

UNAUTHORIZED PRACTICE AND LEGAL ASSISTANTS

I. INTRODUCTION

In 1968 the American Bar Association's House of Delegates recognized the field of paralegalism in the American legal community.¹ Since 1968 the paralegal (also called the legal assistant) market has blossomed into one of the fastest growing job markets in the United States.² In 1980 the Federal Bureau of Labor Statistics stated that approximately 31,500 persons were employed as paralegals³ with an estimated 65,800 legal assistants projected for the year 1990.⁴ These figures may indeed be conservative considering that there is little agreement as to who is a paralegal and what constitutes a legal assistant because there are no set standards available.⁵ With this rapid growth problems have arisen, not the least of which is when does a paralegal's work cross the threshold of engaging in an unauthorized practice of law. These problems are aggravated by the competing forces of economics and ethics: the economic efficiency for the attorney and client in using paralegal work, versus the ethical consideration of the attorney to prohibit the unauthorized practice of law. To make matters further complex the area of unauthorized practice lacks black-letter law in the nation's statutes, cases and legal scholarship.⁶

This Article will attempt to set forth the areas that unauthorized practice may arise, what is an unauthorized practice of law in regards to paralegals and to give some suggestions as to how attorneys may avoid even the appearance of impropriety as called for by the rules of legal ethics.⁷

1. Ulrich, *Legal Assistants and the Organized Bar: Where Do We Go From Here*, A.B.A. LEGAL ASSISTANT UPDATE, Vol. 4, p. 133.

2. The Nat'l L.J., July 4, 1983, at 1, col. 4.

3. *Id.* at 8.

4. *Id.* at 1.

5. *Id.* at 8.

6. For an excellent review of paralegal issues including unauthorized practice of law, see Haskell, *Issues in Paralegalism: Education, Certification, Licensing, Unauthorized Practice*, 15 GA. L. REV. 631 (1981).

7. MODEL CODE OF PROFESSIONAL RESP. Canon 9 (1980).

II. PARALEGAL PROBLEMS

While the ABA did recognize the existence of paralegals in 1968,⁸ the Bar did not provide a clear definition as to what a legal assistant is.⁹ In general, it has been stated that a paralegal or legal assistant is, "a person not admitted to the practice of law who acts as an employee or assistant to an active member of the bar."¹⁰ Paralegals are not a member of the bar and are not subject to regulations of bar associations. However, some states do provide for rules on the use of paralegals,¹¹ but these states are exceptions and their rules are little more than suggestions on legal assistant use. Because of this and some states' inaction on these issues, the principles of unauthorized practice of law provide the framework on which to determine the proper use of paralegals in the legal profession.

III. THE ETHICAL CONSIDERATIONS OF UNAUTHORIZED PRACTICE OF LAW AND PARALEGALS

One of the most pressing problems that face bar associations around the United States is unauthorized practice of law.¹² The American Bar Association's Code of Professional Responsibility, Canon 3 states that in general lawyers have an ethical duty to assist in preventing the unauthorized practice of law. This canon, as are most of the canons, are only goals of the American Bar Association. A more concrete ethical statement is found in the model rules' ethical considerations: "Rule 5.5. Unauthorized Practice of Law – A lawyer shall not . . . (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."¹³

Attorneys are not the only group of professionals who are concerned with this problem. The National Federation of Paralegal Association (NFPA) a national voluntary association of paralegals with a membership in 1983 of over 6,000,¹⁴ has stated:

A paralegal shall demonstrate initiative in performing and expanding

8. Ulrich, *supra* note 1.

9. The Nat'l L.J., *supra* note 2, at 8.

10. Dunlap, *Guidelines for Utilization of Legal Assistant Services*, 66 MICH. B.J. 168 (1987).

11. These states include Florida, Rhode Island, Connecticut, Kentucky, Texas and Michigan.

12. Orlik, *Ethics for the Legal Assistant* 24 (1986).

13. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 (1987).

