Foundations of

Cases, Commentary, and Ethics

Sixth Edition

Ransford C. Pyle

Carol M. Bast

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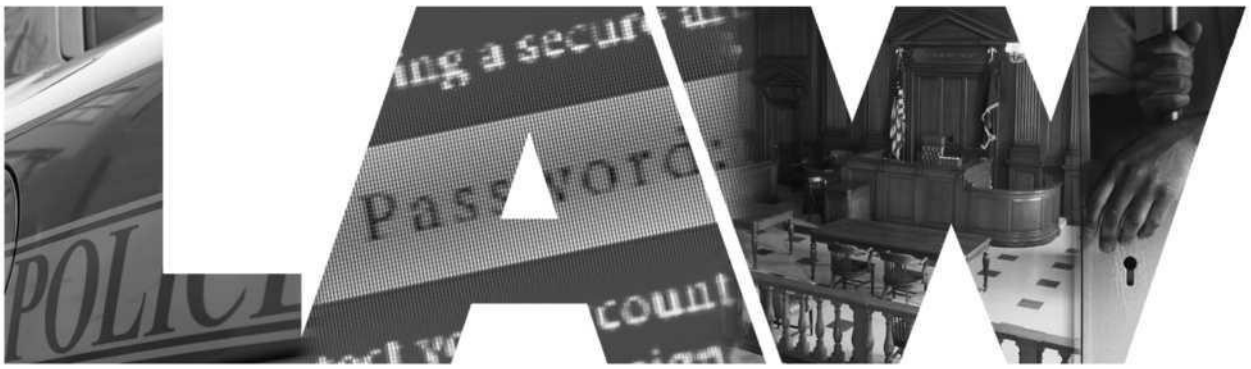

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Sixth Edition

Ransford C. Pyle
University of Central Florida

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University of Central Florida

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PREFACE

The goals of this edition have not changed from prior editions. Many new cases have been added and others have been removed, but the body of the text remains as expository comments and condensed judicial decisions. Thus, this preface reissues many of Dr. Ransford Pyle's comments from prior editions. Dr. Pyle was the sole author of the first through third editions, and he brought me in as second author on the fourth edition. Dr. Pyle turned the book over to me to prepare beginning with the fifth edition, an endeavor that I gladly accepted; he will remain as first author because he was the one who inspired the book's creation.

Foundations of Law is intended for introductory law courses at the postsecondary, undergraduate level of instruction, particularly in paralegal programs, pre-law and legal studies programs, and business law courses that aim at a broader base than the "legal environment of business." Dr. Pyle taught for nearly three decades in a program that began as a strictly paralegal program but gradually changed in student orientation to comprise primarily pre-law students. The goal has been to impart the basic knowledge of American law and the American legal system that any undergraduate ought to have, regardless of whether he or she wants to be a paralegal or a lawyer, or simply wants to acquire an understanding of the law. The needs of students have not changed even if their aspirations have shifted.

Foundations approaches the law from a lawyer's viewpoint, as opposed to that of a social scientist, covering basic fields of the law such as property, contracts, torts, and criminal law, as well as procedure in both civil and criminal cases. Dr. Pyle included historical and societal commentary where he thought it helpful in understanding the law; he would have liked to include much more, but found that covering most of the basic fields and legal concepts is quite enough for a one-semester course.

This edition includes "You Be the Judge" features that provide students with some facts that might be the basis of a lawsuit and ask them to determine how they would decide the case. Students may or may not agree with the way in which actual controversies involving the facts were decided. These features can be used to generate class discussion or as student assignments.

A number of cases excerpted in the book contain concurring and dissenting opinions. Cyber Exercises at the end of the chapters require students to access these opinions and delve

into their reasoning. In addition, other Cyber Exercises can be used as a basis for online research related to legal topics.

Organization

The basic topics of the course reflect our legal tradition, as well as the basic fields found in the law and in legal education. The organization of chapters is simple and logical. The book eases students into the study of law with a narrative chapter on the legal profession. The second chapter covers legal ethics. Dr. Pyle experimented with saving this chapter for the last in the course, with the thought that legal ethics are better understood after a full acquaintance with the law, but, because the first chapter on the legal profession necessarily addresses what lawyers do and what others may not do, legal ethics, and especially unauthorized practice of law, follows some of the issues raised in the first chapter. Chapters 3 and 4 introduce the sources of the law in terms of cases and legislation. (Some have suggested the inclusion of a chapter on the Constitution as a source of law, but Dr. Pyle always felt that the Constitution, though essential to understanding some of our law, is primarily an allocation of power rather than a source of law. The Constitution is referenced where necessary [e.g., criminal procedure].) Chapters 5 and 6 introduce the American court system. Chapters 7 and 8 deal with procedure—civil and criminal, respectively. Chapters 9 through 13 discuss major fields of substantive law. Chapter 14 deals with administrative law and procedure, focusing on the latter.

It is my great pleasure to have two guest editors who were responsible for updating Chapters 13 and 14. Marc Anthony Consalo, who practices family law, edited Chapter 13 on family law. Karen Zagrodny Consalo, who practices administrative law, edited Chapter 14 on administrative law. I am very happy that they lent their expertise to those chapters and I think that they did a wonderful job.

Appendix A, "How to Read and Brief a Case," is ordinarily read by students early in the course to prepare them for tackling the many judicial opinions in the text. Formerly focusing on how to read a case, this appendix has been expanded to include an explanation of how to brief a case. Appendix B contains the complete text of the U.S. Constitution, a document frequently consulted during class.

Chapter Format and Features

The body of the text in each chapter consists of narrative and commentary on the law and legal system, interspersed with edited cases—that is, judicial opinions—to illustrate or expand on the comments. Within each edited case, references to other cases have been shortened to retain only the case names. Legal terms mentioned in the commentary and cases are boldfaced in the text and defined in the margins. This is helpful to both student and teacher, with the caveat that many students rely on learning these definitions for exams to the neglect of reading text or cases, apparently not believing that they will suffer when they encounter those terms on exams.

A major undertaking in each new edition has been the inclusion of many new cases. To some extent this process updates the cases, but more importantly it is an attempt to weed out cases that proved inferior as learning tools and replace them with cases that are more effective

in this regard. Review questions are found at the end of each chapter. Dr. Pyle reintroduced reading review questions (a feature from the second edition) in each chapter; these are ten or so questions that test students' absorption of important words and concepts in each chapter. They are not deep questions but instead are designed to test whether the reader has a basic knowledge of the chapter. Dr. Pyle often resorted to these questions when he had covered a chapter and had a few minutes left in class before time ran out. They may also be useful for instructors who hold review sessions before tests, but their primary purpose is to provide a self-test for students when they finish a chapter.

At the request of some instructors, the book includes some open-ended Critical Thinking Questions at the end of each chapter. These were intended for those who wish to deal in general terms with legal issues. One of the reasons one enjoys teaching an introductory law class is that rarely does a week go by without an interesting legal event emerging from the shadows. These events demonstrate that law is vital and dynamic, a welcome contrast to black-letter law learning and the more routine features of practice. These critical thinking questions are optional for the instructor: Dr. Pyle used these questions as part of his quasi-Socratic approach, whereas an instructor who uses significant class time for student presentation of cases would probably not use them. It goes without saying that instructors should employ their own teaching talents and follow their own goals, in keeping with the composition of their audience.

Dr. Pyle retained the "Scenarios" ("Review Problems" in a few instances) at the end of chapters. These are designed to make readers apply chapter concepts to hypothetical cases, cases either loosely based on actual cases or situations that are looming on the legal horizon.

Instructor Companion Site

The online Instructor Companion Site provides the following resources:

Instructor's Manual and Test Bank

The Instructor's Manual and Test Bank have been greatly expanded to incorporate changes in the text and to provide comprehensive teaching support. They include the following:

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Please note that Internet resources are of a time-sensitive nature and URL addresses may often change or be deleted.

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CHAPTER 1

Law and the Profession of Law

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Summary

Learning Objectives

After reading this chapter, you should be able to:

- Identify the basic requirements for becoming a lawyer
- Outline the law school experience
- Discuss the bar examination
- Discuss attorney employment
- Define what attorneys do
- Identify the various roles of the lawyer
- Discuss the role of the paralegal
- Understand the limitations on tasks performed by the paralegal
- Understand licensing, certification, and registration of paralegals
- Define what paralegals do

INTRODUCTION

We all know what the law is; we use the term every day with considerable confidence that our listeners know perfectly well what meaning we attach to this word, even though it may have quite a few shades of meaning. Nevertheless, almost no one can come up with a definition of the term that would satisfy the critical scrutiny of a diverse segment of speakers of American English. Rather than foray into the semantic, philosophical, and scholarly features of definition, let us limit our inquiry to the practical side of the law, since this book is designed as an introduction for those who are considering the practice of law as a career field. We hope the text will also serve those who simply want to know more about the field, but the focus will be practical or, better said, an introduction to the practical. This simplifies our definitional quandary: *Law* is what lawyers do, what judges decide, what legislators make. Law is more than that, broader than that, but let us leave any such expansions for another book.

In a sense, this chapter covers what the law says the law is. In particular, we will look at what it is that lawyers do when they are described as "practicing law." Be forewarned, however: even the practice of law is hard to define. Lawyers are licensed to practice law and unlicensed individuals are prohibited from practicing law, but the courts and the professional associations that make the prohibitions have had a difficult time delineating what exactly constitutes those activities that are strictly the practice of law. Some things—for example, representing someone before a court of law—are nearly universally considered the territory of lawyers, while others, such as giving someone advice as to the conduct of affairs, are not always easy to label or recognize as legal advice.

The people we call *lawyers* or, alternatively, *attorneys* may be identified by the custom of licensing. One definition of a lawyer, then, is one who is licensed to practice law. What exactly a lawyer is licensed to do is problematic. Bar associations and state supreme courts have often despaired of finding a definition; in the latter part of this chapter, we examine an area called "the unauthorized practice of law" in an attempt to discern what the practice of law is by looking at what those without licenses may not do. Some of this inquiry accompanies our discussion of legal assistants, or *paralegals*, who are essential adjuncts to lawyers and law firms.

