



NATIONAL
FEDERATION
of
PARALEGAL
ASSOCIATIONS Inc.
®

*NFPA – The Leader
of the Paralegal Profession®*

April 5, 2011

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State Capitol
Room 109
Hartford, CT 06106-1591

Thomas P. Sheridan
Office of the Senate Clerk
State Capitol
Room 305
Hartford, CT 06106-1591

RESPONSE TO RAISED HOUSE BILL No. 6477, LCO 3853

Dear Messrs Coleman and Sheridan:

The National Federation of Paralegal Associations, Inc. (“NFPA”) submits this letter in response to Raised House Bill No. 6477, LCO 3853, which is scheduled for hearing on April 8, 2011. We respectfully request that this letter be considered as testimony in lieu of an appearance at the hearing.

NFPA received a request to respond to Raised House Bill No. 6477 from the Connecticut Alliance of Paralegal Associations. The Alliance is made up of the Central Connecticut Paralegal Association, Inc., the Connecticut Association of Paralegals, Inc. and the New Haven County Association of Paralegals, Inc. All three of these associations are members of NFPA. NFPA is comprised of over 50 paralegal associations, representing approximately 10,000 paralegals.

The proposed amendments to Section 51-88 of the general statutes are too broad, affecting a wide range of non-lawyers and not just “notario” or “notario publico”. In that regard, NFPA is concerned with the following language contained Sec. 2 (a) in Raised H.B. No. 6477, as it relates to non-lawyers: “or (8) draft, review or analyze legal documents for clients in this state, or research and analyze the law of this state and advise clients in this state of the status of such law.” NFPA believes that this language is restrictive and is in conflict with already established standards of practice with regard to non-lawyer practice and/or assistance. We therefore request that this language be stricken from the proposed amendment to Sec. 51-88 of the general statutes. (Raised H.B. No. 6477, attachment “A”). The remainder of this letter will support this position.

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Non-lawyers, including paralegals, are vital in aiding in the cost effective delivery of legal services. As defined by the American Bar Association ("ABA"):

A legal assistant or paralegal is a person, qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible.

(emphasis added).

NFPA expands on the ABA's definition and states:

A paralegal is a person, qualified through education, training or work experience to perform substantive legal work that requires knowledge of legal concepts and is customarily, but not exclusively, performed by a lawyer. This person may be retained or employed by a lawyer, law office, governmental agency or other entity or may be authorized by administrative, statutory or court authority to perform this work. Substantive shall mean work requiring recognition, evaluation, organization, analysis, and communication of relevant facts and legal concepts.

It is well established and recognized that non-lawyers assist in drafting documents, researching and analyzing law, and have contact with clients. It is also well established that in some situations, according to state law, non-lawyers are allowed to practice in certain administrative agencies. (See Connecticut Practice Book Sec. 2-44A (b)(2), attachment "B"). The adoption of Sec. 51-88, 2(a)(8) conflicts with these already established standards in the state of Connecticut.

The 2011 Connecticut Practice Book Sec. 2-44A, "Definition of the Practice of Law", states under subsection (c), "Non-lawyer Assistance" that "[n]othing in this rule shall affect the ability of non-lawyer assistants to act under the supervision of a lawyer in compliance with Rule 5.3 of the Rules of Professional Conduct." The Connecticut Rules of Professional Conduct Rule 5.3, "Responsibilities Regarding Non-Lawyer Assistants", states that the supervising lawyer must "make reasonable efforts to ensure" that the non-lawyers' "conduct is compatible with the professional obligations of the lawyer" and that the supervising lawyer is responsible for the conduct of that person. (See Rule 5.3(1)-(3), attachment "C").

The Connecticut Bar Association ("CBA") also developed "*Guidelines for Lawyers Who Employ or Retain Legal Assistants*". The duties of non-lawyers in proposed Section 51-88(2) (a)(8) at issue in this proposed legislation are directly addressed by the CBA in Guideline 2 which states: "Legal documents may be drafted by a legal assistant but such documents shall be reviewed by the lawyer." It further states "[a] legal assistant may conduct statutory, case law and other legal research but the research product shall be reviewed by the lawyer." Furthermore, in its comments under Guideline 2, the CBA supports the position of NFPA in its position statement on non-lawyer practice as it pertains to education, training and experience. Guideline

2 comments state, "Although there are many tasks that legal assistants may legally perform, in delegating tasks to any particular legal assistant, the lawyer should be confident that based on the legal assistant's education, training, experience and overall abilities, the tasks will be performed in a timely and satisfactory manner." (attachment "D").

In further support that the proposed language in Sec. 51-88(2)(a)(8) is restrictive and in conflict with already established standards of practice, ABA Canon 3, Ethical Considerations EC 3-6 states: "A lawyer often delegates tasks to clerks...and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. The delegation enables a lawyer to render legal services more economically and efficiently." In footnote 3 to EC 3-6 it states "[a] lawyer can employ...nonlawyer draftsmen or nonlawyer researchers. In fact, he may employ nonlawyers to do any task for him...so long as it is he who takes the work and vouches for it to the client and becomes responsible to the client." (citing ABA Opinion 316 (1967)) (attachment "E").

It is therefore imperative in our profession that paralegals are not restricted from drafting, reviewing or analyzing legal documents for clients or from researching and analyzing laws of state provided the paralegal follows the ABA and state rules regarding these duties.

As additional support to the above written testimony, NFPA attaches its Position Statement on the Outsourcing of Paralegal Duties to Foreign Countries (attachment "F") and its Position Statement on Non-Lawyer Practice (attachment "G").

On behalf of NFPA and its members, we thank you for your time and consideration of this response to the Raised House Bill No. 6477, LCO 3853.

Respectfully Submitted,

NATIONAL FEDERATION OF PARALEGAL
ASSOCIATIONS, INC.



Robert S. Hrouda, RP
Vice President and
Director of Positions and Issues

Section A



General Assembly

Raised Bill No. 6477

January Session, 2011

LCO No. 3853

03853 _____ JUD

Referred to Committee on Judiciary

Introduced by:

(JUD)

AN ACT CONCERNING THE UNAUTHORIZED PRACTICE OF LAW BY NOTARIES PUBLIC AND THE OUTSOURCING OF THE DRAFTING, REVIEW OR ANALYSIS OF LEGAL DOCUMENTS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. (NEW) (*Effective October 1, 2011*) (a) A notary public shall not offer or provide legal advice to any person in immigration matters or represent any person in immigration proceedings unless such notary public has been admitted as an attorney under the provisions of section 51-80 of the general statutes or is authorized by federal regulations to practice immigration law or represent persons in immigration proceedings.

(b) A notary public shall not assume, use or advertise the title of notario or notario publico, unless such notary public has been admitted as an attorney under the provisions of section 51-80 of the general statutes.

(c) Any notary public who violates any provision of this section shall have committed a violation of subsection (a) of section 51-88 of the general statutes, as amended by this act, and be subject to the penalties set forth in subsection (b) of said section.

Sec. 2. Subsections (a) and (b) of section 51-88 of the general statutes are repealed and the following is substituted in lieu thereof (*Effective October 1, 2011*):

(a) A person who has not been admitted as an attorney under the provisions of section 51-80 shall not: (1) Practice law or appear as an attorney-at-law for another, in any court of record in this state, (2) make it a business to practice law, or appear as an attorney-at-law for another in any such court, (3) make it a business to solicit employment for an attorney-at-law, (4) hold himself out to the public as being entitled

to practice law, (5) assume to be an attorney-at-law, (6) assume, use or advertise the title of lawyer, attorney and counselor-at-law, attorney-at-law, counselor-at-law, attorney, counselor, attorney and counselor, or an equivalent term, in such manner as to convey the impression that he is a legal practitioner of law, [or] (7) advertise that he, either alone or with others, owns, conducts or maintains a law office, or office or place of business of any kind for the practice of law, or (8) draft, review or analyze legal documents for clients in this state, or research and analyze the law of this state and advise clients in this state of the status of such law.