14. The Nat'l L.J., *supra* note 2, at 8.

the paralegal role in the delivery of legal services within the parameters of unauthorized practice of law statutes.

Discussion: Recognizing the professional and legal responsibility to abide by the unauthorized practice of law statutes, the Federation supports and encourages new interpretation as to what constitutes the practice of law.¹⁵

In this day of growing legal responsibility, more complex litigation and legal issues affecting more areas of all peoples' lives, it becomes increasingly likely for paralegals to be involved in unauthorized practice of law. However, with the unclear and discretionary definitions for unauthorized practice, the problem arises of trying to delineate what is unauthorized practice and whether a paralegal's work breaches that ethical consideration.

IV. STATE LEGISLATURES AND PARALEGALS

Most states have written into their state statutes definitions of practice of law and have included civil and/or criminal penalties for the unauthorized practice of law.¹⁶ The major problem with most of these statutes, however, is the broadness of the definitions. This overbreadth problem causes these statutes to be construed to encompass many areas of potential practice of law. Since this is the case the guidance from these statutes is minimal to the practitioner who seeks to prevent unauthorized practice of law.

In a related area, regarding use of paralegals, the state legislature of Florida in 1987 passed Florida Statutes § 57.104 which stated:

Section 1. Computation of attorneys' fees. — In any action in which attorneys' fees are to be determined or awarded by the court, the court shall consider, among other things, time and labor of any legal assistants who contributed nonclerical, meaningful legal support to the matter involved and who are working under the supervision of an attorney. For purposes of this section "legal assistant" means a person, who under the supervision and direction of a licensed attorney engages in legal research, and case development or planning in relation to modifications or initial proceedings, services, processes, or applications; or who prepares or interprets legal doc-

15. Orlik, *supra* note 12, at 25.

16. Some examples of such statutes are ALASKA STAT. § 08.08.210, 08.08.230 (1987); CONN. GEN. STATS. § 51-88 (1987); FLA. STAT. ANNOT. § 454.23 (West 1987); MICH. COMP. LAWS ANN. § 600.916 (West 1987); MINN. STAT. § 481.02 (1987); MO. REV. STAT. § 484.010(10) (1987).

uments or selects, compiles, and uses technical information from references such as digests, encyclopedias, or practice manuals and analyzes and follows problems that involve independent decisions.¹⁷

This statute may have the effect of broadening the role of the paralegal in the office. Under prior Florida law it has been found to be in error for a court, when awarding legal fees, to include paralegal services.¹⁸ The Florida statute allows those services by a paralegal to be included in attorney fees and broadens the paralegal's role since the attorney seeking fees could use the paralegal's services and be able to collect fees on that service. However, a Florida District Court of Appeals case held the act to be "prospective only."¹⁹

So again, the prospect of the competing considerations of ethics and efficiency will be tested by this statute. On the one hand, the attorney, wishing to maximize his valuable time, could now employ, under this statute, a paralegal to do the tasks the attorney would have performed himself in order to receive full compensation by a court awarding legal fees. This is countered by the goal of ethical use of paralegals which includes the prevention of unauthorized practice of law. This controversy will come into play as the paralegal may well engage in unauthorized practice of law considering the potential under this statute for the expanded use of legal assistants. Therefore, the attorney's ethical duties under the rules of professional ethics will be further tested with the broader use of paralegals as may well occur in Florida upon implementation of § 57.104.

V. CASE LAW AND UNAUTHORIZED PRACTICE

Each state court has the responsibility of defining or adjudicating what constitutes unauthorized practice for that jurisdiction.²⁰ Also, it is well established that it is the court's role to regulate the legal profession and unauthorized practice of law.²¹ The ABA's own Ethical Considera-

17. FLA. STATUTES ANN. § 57.104 (West 1987).

18. See *Bill Rivers Trailers, Inc. v. Miller*, 489 So. 2d 1139 (Fla. 1st Dist. Ct. App. 1986); *ABD Management Corp. v. Robert L. Turchin, Inc.*, 490 So. 2d 202 (Fla. 2d Dist. Ct. App. 1986); *In re Paulk v. Lindamood*, 529 So. 2d 1150 (Fla. 1st Dist. Ct. App. 1988).