An important theme of this chapter concerns the broad range of advice and services that lawyers provide to the public. "Lawyering" is not simply a matter of giving legal advice, drafting legal documents, and appearing in court. Contemporary American life is complex in large part because of the regulation of all spheres of human endeavor. In many ways, law defines and regulates life, love, and death, not to mention property, business, crime, and injury. The first author, having taught in higher education for nearly three decades, would today give advice that did not occur to him 30 years ago to anyone embarking on a teaching career: "Don't sign that teaching contract until you have shown it to an attorney; and make sure you consult an attorney who specializes in academic contracts." It would be wise, in fact, to consult an attorney before making any important decision: buying a house, getting married, making a will, starting or investing in a business. Lawyers have a wealth of knowledge by virtue first of their legal training and second because they spend their days anticipating and solving myriad problems. As a result, they can provide a great deal of advice about the law and about many of life's problems.

Let us, then, inquire into who lawyers are and how they become lawyers. Thereafter we discuss what lawyers do, what they should not do, and what others may not do. All of this is

important information about the legal profession, but it is also an important first step toward understanding law and the legal system. Lawyers in general maintain and direct the law and its system. Those special lawyers we call *judges* enforce and define the law. Formal lawmaking is the province of legislators, who need not be lawyers but often are and who almost never draft legislation without legal consultation.

THE LAW AND THE LAWYER

Lawyers are named after the subject matter of the profession, the law. Unfortunately, the field of law is not as easily described as, say, electrical engineering. The problem of precisely defining law may be left to legal philosophers and scholars of **jurisprudence**. The primary concern of this study is with law in operation or "in practice." Lawyers are called professionals, but are also referred to as *practitioners,* referring to the professional application of learned skills. The practice of law includes a great variety of services furnished by lawyers to their clients.

jurisprudence

Commonly defined as the science or philosophy of law; it is generally concerned with the nature of law and legal systems.

For practical purposes, *law* may be defined as a process, a system, or a set of rules governing society. As a process, law can be viewed as the means by which rights and duties are created and exercised. As a system, law interconnects rules governing society with a hierarchy of courts served by the legal profession and the police. As a set of rules, law is a complex code of conduct and values formally established and published, backed by the threat of enforcement. This last view of law as rules is what law students regularly study and what the public generally views as the law.

Failure to understand law as system and process, however, leads to a distorted view of law and lawyers. For example, nonlawyers often regard **plea bargaining** as an unethical device used by criminal defense lawyers to circumvent justice. Plea bargaining makes sense only in the context of the pressures and problems inherent in the administration of criminal justice. It has become an indispensable aid (some might say a necessary evil) in resolving criminal cases in the context of overcrowded jails, overburdened court **dockets,** and overworked **prosecutors**.

plea bargaining

One accused of a crime can "bargain" through her attorney with the prosecutor; the bargain usually involves an agreement by the accused to plead guilty in return for favorable treatment, such as a lenient sentence, reduction to a lesser charge, or probation in lieu of incarceration.

docket

The court calendar of proceedings.

prosecutor

The attorney charged with prosecuting criminal cases on behalf of a state or the United States; a public employee commonly titled state attorney, district attorney, or United States attorney.

One must never forget that law continually undergoes change. Not only do the rules change, but the legal system also changes. As society changes, so must law. Law has a particularly important place in American society, which is extremely diverse and complex in comparison with other societies. The various parts of American society express differing and often conflicting values, so a major task of law is to convert values into functioning rules. In recent times, America has encountered major value confrontations over issues such as racial discrimination, same-sex marriage, the death penalty, and abortion. Although these are social, political, and even spiritual issues, Americans have looked to law and the legal system for their resolution.

The law we discuss in the following chapters is American law, the law of the American legal system as practiced by the legal profession. It might more properly be labeled "Anglo-American law," as we have more than 900 years of unbroken legal tradition from England. The severing of political bonds with England in 1776 did not bring a corresponding break with the English legal tradition. In fact, it has been argued convincingly that the American colonials were fighting for the rights normally accorded Englishmen in England but denied to Americans by colonial governments.

adversarial system

The U.S. legal system in which litigants, typically represented by attorneys, argue their respective sides in a dispute before an impartial judge and jury.

will

A document through which a person directs how his or her property will be distributed after the person's death.

contract

An agreement that creates a legal relationship and obligations between two or more parties.

litigation

A dispute brought to court; derived from the Latin *lis*, which means lawsuit.

breach of contract

When a party fails to render the performance required by a contract.

bar

The term used to refer collectively to licensed members of the legal profession.

bench

Drawn from the term referring to the seat occupied by judges in court; refers to all judges collectively.

disbarment

The most severe professional disciplinary sanction, canceling an attorney's license to practice law.

bar examination

A written test required of an applicant for a license to practice law.

Law is concerned with rights, duties, obligations, and privileges and their enforcement. Under the U.S. constitutional model, political authority is divided among the executive, legislative, and judicial branches of government. The study of law generally focuses on the judiciary because the courts in our system are entrusted with interpreting the law, and it is in the courts that disputes between opposing sides are resolved.

Disputes form the heart of our legal system, which has evolved as an **adversarial system** in which legal battle is waged by conflicting parties employing legal counsel to take their sides before an impartial judge and, if necessary, an impartial jury. The practice of law commonly involves advancing and protecting the interests of a client in a dispute, but equally important is the prevention of disputes. No ethical lawyer would write a **will** or **contract** or close a real estate transaction hoping that **litigation** will result. The test of a well-written will is whether its provisions are carried out uncontested; the test of a good contract is whether it has resolved all reasonably foreseeable conflicts in advance and allows the contracting parties to perform their obligations to their mutual satisfaction. Perhaps it is in this area of preventive law, in which lawyers foresee and avoid future problems, that they do their best work and provide their most valuable services. The public rarely recognizes that lawyers routinely perform this function. The uncontested will, the contract that is not **breached,** and the transaction that runs smoothly do not make headlines. For most lawyers, however, an appreciative and satisfied client is one of the frequent personal rewards of the practice of law.

BECOMING A LAWYER

To represent a client before a court, a person must become a member of the bar. In a general sense of the term, the **bar** refers to licensed members of the legal profession, the community of American lawyers, just as the term **bench** refers to all judges collectively. Requirements for membership, however, differ from state to state, and membership in one state bar does not confer membership in another state. In most states, licensing is regulated by the state supreme court with the assistance of the state bar association to which members pay annual dues. The state bar associations are responsible for maintaining standards of conduct within the profession and for determining misconduct or assisting the court in disciplining members for misconduct with a variety of sanctions, the most severe of which is **disbarment**. Bar disciplinary boards are particularly concerned about misconduct in relations with clients, such as misuse of client funds or the failure to provide promised services. Bar associations also engage in review and reform of laws and provide a sounding board and even lobbying activities for the legal profession. If a state attempts to place new restrictions or taxes on lawyers, for example, they will be quick to respond through their respective bar associations. The authority and activities of the different associations vary considerably from state to state.

Admission to the bar requires one to pass a **bar examination** and submit to scrutiny by the bar association. As shown in Exhibit 1-1, bar examination passage rates vary from state to state; and some law school graduates take the examination two or more times before they pass. Traditionally, bar membership has required that each candidate be approved on the basis of moral character, as determined by the licensing association. In earlier times, the character and

EXHIBIT 1-1 2013 Bar Examination Passage Rate*

Selected States	First Time Taking Exam	Successive Time(s) Taking Exam
California	65%	30%
Florida	78%	32%
Illinois	88%	51%
Indiana	83%	42%
Louisiana	58%	32%
Massachusetts	85%	43%
Michigan	69%	45%
New Jersey	79%	50%
New York	76%	34%
Ohio	86%	42%
Oklahoma	86%	58%
Pennsylvania	81%	41%
South Dakota	91%	65%
Texas	85%	56%

**Source: National Conference of Bar Examiners*

competence of an applicant for admission to the bar was vouched for by members of the bar; today, some states conduct extensive inquiry into each applicant's background.

Approval of an application to take the bar examination generally requires completion of law school and the receipt of a law degree, usually called a **J.D.** (Juris Doctor) or **LL.B.** (Bachelor of Laws), although some states allow senior law students to take the examination prior to graduation. Admission to law school normally requires completion of a 4-year undergraduate degree.

J.D.

The basic law degree; stands for "Juris Doctor" and is equivalent to the more traditional LL.B.

LL.B.

The basic law degree, a "bachelor of laws," replaced in most law schools today by J.D. (Juris Doctor).

Law School

To understand how lawyers think, some appreciation of the law school experience is helpful. Law school provides a type of rigorous training that formally and informally molds a certain sort of thinking. Strict emphasis on critical and analytical reasoning sets a high standard for legal debate and discussion, but some have argued that the focus is too narrow.

Admission to law school is highly competitive. Prestige and reputation are important in the legal profession and equally so to the law student because placement and salary upon graduation from law school depend upon the prestige of the law school and performance in law school. Entry to law school is based principally on undergraduate grade point average and scores obtained on the **Law School Admissions Test** (**LSAT**). The more prestigious the law school, the higher one's grades and scores must be to obtain admission. Intense competition is

Law School Admissions Test (LSAT)

A written, largely multiple-choice, test required for admission at most law schools.

characteristic of law students and happily encouraged by their professors, most of whom were once law school achievers.

Among law schools, the most elite are considered "national law schools" because their orientations as well as their reputations are national. Yale Law School in New Haven, Connecticut, for example, is not a training ground for Connecticut lawyers but an entrée to large New York law firms, the so-called Wall Street firms, which represent national business interests. The archetype of the perfect new **associate** just hired by a law firm is the person who went to Harvard Law School, became editor of the *Harvard* **Law Review**, and served a year or two as a **law clerk** for a United States Supreme Court **Justice**. Such credentials would guarantee a handsome salary at a top law firm.