(b) Any person who violates any provision of this section shall be fined not more than [two hundred and fifty] one thousand dollars or imprisoned not more than two [months] years, or both. The provisions of this subsection shall not apply to any employee in this state of a stock or nonstock corporation, partnership, limited liability company or other business entity who, within the scope of his employment, renders legal advice to his employer or its corporate affiliate and who is admitted to practice law before the highest court of original jurisdiction in any state, the District of Columbia, the Commonwealth of Puerto Rico or a territory of the United States or in a district court of the United States and is a member in good standing of such bar. For the purposes of this subsection, "employee" means any person engaged in service to an employer in the business of his employer, but does not include an independent contractor.

This act shall take effect as follows and shall amend the following sections:		
Section 1	<i>October 1, 2011</i>	New section
Sec. 2	<i>October 1, 2011</i>	51-88(a) and (b)

Statement of Purpose:

To clarify that notaries public who are not attorneys may not offer legal assistance in immigration matters or convey the impression that they are attorneys by the use of certain titles, to provide that outsourcing of legal document review to nonattorneys constitutes the unauthorized practice of law and to increase the penalty for the unauthorized practice of law.

[Proposed deletions are enclosed in brackets. Proposed additions are indicated by underline, except that when the entire text of a bill or resolution or a section of a bill or resolution is new, it is not underlined.]

Section B

OFFICIAL

2011

CONNECTICUT PRACTICE BOOK

(Revision of 1998)



to Oct. 1, 2003; Sept. 30, 2003, effective date changed to Jan. 1, 2004; amended June 26, 2006, to take effect Jan. 1, 2007.)

Sec. 2-43. Notice by Attorney of Alleged Misuse of Clients' Funds and Garnishments of Lawyers' Trust Accounts

(a) When any complaint, counterclaim, cross complaint, special defense or other pleading in a judicial or administrative proceeding alleges a lawyer's misuse of funds handled by the lawyer in his or her capacity as a lawyer or a fiduciary, the person signing the pleading shall mail a copy thereof to the statewide bar counsel.

(b) In any case where a lawyer's trust account, as defined in Section 2-28 (b), is garnisheed, or otherwise liened, the party who sought the garnishment or lien shall mail a copy of the garnishee process or writ of attachment to the statewide bar counsel.

(P.B. 1978-1997, Sec. 28D.)

Sec. 2-44. Power of Superior Court to Discipline Attorneys and to Restrain Unauthorized Practice

The superior court may, for just cause, suspend or disbar attorneys and may, for just cause, punish or restrain any person engaged in the unauthorized practice of law.

(P.B. 1978-1997, Sec. 29.)

Sec. 2-44A. Definition of the Practice of Law

(a) General Definition: The practice of law is ministering to the legal needs of another person and applying legal principles and judgment to the circumstances or objectives of that person. This includes, but is not limited to:

(1) Holding oneself out in any manner as an attorney, lawyer, counselor, advisor or in any other capacity which directly or indirectly represents that such person is either (a) qualified or capable of performing or (b) is engaged in the business or activity of performing any act constituting the practice of law as herein defined.

(2) Giving advice or counsel to persons concerning or with respect to their legal rights or responsibilities or with regard to any matter involving the application of legal principles to rights, duties, obligations or liabilities.

(3) Drafting any legal document or agreement involving or affecting the legal rights of a person.

(4) Representing any person in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in any administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.

(5) Giving advice or counsel to any person, or representing or purporting to represent the interest of any person, in a transaction in which an interest in property is transferred where the advice or counsel, or the representation or purported representation, involves (a) the preparation, evaluation, or interpretation of documents related to such transaction or to implement such transaction or (b) the evaluation or interpretation of procedures to implement such transaction, where such transaction, documents, or procedures affect the legal rights, obligations, liabilities or interests of such person, and

(6) Engaging in any other act which may indicate an occurrence of the authorized practice of law in the state of Connecticut as established by case law, statute, ruling or other authority.

"Documents" includes, but is not limited to, contracts, deeds, easements, mortgages, notes, releases, satisfactions, leases, options, articles of incorporation and other corporate documents, articles of organization and other limited liability company documents, partnership agreements, affidavits, prenuptial agreements, wills, trusts, family settlement agreements, powers of attorney, notes and like or similar instruments; and pleadings and any other papers incident to legal actions and special proceedings.

The term "person" includes a natural person, corporation, company, partnership, firm, association, organization, society, labor union, business trust, trust, financial institution, governmental unit and any other group, organization or entity of any nature, unless the context otherwise dictates.

The term "Connecticut lawyer" means a natural person who has been duly admitted to practice law in this state and whose privilege to do so is then current and in good standing as an active member of the bar of this state.

(b) Exceptions. Whether or not it constitutes the practice of law, the following activities by any person are permitted:

(1) Selling legal document forms previously approved by a Connecticut lawyer in any formal.

(2) Acting as a lay representative authorized by administrative agencies or in administrative hearings solely before such agency or hearing where:

(A) Such services are confined to representation before such forum or other conduct reasonably ancillary to such representation; and

(B) Such conduct is authorized by statute, or the special court, department or agency has adopted a rule expressly permitting and regulating such practice.

(3) Serving in a neutral capacity as a mediator, arbitrator, conciliator or facilitator.

(4) Participating in labor negotiations, arbitrations, or conciliations arising under collective bargaining rights or agreements.

(5) Providing clerical assistance to another to complete a form provided by a court for the protection from abuse, harassment and violence when no fee is charged to do so.

(6) Acting as a legislative lobbyist.

(7) Serving in a neutral capacity as a clerk or a court employee providing information to the public.

(8) Performing activities which are preempted by federal law.

(9) Performing statutorily authorized services as a real estate agent or broker licensed by the state of Connecticut.

(10) Preparing tax returns and performing any other statutorily authorized services as a certified public accountant, enrolled IRS agent, public accountant, public bookkeeper, or tax preparer.

(11) Performing such other activities as the courts of Connecticut have determined do not constitute the unlicensed or unauthorized practice of law.

(12) Undertaking pro se representation, or practicing law authorized by a limited license to practice.

(c) **Nonlawyer Assistance:** Nothing in this rule shall affect the ability of nonlawyer assistants to act under the supervision of a lawyer in compliance with Rule 5.3 of the Rules of Professional Conduct.

(d) **General Information:** Nothing in this rule shall affect the ability of a person or entity to provide information of a general nature about the law and legal procedures to members of the public.

(e) **Governmental Agencies:** Nothing in this rule shall affect the ability of a governmental agency to carry out its responsibilities as provided by law.

(f) **Professional Standards:** Nothing in this rule shall be taken to define or affect standards for civil liability or professional responsibility.

(g) **Unauthorized Practice:** If a person who is not authorized to practice law is engaged in the practice of law, that person shall be subject to the civil and criminal penalties of this jurisdiction.

(Adopted June 29, 2007, to take effect Jan. 1, 2008.)

Sec. 2-45. —Cause Occurring in Presence of Court

If such cause occurs in the actual presence of the court, the order may be summary, and without complaint or hearing; but a record shall be made of such order, reciting the ground thereof. Without limiting the inherent powers of the court, if attorney misconduct occurs in the actual presence of the court, the statewide grievance committee and the

grievance panels shall defer to the court if the court chooses to exercise its jurisdiction.

(P.B. 1978-1997, Sec. 30.)

Sec. 2-46. Suspension of Attorneys Who Violate Support Orders

(a) Except as otherwise provided in this section, the procedures of General Statutes §§ 46b-220 through 46b-223 shall be followed with regard to the suspension from the practice of law of attorneys who are found to be delinquent child support obligors.