19. *Lemoine v. Cooney*, 514 So. 2d 391 (Fla. 4th Dist. Ct. App. 1987), *rev. den'd*, 523 So. 2d 577 (Fla. 1988).

20. ABA Comm. on Professional Ethics and Grievances Formal Op. 198 (1939).

21. See *In re Rhode Island State Bar*, 106 R.I. 752, 263 A.2d 692 (1970); *State Bar of Wisconsin v. Bonded Collections, Inc.*, 36 Wis.2d 643, 154 N.W.2d 250 (1967); *Hoffmeister v. Tod*, 349 S.W.2d 5 (Mo. 1961).

tion 3-5 has clearly said, "It is neither necessary nor desirable to attempt the formulation of a single specific definition of what constitutes the practice of law."²² This sentiment is also echoed by several state courts²³ but was best articulated by the Arizona Supreme Court in *State Bar of Arizona v. Arizona Land Title and Trust Company*²⁴ which held, ". . . [I]t is impossible to lay down an exhaustive definition of 'practice of laws'"²⁵ However, we can find more specific descriptions from other courts on what is the practice of law.

The practice of law is not limited to litigation in the courts but includes the giving of legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are defined or secured, regardless of whether or not such matters are or may be subject of litigation.²⁶

It is difficult to specify unauthorized practice and comparison of state decisions demonstrate inconsistencies and disagreement.²⁷

There are many reasons for the bar's dilemma of unauthorized practice.²⁸ It has been said that unauthorized practice should be prevented because, "The amateur at law is as dangerous to the community as an amateur surgeon would be."²⁹ In less dramatic fashion Professor Charles W. Wolfram has detailed four basic reasons: (1) Protect the legal system against the consequences of incompetence or lack of integrity of nonlawyers; (2) protect clients from harmful incompetence; (3) provide the framework for regulating attorneys; and (4) to enhance

22. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1987).

23. *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 366 P.2d 1 (1961), *reh'g den'd*, 91 Ariz. 293, 371 P.2d 1020 (1962); *Cowern v. Nelson*, 207 Minn. 642, 290 N.W. 795 (1940).

24. 90 Ariz. 76, 366 P.2d 1 (1961).

25. *Id.* 90 Ariz. 76 at _____, 366 P.2d 1 at 8-9.

26. *In re The Florida Bar*, 267 So. 2d 824, 826-27 (Fla. 1972) (quoting 3 Fla. Jur., Attorneys § 7).

27. An example is the preparation of real estate documents. Several cases, including *Houts v. State ex rel. Oklahoma Bar Ass'n*, 486 P.2d 722 (Okla. 1971), have held that preparation of real estate instruments constituted practice of law. On the other hand, the Arkansas Supreme Court has held that "simple real estate transactions" such as warranty deeds, lease agreements and bill of sale preparation does not constitute practice of law. *Pope County Bar Ass'n, Inc. v. Suggs*, 274 Ark. 250, 624 S.W.2d 828 (1981).

28. Cases which have given various reasons for prohibiting unauthorized practice of law include: *Hoffmeister v. Tod*, 349 S.W.2d 5 (Mo. 1961); *In re Baker*, 8 N.J. 321, 85 A.2d 505 (1951).

29. *In re Baker*, 8 N.J. 321 at _____, 85 A.2d 505, 514 (1951).

an attorney's "monopoly" on the practice of law.³⁰

There are very few cases dealing with unauthorized practice and paralegals. Few cases have arisen in the short time paralegals have been recognized. In an early statement, the ABA stated,

A lawyer can employ law secretaries . . . or non-lawyer researchers. In fact he may employ non-lawyers to do any task for him except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal proceedings a part of the judicial process so long as it is he who takes the work and vouches for it to the client and becomes responsible for it to the client. In other words, we do not limit the kind of assistants the lawyer can acquire in any way to persons who are admitted to the Bar, so long as the non-lawyers do not do things that lawyers may not do or do the things that lawyers only may do.³¹

The opinion of the ABA has remained consistent and since 1968 some states have addressed this problem in specific cases.