Law school training continues to follow a model established in the 1890s by Dean Christopher Columbus Langdell of the Harvard Law School. He invented the **case method,** in which students read judicial opinions, or cases, rather than treatises about law, formerly the dominant method of studying law. Langdell reasoned that the practice of law in the United States was based on discovering the law through judicial decisions because it was in the courts that law was interpreted and explained. A natural corollary to the case method is the *Socratic dialogue* between professor and student. Instead of lecturing, the law professor asks questions of the students about cases they have been assigned to read, so as to determine the issues and reasoning in the opinions. For the first-year law student, this is a grueling and often humiliating experience, which has been called a "game that only one (the professor) can play." It is a rite of passage in which students are forced to shed their former ways of thinking and reacting to issues and problems and begin to "think like lawyers." This method of teaching has been seriously criticized as promoting tunnel vision, but it succeeds in its goal of fostering analytical thinking and objective argument. Because of this criticism, however, many law schools have in recent years shown greater sensitivity to the needs of students, offering counseling and tutoring by staff and peers.

The human product of an American law school has read hundreds of judicial opinions and spent countless hours finding his or her way through an extensive law library but may never have been in a courtroom and may not know the difference between a **bailiff** and a **court reporter**. In recent years law schools have initiated or expanded the number of **clinical programs,** in which students practice law under the supervision of an instructor. In addition, many law students gain experience by serving as law clerks for law firms during the summers between academic years. Despite this occasional practical education, law schools focus on developing an attitude of mind that seeks the relevant legal issue in each human transaction and applies a technical, analytical approach to solving problems.

associate
The title usually given to a full-time member of a law firm who has not yet been elevated to partner.

Law Review
Publication issued by most accredited law schools, on a quarterly basis, with scholarly articles and comments on legal issues.

law clerk
A law school student who works summers or part time for private attorneys; also, top law students who obtain clerkships with judges after graduating from law school.

Justice
The title given to the judges of the Supreme Court of the United States and to the judges of the appellate courts of many of the states.

case method
A means of studying law that consists of reading judicial opinions (cases) and analyzing them under the law professor's questioning; since its introduction by Dean Langdell at Harvard Law School, this method has been the standard approach to law school instruction in the United States.

bailiff
An officer of the court charged with keeping order in the courtroom, having custody over prisoners and the jury.

court reporter
A person who makes verbatim recordings of court proceedings and other sworn statements, such as depositions, which can be reduced to printed transcripts.

Obtaining a License to Practice Law

To represent a client in legal matters, an attorney must be licensed in the jurisdiction in which she or he practices. Each state has its own requirements for admission to practice, and the federal courts have their own requirements. Many states relax their requirements for long-term members of the bar of other states, but the process by which the newly graduated law student becomes an attorney follows a similar pattern in most states.

Application for licensing generally requires graduation from a law school approved by the American Bar Association (ABA) (in some states, nonapproved law schools are allowed).

The applicant must also show good moral character, but the extent to which this is scrutinized depends on the state. *Moral fitness* is difficult to define and must be determined on a case-by-case basis; in the real world, bar examiners are especially concerned about defects in character that suggest a potential for betraying a client's trust or deceiving a court. For example, an individual previously convicted of **perjury** would be a poor candidate for the practice of law, having already demonstrated a disregard for the integrity of the justice system. Finally, admission is usually predicated on a passing score on the bar examination. What constitutes a passing score is determined by the examiners and often varies from state to state, giving some states the reputation as "hard" states for passing the bar.

clinical programs

Programs found in most law schools, and sanctioned by the courts and the bar, in which students provide legal services to the public under the supervision of law professors; some schools require enrollment, but in most law schools "clinic" is a voluntary course for credit.

perjury

Knowingly making a false statement under oath in a judicial proceeding; the false statement must concern a material issue or fact in the proceeding.

Bar Examination

Upon completion of law school or just before graduation, aspiring candidates face the dreaded ordeal of the bar examination. This generally consists of two or three days of a written examination, which in most states consists of two parts. One part is the **Multistate Bar Examination,** a standardized national test that contains 200 multiple-choice questions on general legal topics such as property, contracts, and constitutional law. Each question is based on a hypothetical fact situation, and the examination requires a thorough knowledge of **black-letter law**. This mentally exhausting part of the examination lasts six hours.

Multistate Bar Examination

A standardized national test of general legal subjects, such as property, contracts, and constitutional law.

black-letter law

Lawyers' slang for the basic, well-established rules of law.

The "Multistate" tests candidates' knowledge of general principles of law, but most states also require a second part that addresses law specific to the state administering the examination. This part of the examination often requires written essay questions based on hypothetical legal disputes and resembles the sorts of examinations typically given as final examinations in law school. Applicants must then wait several weeks, or even months, to receive the final results. Each state licensing board or supreme court is free to establish its own standards, so a passing grade on the Multistate in one state may be a failing grade in another. In most states, between sixty-five and ninety percent of examinees pass. A failing candidate can usually retake the examination, though some states limit the number of times the examination can be taken.

Since 2011, fourteen states have adopted the Uniform Bar Exam, which adds the Multistate Essay Examination and the Multistate Performance Test to the Multistate Bar Examination, as the sole measure to gauge that a candidate has the requisite knowledge of the law to be licensed. An advantage of the Uniform Bar Exam is portability, in that a candidate who has taken the Uniform Bar Exam in one state may be able to use the score attained to become licensed in a second state that has adopted the Uniform Bar Exam. Jurisdictions with the largest number of candidates have hesitated to adopt the Uniform Bar Exam because of the absence of state-specific questions and the fear of turning too much control over attorney licensure to the National Conference of Bar Examiners, the body that developed the Uniform Bar Exam.

The bar examination not only establishes a minimum standard of competence for lawyers but also represents a psychological ordeal shared by attorneys; most recall the experience quite vividly. The Multistate in particular calls for an approach for which law students have not been prepared, namely, to marshal a broad knowledge of the law and apply it all at once to a series of multiple-choice questions. For this reason, most applicants take a bar review course lasting several weeks prior to the examination itself. Whereas law students have been accustomed to limiting their study to a particular subject over the course of an

integrated bar

A state bar association in which membership is required in order to practice law.

academic term, the bar examination requires the applicant to recall the sum of 3 years of legal study.

In most states, a license to practice law is predicated on membership in the state bar association. This signifies an **integrated bar**. Because the bar also acts as a lobbying organization, some members may object when their dues are spent on political efforts with which they disagree. As indicated in the following case, *In re Proposed Amendments to Iowa's Bar Admission Process*, Iowa is one of the states requiring the newly admitted attorney to complete a basic skills course to provide practical skills training not part of the traditional law school curriculum.

In the Supreme Court of Iowa

In the Matter of Proposed Amendments to Iowa's Bar Admission Process

§

Order

In December 2013, The Iowa State Bar Association submitted its Report of the Blue Ribbon Committee on Legal Education and Licensure (report). The report contained the following four recommendations:

Recommendation One: Create an alternative for admission to the practice of law in Iowa absent examination for qualified graduates of Iowa law schools. This proposal would create a "diploma privilege" for qualified graduates of Drake and Iowa law schools.

Recommendation Two: Extend the comprehensive character and fitness screenings to applicants who would be admitted absent examination.

Recommendation Three: Adopt the Uniform Bar Examination for applicants who would not qualify under the diploma privilege.

Recommendation Four: Investigate alternatives to the Iowa Basic Skills Course for applicants who would not qualify under the diploma privilege.

In response to the report, the court provided a ninety-day period for the public to submit written comments and held a public hearing on August 27, 2014. At least 155 written comments were submitted to the court. At the public hearing, twenty-five witnesses presented information on the diploma privilege proposal and made arguments for and against the recommendations. The court extends its deep appreciation to each person who submitted a written comment on the recommendations and to those persons who presented at the public hearing. The court is also very grateful for the thoughtful work of the blue ribbon committee and the interest of The Iowa State Bar Association in the administration of the practice of law in Iowa.

Having now fully and carefully considered the recommendations, public comments, and information presented at the public hearing, the court concludes a diploma privilege should not be adopted. Therefore, the court will take no action at this time on recommendations one and two contained in the report.

The court further concludes that the current process for admission of lawyers by examination should be carefully studied, with the goal of achieving greater efficiency, expedition, economy, and utility for the applicants for admission. Accordingly, the court requests that the Iowa Board of Law Examiners research, study, and submit a report to the court not later than March 31, 2015 with a recommendation regarding each of the following topics:

1. Whether the Uniform Bar Examination should be adopted in Iowa, and, if so, the process that should be followed.
2. Whether law students should be allowed to apply for and sit for the bar examination in February of their third year of law school.
3. Whether other adjustments or changes in the bar admission process should be considered.

The court is also cognizant of the concerns expressed in many of the comments regarding the current requirement for Iowa lawyers to complete an approved Basic Skills Course within one year after admission by examination. In a separate order, the court will be requesting additional public comment on the question of whether the Basic Skills Course requirement for persons admitted to practice law in Iowa after 2014 should be retained, and, if so, whether the course or the requirements of the course should be revised.

Dated this 5th day of September, 2014.

The Supreme Court of Iowa
By: Mark S. Cady, Chief Justice

Case Questions

1. What is a diploma privilege?
2. What would be the benefits of Iowa adopting a diploma privilege?
3. Why do you think that the Iowa Supreme Court rejected creation of a diploma privilege?
4. What would be the benefits of Iowa adopting the Uniform Bar Examination?
5. What are the disadvantages of Iowa adopting the Uniform Bar Examination?
6. Why would a state require attorneys to complete a basic skills course within one year of passing the state bar examination?

Attorney Employment

The vast majority of new bar members join private law firms, but significant numbers obtain employment as government attorneys or as **house counsel** for private corporations. A few brave souls decide to "hang out their shingles" and begin practicing law as sole practitioners or jointly with one or more law school colleagues. Despite 3 years of intensive training, few law school graduates are prepared for the demands of practice. They are unfamiliar with law office routine and management, including collecting for services rendered, the peculiarities of court systems, and standard practice areas such as interviewing clients and negotiating settlements. Successful practice requires interpersonal skills that are sorely neglected in law school. In addition, law school focuses on major legal issues presented in casebooks with national distribution. A law school graduate, before preparing for the bar exam, is likely to be totally ignorant of many areas of state law. A new lawyer is unlikely to know how to process a **bankruptcy,** do a tenant eviction, get a **zoning variance** from a city, or even conduct a **real estate closing**. Because of their unfamiliarity with so many features of day-to-day practice, new lawyers are most comfortable in the company of more experienced practitioners and their legal staff.