(b) A judge, upon finding that an attorney admitted to the bar in this state is a delinquent child support obligor as defined in General Statutes § 46b-220 (a), may, pursuant to General Statutes § 46b-220 (b), issue a suspension order concerning that attorney.

(c) If the attorney obligor fails to comply with the conditions of the suspension order within thirty days of its issuance, the department of social services, a support enforcement officer, the attorney for the obligee or the obligee, as provided in the suspension order, shall file with the clerk of the superior court which issued the suspension order an affidavit stating that the conditions of the suspension order have not been met, and shall serve the attorney obligor with a copy of such affidavit in accordance with Sections 10-12 through 10-17. The affidavit shall be filed within forty-five days of the expiration of the thirty day period.

(d) Upon receipt of the affidavit, the clerk shall forthwith bring the suspension order and the affidavit to a judge of the superior court for review. If the judge determines that pursuant to the provisions of General Statutes § 46b-220 the attorney obligor should be suspended, the judge shall suspend the attorney obligor from the practice of law, effective immediately.

(e) A suspended attorney who has complied with the conditions of the suspension order concerning reinstatement, shall file a motion with the court to vacate the suspension. Upon proof of such compliance, the court shall vacate the order of suspension and reinstate the attorney. The provisions of Section 2-53 shall not apply to suspensions under this section.

(f) The clerk shall notify the statewide bar counsel of any suspensions and reinstatements ordered pursuant to this section.

(P.B. 1978-1997, Sec. 30A.)

Sec. 2-47. Presentments and Unauthorized Practice of Law Petitions

(a) Presentment of attorneys for misconduct, whether or not the misconduct occurred in the actual presence of the court, shall be made by

Section C

subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Rule 5.3. Responsibilities regarding Non-lawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(1) A partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(2) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(3) A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(A) The lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(B) The lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(P.B. 1978-1997, Rule 5.3.) (Amended June 26, 2006, to take effect Jan. 1, 2007.)

COMMENTARY: Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not

have legal training and are not subject to professional discipline.

Subdivision (1) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See first paragraph of Commentary to Rule 5.1. Subdivision (2) applies to lawyers who have supervisory authority over the work of a nonlawyer. Subdivision (3) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) An agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) A lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed upon purchase price; and

(3) A lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) A nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

(P.B. 1978-1997, Rule 5.4.) (Amended June 26, 2006, to take effect Jan. 1, 2007.)

COMMENTARY: The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee

Section D

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Guidelines for Lawyers Who Employ or Retain Legal Assistants

Information for:

Lawyers	Judges
Paralegals	Media
Students	Public

The Connecticut Bar Association's House of Delegates approved these Guidelines for Lawyers Who Employ or Retain Legal Assistants and Guidelines for Legal Assistants on January 13, 1997. These guidelines may be photocopied, but should be identified as CBA Guidelines for Lawyers Who Employ or Retain Legal Assistants and Guidelines For Legal Assistants. Acknowledgment is given to those members who assisted in the development of these guidelines: Eileen Glancy; Peter C. Herbst; Quinlin Johnstone (Chair); Jill E. Marlin; Sid M. Miller; Wanda Negron; Andrew H. Pinkowski; Jane S. Scholl; Fred D. Settle.

These guidelines are directed to Connecticut lawyers who employ or retain legal assistants and are intended as a brief summation of the legal and professional responsibility obligations pertaining to lawyers' utilization of legal assistants. The guidelines are not meant to supersede any applicable federal, state or local laws or any provisions of the Rules of Professional Conduct as approved by the Connecticut Superior Court judges. Legal assistants can help lawyers to provide quality legal services to clients at an affordable price. However, to protect client interests and public interests, lawyer utilization of legal assistants should be in accordance with these guidelines and the underlying laws and rules of professional conduct on which the guidelines are based.

It should be noted that the guidelines are applicable to lawyers in all types of law offices that utilize legal assistants, among them not only independent private firms but also government law offices, corporate law department offices, and legal aid offices. The guidelines also apply not only to lawyers or law offices that employ legal assistants but also to those that retain legal assistants as independent contracting parties to perform legal work for lawyers under the lawyers' supervision and for which the lawyers are responsible.

These guidelines adopt the following definition of legal assistant, a definition approved by the American Bar Association Board of Governors:

A legal assistant is a person, qualified through education, training, or work experience, who is employed or retained by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance under the ultimate direction and supervision of an attorney, of specifically delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.¹

As used herein, "legal assistant" and "paralegal" are synonymous terms.²

Guideline 1

Responsibility and Supervision. A lawyer is responsible for all of the professional actions of a legal assistant performing legal services under the lawyer's direction. The lawyer should take all reasonable supervisory measures to make certain that the legal assistant is not engaged in the unauthorized practice of law and that the legal assistant's conduct is consistent with the lawyer's obligations under the Rules of Professional Conduct.

Comment. The unauthorized practice of law is prohibited by statute in Connecticut, Conn. Gen. Stats. Anri. 51-88. Violation of the statute is a crime. In addition to criminal penalties, the court may enjoin the unauthorized practice of law and impose penalties for contempt of court. The Connecticut statutes do not elaborate on what constitutes the unauthorized practice of law but the Connecticut Supreme Court has declared that the purpose of the Connecticut statutes on unauthorized practice is to prohibit conduct "commonly understood to be the practice of law." *Grievance Committee v. Payne*, 128 Conn. 325, 330, 22 A.2d 623, 626 (1941). This language is quoted with approval in *State Bar Assn. v. Conn. Bank & Trust Co.*, 145 Conn. 222, 234, 140 A.2d 863, 870 (1958). Among acts generally considered to be the unauthorized practice of law are appearances before courts or administrative agencies, unless authorized by statute, court rule, or agency rule; providing legal advice; and drafting legal documents. *Grievance Committee v. Dacey*, 154 Conn. 129, 222 A.2d 339 (1966). Also see *In re Peterson*, 163 B.R. 665, 671-675 (1994). As to the propriety of legal assistants drafting legal documents under the supervision of a lawyer, see Guideline 2.

The Rules of Professional Conduct prohibit a lawyer from assisting a legal assistant or others in the unauthorized practice of law. Rule 5.5 of the Rules of Professional Conduct states that "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."

To assure that legal assistants and others over whom a lawyer has direct supervisory authority will not engage in unauthorized practice of law or conduct incompatible with the lawyer's professional responsibility obligations, the lawyer should instruct such persons in applicable legal and professional responsibility obligations. On this requirement see particularly Rules of Professional Conduct, Rule 5.3(b) and

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the comment following Rule 5.3. As partial fulfillment of this instructional duty relative to any legal assistant for whom the lawyer has direct supervisory responsibility, the lawyer should make certain that the legal assistant has received a copy of the Guidelines for Legal Assistants approved by the Connecticut Bar Association and that the legal assistant is fully familiar with the content of those guidelines.

Guideline 2

Tasks Legal Assistants May Perform. If a lawyer maintains responsibility for a legal assistant's work product and adequately supervises the legal assistant's performance, a wide and varied range of tasks may properly be delegated by a lawyer to a legal assistant, including many tasks commonly performed by lawyers. Some of the more important of these tasks are listed below, the list being illustrative not exhaustive.

Interviewing. Clients, witnesses and others may be interviewed by a legal assistant, but legal advice may not be given by the legal assistant nor may the legal assistant accept or reject clients or set legal fees.

Drafting Legal Documents. Legal documents may be drafted by a legal assistant but such documents shall be reviewed by the lawyer.

Legal Research. A legal assistant may conduct statutory, case law and other legal research but the research product shall be reviewed by the lawyer.

Appearance Before Courts and Other Adjudicatory Bodies. A legal assistant may appear before adjudicatory bodies only if authorized by law to do so. However, with appropriate approval, a legal assistant may accompany and assist counsel at pretrial conferences and judicial and other adjudicatory proceedings.

Will Executions. A legal assistant may attend will executions and act as a witness but may not provide legal advice at will executions.