In *The Florida Bar v. Pascual*,³² the Florida Supreme Court held that a paralegal who had represented another party at a real estate closing and had given legal advice without legal supervision and constituted the unauthorized practice of law. The Florida court ordered an injunction to prohibit Pascual from unauthorized practice of law in the state of Florida.

The violation of such an injunction can create serious penalties. In *The Florida Bar v. Valdes*³³ a person who, while under a prior injunction forbidding legal activity in Florida, was sentenced to five months of imprisonment for practicing law. However, the Florida Supreme Court suspended the sentence upon completion of 100 hours of community service work. Further, the Florida court reaffirmed the prior injunction against Valdes prohibiting him from legal activity.

In *Wyoming State Bar v. Hardy*,³⁴ a "law clerk" who drafted a will, saying that he did not intend to practice law, was held to be engaged

30. C. WOLFRAM, MODERN LEGAL ETHICS 829 (1986). The fourth reason cited by Professor Wolfram has been harshly criticized by the Washington State Supreme Court in *Culton v. Heritage House Realtors, Inc.*, 694 P.2d 630 (Wash. 1985), in which the court stated: "We no longer believe that the supposed benefits to the public from lawyers monopoly on performing legal services justifies limiting the public's freedom of choice." 694 P.2d 630 at 634.

31. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 316 (1967).

32. 424 So. 2d 757 (Fla. 1982).

33. 507 So. 2d 609 (Fla. 1987).

34. 61 Wyo. 172, 156 P.2d 309 (1945).

in unauthorized practice of law. The "clerk" was enjoined by the court from further practice of law. The moral of the case is that unauthorized practice by a law clerk or other lay person, intended or not, is clearly punishable by the courts. Another case which illustrates this point is *In the Matter of Silber*,³⁵ in which a law clerk represented a client of the firm for which she was employed in pretrial hearings and in open court. This clerk was a former law student awaiting the results of the bar examination. She performed the unauthorized practice when her supervising attorney was not available to the client. This action resulted in disciplinary action against the clerk and a public reprimand for the supervising attorney.³⁶

VI. BAR ASSOCIATIONS AND PARALEGALS

In response to the problem of paralegals and unauthorized practice some state bar associations have taken action to help attorneys in providing guidelines on how to ethically use paralegals.³⁷ There have been special commissions and even divisions of state bar associations which have been created to deal with the problem. One of the best examples is the Code of Ethics and Professional Responsibility of the Legal Assistants Division of the State Bar of Texas' Canons of Ethics.³⁸

35. 100 N.J. 517, 497 A.2d 1249 (1985).

36. The specifics of the clerk's discipline were not detailed in the case.

37. These states include Connecticut, Florida, Illinois, Iowa, Kentucky, Michigan, New Hampshire, New Mexico, New York, Rhode Island and Texas. See Haskell, *supra* note 6, at 656-657. The states of Connecticut, Rhode Island and Texas adopted paralegal guidelines since the Haskell article was published.

38. 45 TEX. B.J. 758 (1982). These 10 canons are as follows:

Canon 1. A legal assistant shall not engage in the practice of law as defined by statutes or court decisions, including but not limited to accepting cases or clients, setting fees, giving legal advice or appearing in a representative capacity in court or before an administrative or regulatory agency (unless otherwise authorized by statute, court or agency rules); the legal assistant shall assist in preventing the unauthorized practice of law.

Canon 2. A legal assistant shall not perform any of the duties that attorneys only may perform or do things which attorneys themselves may not do.

Canon 3. A legal assistant shall exercise care in using independent professional judgment and in determining the extent to which a client may be assisted without the presence of an attorney, and shall not act in matters involving professional legal judgment.

