Several years ago, I was asked to present an ethics lecture to the NALS Region 6 meeting held in North Little Rock, Arkansas. I pondered the problem of how to cover ALL ethical rules that are important to legal support staff in such a short span of time. After giving it careful thought, I distilled the rules down to this handy-dandy list, named, of course:

**Cathy’s Top Ten**
A list of dos and don’ts for legal support professionals
1. Don’t talk.
2. Don’t commit UPL.
3. Don’t misrepresent yourself.
4. Don’t commingle funds.
5. Do get a written fee agreement.
6. Don’t solicit.
7. Do understand the rules on attorney advertising.
8. Do be honest.
9. Do strive to be competent and professional.
10. Do advise your attorney of any conflict of interest.

Let’s start with which rules you should be concerned about. When you joined NALS, you agreed to abide by the NALS Code of Ethics. The NALS Code of Ethics, in turn, is actually based on the code of ethics that attorneys must follow. For most states, those rules come from the Model Rules of Professional Conduct, promulgated by the American Bar Association and adopted by the states. At the core of all the rules is the duty of loyalty—all the rules are in place to guide attorneys as they provide undivided loyalty to their clients.

Let’s look at them more closely:

1. **Don’t talk (Rule 1.6)**

Don’t talk. This two-word sentence will keep you out of SO much trouble, if you simply follow it.

Lawyer-client confidentiality actually involves two areas of law: (1) the professional responsibility rules regarding the duty of confidentiality—Model Rules of Professional Conduct, Rule 1.6, and (2) attorney-client privilege—a rule of evidence that prevents attorneys from being forced to testify in court about privileged (read: confidential) information.

Rule 1.6 starts out with these words: “A lawyer shall not reveal information relating to representation of a client . . . .” That is pretty strong: shall not. You shall not talk—about anything to do with your clients, even as to who they are. There are other rules that allow an attorney to legitimately reveal client information (pretrial publicity, for instance), but the decision is the attorney’s.

After making that strong statement, Rule 1.6 sets out the exceptions to the rule. The exceptions are discretionary—the verb is MAY reveal. Almost nothing in the rules requires a lawyer to use a confidentiality exception. When an attorney does exercise one of the exceptions to the rule, he or she must limit the disclosure to only necessary information. Let’s look at some of the exceptions to the rule of confidentiality:

Implied authorizations—Without this exception, a lawyer could not even draft a complaint, since a complaint must allege facts about the client’s case that establish a cause of action. Also, a lawyer is authorized to admit to facts that cannot properly be denied. The exception also allows lawyers to share client information among lawyers and employees in a firm. But, if the client has requested that certain information not be disclosed to other members of the firm, then you must not share it.

Prevention of client criminal conduct or fraud—The Model Rule says that the lawyer is allowed to disclose information that the lawyer reasonably believes is likely to “result in imminent death or substantial bodily harm.” (The Arkansas
So what is UPL (Unauthorized Practice of Law)? The practice of law is hard to define, so the unauthorized practice of law is even harder to define. Legal support staff can, under the direct supervision of a lawyer (this is key!), do anything a lawyer can do, and nothing a lawyer cannot do, except for those things that are reserved solely to lawyers.

Defense of a claim against the lawyer—What kinds of claims against the lawyer would justify revealing client information?

— When a client sues his or her attorney.
— When an attorney is charged with a crime with respect to the representation.
— When the attorney is charged by a disciplinary authority for a violation of the ethics rules.

Again, only the information that the lawyer “reasonably believes necessary” may be revealed.

Collection of fees—A lawyer may disclose information when it is necessary to collect fees (only the information that is necessary to collect the fee—nothing else).

Client confidentiality is further protected by the attorney-client privilege. In most instances, attorneys cannot be forced to give testimony that concerns their clients because the attorney-client privilege protects that kind of confidential information. The attorney-client privilege can also shield the attorney from being forced to testify about conversations the attorney had with the client before the attorney-client relationship began. For the privilege to attach, these four elements must be present:

1) A client must make a communication (mere evidence does not qualify).
2) The communication was made between privileged persons (the attorney and client, or the support staff and client, etc.).
3) The communication was made in confidence (no third parties—this breaks attorney-client privilege).
4) The communication was made for the purpose of obtaining or providing legal assistance for the client (not just idle conversations at a cocktail party).

2 & 3. Don’t commit UPL and don’t misrepresent yourself (Rule 5.3)

The attorney’s ethics rules put the duty squarely on the attorney to make sure that support staff comply with the rules. The NALS rules put this duty on you, but it all goes back to helping the attorney comply with his set of rules.

Model Rule 5.3 requires partners in a law firm and the lawyers who supervise non-lawyers to ensure that the conduct of all those employees is compatible with the same obligations as those of lawyers.