Real Estate Closings. A legal assistant may attend closings, even though no lawyer from the law firm employing the legal assistant is also present. However, at the closing the legal assistant may act only as a messenger and should not use or express any independent opinion or judgment about execution of the documents, changes in adjustments or price, or other matters involving documents or funds. For further particulars, see comment below.

Depositions. A legal assistant may summarize and index depositions and, with appropriate approval, attend the taking of depositions, but may not conduct depositions.

Preparing Tax Returns. A legal assistant may prepare client income, estate, gift and other tax returns but such returns shall be reviewed by the lawyer.

Comment. Although there are many tasks that legal assistants may legally perform, in delegating tasks to any particular legal assistant, the lawyer should be confident that based on the legal assistant's education, training, experience and overall abilities, the tasks will be performed in a timely and satisfactory manner.

A real estate closing opinion by the Connecticut Bar Association's Committee on Professional Ethics, Opinion 96-14, provides in part as follows:

In the opinion of the Committee, a law firm or an attorney may use an employee who is not admitted to practice, in this case a legal assistant or paralegal, as a messenger to deliver and pick up documents and funds required for a real estate closing. The messenger function could include communicating information or questions from an attorney in the firm to the buyer's attorney. If the buyer is represented by an attorney who is not present at the closing, then the seller's attorney should not communicate with the buyer directly or through the employee without the prior permission of the buyer's attorney, as required by Rule 4.2 of the Rules of Professional Conduct.

The employee should not compromise his or her function as a messenger by providing information regarding the legal implications of a document. It is expected the employee will contact an attorney in the firm during the closing for instructions, if any questions are raised about the execution of the documents, changes in adjustments or price, or other matters involving documents or funds. The employee should not, however, be involved as an intermediary between the seller's attorney and the buyer or the buyer's attorney to negotiate or otherwise resolve questions about the funds or the legal sufficiency or effect of documents. Nor should the employee use or express any independent opinion or judgment about such matters. Nor should the employee supervise the closing where there is no attorney at the closing to perform this function.

Guideline 3

Protecting Client Confidences. The lawyer should take reasonable measures to ensure that all client confidences are protected by the legal assistant.

Comment. The lawyer's responsibility to protect client confidences, according to the comment to Rule 5.3 of the Rules of Professional Conduct, includes the responsibility to give assistants whom they employ or retain "appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client...." It should be noted that Rule 1.6 of the Rules of Professional Conduct, which has as its heading "Confidentiality of Information," applies broadly to information related to representation of a client. Rule 1.6a states: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation,

except for disclosures that are impliedly authorized in order to carry out the representation..." with certain listed exceptions. Thus Rule 1.6a provides that all information relating to the representation may be confidential.

Guideline 4

Status Disclosure. The lawyer should take reasonable measures to ensure that clients, courts and other relevant persons are aware that a legal assistant, whose services are utilized by the lawyer in performing legal services, is not licensed to practice law.

Comment. The lawyer has the responsibility to disclose to third persons the status of the legal assistant. This disclosure may be made orally or in writing and generally should be made when the legal assistant initially has contact with the third person.

Guideline 5

Letterheads and Business Cards. A lawyer may identify legal assistants by name and title on the lawyer's letterhead and on business cards identifying the lawyer's firm.

Comment. Letterhead and business card identifications should not be misleading and when a legal assistant's name is included, the legal assistant's status should clearly be indicated. Informal Opinion 85-17 of the Connecticut Bar Association's Committee on Professional Ethics is consistent with this guideline.

Guideline 6

Conflict of Interest. In employing or retaining a legal assistant, or assigning a legal assistant to any particular client matter, a lawyer should take reasonable measures to ensure that no conflict of interest is presented arising out of the legal assistant's current or prior employment or from the legal assistant's other business or personal interests.

Comment. Rule 5.3 of the Rules of Professional Conduct requires that a lawyer employing or retaining a legal assistant shall make reasonable efforts to ensure that the legal assistant's conduct is "compatible with the professional obligations of the lawyer." Among these professional obligations is not to represent a client in conflict of interest situations as proscribed by Rules 1.7-1.13 of the Rules of Professional Conduct. Obviously, if there is a conflict of interest between a legal assistant and a client and the legal assistant is acting for the lawyer, a prohibited conflict of interest situation may exist. Among precautions the lawyer should take to avoid conflict of interest problems are to make inquiries, prior to hiring or retaining the legal assistant, as to the legal assistant's past and current employment that might raise conflict of interest concerns. Another precautionary measure that should be taken is for the lawyer to instruct the legal assistant, following employment or retention, to inform the lawyer of any interest that may arise involving the legal assistant that could raise conflict of interest concerns.

Guideline 7

Fee Sharing. A lawyer shall not split legal fees with a legal assistant nor pay a legal assistant for the referral of legal work.

Comment. A lawyer is expressly prohibited by Rule 5.4(a) of the Rules of Professional Conduct from sharing legal fees with a nonlawyer, but Rule 5.3(a)(3) does state that "a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement." The prohibition on sharing legal fees with a legal assistant does not, however, prevent a lawyer from compensating a legal assistant based on the quantity and quality of the legal assistant's work and the value of that work to a law practice. Connecticut Bar Association's Committee on Professional Ethics Opinion 93-1 expressly holds that a law firm may provide periodic bonuses to its legal assistants based upon client projects completed and billable hours recorded. But the legal assistants' compensation may not be contingent, by advance agreement, upon the profitability of the lawyer's practice.

Guideline 8

Fee Charges. In establishing a fee arrangement with a client, a lawyer may include a reasonable and separate charge for work performed by a legal assistant, provided that the client consents after consultation.

Comment. In *Missouri v. Jenkins*, 491 U.S. 274 (1989), the Court held, in setting a reasonable fee under 28 U.S.C. 1988, that it was appropriate to include a charge for legal assistant services and that it was appropriate to value such services at "market rates" rather than "actual cost" to the lawyer. Of course, any fee charged by the lawyer, whether including a charge for legal assistant work or not, must be reasonable, as required by Rule 1.5 of the Rules of Professional Conduct.

Guideline 9

Partnership With a Legal Assistant. A lawyer shall not form a partnership with a legal assistant if any of the partnership's activities consist of the practice of law.

Comment. This prohibition against forming a partnership with a legal assistant, or any other nonlawyer, is expressly proscribed by Rule 5.4(b) of the Rules of Professional Conduct, and is further prohibited by Rule 5.5 (b) of the Rules of Professional Conduct stating that a lawyer shall not "assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." It also should be noted that Rule 5.5(d) of the Rules of Professional Conduct generally prohibits a lawyer from practicing with or in a professional corporation or association authorized to practice law for a profit if a legal assistant or

other nonlawyer owns any interest therein, is a corporate officer or director, or has a right to direct or control the professional judgment of a lawyer.

Guideline 10

Continuing Education and Pro Bono Publico Activities. A lawyer who employs a legal assistant should encourage the legal assistant's participation in appropriate continuing education and pro bono publico activities.

Comment. This guideline is consistent with the objectives of Rules 1.1, 5.3 and 6.1 of the Rules of Professional Conduct.

Illustrative examples of how this guideline might be implemented are these: (a) encouraging attendance by the legal assistant at appropriate continuing education programs; (b) conducting in-house training programs for the legal assistant, or including the legal assistant in appropriate in-house programs designed for lawyers; (c) providing the legal assistant with access to appropriate publications concerning the substantive areas in which the legal assistant works; (d) encouraging and supporting the legal assistant's membership in appropriate professional organizations; and (e) encouraging a legal assistant's pro bono publico efforts by granting some time away from regular job duties and providing reasonable office logistical support.

Notes

1. Approved by the ABA Board of Governors on February 6, 1996.
2. In many respects, the guidelines also may apply to nonlawyers other than legal assistants who are employed or retained by lawyers, including legal secretaries.