The competitive spirit of law school also directs many new lawyers to large firms. Already oriented toward achievement and success, graduating law students often measure themselves by starting salaries and the prestige of the law firms they join. Big-city law firms compete with each other for top law school graduates, and the largest Wall Street firms offer starting salaries more than twice the average.

Fortunately for our society, not all law graduates are driven to enrich themselves. It is very common for a graduate to return to his or her hometown to assume a respected position among friends and associates. Lawyers who choose this path inevitably find that the rewards of service to the community outweigh monetary compensation. The practice of law, like most

house counsel

Full-time attorneys employed by many corporations and other businesses as part of the administrative staff; distinguished from "outside counsel."

bankruptcy

Generally, the situation in which a person, business, or government cannot or will not pay its debts, so its property is entrusted to a "trustee in bankruptcy" who distributes the property to creditors.

zoning variance

Exception to or specific modification of a zoning code or ordinance. It is customary in the United States for local governments to create *zones* within city and county boundaries with restrictions primarily on the form of use, for example, agricultural, residential, commercial, etc.

real estate closing

Culmination or completion of a real estate transaction(s), at which numerous documents are signed and exchanged, payment is made, and property deeds are transferred.

other professions, offers an opportunity for personal satisfaction difficult to find in other kinds of employment.

Some law school graduates have specific goals for their training, such as preserving the environment, providing legal services to the poor, prosecuting criminals, or serving as elected legislators. The legal profession provides a unique foundation for contributing to change or improvement of one's society.

Obtaining prestigious employment, however, does not guarantee a successful career. New attorneys in a firm are called *associates,* a position from which they may never advance. The traditional course of a legal career in a private firm entails working for a few years as an associate and then being invited to become a partner in the firm, which means moving from collecting a salary to sharing in the profits of the firm. In the largest firms, only a small number of associates are ever asked to become partners. Associates who do not make partner commonly move to other firms or set up their own practices. This brutally competitive system has been improved somewhat in many firms by the establishment of intermediate positions like senior associate or junior partner. This allows firms to reward attorneys without forcing a partnership decision.

The pressures on attorneys to perform do not consist simply of providing good services to clients. A law firm is also a business, and attorneys who do not add significant profits to the business by way of new clients and many hours of work that are billable to clients are unlikely to become partners in a firm. For some, the advantage of employment with government or a private corporation is that an attorney is more often measured by the quality of work rather than the quantity of business generated. See Exhibit 1-2 for types of employment for law school graduates.

Paralegals must understand the stresses involved in the work of attorneys in order to work better with their employers. One of the advantages of paralegal work over that of an attorney is that paralegals do not bear ultimate responsibility for the outcome of clients' problems. The difference in stress can be great. Paralegals occupy a position similar to corporate lawyers in that performance is measured by the quality of their work.

EXHIBIT 1-2 Type of Employment for 2013 Law School Graduates*

Private practice	51.1%
Business	18.4%
Judicial clerk	9.0%
Public interest	7.1%
Government	11.5%
Academic	2.6%
Unknown	.3%

**Source: National Association for Law Placement*

WHAT LAWYERS DO

The United States has more than a half a million lawyers. They are assisted by more than two hundred thousand paralegals. Obviously, a great deal of legal work exists to support this workforce. What exactly do lawyers do?

Acquisition of knowledge in law school is merely the first step in becoming a competent attorney; this knowledge must be put into practice. Just as the LSAT is an imprecise predictor of performance in law school, law school grades are an imperfect predictor of success in the practice of law. Even the bar examination fails to measure many qualities essential to future success. An attorney is not simply a repository of legal knowledge and technical skills. An attorney is a problem solver who must rely on imagination, creativity, common sense, and psychology as well as the analytical skills learned in school. The rules that make up the body of the law are abstractions that take on meaning only in the course of human events. Attorneys are frequently addressed as "counselor," and this perhaps comes closer than any other word to the true nature of their work. Attorneys act as providers of legal services, advisors, counselors, negotiators, and agents for their clients.

Many states have attempted to define what lawyers do in order to clarify what is meant by *unauthorized practice of law (UPL)* because each state prohibits the unauthorized practice of law and punishes violations with fines and injunctions and (on rare occasions) with jail. In our legal system, we insist that crimes be clearly expressed by **statute**. Nevertheless, expressing what is prohibited as UPL has been difficult because it is difficult to articulate precisely what *only* lawyers may do.

statute

A law enacted by the legislative branch of government declaring, commanding, or prohibiting something.

An example of the dilemma posed by defining the practice of law can be found in an opinion of the Supreme Court of South Carolina, which has, as in most jurisdictions, the final say on rules of the bar. The South Carolina Bar Association, through a subcommittee, proposed rules for the unauthorized practice of law and submitted them to the Supreme Court of South Carolina with the following response:

> We commend the subcommittee for its Herculean efforts to define the practice of law. We are convinced, however, that it is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules. Instead, we are convinced that the better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy. . .
>
> We urge any interested individual who becomes aware of such conduct [which might constitute unauthorized practice of law] to bring a **declaratory judgment** action in this Court's original jurisdiction to determine the validity of the conduct. *In re South Carolina Bar,* 309 S.C. 304, 422 S.E.2d 123 (1992).

declaratory judgment

A binding judgment that specifies the rights of the parties but orders no relief. It is the appropriate remedy for the determination of an actionable dispute when the plaintiff's legal rights are in doubt.

Although the court enumerated specific exceptions to unauthorized practice of law (e.g., CPAs working within their area of expertise and persons certified to represent parties before state agencies), it clearly preferred the case-by-case approach to defining the practice of law, or the unauthorized practice of law, to an arbitrary set of rules. If we recognize the different roles of bar and court, the decision makes more sense. Of course it would be fine to have a clear set of rules, but the practice of law is ever changing. Law firms are growing into huge businesses in which individual lawyers are highly specialized and assisted by staffs that perform tasks that only lawyers performed in the past. Bar associations, when dealing with unauthorized practice of law,

are concerned with protecting their members from nonlawyers' encroachment into their activities. The courts are also concerned with the rights of members of the public to give and receive assistance in the conduct of their affairs. As we will see in Chapters 3 and 4, deciding cases and making rules are different processes; not all problems can be resolved in advance by a set of rules.

In many states, the highest court in the state has the authority to punish someone for unauthorized practice of law. Usually the court delegates the task of investigating the facts supporting unauthorized practice of law claims; in Ohio, for instance, the Supreme Court of Ohio gives this responsibility to the Board on the Unauthorized Practice of Law, as shown in *Lorain County Bar Association v. Zubaidah*. A three-person hearing panel of the Board makes findings of fact and conclusions of law and recommends a sanction, which may be adopted by the Board. The court reviews the Board's findings and imposes sanctions. Zubaidah provided character evidence for various criminal defendants but had crossed into the practice of law by providing legal advice, often in conflict with that of the defendants' attorneys.

What is the court to do when someone continues to engage in unauthorized practice of law in contravention of the court's prior order? A court has the inherent authority to discipline someone who disobeys its order, as in *Lorain County Bar Association v. Zubaidah*.

Supreme Court of Ohio
LORAIN COUNTY BAR ASSOCIATION
v.
ZUBAIDAH et al.

No. 2013-0072
20 N.E.3d 687
Sept. 25, 2014

§

Per Curiam.

On March 25, 2011, relator, the Lorain County Bar Association, filed a four-count complaint with the Board on the Unauthorized Practice of Law against respondents, King Ayettey Zubaidah (f.k.a. Gerald McGee) and his Ohio corporation, STAND Inc. The complaint alleged that Zubaidah, who is not licensed to practice law in Ohio, provided legal advice and services to four defendants during their criminal proceedings. Zubaidah answered the complaint, admitting to a number of the facts asserted but denying the allegations of the unauthorized practice of law. A panel of the board was appointed to hear the case. . . .

Zubaidah filed objections to the board's report with this court, generally asserting that the board's decision was not factually supported. For the reasons stated below, we overrule Zubaidah's objections, and we agree with the board's findings and recommendations. We accordingly enjoin Zubaidah and STAND Inc. from engaging in the unauthorized practice of law, we assess costs, and we order Zubaidah and STAND, jointly and severally, to pay a $20,000 civil penalty. . . .

In 1986, the Lorain County Court of Common Pleas convicted Zubaidah of a single count of aggravated trafficking in drugs, imposed a suspended prison sentence of one and a half years, and ordered Zubaidah to serve five years of probation. Zubaidah was the president of STAND Inc. (Striving Towards a New Day!), a corporation he formed in 2008 inspired by his own experience with the justice system and his research into judicial cases. A stated mission of STAND was "to help change the unfair and partial treatment against minorities in the judicial system.". . .

Recipients of Zubaidah's assistance become STAND "members" after signing a "General Letter of Introduction," which is a one-page agreement providing that "STAND Inc. will be assisting" the member. No payment is required to be a STAND member. In each of the four matters giving rise to the counts against

respondents, the parent of a criminal defendant or the defendant himself requested assistance from Zubaidah during the pendency of the defendant's proceedings and signed the STAND agreement. All family members who testified regarding the four matters stated that Zubaidah had never claimed to be an attorney, and they were aware that Zubaidah was not an attorney. . . .

[The opinion discusses the Calhoun Matter and the White Matter.]

In 2008, Isaiah Harris faced a number of charges in three separate cases, all involving the same victim. In May 2008, he was charged with felonious assault and domestic violence. In September 2008, he was charged with domestic violence and violation of a protection order. And in December 2008, he was charged with domestic violence, violation of a protection order, intimidation, kidnapping, rape, and two counts of aggravated burglary. Judge Christopher Rothgery presided over the cases and appointed J. Anthony Rich to represent Harris in all three. Harris personally signed a STAND membership agreement with Zubaidah.