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What does it mean to accept a case? For years, when I spoke to legal support groups, I said that support staff should not conduct the initial client interview without an attorney present; this made sense to me because support staff cannot accept cases. What you can do, however, is gather information. It is okay to conduct the initial client interview, as long as you make your role clear to the client, and let him or her know that the attorney will make the decision as to whether or not to accept the case.

What about setting fees? Rule 1.5 deals with what goes into setting a fee, and much of it has to do with the attorney’s professional judgment. But what if your attorney says to you, for an uncontested divorce, no property, no kids, we charge X amount, and it is okay for you to tell prospective clients that. Are you setting fees? I would say no; you are merely the conduit for the information.

Even “appearing in court” is not as clear-cut as it seems. There are several administrative agencies that allow non-lawyers to appear before them on behalf of clients.

“Giving legal advice” is the grayest area of all. What if a client comes in the door with a summons and complaint and asks you, “When do we have to respond?” The summons itself answers this question. Clearly, a procedural question like that is not giving legal advice. But what if the client comes in the door with the summons and complaint, hands it to you, and says, “What do I do?” You read the complaint, explain to the client that it is a negligence action, we should file an answer and raise the affirmative defense of comparative negligence, and also a Rule 12(b) motion to dismiss, and that the judge will probably dismiss the claim. Clearly, this answer would be giving legal advice. Between these two scenarios is a huge gray area. Typically, the case law says that you cross that line into unauthorized practice when you apply legal knowledge to a specific person’s specific legal problem. The rule of thumb is, if in doubt, don’t talk (back to Cathy’s Rule 1, right?).

4. Don’t commingle funds (Rule 1.15)

This is the death knell for an attorney’s license. All funds of the client must be kept separate from the office operating account. This includes advances on fees that have not been earned yet, settlement funds that have not been distributed
to the client yet, or any other funds that belong to the client. All client funds should be kept in an interest-bearing account and the interest belongs to the client. If the amounts are small, or will not be in the account for long such that the interest accrued will be small, they should be placed in an IOLTA (Interest on Lawyer’s Trust Accounts) account, and the interest earned will go to the IOLTA Foundation to be used to improve the judicial system.

5. **Do get a written fee agreement (Rule 1.5)**

Written fee agreements are not required by the rules, except for contingency fee cases, but it is always the better practice to get it in writing. When there is a dispute with the client down the road, you have proof of what the agreement was.

6 & 7. **Don’t solicit (Rule 7.3) and do understand the rules on attorney advertising (Rules 7.1–7.5)**

Make sure you understand the difference between solicitation and advertising. Generally, advertising is okay, with exceptions; solicitation is not okay, with exceptions.

Solicitation occurs when an attorney contacts someone she knows is in need of legal representation in order to persuade that person to hire her (think: one-on-one). This is generally prohibited because it has so much potential for the attorney putting undue pressure on the potential client, perhaps when the client is vulnerable. One of the exceptions to solicitation is that attorneys may mail letters soliciting the potential client’s business. The rules are very detailed about how this should be done and what it should contain, and most states have a restriction that letters cannot be sent for 30 days after the incident if a death was involved.

Advertising is to the masses (think: radio, TV, newspapers). Advertising is generally okay as long as it is not false or misleading, but there are very specific rules on this as well and they vary by state. If you are involved in the preparation of advertising for your firm, learn these rules by heart! Know whether your state prohibits testimonials or endorsements, whether you can use clients or former clients (probably not!), and how long you have to keep copies of the advertisements.

8. **Do be honest (Rules 4.1–4.4)**

Do we even need to explain this one?

9. **Do strive to be competent and professional (Rules 1.1, 1.3)**

You are off to a good start here—you are a member of NALS, with its emphasis on professionalism and continuing legal education.

Communication, Rule 1.4, is also a big part of competence and professionalism. Lack of communication is one of the most common reasons that clients contact the bar disciplinary office. You can do a lot to help with that by just keeping the client informed of what is happening in the case.

10. **Do advise your attorney of any conflict of interest (Rules 1.7–1.13)**

Remember, the rules are about loyalty to the client. A conflict of interest is anything that interferes with that loyalty. Read these rules carefully to make sure you understand where potential conflicts may exist, and always make sure you bring them to your attorney’s attention. Some law firms have their own policies regarding conflicts of interest to ensure the firm complies with this rule.

That’s it, in a nutshell. Use Cathy’s Dos and Don’ts as a helpful guideline, but remember there is no substitute for knowing the rules—for the sake of your professionalism and your supervising attorney’s.

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Ms. Underwood is a 2002 graduate of the University of Arkansas-Little Rock William H. Bowen School of Law. Before becoming an attorney, she received the Pulaski County Bar Association Liberty Bell Award in 1994 and the NALS Award of Excellence in 1996. In 2010, Ms. Underwood received the Arkansas Bar Association Golden Gavel Award, the NALS Scales of Justice Award, and the Delmar-Cengage Learning Excellence in Teaching Award.