Canon 4. A legal assistant shall preserve and protect the confidences and secrets of a client.

Canon 5. A legal assistant shall not solicit legal business on behalf of an

From these state bar guidelines, case law and other ethical considerations the following general suggestions on preventing unauthorized practice of law by paralegals may be made:

1. When introduced to a client, opposing attorney or any of opposing attorney's staff or clients the paralegal must be presented as a paralegal, not as a lawyer.³⁹

2. A paralegal should always be closely supervised by an attorney.⁴⁰ Failure to do so can result in disciplinary action against the supervising attorney.⁴¹

3. Paralegals should give no legal advice even if they know the correct answer or advice to a legal issue.⁴²

4. Paralegals should not solicit clients for their supervising attorney.⁴³

5. The firm or supervising attorney should not hold out the paralegal as an attorney.⁴⁴

6. Legal fees shall not be split between the attorney and the legal

attorney.

Canon 6. A legal assistant shall not engage in performing paralegal functions other than under the direct supervision of an attorney, and shall not advertise or contract with members of the general public for the performance of paralegal functions.

Canon 7. A legal assistant shall avoid, if at all possible, any interest or association which constitutes a conflict of interest pertaining to a client matter and shall inform the supervising attorney of the existence of any possible conflict.

Canon 8. A legal assistant shall maintain a high standard of ethical conduct and shall contribute to the integrity of the paralegal profession.

Canon 9. A legal assistant shall maintain a high degree of competency to better assist the legal profession in fulfilling its duty to provide quality legal services to the public.

Canon 10. A legal assistant shall do all other things incidental, necessary or expedient to enhance professional responsibility and the participation of legal assistants in the administration of justice and public service in cooperation with the legal profession.

39. See 59 CONN. B.J. 425 at 434.

40. See 59 CONN. B.J. at 432, *Provisional Order #18* 454 A.2d 1222 at 1223 (R.I. 1983) (Guideline II(2)). TEXAS LEGAL ASSISTANTS, *supra* note 38, Canon 6.

41. *In re Silber*, 100 N.J. 517, 497 A.2d 1249 (1985).

42. *Provisional Order #18*, 454 A.2d 1222 (R.I. 1983) (Guideline II), *Texas Legal Assistants*, Canon 1, 45 TEXAS B.J. 758, 59 CONN. B.J. 425 at 433.

43. *Texas Legal Assistants*, Canon 5, 45 TEXAS B.J. 758.

44. *Provisional Order #18*, 454 A.2d 1222 (R.I. 1983) (Guideline VII), 59 CONN. B.J. 425 at 434. See also *The Florida Bar v. Savitt*, 363 So. 2d 559 (Fla. 1978).

assistant.⁴⁵

7. There can be no partnership between an attorney and a paralegal.⁴⁶

Perhaps the best suggestions are ones which cannot be clearly written into a black-letter rule. These suggestions are to use common sense and to "avoid even the appearance of impropriety"⁴⁷ in using a legal assistant.

VII. CONCLUSION

As one can see the area of unauthorized practice is vague and this area involving legal assistants is as vague as any other. While no definite statements about the law on this topic are readily available, some states are providing guidelines in this area for the practicing attorney to consult to more effectively employ paralegals. What is needed is more state bar associations to promulgate guidelines on this subject.

In an age where legal problems grow more complex and the attorney is seemingly faced with less time the use of paralegals will certainly increase. The pressures of economics and ethics will, of course, grow as the paralegal community grows. Therefore, states across the United States should be prepared now to give attorneys guidelines for the proper use of legal assistants so that the legal profession may use this potential assistance to the benefit of the client and the profession.

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45. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1987). See *The Florida Bar v. Meserve*, 372 So. 2d 1373 (Fla. 1979).

46. *Provisional Order #18*, 454 A.2d 1222 (R.I. 1983) (Guideline VIII); 59 Conn. B.J. 425, at 433; 57 MICH. ST. B.J. 334-338 (Guideline 3(3)).

47. Canon 9, *supra* note 7.