In February 2009, the court consolidated the three cases pursuant to Harris's request but over Rich's objection. By March 2009, Rich had become extremely concerned with Harris's defiance to his legal advice and certain instances of Harris's behavior that threatened to undermine his own defense. For example, Harris confessed to many of the charged crimes during recorded phone calls to the victim from jail, yet refused to enter a guilty plea to any charges, turning down a favorable plea deal for a three-year prison term that had been offered by the prosecution.

Harris's consolidated cases were scheduled for a bench trial in May 2009. Two weeks prior to trial, Zubaidah sent a letter to Judge Rothgery, attaching Harris's agreement to allow STAND to "support * * * his involvement with the judicial system." Zubaidah indicated that he had in-depth knowledge about the facts of Harris's case; he defended Harris's actions by explaining that they were born of "intoxicated love emotions" and arguing that Harris was "only guilty of loving [the victim] too much." Zubaidah asserted that "[r]egardless of his extreme love for [the victim] he wouldn't force her to have sex with him or be a burglar where his three children resided."

At Harris's trial, the prosecution played the recordings of Harris explicitly confessing to many of the crimes that he was contesting he committed. Judge Rothgery called a recess and suggested that Rich and Harris regroup in order to repair what appeared to be a breakdown in communication over trial strategy. Rich negotiated with the prosecution for a plea deal for four years in prison, and the judge indicated a willingness to assent to such a deal. Harris again refused to enter a plea and insisted on continuing with the trial. Harris was ultimately convicted of rape, intimidation, three counts of domestic violence, two counts of violating a protection order, and two counts of aggravated burglary, and was sentenced to 23 years and 6 months in prison.

Zubaidah was in attendance throughout Harris's trial, though testimony conflicted as to Zubaidah's level of participation. Zubaidah and Harris's father testified that Zubaidah did not speak at any point during the trial. Rich testified that during the recess, Zubaidah spoke to Harris in Rich's presence and explicitly advised Harris not to accept the four-year plea deal, contrary to Rich's advice.

Both Zubaidah and Harris's father testified that Zubaidah was a friend of the family, not an attorney, and was not practicing law. They maintained that Zubaidah's letter to Judge Rothgery was a typical layperson's character reference, seeking to mitigate a defendant's punishment. Judge Rothgery testified that Zubaidah's letter exceeded the boundaries of a mere character letter when it began to assert Harris's lack of guilt based on the specific facts underlying the charges. Upon considering the character letter together with Zubaidah's letter of introduction portraying himself and STAND as representatives of Harris in his legal proceedings, Judge Rothgery believed that the letter constituted legal advocacy. As in the White case, Rich testified that despite Zubaidah's claims that he is not an attorney, Zubaidah's advice to Harris and ex parte letter to Judge Rothgery led Rich to believe that Zubaidah was practicing law. Rich believed that the much longer prison sentence Harris received after rejecting plea offers made Zubaidah's detriment to Harris's case very clear. . . .

[The opinion discusses the Bason Matter.]

The Ohio Constitution provides this court with original jurisdiction over the practice of law, whether authorized or unauthorized. . . . The unauthorized

practice of law occurs when a person who is not admitted to the Ohio bar or otherwise certified to practice law by the Supreme Court provides legal services to another person in this state. . . .

Disclaimers are . . . ineffective: persons who disclose their nonattorney status are not then free to practice law without authorization. . . . Even good intentions do not override the prohibition against the unauthorized practice of law. . . .

Generally, a person who sends a character-reference letter to a judge on behalf of another person is not engaging in the unauthorized practice of law. . . . In the criminal context, information about the defendant's character may assume the form of admissible evidence at trial through character testimony permitted under the Rules of Evidence and also may also serve as evidence, subject to the judge's discretion, relevant to the defendant's sentencing. . . . Therefore, pure character letters—those without legal arguments identifying and applying law—are evidentiary by nature and do not constitute the practice of law. However, when letters by nonattorneys cross the line from endorsing a person's character to advocating specific legal positions on behalf of that person, the unauthorized practice of law occurs. . . .

To the extent that a nonparty to litigation might be permitted by a trial or appellate court to present a legal argument, he is limited to furthering his own interests as a nonparty and may not raise issues beyond those already raised by the parties. . . . And despite the laudable desire to seek reform in the criminal system, such a desire cannot be realized by legally advising and advocating on behalf of a criminal defendant without violating our prohibition against the unauthorized practice of law. . . .

Here, Zubaidah's actions extended beyond the permissible conduct of endorsing a person's character, advocating a social issue generally, advancing personal interests, or providing nonlegal advice to a family member. Despite Zubaidah's good intentions and intermittent disclaimers, his conduct shows a pattern of advocating legal positions on behalf of defendants and providing legal advice to those defendants, leading to serious consequences for the STAND clients who trusted him.

Zubaidah held himself out as an advocate with legal expertise to community members, legal professionals, and the judiciary. Zubaidah sought out formal representation relationships with criminal defendants' families and entered into agreements that implied to the signers that he had specialized knowledge of the legal system. Zubaidah repeatedly sent letters to attorneys and to judges on behalf of criminal defendants in pending cases that indicated that STAND would be assisting the defendant and that cited case law, raised legal issues, and asked for legal results.

Zubaidah also provided legal advice to the criminal defendants involved, as well as to their family members. At least one attorney heard Zubaidah directly give his client legal advice, and the remainder of the defense attorneys who testified believed from their own observations that Zubaidah had given their clients legal advice.

The board found the attorneys' testimony to be credible, and we defer to this well-supported finding. The legal stances taken by defendants under Zubaidah's counsel, which often directly contradicted the attorneys' recommendations, add strong credibility to the attorneys' belief. Zubaidah's attempt to advocate on behalf of STAND before this court greatly weakens his personal assertions that he has not practiced law at any point; it is clear that he either does not understand or refuses to acknowledge what does and does not constitute the practice of law. . . .

The competing legal advice from Zubaidah created, or at a minimum exacerbated, a divide between the defendants and their defense attorneys: the attorney witnesses testified that Zubaidah played a significant role in eroding the client-attorney relationship, in some cases causing them to withdraw as counsel. As noted by attorney Rich, Zubaidah was able to learn information from the criminal defendants that would be considered confidential in an attorney-client relationship but that Zubaidah could be compelled to disclose by subpoena, creating the potential for "catastrophic consequences" in the defendants' criminal proceedings. And Zubaidah's involvement led to actual detrimental consequences for STAND members, most strikingly illustrated by Harris receiving more than 20 additional years of imprisonment by following the legal advice of Zubaidah rather than that of his own defense attorney. . . .

Zubaidah had previously been ordered to cease engaging in the unauthorized practice of law: he

remains under a cease-and-desist order issued by this court on April 29, 2011. . . . Zubaidah had been informed that the conduct at issue might constitute an act of unauthorized practice of law. The Lorain County Bar Association demanded as early as December 31, 2009, that respondents stop engaging in the unauthorized practice of law, but Zubaidah denied the allegations made in the bar's letter, found the demand to have "no merit," and continued the same conduct.

One mitigating factor points to a less severe penalty. Zubaidah's conduct resulted from a motive other than dishonesty or personal benefit. Zubaidah did not gain financially from his actions and exhibited a sincere desire both to help young men in his community and correct perceived inequalities in the legal system.

Case Questions

1. What was the relationship between STAND and the various criminal defendants?
2. How did Zubaidah's conduct complicate Harris's relationship with his appointed attorney, Anthony Rich?
3. What was Rich's evaluation of Zubaidah's conduct in Harris's case?
4. What portion of Zubaidah's conduct was permissible?
5. What portion of Zubaidah's conduct amounted to unauthorized practice of law?
6. What was the problem with Zubaidah receiving confidential information from defendants?
7. What was the mitigating factor?

The Lawyer as Provider of Legal Services

The public most commonly pictures the lawyer as a furnisher of services in legal problem solving. Although this may be the primary function of an attorney, the following sections reveal that attorneys also play many other roles.

The dramatic popular image of the lawyer focuses on the trial lawyer, when in actuality very few attorneys spend a significant portion of their time in court. Many lawyers never try cases, and most trial lawyers spend most of their time preparing for trial. Lawyers are basically problem solvers. Sometimes the problems are actual disputes that may lead to lawsuits and eventually to trial. Most disputes never reach the trial stage but are settled with the lawyer acting principally as negotiator or conciliator.

Much of the work that lawyers do has nothing to do with disputes. Many client problems do not involve an adversary but range from matters as simple as changing one's legal name to something as complicated as obtaining approval for a major airport. Potential adversaries may be lurking on the sidelines, but most problems require legal help largely because they have legal consequences. Incorporating a business must be accomplished in accordance with state law; writing a will must be done with formalities dictated by state law. Although these things may be done without an attorney, it is wiser and safer to employ professional services.

Most lawyers are specialists, whether they realize it or not. Some, for instance, handle only tax matters; others, who may call themselves general practitioners, may refuse to handle criminal or divorce cases. The body of the law is immense and constantly growing. No lawyer can adequately keep up with the changes in all areas of the law. If a lawyer accepts a case in an area in which she is not expert, it is her duty to educate herself before proceeding.

Because of specialization, the distribution of legal work for any particular lawyer varies considerably, but we may make some generalizations about how lawyers spend their time. They talk with clients, first to understand the problem, then to explain its legal ramifications to the client.

medical malpractice

A form of professional misconduct restricted to negligence in the medical field; an important field of legal specialization.

They write many letters—to clients, to other attorneys, to a large variety of other sources—to request information. They are constantly reading. They read contracts furnished by their clients; they read wills and deeds and many other legal documents to assess their clients' duties, rights, and risks. They read a lot of "law," which may be research focused on a particular problem or dispute or may be designed to keep them current in areas of law of particular concern. Lawyers must be well informed about matters affecting their clients. It has been said that some lawyers specializing in **medical malpractice** cases know more about many fields of medicine than the average physician does. In short, the attorney must know enough to provide competent legal representation to a client, an ethical duty imposed by every state bar association. (See Chapter 2 on current ethical codes.)

