Care Team available to assist all users, a Dedicated LAWCLERK Advisor for each attorney, conflict check procedures, rating mechanisms, secure and encrypted communication tools, secure and encrypted document management system, a Confidentiality and Non-Disclosure Agreement for each project, payment processing, and tax reporting services. This is tantamount to a fee paid for other legal-related services, such as practice management software (like Clio or MyCase), document management software (like Dropbox or Box), or legal research tools (like Westlaw or Lexis). LAWCLERK has simplified the process by only requiring the attorney to identify a single project price, but this project price is comprised of two components – the service fee to LAWCLERK and the fee paid to the freelance attorney for their services. For the avoidance of doubt, there is a clear separation between the fee paid by the client to the client's attorney, and the amount paid by the attorney for the completion of a project. At no point does LAWCLERK "share" the legal fees paid by the client. The ABA's Formal Opinion 88-356 explains that there is no fee sharing when an attorney pays a placement agency (or a recruiter) to obtain temporary lawyer services even where the agency's fee is a proportion of the lawyer's compensation. While LAWCLERK is not a staffing agency, the opinion remains on point: > This Committee is of the opinion that an arrangement whereby a law firm pays to a temporary lawyer compensation in a fixed dollar amount or at an hourly rate and pays a placement agency a fee based upon a percentage of the

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	lawyer's compensation, does not involve the sharing of legal fees by a lawyer with a nonlawyer in violation of Rule 5.4 or DR 3-102(A) of the Code. There is a distinction between the character of the compensation paid to the lawyer and the compensation paid to the placement agency. The temporary lawyer is paid by the law firm for the services the lawyer performs under supervision of the firm for a client of the firm. The placement agency is compensated for locating, recruiting, screening and providing the temporary lawyer for the law firm just as agencies are compensated for placing with law firms nonlawyer personnel (whether temporary or permanent). Moreover, even assuming there is a total amount comprised of a lawyer's compensation and the placement agency fee that is split, the total is not a "legal fee" under the commonly understood meaning of the term. A legal fee is paid by a client to a lawyer. Here the law firm bills the client and is paid a legal fee for services to the client. The fee paid by the client to the firm ordinarily would include the total paid the lawyer and the agency, and also may include charges for overhead and profit. There is no direct payment of a "legal fee" by the client to the temporary lawyer or by the client to the placement agency out of which either pays the other.

Similarly, there is no direct payment of a legal fee by the client to LAWCLERK or its freelance lawyers. Rather, the legal fee paid by the client is solely paid to the attorney.

Moreover, the purpose of the restrictions on fee sharing is to preserve the independence of the lawyer. LAWCLERK does not exercise any control over the attorney, the attorney's relationship with their client, and has no involvement in the negotiation of the client retention or fee structure. This further underscores that LAWCLERK is ethically compliant and does not engage in prohibited fee sharing.