Section E

ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY

The Model Code of Professional Responsibility was adopted by the House of Delegates of the American Bar Association on August 12, 1969 and was amended by the House of Delegates in February 1970, February 1974, February 1975, August 1976, August 1977, August 1978, February 1979, February 1980, and August 1980.

CANON 3
A Lawyer Should Assist
In Preventing the Unauthorized
Practice of Law

ETHICAL CONSIDERATIONS

EC 3-1 The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession.

EC 3-2 The sensitive variations in the considerations that bear on legal determinations often make it difficult even for a lawyer to exercise appropriate professional judgment, and it is therefore essential that the personal nature of the relationship of client and lawyer be preserved. Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment.

EC 3-3 A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards.¹ The Disciplinary Rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment. Moreover, a person who entrusts legal matters to a lawyer is protected by the attorney-client privilege and by the duty of the lawyer to hold inviolate the confidences and secrets of his client.

EC 3-4 A layman who seeks legal services often is not in a position to judge whether he will receive proper professional attention. The entrustment of a legal matter may well involve the confidences, the reputation, the property, the freedom, or even the life of the client. Proper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he is subject to the regulations of the legal profession.

EC 3-5 It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law.¹ Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

EC 3-6 A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product.¹ This delegation enables a lawyer to render legal service more economically and efficiently.

EC 3-7 The prohibition against a non-lawyer practicing law does not prevent a layman from representing himself, for then he is ordinarily exposing only himself to possible injury. The purpose

the Individual Lawyer and of the Organized Bar, 12 U.C.L.A. L. REV. 438, 439 (1965).

2. "What constitutes unauthorized practice of the law in a particular jurisdiction is a matter for determination by the courts of that jurisdiction." *ABA Opinion 198* (1939).

"In the light of the historical development of the lawyer's functions, it is impossible to lay down an exhaustive definition of 'the practice of law' by attempting to enumerate every conceivable act performed by lawyers in the normal course of their work." *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz., 76, 87, 366 P.2d 1, 8-9 (1961), *modified*, 91 Ariz. 293, 371 P.2d 1020 (1962).

3. "A lawyer can employ lay secretaries, lay investigators, lay detectives, lay researchers, accountants, lay scribes, nonlawyer draftsmen or nonlawyer researchers. In fact, he may employ nonlawyers 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 that are 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 to the client." *ABA Opinion 316* (1967).

ABA Opinion 316 (1967) also stated that if a lawyer practices law as part of a law firm which includes lawyers from several states, he may delegate tasks to firm members in other states so long as he "is the person who, on behalf of the firm, vouches for the work of all of the others and, with the client and in the courts, did the legal acts defined by that state as the practice of law."

"A lawyer cannot delegate his professional responsibility to a law student employed in his office. He may avail himself of the assistance of the student in many of the fields of the lawyer's work, such as examination of case law, finding and interviewing witnesses, making collections of claims, examining court records, delivering papers, conveying important messages, and other similar matters. But the student is not permitted, until he is admitted to the Bar, to perform the professional functions of a lawyer, such as conducting court trials, giving professional advice to clients or drawing legal documents for them. The student in all his work must act as agent for the lawyer employing him, who must supervise his work and be responsible for his good conduct." *ABA Opinion 85* (1932).

4. "No division of fees for legal services is proper, except with another lawyer . . ." ABA CANONS OF PROFESSIONAL ETHICS, CANON 34 (1908). Otherwise, according to *ABA Opinion 316* (1967), "[t]he Canons of Ethics do not examine into the method by which such persons are remunerated by the lawyer . . . They may be paid a salary, a per diem charge, a flat fee, a contract price, etc."

See ABA CANONS OF PROFESSIONAL ETHICS, CANONS 33 and 47 (1908).

5. "Many partnership agreements provide that the active partners, on the death of any one of them, are to make payments to the estate or to the nominee of a deceased partner on a pre-determined formula. It is only where the effect of such an arrangement is to make the estate or nominee a member of the partnership along with the surviving partners that it is prohibited by Canon 34. Where the payments are made in accordance with a pre-existing agreement entered into by the deceased partner during his lifetime and providing for a fixed method for determining their amount based upon the value of services rendered during the partner's lifetime and providing for a fixed period over which the payments are to be made, this is not the case. Under these circumstances, whether the payments are considered to be delayed payment of compensation earned but withheld during the partner's lifetime, or whether they are considered to be an approximation of his interest in matters pending at the time of his death, is immaterial. In either event, as Henry S. Drinker says in his book, *LEGAL ETHICS*, at page 189: 'It would seem, however, that a reasonable agreement to pay the estate a proportion of the receipts for a reasonable period is a proper practical settlement for the lawyer's services to his retirement or death.'" *ABA Opinion 308* (1963).

6. *Cf. ABA Opinion 311* (1964).

7. "That the States have broad power to regulate the practice of law is, of course, beyond question." *United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967).

"It is a matter of law, not of ethics, as to where an individual may practice law. Each state has its own rules." *ABA Opinion 316* (1967).

8. "Much of clients' business crosses state lines. People are mobile, moving from state to state. Many metropolitan areas cross state lines. It is common today to have a single economic and social community involving more than one state. The business of a single client may involve legal problems in several states." *ABA Opinion 316* (1967).

9. "[W]e reaffirmed the general principle that legal services to New Jersey residents with respect to New Jersey matters may ordinarily be furnished only by New Jersey counsel; but we pointed out that there may be multistate transactions where strict adherence to this thesis would not be in the public interest and that, under the circumstances, it would have been not only more costly to the client but also 'grossly impractical and inefficient' to have had the settlement negotiations conducted by separate lawyers from different states." *In re Estate of Waring*, 47 N.J. 367, 376, 221 A.2d 193, 197 (1966).

Cf. ABA Opinion 316 (1967).

10. Conduct permitted by Disciplinary Rules of Canons 2 and 5 does not violate DR 3-101.

11. See ABA CANONS OF PROFESSIONAL ETHICS, CANON 47 (1908).

12. It should be noted, however, that a lawyer may engage in conduct, otherwise prohibited by this Disciplinary Rule, where such conduct is authorized by preemptive federal legislation. See *Sperry v. Florida*, 373 U.S. 379, 10 L. Ed. 2d 428, 83 S. Ct. 1322 (1963).

13. See ABA CANONS OF PROFESSIONAL ETHICS, CANON 34 (1908) and *ABA Opinions 316* (1967), 180 (1938), and 48 (1931).

"The receiving attorney shall not under any guise or form share his fee for legal services with a lay agency, personal or corporate, without prejudice, however, to the right of the lay forwarder to charge and collect from the creditor proper compensation for non-legal services rendered by the law [sic] forwarder which are separate and apart from the services performed by the receiving attorney." *ABA Opinion 294* (1958).

14. See *ABA Opinion 266* (1945).

15. *Cf. ABA Opinion 311* (1964).

16. See *ABA Opinion 1440*

17. Amended, February 1980, House Informational Report No. 107.

18. See ABA CANONS OF PROFESSIONAL ETHICS, CANON 33 (1908); *cf. ABA Opinions 239* (1942) and 201 (1940)

ABA Opinion 316 (1967) states that lawyers licensed in different jurisdictions may, under certain conditions, enter "into an arrangement for the practice of law" and that a lawyer licensed in State A is not, for such purpose, a layman in State B.

Section F



The National Federation of Paralegal Associations, Inc.

Position Statement on the Outsourcing of Paralegal Duties to Foreign Countries

The National Federation of Paralegal Associations (NFPA) believes it is in the best interest of the NFPA to proactively position the NFPA in the forefront of this issue. This position statement:

- Allows for the dissemination of NFPA's position in articles and on its web site.
- Provides a forum for increasing understanding of what a paralegal does.
- Takes a position that advocates keeping paralegal jobs in the local community.
- Educates the business community regarding dangers and pitfalls of outsourcing paralegal jobs overseas.