In short, lawyers must rely on their communication skills; they talk, they write, and they read. Those who view lawyers merely as clever manipulators of words fail to recognize that a primary function of law in our society is to reduce rules of conduct to precise language that can be applied to real situations. Lawyers exercise their verbal skills with knowledge of the law and supported by analytical training. In a legal context, words often are not used in the manner of casual speech. The attorney must use not only legal terms in a precise way but ordinary words as well. When dealing with the written word, attorneys read with a verbal microscope, analyzing each word and phrase for its legal implications. They are adept at what we might call "legal semantics." Anyone can memorize rules or fill out forms, but training, experience, and intelligence are required to use the special language of the law.

Lawyers are also organizers. Many transactions require detail and coordination. The merger of two corporations, for example, is a complex transaction that should be performed without leaving loose ends. Lawyers serve in such transactions to ensure that no legal problems will arise that could have been foreseen and avoided during the negotiations. They establish an orderly process to facilitate a smooth transition. Similarly, preparation for trial requires a step-by-step process in which all necessary information is collected and organized in a way that builds a logical and convincing presentation of the client's side of the lawsuit. As the case is built, it must be constantly reevaluated; lack of proper organization will produce poor results.

YOU BE THE JUDGE

Unauthorized Practice of Law

Which of the following acts, if performed by a layperson, constitute unauthorized practice of law?

- Publishing a packet of materials providing information on how to obtain a divorce
- Selling a packet of materials providing information on how to obtain a divorce
- Meeting with individuals contemplating divorce and advising them on a course of action
- Helping individuals prepare documents for their divorce

See State v. Winder, 348 N.Y.S.2d 270 (N.Y. App. Div. 1973).

The Lawyer as Advisor

Clients consult lawyers when they feel they need legal advice. Many transactions and events take place in our society that have legal significance, and common sense dictates that they be entrusted at least in part to someone knowledgeable regarding their legal ramifications. Most of these probably involve property transactions in some way, but those who are accused of a crime or are seeking compensation for injury can best protect their interests by employing an attorney.

A person making a will or buying a residence is involved in important property planning. For most, purchasing a home constitutes the largest investment of a lifetime, and the consequences of such a transaction should not be left to chance and ignorance. This transaction involves two principal areas of law: the law of real property and the law of contracts. Property law has evolved over many centuries and contains many relics of the past that present hidden traps for the unwary or the uninformed. The buyer may be presented with a standard contract for sale that provides reasonable protections for buyer and seller or may be confronted with a contract that was designed primarily for the benefit of the seller. In either case, the buyer is unlikely to understand the full import of the many clauses contained in the document. An attorney who is well versed in property law can explain the contract and advise the client about its possible dangers and how to deal with them.

As an advisor in these circumstances, the attorney does not give only legal advice. The attorney is likely to have a wealth of practical knowledge that has nothing to do with law, strictly speaking, such as the current state of local real estate prices, the most favorable mortgage rates, and planned or proposed development in the area. The attorney may know that the airport is about to change its flight paths in such a way that flights will pass directly over the home in question. Such information may be more valuable to a client than the explanation of rights and duties or the legal consequences of the contract itself.

Attorneys may be successful for many reasons, including politics and even luck, but most attorneys succeed because they provide valuable services. They are in a position to acquire a great deal of practical knowledge because they deal on a daily basis with countless problems that arise in the course of practice. An attorney who specializes in wills and **trusts,** for example, has seen countless examples of what can happen when someone dies if relatives and in-laws fight over the deceased's **estate.** Writing a will for a client may appear to be a technical legal matter, yet an attorney's knowledge of human nature will influence the legal advice given.

This role of the lawyer as personal, practical advisor is also important with business clients. Many businesses frequently require legal help. Not only are they concerned with making contracts and buying and selling, but they must also be concerned with employee relations, government regulation, and taxation, not to mention the type of business organization that is appropriate to the enterprise. It is common for a close relationship to develop between an attorney and a business client. The attorney comes to understand the business and its needs, and the client often turns to the attorney for advice of a business and personal nature. The client also enjoys the **attorney-client privilege**, which allows the client to treat the attorney as a confidante who may be told matters that could not be disclosed to anyone else.

trust

A device whereby title to property is transferred to one person, the trustee, for the benefit of another, the beneficiary.

estate

Has several legal meanings; when used in reference to a decedent, it means the property rights to be distributed following death.

attorney-client privilege

Legal protection whereby confidential statements made by a client to an attorney may not be disclosed to others by the attorney without the client's permission.

The Lawyer as Counselor

The role of counselor includes the role of advisor and more. The term is commonly used to refer to legal counsel, but in fact attorneys are often called upon to do much more. Certain areas of the practice of law entail personal counseling skills beyond legal skills, most notably divorce law. Lawyers must be prepared for the fact that clients deliver to them problems that the clients are not competent to handle themselves. When dealing with a client seeking divorce or one accused of a crime, the lawyer must be aware that the client is dealing with intensely emotional personal problems as well as immediate legal problems. Law school training rarely prepares the new attorney for this kind of conflict.

Although the function of the lawyer is to resolve a client's legal difficulties, the close personal and confidential relationship that often develops between lawyer and client can put the attorney in a role similar to that of a mental health counselor. Some lawyers avoid this role by taking a distant, strictly professional attitude toward their clients, but others feel that this can seem callous and insensitive to a client who may be very much in need of caring and understanding. To clients who may be full of guilt and pain and have low self-esteem, personal rejection by the person they are looking to for solutions can make them feel very alone.

On the surface, the lawyer's responsibility would seem to end with the furnishing of legal services, but the nature of the relationship between attorney and client affects the quality of the services rendered. A divorcing spouse or an incarcerated person may well be in an emotional state that weakens his or her ability to achieve a reasonable legal solution. Persons suing for compensation for personal injury often face loss of work, medical expenses, and other financial difficulties that render them vulnerable to unfair negotiations with an insurance company or corporation that views the dispute as merely a business transaction. An attorney insensitive to these personal problems may do a client a disservice.

Attorneys must also learn that a fine line must be drawn between caring and understanding and emotional involvement with a client's problems. It is one thing to have a personal relationship with a client and quite another to have a social or even romantic relationship. Taking a cue from mental health counselors, the lawyer should maintain a professional attitude without losing sight of the fact that clients are human beings deserving respect and understanding.

YOU BE THE JUDGE

Disbarred or Suspended Attorney Performing Law-Related Services

- May a law firm hire a disbarred or suspended attorney to perform paralegal services?
- What type of supervision must the attorney provide under the circumstances?

See chart III of the 2009 Survey of Unauthorized Practice of Law Committees, accessible at http://www.abanet.org; *In re* Juhnke, 41 P.3d 855 (Kan. 2002).

The Lawyer as Negotiator

The attorney must give each client the best representation possible. In the adversarial legal system, a lawyer often appears to be the "hired gun," using all the tricks of the trade to destroy the opposing party. This picture misrepresents the role of the lawyer, who is more often a negotiator, mediator, and conciliator. In a personal injury case, for example, the attorney must weigh a number of factors besides winning. If a person injured in an auto accident is suing an insurance company, both sides will have made an estimate of reasonable compensation. Their estimates are based on past experience, both in negotiations and with awards made by juries and judges. If the initial estimates, which are kept secret, are close, it is likely that the two sides can come to an agreement early in the process. If this happens, a number of advantages accrue to the client. First, the client will not experience the considerable unpleasantness of a trial. Second, the client will not endure prolonged negotiations. Third, the expenses, including attorneys' fees, will be minimized.

The client in this case is best served by an attorney who is a persuasive negotiator and can convince the other parties that it is in their best interests to present reasonable offers of compensation. The attorney not only negotiates with the insurance company's attorney but also must apprise the client of the risks and strategies on both sides, so that the client has reasonable expectations. Although the client must make the final decision to accept or reject an offer of settlement, the attorney commonly acts as a mediator between the two sides, ultimately persuading the client that an offer should be accepted. It should be noted, however, that some insurance companies adopt a strategy of nonnegotiation, in which case the plaintiff's attorney must assume an aggressive and threatening posture.

The adversarial role is especially problematic in divorce cases. The legal process of divorce tends to aggravate an already painful and frequently hostile relationship between husband and wife. The best interests of clients go beyond maximizing economic benefits and parental rights. If minor children are involved, the divorcing parents need to establish at least a minimal basis of cooperation for the children's sake. A court battle is likely to leave everyone severely scarred emotionally. Nowhere are ethical and professional duties more perplexing than in divorce law. Divorce does not make unhappy people happy. Perhaps no other area of the practice of law produces so many dissatisfied clients. Interpersonal skills in negotiation, mediation, and conciliation are just as essential as legal skills in this field.

Negotiating skills are essential in commercial law as well. In business and real estate transactions, in contracts, and in structuring business organizations, the objective is usually to establish agreement among all concerned within the requirements of the law. Though different parties have different self-interests, business transactions are normally entered into because everyone benefits. The attorney acts as a facilitator and negotiator, at the same time protecting the client's interests. In some long-standing business relationships based on personal trust, legal counsel may actually be intrusive. If agreements have customarily been cemented with a handshake, the sudden appearance of a contract written by an attorney may be insulting and could damage the relationship. Again, the lawyer's legal skills must be tempered with sensitivity.

EXHIBIT 1-3 What a Paralegal May Do*

Generally, a paralegal may do preparatory work that is later reviewed by an attorney, such as conducting legal research; drafting documents; summarizing depositions, interrogatories, and other court-related information; and conducting other types of investigations and research.

The attorney may ask the paralegal to assist the attorney at real estate closings, depositions, and court and administrative proceedings. Other tasks a paralegal might perform, as long as the paralegal's status as a non attorney is clearly disclosed, the paralegal is supervised by an attorney, and the tasks do not include providing legal opinions or advice, include gathering information from clients and maintaining contact with clients, gathering information from witnesses, and preparing and signing routine correspondence.