Therefore, the NFPA adopts the following position statement regarding the outsourcing of paralegal duties to foreign countries, to be implemented consistent with the NFPA Resolution 01S-04 which imposes certain limits on advocacy efforts in those states with the NFPA voting member associations:

The attorney client relationship is one of the most important business relationships, and the cornerstone of our judicial system. Paramount to this relationship is the maintenance of client confidentiality and the privacy of client information. Any release of this information to a third-party must be carefully considered and appropriate precautions taken. To release such private and confidential information out of an attorney's control and into the hands of a third-party in another country should be done sparingly and only as a last resort. Further, since paralegals are highly trained and qualified professionals who provide efficient, cost-effective, and timely service to attorneys and clients, they should be utilized first and foremost for all non-attorney legal work. If work is to be outsourced, it should first be outsourced to qualified and competent paralegals within the attorney's local community, then nationally, and finally, internationally. The client at all times should be kept informed as to who is actually performing their legal work and should have the opportunity to request that their legal work not be outsourced.

BACKGROUND and DISCUSSION.

According to a recent study by researchers at the University of California at Berkeley [The New Wave of Outsourcing by Ashok D. Bardham and Cynthia Kroll, Fisher Center Research Reports, Year 2003, Paper 1103, eScholarship Repository, University of California, <http://repositories.cdlib.org/iber/fcreue/reports/1103>], (*hereinafter referred to as "Fisher Study"*) "[t]here is a growing apprehension among business leaders, economists and ordinary Americans that we are witnessing what may well be the largest out-migration of non-manufacturing jobs in the history of the US economy." Additionally, "Legal research and other back-office work carried out at law firms may be among the next set of white-collar jobs to move offshore in big numbers. According to the Fisher Study, legal assistants and paralegals working in India on behalf of U.S. law firms earn, on average, between \$6 and \$8 per hour. That's about one-third of what their counterparts in the United States are paid."

For law firms and clients of law firms considering the outsourcing of legal work internationally, the following questions should be addressed:

Timing and Cost. Is there enough time for the project to be outsourced given time zone differences? What contingencies are in place in the event of a failure to deliver the outsourced project on time? What are the costs associated with rush work? Will cost savings actually be realized once costs of management, review time, revisions and formatting have been factored in?

Quality. Will you get the same quality of product if outsourced versus in-house? Will language differences present any barriers?

Conflicts. Have appropriate conflicts checks been completed.

Communication. How will language barriers and time zone differences affect communication?

Skill Sets and Resources. Do those performing the outsourced work have the appropriate training and understanding of United States, administrative, state or local laws and regulations? Do they possess access to the resources necessary to perform the task including both primary and secondary resources? Do they have the technological resources to perform the task? Is there the appropriate staffing necessary to complete the task?

Finally, the most important consideration with respect to outsourcing of legal work to offshore parties:

Confidentiality. Privacy. Liability. Have you consulted with your client and received client approval for sending legal work offshore? Do you have the appropriate confidentiality agreements in place? Is there a written policy regarding privacy of information? What liabilities does outsourcing expose you to in the United States and in the offshore country—for example, copyright infringement or privacy issues? If there are problems where and how will they be resolved?

At this time, while it may be tempting for some law firms and legal departments to outsource portions of their legal work, there is not enough evidence that there is a true cost savings for the average firm. Further, confidentiality, privacy, liability, and the unauthorized practice of law are all issues that have not been sufficiently tested with regard to sending work offshore. However, this issue has received a significant amount of press and discussion and is slated to become a hot topic in the future as law firm clients seek to lower costs and maximize results for their legal expenditures.

Prepared for the National Federation of Paralegal Associations by Wayne D. Akin, the Special Research Coordinator and 2005-2006 Vice President and Director of Positions and Issues (VPPI). This topic was presented to and passed by the delegation at the 2005 Policy Meeting in Las Vegas, Nevada, as Resolution 05-10. The VPPI presented the position statement to the Board of Directors at the Summer Board Meeting held July 22-23, 2005, in Rochester, New York where it was formally adopted.

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Wayne Akin is a litigation paralegal with the law firm Miller Nash, LLP in Portland, Oregon. His primary practice is in securities litigation, but he also works in civil, construction, and employment litigation, insolvency and reorganization, and creditors' rights. Wayne also handles garnishments, background checks, skip-tracings, online information retrieval, asset evaluations, discovery and judgment searches, and trial preparation. Wayne also manages a number of the firm's document hubs and serves as his firm's Summation expert. Previously Wayne focused on intellectual property with an emphasis on patents.

Wayne has been involved with the Oregon Paralegal Association (OPA) and the National Federation of Paralegal Associations (NFPA). He has served as a chairperson of OPA's Intellectual Property Specialty Group, as a member of OPA's Board of Directors for two years, as OPA's Treasurer for two years, and was recipient of OPA's Outstanding New Member Award for 2000-2001. For the NFPA, Wayne served two and a half years as Special Research Coordinator. Wayne has written a number of articles for OPA's Paragram newsletter and NFPA's The National Paralegal Reporter

Wayne currently serves as NFPA's Vice President and Director of Positions and Issues where he is responsible for the Bar Association, Case Law, Ethics & Professional Responsibility, Legislative, Special Research, Regulation Review, and Unauthorized Practice of Law Research Coordinators, the Ad Hoc Committee on Non-Lawyer Practice and the Ad Hoc Committee on Mandatory Paralegal Regulation, and serves on the Ethics Board.

Section G



The National Federation of Paralegal Associations

Position Statement on Non-Lawyer Practice

The National Federation of Paralegal Associations (NFPA) believes it is in the best interest of the NFPA to be prepared to respond to potential legislation or court rules providing for non-lawyer practice.

NFPA believes that paralegals can and should play an integral role in the delivery of cost-effective legal and law-related services. Therefore, the NFPA adopts the following position statement regarding Non-Lawyer Practice, to be implemented consistent with the NFPA Resolution 01S-04 which imposes certain limits on advocacy efforts in those states with the NFPA voting member associations:

The NFPA supports legislation and adoption of court rules permitting non-lawyers to deliver limited legal services provided that such legislation or court rules include:

1. Exceptions from the unauthorized practice of law.
2. That non-lawyer practice rules contain minimum criteria as set forth herein.
3. Advanced competency testing as to specialty practice area and limitation of practice as prescribed by laws, regulations, or court rules.
4. Notwithstanding the foregoing, paralegals who choose to work in a traditional setting under the supervision of an attorney shall be specifically exempt from any such non-lawyer practice laws, regulations, or court rules.

BACKGROUND.

Over twenty years ago, the NFPA stated that "In examining contemporary legal institutions and systems, the members of the NFPA recognize that a redefinition of the traditional delivery of legal services is essential in order to meet the needs of the general public. We are committed to increasing the availability of affordable, quality legal services, a goal which is served by the constant reevaluation and expansion of the work that paralegals are authorized to perform. Delivery of quality legal services to those portions of our population currently without

access to them requires innovation and sensitivity to specific needs of people”¹ The growing gap between those few citizens who can afford quality legal services and those who must proceed without any legal representation whatsoever has gained increased prominence in recent years. Many observers now recognize the desirability and fairness of increasing the availability of basic legal services to a much broader portion of our community. Certain states have adopted or are considering legislation or judicial rules allowing non-lawyers to provide limited legal and law-related services directly to the public (such non-lawyers are commonly referred to as Legal Document Preparers (“LDP”)).²

RECOMMENDATIONS

In order to facilitate improved access to the legal system, qualified non-lawyers must be permitted to provide limited legal and law-related services directly to the public, including guidance and/or direction within a certain scope, according to their expertise, experience, and education. To be effective, any new non-lawyer regulation plan must include authority for qualified non-lawyers to provide a limited scope of legal advice under conditions which balance public protection with consumers’ individual needs.

However, the NFPA believes that the following four areas must to be addressed in any non-lawyer practice regulation plan: 1) minimum licensing criteria; 2) practice state; 3) exemptions for traditional paralegals working under the supervision of an attorney; and, 4) specific exceptions from unauthorized practice of law (UPL) statutes (if any).

I. Minimum Registration Criteria

Currently, the educational standards in the State of Arizona for a person to become an LDP³ are far below what NFPA and the American Association for Paralegal Education (AAfPE) deem acceptable for entry into the paralegal profession. The Department of Labor, Bureau of Labor Statistics, recognizes that it is no longer common for a person to become a paralegal

¹ Legal Assistant Today/Winter 1985

² Arizona Code of Judicial Administration § 7-208; California Business and Professions Code §§ 6400-6401.6; 2005 IL S.B. 335, Illinois 94th General Assembly

³ *Arizona minimum criteria.* 3. Initial Certification a. Eligibility for Individual Certification. The board shall grant an initial certificate to an individual applicant who meets the following qualifications: (1) A citizen or legal resident of this country; (2) At least 18 years of age; (3) Of good moral character; and (4) Comply with the laws, court rules, and orders adopted by the supreme court governing legal document preparers in this state. (5) The applicant shall also possess one of the following combinations of education or experience: (a) a high school diploma or a general equivalency diploma evidencing the passing of the general education development test and a minimum of two years of law related experience in one or a combination of the following situations: (i) under the supervision of a licensed attorney; (ii) providing services in preparation of legal documents prior to July 1, 2003; (iii) under the supervision of a certified legal document preparer after July 1, 2003; or (iv) as a court employee; (b) a four-year bachelor of arts or bachelor of science degree from an accredited college or university and a minimum of one year of law-related experience in one or a combination of the following situations: (i) under the supervision of a licensed attorney; (ii) providing services in preparation of legal documents prior to July 1, 2003; (iii) under the supervision of a certified legal document preparer after July 1, 2003; or (iv) as a court employee; (c) a certificate of completion from a paralegal or legal assistant program that is institutionally accredited but not approved by the American Bar Association, that requires successful completion of a minimum of 24 semester units, or the equivalent, in legal specialization courses; (d) a certificate of completion from an accredited educational program designed specifically to qualify a person for certification as a legal document preparer under this code section, 6 (e) a certificate of completion from a paralegal or legal assistant program approved by the American Bar Association; (f) a degree from a law school accredited by the American Bar Association; or (g) a degree from a law school that is institutionally accredited but not approved by the American Bar Association.

without formal paralegal education⁴. The North Carolina Bar Association and the North Carolina Supreme Court recently adopted a plan for certification of paralegals, which provides very broad authority for non-lawyer practice for those who meet the certification standards. 27 N.C. Administrative Code, Subchapter 1G, Paralegal Regulation.

Because paralegals often perform the same functions as an attorney, it is recommended that paralegals attain a certain level of education and specifically, paralegal education. If this is the case for paralegals who work under the direct supervision of an attorney, then it is certainly necessary for those working directly with the public to attain at least the same. In fact, non-lawyers practicing directly to the public should be held to a higher standard than those working under the supervision of an attorney.

NFPA has resolved that any non-lawyer delivering legal and law-related services directly to the public meet the following minimum criteria:

- a. Minimum post-secondary education standards as further described on the attached Appendix A; and
- b. Continuing Legal Education criteria consistent with NFPA's, the standards of which are described in the attached Appendix B; and
- c. Attestation by an attorney licensed to practice law in that state as to the non-lawyers experience and work history; and
- d. Fitness and Character criteria as further described on the attached Appendix C; and
- e. Bonding or Insurance Requirements.

2. Practice Area and Practice State

The types of services being provided by LDP's in the States of Arizona and California require specific practice area knowledge. However, the current laws and/or rules are for general certification. If LDP's represent themselves as specialists in specific practice areas as Wills & Estates, Family Law, etc., then how will the consumer know that the LDP "specializing" in such areas has received only a general certification based on undefined law related experience? Further, with the growing use of the Internet and software technology there is a risk of LDP's, including businesses, so certified, extending beyond the jurisdiction in which they are licensed to practice to offer legal and law-related services to unsuspecting residents of other states.

⁴ While some paralegals train on the job, employers increasingly prefer graduates of postsecondary paralegal education programs; college graduates who have taken some paralegal courses are especially in demand in some markets. There are several ways to become a paralegal. The most common is through a community college paralegal program that leads to an associate's degree. The other common method of entry, mainly for those who have a college degree, is through a certification program that leads to a certification in paralegal studies. A small number of schools also offer bachelor's and master's degrees in paralegal studies. Some employers train paralegals on the job, hiring college graduates with no legal experience or promoting experienced legal secretaries. Other entrants have experience in a technical field that is useful to law firms, such as a background in tax preparation for tax and estate practice, criminal justice, or nursing or health administration for personal injury practice. See <http://www.bls.gov/oco/ocos114.htm#training>.

Therefore, practice area and jurisdictional restrictions should be LDP Rule disclosure requirements. Additionally, any such LDP Rule should provide for disciplinary action of the LDP and consumers with remedies in the event the consumer is harmed by an LDP working outside the scope of his or her knowledge and jurisdiction.

3. Exemption for Paralegals Working Under the Supervision of an Attorney

Historically, paralegals work under the supervision of an attorney and unless such paralegal applies and obtains licensure under a non-lawyer practice rule, he or she must be specifically exempt from such rule. Many traditional paralegals perform substantive legal work with very few restrictions because the work product is the responsibility of the supervising attorney. Attorneys have been able to provide lower cost services to their clients through the increased utilization of their paralegals. Without a specific exemption for traditional paralegals who work for and under the supervision of an attorney, there are substantial risks that the scope of work performed by traditional paralegals could exceed the limitations established by the non-lawyer practice laws and/or rules. Consequently, the fees associated with such work may be deemed non-recoverable. Equally important, the use of paralegals in a traditional setting may become limited by the parameters set forth in non-lawyer laws. Non-lawyer practice rules must be limited to those non-lawyers who deliver legal and law related services directly to the public without the supervision of an attorney.

4. UPL

If the intent of non-lawyer laws and/or rules is to create more choices for consumers to obtain legal and law related services by providing an additional level of service provider, then it is imperative that the non-lawyer laws and/or rules include specific exemptions from unauthorized practice of law statutes or court rules. Since some states rely on court interpretations of broad practice of law definitions and unauthorized practice of law, the activities permitted under any non-lawyer practice law and/or rule, would be subject to interpretation by state courts. This is counterintuitive to the intent of the creation of non-lawyer laws and may prevent consumers from receiving the services required to effectively resolve their legal issues. For example, in the State of Arizona, an LDP can “prepare or provide legal documents without an attorney’s supervision.” In certain instances, the mere provision of a legal document may require a degree of legal judgment. Alternatively, if a consumer chooses the wrong legal document for his or her situation, what responsibility does the LDP have to advise against the use of such document? The activity (preparing and providing legal documents) is authorized by Arizona’s LDP Rule; however, the application of this activity is subject to interpretation by state courts. If a non-lawyer is practicing in accordance with the laws and/or rules enabling such practice, it is in the best interest of the consumer that the non-lawyer be permitted to fully provide services without fear of prosecution for the unauthorized practice of law.

CONCLUSION

NFPA wants to avoid the creation of a legal document preparer profession where people purport to be paralegals, *but who have neither the requisite education nor training recommended by paralegals and paralegal educators for entry into the paralegal profession.*

NFPA desires to expand paralegal roles where qualified paralegals have alternate career paths.

NFPA desires to maintain the integrity of the paralegal profession and together with AAFPE, has worked to establish appropriate minimum paralegal education criteria, ethical standards, and Continuing Legal Education requirements.