**Source: Guideline 5 of the National Association of Legal Assistants Model Standards and Guidelines for Utilization of Paralegals*

PARALEGALS/LEGAL ASSISTANTS

Origins

paralegal (legal assistant)

Generally, an employee in a law office who performs legal tasks under attorney supervision but who is not licensed to practice law. Some states allow paralegals to provide limited legal services without supervision. "Paralegal" as a title and a job is usually interchangeable with "legal assistant."

Today the terms **paralegal** and **legal assistant** are used interchangeably, though there has been some debate over which term is more descriptive. In some cities and even in individual law firms, the terms may be used to differentiate two jobs that also different in prestige, though there is no clear indication of which is higher. Thus, some lawyers and some legal staffers insist on two different meanings; it is simply a matter of custom. As with other areas of employment, the more skill and judgment required in a job, the more prestige that job is likely to carry.

Tasks assigned to paralegals today were, in times past, assigned to staff of the law firm or done by the lawyers themselves—that is, until *paralegal* came to be recognized as an essential job in law firms. Paralegals assist lawyers in providing legal services to clients, but there are a number of things paralegals cannot do because they are not licensed to practice law, a matter discussed later in this chapter. Because paralegals are employees of lawyers and law firms, the nature of their work depends largely on how their work is defined by their employers. Nevertheless, the types of tasks they perform have become increasingly standardized, in part because of the uniformity of the formal training they are receiving in educational institutions.

Inns of Court

Place in London where English lawyers were trained; for centuries, students learned the law there by association with legal scholars, lawyers, and judges.

Although the paralegal profession is relatively recent in origin, lawyers have been using legal assistants in some form since the founding of our republic (see Exhibit 1-3). Before bar associations, bar examinations, and law schools, it was the custom in the legal profession to learn law by apprenticeship in a law office, often called "reading the law." Except for those affluent enough to study law at the **Inns of Court** in London, early nineteenth-century lawyers learned law by assisting lawyers for a period of time, taking what opportunities they could to read cases and treatises about the law. This often took on an aspect of exploitation at low wages, but eventually the novice was sponsored by his employer to be accepted into practice

by the courts of his jurisdiction. This form of legal education qualified bar applicants in most states well into the twentieth century, and contemporary law school students continue to serve much the same function when they work as law clerks in law offices during summer vacations from law school. It would be appropriate to refer to these students as paralegals, though the customary label is *clerk.* In communities with large law schools, law students and paralegals often compete for employment.

Before the rise of paralegalism, many lawyers trained their legal secretaries to perform legal tasks beyond the usual scope of secretarial work, and some attorneys still prefer this approach to hiring formally trained assistants. Many present-day paralegals were trained in this way. As the attorney's practice increased, the secretary was gradually converted into a full-time paralegal, and a new secretary was hired to do the secretarial/administrative work. The advantage of such an arrangement was that the lawyer was able to take an employee with whom a good working relationship had been established and train that person to do the specific auxiliary tasks the lawyer needed. The disadvantage was that both the lawyer and the secretary took time away from their work for the training.

The paralegal position would never have been invented had it not proven economically advantageous to law firms. The prime movers in paralegalism have been the largest law firms in the largest American cities. In large law firms, attorneys tend to be highly specialized, which tends to produce attorneys who are very knowledgeable and competent within their field of practice. They charge premium fees because they can provide quick delivery of high-quality legal services to large corporate and affluent private clients. However, this can be accomplished effectively only if the firm is a well-managed business. The lawyers are freed to concentrate on important tasks by the assistance of a competent staff, consisting primarily of law office managers, paralegals, and secretaries. The more support staff a lawyer has, the more time the lawyer can devote to delivering legal services and the more money can be brought into the firm. In many instances this benefits the clients, who can be billed for paralegal research, for example, at a significantly lower rate than the attorney's hourly rate. In short, paralegals came to occupy defined positions in large law firms simply because they were part of a rational allocation of work that improved the quality of legal services at the same time that it increased profit for the firm.

YOU BE THE JUDGE

Business Cards and Law Firm Letterhead

- Under what circumstances is it appropriate for a paralegal to give the paralegal's business cards to law firm clients?
- May a law firm list a paralegal on the law firm letterhead?

See comment to Guideline 5 of the ABA Model Guidelines for the Utilization of Paralegal Services, accessible at http://www.abanet.org/.

Paralegal Training

Because paralegals are as yet unlicensed, no formal training is required (but see California Business and Professions Code, § 6450 et seq.). As mentioned, many paralegals have been trained at work by their supervising attorney; some have even trained themselves. While we may call some persons paralegals by virtue of the completion of formal training, others are best defined by the nature of the work they do. In addition, many individuals working in law firms perform secretarial work as well as legal work that goes beyond what would normally be expected of a legal secretary. Whether we call such individuals legal secretaries or paralegals is presently a matter of choice.

Paralegal training is not currently monopolized by any one type of institution. This is unusual because training in most fields is clearly either vocational or academic. Paralegals should be viewed as professionals who must possess not only technical skills but also a firm grounding in the subject matter of their field, which is law. A *professional* is a person who applies a body of knowledge to aid people in solving their problems.

Recognition of paralegalism as a profession in its own right is imminent. To take their place beside the time-honored professions, paralegals must possess more than technical skills. They must also acquire a broad body of knowledge to help them exercise wise and effective judgments. With this in view, paralegal training takes on a serious mission.

Academic institutions conform to the traditions of academic training and the requirements of regional accrediting agencies, which monitor the activities of the institutions that seek continuing approval. The American Bar Association (ABA) has added its own approval process, which entails a detailed initial approval application and periodic review to maintain approval. Any program that has obtained ABA approval has received careful attention to ensure that it meets stringent requirements. Because the approval process is voluntary as well as costly and time consuming, many fine programs have declined to seek ABA approval. The American Association for Paralegal Education (AAfPE) plays a significant role in discussing and setting standards for paralegal programs.

Regional accreditation subjects an educational institution as a whole to intense scrutiny but does not necessarily subject its paralegal program to the same scrutiny; this is largely up to the institution itself. An institution like a community college or university that has both regional accreditation and ABA approval has undergone scrutiny through two processes. Though neither of these guarantees high quality, they demonstrate that a program has met important minimal standards. A less formal but nonetheless important measure of any program is its reputation among local attorneys. Like law schools and the legal profession in general, reputation and prestige are very important. Good programs that graduate good paralegals will ultimately be recognized through the legal grapevine because attorneys have a serious interest in hiring competent paralegals.

Paralegal training programs can also be divided into degree programs and certificate programs. Degree programs are more typical of traditional academic programs, like those found in community college, college, and university settings, where a degree such as Associate of Science, Associate of Arts, or Bachelor of Arts is awarded. In these programs, the institution usually requires that the academic training meet a general standard that may require courses in addition to paralegal courses. In certificate programs, a certificate of satisfactory completion is conferred, and the programs usually limit themselves to the particular field of study. *Certificate programs* should not be confused with *certification* by the National Association of

Legal Assistants (NALA), which conducts an optional examination of qualified paralegals leading to the designations *Certified Legal Assistant* and *Certified Paralegal.* Although this designation has no official legal status, NALA was an early entrant into the paralegal field, assigning itself the mission of establishing standards for practicing paralegals; certification, like passing a bar exam, is evidence of professional knowledge and competence.

YOU BE THE JUDGE

Legal Fees

- May an attorney charge a client for paralegal services even though the amount charged is above the amount the attorney is paying the paralegal for performing the services?
- May an attorney compensate a paralegal for bringing a client to the law firm?

See Richlin Sec. Serv. Co. v. Chertoff, 128 S. Ct. 2007 (2008). Also see comment to Guidelines 8 and 9 of the ABA Model Guidelines for the Utilization of Paralegal Services, accessible at http://www.abanet.org/.

Curriculum

Paralegal courses echo those taught in law school. Both train legal practitioners, and the subjects are necessarily similar. Because of the variety of paralegal programs, the curriculum and pedagogy vary far more than they do in law school. Nevertheless, the basic subjects have changed little in name over the years. Both the law and legal curricula divide law into two major areas: **substantive law** and **procedural law.** Procedural law is aptly named because it deals with procedure: such things as **pleading**, **evidence**, **motions**, and **jurisdiction**. Substantive law in one sense covers all that is not procedural or, more specifically, the basic law of legal rights and duties. *Procedural law* is the means by which rights and duties may be enforced. *Substantive* is derived from *substance,* which is often contrasted with *form.* We are inclined to elevate substance over form in our personal values; but, in law, form—that is, procedure—is the structure that creates system rather than chaos and anarchy.

The word *right* conjures up fundamental rights, such as freedom of speech and equality before the law, but legal process is far more often involved in more mundane rights and duties. For example, the law recognizes that each of us has a right to be free of physical attack by others, to enjoy a reputation unsullied by malicious lies about our character, to enjoy our privacy, and to use our property in most ways that do not intrude on the rights of others. Furthermore, each of us has a duty to not deprive others of those same rights. The substantive law delineates those rights. Later chapters of this book, which discuss contracts, torts, and property law, among other issues, contain basic treatment of substantive rights and duties. The chapters on civil procedure and criminal procedure deal with basic procedural law. These subjects and others form a basic curriculum for both law schools and paralegal programs.

substantive law

The part of law that creates, defines, and regulates rights; compare to *procedural law*, which deals with the method of enforcing rights.

procedural law

The part of the law that deals with procedures and the proper or authorized method of doing things.

pleadings

Written formal documents framing the issues of a lawsuit, consisting primarily of what is alleged on the one side (for example, the plaintiff's complaint) or denied on the other (for example, the defendant's answer).

evidence

The information presented at trial; the rules of evidence are part of the procedural law.

motions

Requests that a judge make a ruling or take some other action.

jurisdiction

The authority, capacity, power, or right of a court to render a binding decision in a case.