NFPA desires to keep high standards intact. By allowing non-lawyers who have not met the minimum standards for entry into the paralegal profession to deliver legal and law-related services directly to the public, or to identify themselves as paralegals, may jeopardize the integrity of the entire paralegal profession.

It has taken many years of hard work for paralegals to be recognized as professionals and to establish paralegal industry standards that are becoming widespread today.

Any state seeking to regulate non-lawyers is to be commended for attempting to address the access to legal services crisis with the increased utilization of paralegals as an additional level of service providers.

Prepared for the National Federation of Paralegal Associations by the Ad Hoc Committee on Non-Lawyer Practice. The Ad Hoc Committee on Non-Lawyer Practice was created by Resolution 05-, passed by the delegation at the 2005 Policy Meeting in Las Vegas, Nevada. The committee presented their draft position statement to the Board of Directors at the Summer Board Meeting held July 22-23, in Rochester, New York. The final position statement was presented to the Board of Directors at the Fall Board Meeting held via telephone on November 5, 2005.

The members of the Ad Hoc Committee on Non-Lawyer Practice were:

Sandra Heintz.

Sandi is a paralegal with Mistick PBT and its affiliates, Mistick Construction, Insurance Restoration Services, Mistick Management, North Side Associates, Allegheny Millwork, Bridges Construction and Wood Street Commons. She is involved in contracts, litigation, corporate, real estate, insurance litigation and collections with Mistick and the various subsidiaries.

She is a graduate from the Duquesne University and received both the general and litigation paralegal certificates and has been a member of Pittsburgh Paralegal Association since 1988.

She currently is serving her third term as the NFPA Primary Representative. In addition, she served two terms as PPA's vice-president, co-chaired and chaired the Litigation Section, co-chaired the Paralegal/Attorney Dinner, attended the first Leadership Conference sponsored by NFPA, and has been a member of the board and various committees over the years.

Patricia A. Junker.

Patricia A. Junker has been employed as a corporate paralegal since 1984. Currently, Patricia works in the business group of the Pittsburgh office of Klett Rooney Lieber & Schorling. Patricia specializes in commercial loan transactions and corporate compliance.

Patricia holds a Bachelor of Arts from the University of Dayton and received her paralegal training from The Institute for Paralegal Training in Philadelphia, Pennsylvania.

For the past three years, Patricia has served as the Secondary Representative to the National Federation of Paralegal Associations on behalf of the Pittsburgh Paralegal Association ("PPA"). Patricia also served as the Chair of the Education and Professional Development Committee of PPA.

Kelli Wilcox.

Kelli Wilcox is employed as a full-time paralegal with the law firm Oles Morrison Rinker & Baker, LLP in Seattle, Washington. She works with the Business Practice Group, primarily in the areas of business acquisitions, corporate law and real estate. She is a graduate, with honors, of the Paralegal Program at Highline Community College in Des Moines, Washington. Kelli has also taught in Highline's Paralegal Program and served as the Chair of its Advisory Committee.

Kelli has been involved with the Washington State Paralegal Association (WSPA) for several years, working diligently for two years to form and nurture the South King County Chapter, then serving two terms as President, during which she presented before the Practice of Law Board on paralegal regulation and before the American Bar Association with regard to the proposed definition of the practice of law on behalf of WSPA. Additionally Kelli has worked on WSPA's committee to address Washington's

proposed Legal Technician Rule to ensure that qualified Paralegals play an integral role in the delivery of legal and law-related services.

Kelli now serves as WSPA's CLE Chair, is the Vice President of Profession Development, and is the Association's Primary Representative to the National Federation of Paralegal Associations.

Wayne D. Akin.

Wayne Akin is a litigation paralegal with the law firm Miller Nash, LLP in Portland, Oregon. His primary practice is in securities litigation, but he also works in civil, construction, and employment litigation, insolvency and reorganization, and creditors' rights. Wayne also handles garnishments, background checks, skip-tracings, online information retrieval, asset evaluations, discovery and judgment searches, and trial preparation. Wayne also manages a number of the firm's document hubs and serves as his firm's Summation expert. Previously Wayne focused on intellectual property with an emphasis on patents.

Wayne has been involved with the Oregon Paralegal Association (OPA) and the National Federation of Paralegal Associations (NFPA). He has served as a chairperson of OPA's Intellectual Property Specialty Group, as a member of OPA's Board of Directors for two years, as OPA's Treasurer for two years, and was recipient of OPA's Outstanding New Member Award for 2000-2001. For the NFPA, Wayne served two and a half years as Special Research Coordinator. Wayne has written a number of articles for OPA's Paragram newsletter and NFPA's The National Paralegal Reporter.

Wayne currently serves as NFPA's Vice President and Director of Positions and Issues where he is responsible for the Bar Association, Case Law, Ethics & Professional Responsibility, Legislative, Special Research, Regulation Review, and Unauthorized Practice of Law Research Coordinators, the Ad Hoc Committee on Non-Lawyer Practice and the Ad Hoc Committee on Mandatory Paralegal Regulation, and serves on the Ethics Board.

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Appendix A

Post-Secondary Education and Experience Standards

A candidate applying for certification under a non-lawyer practice rule shall:

- (a) Have graduated from a paralegal/legal assistant program that consists of a minimum of 90 quarter hours (900 clock hours or 60 semester hours) of which at least 45 quarter hours (450 clock hours or 30 semester hours) are substantive legal courses; or and that is approved by the American Bar Association (ABA) or a program which is in substantial compliance with ABA guidelines and shall have six (6) years substantive paralegal experience; or
- (b) A bachelor's degree in any course of study obtained from an institutionally accredited school and three (3) years of substantive paralegal experience;
- (c) A bachelor's degree and completion of a paralegal program which said paralegal program may be embodied in a bachelor's degree; and two (2) years substantive paralegal experience or
- (d) A post-baccalaureate certificate program in paralegal/legal assistant studies, or
- (e) Four (4) years substantive paralegal experience on or before December 31, 2000.

Appendix B

The National Federation of Paralegal Association Continuing Legal Education (CLE) Standards

NFPA accepts the following definition of Continuing Legal Education:

Continuing Legal Education shall include seminars on substantive legal topics, or topics applicable to substantive law issues, or must be oriented to the specific nature of the paralegal profession, such as enhancing computer skills or research techniques, increasing paralegal management skills, issues related to, or affecting, the paralegal profession.

Further, Continuing Legal Education includes authorship of articles by an individual paralegal, including research time; and/or speaking to paralegals regarding substantive law issues or topics oriented to the specific nature of the paralegal profession, including preparation time for such presentation; and attendance and successful completion of law-related classes at community colleges, colleges and universities.

NFPA recognizes continuing legal education offered by the following groups to be approved without further review by NFPA or a designated Coordinator: all bar associations, either mandatory or voluntary; National Association of Legal Assistants, Inc.; American Alliance of Paralegals, Inc.; Inns of Court; and Courts of all jurisdictions within the United States.

Appendix C

Fitness and Character Model

Applicants should be of good moral character based upon the following circumstances:

1. Whether the applicant has been convicted of a felony or comparable crime as defined by an individual state that does not have felony designations; OR
2. Whether the applicant has been suspended or disbarred from the practice of law in any jurisdiction; OR
3. Whether the applicant has been convicted of the unauthorized practice of law in any jurisdiction; OR
4. Whether the applicant is, for reasons of misconduct, currently under suspension, termination, or revocation of a certificate, registration, or license to practice by a professional organization, court, disciplinary board, or agency in any jurisdiction.

An applicant shall be rejected if any of the acts set forth in paragraphs 1-4 immediately above apply. An applicant should have the right to appeal a denial based on the provisions of these criteria. When considering the appeal, it should be considered, but shall not be limited to, the nature of the act, rehabilitation, the time that has transpired since the act, and any other extraordinary circumstances.