The difference between curricula of law schools and those of paralegal programs lies not so much in subject matter as in method. The case method discussed earlier in this chapter is a staple of law schools but is used sparingly in undergraduate education. This book, by the way, uses a modified case method: case excerpts are found in each chapter, but the bulk of the book consists of descriptive comments about the law. Paralegal programs typically include more courses based on practice, whereas law schools relegate this field to on-the-job training or the so-called clinical courses, which are usually voluntary programs. Law schools are often the battlegrounds for theoretical disputes about law, such as feminist legal theory and the radical critique that in the late twentieth century challenged the traditional business—some might call "patriarchal"—focus of law school training. Paralegal training tends to avoid theoretical issues, except to the extent that such issues are encountered in a 4-year curriculum that emphasizes a liberal arts focus over vocational training. The emphasis, of course, depends not merely on the formal curriculum but also on the orientation of the faculty.

Paralegals regularly receive training in law office skills that is absent from law school training. These may include computer program use, law office management, and specific legal clerical tasks. Paralegal training tends to be far more task oriented than law school training, which emphasizes analytical and verbal training. Paralegals frequently serve as interns, doing many of the tasks law students perform as summer law clerks. Many paralegals ultimately decide to go on to law school to be transformed into attorneys. See Exhibit 1-4 for types of employment for paralegals.

What Paralegals May Not Do

Before we discuss what paralegals actually do, it may be helpful to clarify what they may *not* do. This summary does not include all the areas in which paralegals may run into difficulties, such as splitting fees with attorneys, soliciting business for attorneys, and other ethical problems covered in Chapter 2; for now we confine the discussion to work tasks.

EXHIBIT 1-4 Type of Employment for Paralegals Answering 2012 Survey*

Private law firm	63%
Insurance company	2%
Public sector/Government	10%
Self-employed	1%
Health/Medical	1%
Bank	1%
Corporation	17%
Court System	1%
Nonprofit corporation, foundation, or association	2%

**Source: NALA, The Association of Legal Assistants-Paralegals*

Problem areas are subsumed into what is called *unauthorized practice of law.* Some things may be done legally only by licensed attorneys, and most states have a statute that restricts the practice of law to attorneys. Limited exceptions may be made for realtors and accountants, for example, within their respective fields, and paralegals may enjoy limited privileges if the state has specifically authorized them. Those few states that have addressed this issue by statute have largely been concerned with what paralegals cannot do rather than with what they can do. It is incumbent upon paralegals to become familiar with the restrictions and privileges in effect in their state. Because many states are currently investigating the need for and desirability of regulating and licensing paralegals, we can anticipate that the range of permissible activities for paralegals will vary widely among the states and gradually settle into basic principles recognized nationally. Several national paralegal associations and the American Bar Association encourage uniformity among the states. In the meantime, individual paralegals must stay informed of the requirements of their states.

Despite variations among the states, it is possible to arrive at general principles because there is a consensus on what an attorney's license permits. Lawyers are privileged to provide legal advice and legal representation to clients. *Legal advice* means advising a client about legal rights and duties and especially about the proper course of action as it relates to the law. For instance, a paralegal may properly advise someone, "I think you ought to see a lawyer," but it would not be proper to say, "I think you ought to file a motion to dismiss." This extends even to matters of law clearly within the paralegal's knowledge and competence. *The temptation to advise must be resisted.* This proscription extends beyond actual clients—whenever a paralegal gives legal advice, she may be engaged in the unauthorized practice of law. The line is not always easy to draw. Consider the example of a friend laboring under the misconception that the **statute of limitations** is 4 years when the paralegal knows it to be only two. Should she quietly sit by and let her friend lose a suit? Without advising the friend on a course of legal action, the paralegal can certainly question the friend's knowledge and suggest a visit to an attorney or provide a copy of pertinent state statutes, without interpretation that might constitute legal advice.

statute of limitations

A federal or state law that specifies time limits within which suits must be filed for civil and criminal actions; they vary from state to state and from action to action.

Legal representation includes a number of important activities, including representation before a court, which is the privileged domain of attorneys. This monopoly of the bar is necessary to exercise control over attorneys who act improperly and to enable clients who are improperly represented to sue their attorneys for malpractice. Nonlawyers may not represent others in court, may not sign documents submitted to the court in any proceeding, and may not sign any documents that call for an attorney's signature. The paralegal is not an agent of a client and must avoid any appearance of being one. There may be limited exceptions to this rule, but paralegals act at their peril in such matters and must be very clear on state law when interviewing clients or engaging in negotiations.

Observing two cardinal rules can avoid the dangers of legal representation by the paralegal. First, the client must always be aware that the paralegal is not an attorney. In any consultations with a client in which the paralegal may participate, especially in initial contacts, the status of paralegal should be made clear to the client. Letters written on law firm stationery (some states do not allow paralegals' names on the letterhead) should make clear that the letter is not from an attorney—for example, "As Mr. Clinton's paralegal, I have been asked to write concerning . . . [signed] Erin Summer, Paralegal." Even this might not be sufficient if legal advice is offered. Many clients do not know that paralegals are not lawyers.

The second rule concerns attorney supervision. As long as the paralegal is under the control and supervision of an attorney and the attorney exercises supervision properly, nearly all potential problems are avoided. Many legal documents, including pleadings, are prepared by paralegals and signed by lawyers. The attorney is responsible for ascertaining the paralegal's competence to prepare the documents and must review and amend the documents before signing them. Responsibility rests with the supervising attorney, who may be disciplined by the court or the bar association for problems created by a failure to supervise properly, but the paralegal must be aware of the dangers of such situations. Other activities that could constitute unauthorized practice of law include

1. Negotiating fees or legal representation on behalf of the attorney
2. Discussing the merits of a case with attorneys for the other side
3. Assisting others in the unauthorized practice of law

In the following case, *In re Thorne*, the plaintiffs alleged that defendants Prommis Holdings and Prommis Solutions engaged in the unauthorized practice of law by providing paralegal services to the Johnson & Freedman law firm.

471 B.R. 496

United States Bankruptcy Court, N.D. Mississippi

In re Jonathan R. THORNE and Darlene S. Thorne, Debtors.

Jonathan R. Thorne and Darlene S. Thorne, Debtors.

Locke Barkley, Chapter 13 Trustee, Plaintiffs

v.

Prommis Solutions Holding Corporation; Prommis Solutions, LLC; Great Hill Partners, LLC; Morris Schneider and Prior, now Known as Johnson & Freedman, LLC [J & F], Defendants.

Bankruptcy No. 09–11763–DWH. | Adversary No. 10–1172–DWH. | April 27, 2012.

§

Opinion

DAVID W. HOUSTON, III, Bankruptcy Judge. . . .

In their motion for summary judgment and supporting memorandum, Prommis Holding and Prommis Solutions (hereinafter referred to occasionally for convenience as "Prommis defendants"), assert that there is nothing unethical about a lawyer or a law firm outsourcing support services, provided that the lawyers meet all of the ethical obligations to supervise the work and to render competent services to the client. They recognize that traditionally these type services are performed "in house," but argue that there is no ethical requirement that the services be performed "in house." The Prommis defendants also indicate that many bar associations have expressly approved the practice of law firms outsourcing support services to third party vendors just as J & F did with Prommis Solutions. In their memorandum, they include American Bar Association Formal Opinion 08–451, as well as, several opinions adopted by state and local bar associations, all of which support their position. The Prommis defendants contend that since outsourcing is approved, that the payment in the ordinary course of business for the

outsourced services should not be considered the illegal sharing of attorney fees.

The Prommis defendants state that Prommis Solutions followed a standard set of directed tasks in preparing the motion for relief. Further, that § 2.2 of the Services Agreement, entered into between J & F and Prommis Solutions, required Prommis Solutions to use forms provided by J & F, and prohibited Prommis Solutions from making any substantive changes to these forms without the prior review and written consent of a J & F attorney. The Prommis defendants confirmed the statements made by Mark Baker in his affidavit that J & F attorney Karen Maxcy supervised, reviewed, and approved all of the work before directing that it be filed. Indeed, Maxcy executed the Agreed Order along with the debtors' attorney and the attorney representing the Chapter 13 trustee. . . .

The plaintiffs have asserted that the paralegal and support employees at Prommis Solutions were engaged in the unauthorized practice of law when the motion for relief from the automatic stay was filed and resolved in the Thornes' bankruptcy case. Without question, the Prommis Solutions' paralegal, Ruba Franks, assisted in the drafting and filing of the motion and the order, as well as, communicated with Chase to ascertain information about the underlying indebtedness being serviced by Chase. However, the motion and order were on template forms prepared by J & F which could not be modified without the permission of J & F. Karen Maxcy, a licensed Mississippi attorney employed by J & F, supervised and reviewed the entire process. Maxcy executed the motion, as well as, approved the order that brought the proceeding to a conclusion. As perceived by this court, the entire matter was handled in the identical way that it would have been handled had Franks been a paralegal employed by the J & F law firm. The only difference, which has no substantive impact, is that Franks was an outsourced paralegal who was employed by Prommis Solutions. With this level of supervision by a licensed attorney and the use of forms developed by the law firm, to construe that this procedure is the unauthorized practice of law would place form over substance. The use of paralegal employees, whether outsourced or "in house," reduces the time that must be devoted by a licensed attorney, and, in turn, reduces the costs to all parties. . . .

The Official Comment to [rule 5.5 of the Mississippi Rules of Professional Conduct] provides:

> *The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. . . . Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se. . . .*

[The court concludes:]

Neither J & F nor Prommis Solutions were engaged in the unauthorized practice of law considering the factual circumstances in this proceeding, since the undisputed facts establish that the Prommis Solutions' paralegal employee and its support staff were adequately supervised by the J & F attorney, and competent services were provided to the client. The fact that the paralegal services were outsourced as opposed to being "in house," has no substantive relevance, and, considering the specific facts of this proceeding, is not offensive to this court. . . .

Case Questions

1. What tasks did Prommis Solutions perform?
2. What did attorney Maxcy do?
3. Did the court distinguish between outsourced and in house paralegal services?
4. Were the defendants engaged in the unauthorized practice of law?