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Concise Guide to Paralegal Ethics

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Therese A. Cannon • Sybil Taylor Aytch

Clearly written, and replete with design elements that facilitate study and review, the **Concise Guide to Paralegal Ethics** provides succinct coverage that focuses on the professional paralegal. Perfect for use in shorter courses, or substantive courses with an ethics component, the **Fifth Edition** provides timely and thorough coverage of all major legal ethics topics.

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Ethics and Professional Responsibility for Paralegals, Eighth Edition
by Therese A. Cannon and Sybil Taylor Aytch
2018. Paperback. 592 pages.
ISBN: 978-1-4548-7337-2.

10051370-0002

ISBN 978-1-4548-7336-5

9 781454 873365 90000

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Fifth Edition

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Wolters Kluwer

Published by Wolters Kluwer in New York.

Wolters Kluwer Legal & Regulatory U.S. serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.WKLegaledu.com)

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Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-7336-5

Library of Congress Cataloging-in-Publication Data

Names: Cannon, Therese A., author. | Aytch, Sybil Taylor, author.
Title: Concise guide to paralegal ethics / Therese A. Cannon, Chief Accreditation and Student Affairs Officer, Minerva Project/Minerva Schools at KGI; Sybil Taylor Aytch, Registered Paralegal, Quarles & Brady LLP Adjunct Professor, Phoenix College.
Description: Fifth edition. | New York : Wolters Kluwer, [2018] | Series: Paralegal series | Includes bibliographical references and index.
Identifiers: LCCN 2018027392 | ISBN 9781454873365
Subjects: LCSH: Legal ethics — United States. | Legal assistants — Legal status, laws, etc. — United States.
Classification: LCC KF320.L4 C365 2019 | DDC 174/.30973 — dc23
LC record available at https://lccn.loc.gov/2018027392

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This book is dedicated to the thousands of paralegals who work tirelessly to provide quality legal services to clients and who strive to make legal services more accessible.

Summary of Contents

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Appendices

Preface

Approach

This book is written for paralegal students, working paralegals, and lawyers who employ paralegals. It is intended for use primarily as a text, but can be used as a reference manual by teachers and those in practice.

In the 50 years since its inception, the paralegal occupation has truly come into its own. Its growth in numbers, its expansion into all areas of law practice and all sectors of the legal services industry, and its general acceptance by the legal community and the public are impressive. The occupation continues to evolve into a true profession. One of the most critical aspects of any profession is its adherence to an accepted code of ethics. Legal ethics is now taught in virtually every paralegal program in the country. Because of the diversity in paralegal education programs in terms of content, length, and format, ethics is treated in a wide variety of ways in the curriculum. Most programs have a separate course on ethics, and other programs include ethics as a short segment in another required course or teach ethics across the curriculum.

This text is a concise version of *Ethics and Professional Responsibility for Paralegals*. This concise version covers all the same subject matter as the full version, but in an abbreviated format that can be adapted to short courses and to use in several different courses.

Organization and Coverage of the Concise Edition

The content of this book is comprehensive. It covers all the major areas of legal ethics, placing special emphasis on how the rules affect paralegals. It begins with a chapter on the regulation of lawyers and paralegals, covering ethics codes, disciplinary processes for lawyers, and the variety of ways in which paralegals are regulated both directly and indirectly. Unauthorized practice of law is covered in Chapter 2, including the definitions of the practice of law, detailed descriptions of functions that only lawyers are permitted to perform, and information on how UPL which is evolving in view of the growing role of paralegals and nonlawyer legal service providers. Chapter 3 covers the duty of confidentiality and the attorney-client privilege, including common issues that arise in these areas and ways to prevent disclosure of confidential information, including recent developments related to the use of technology.

Chapter 4 covers conflicts of interest, demonstrating how conflicts rules apply to paralegals, including the use of screens and conflicts checks. Rules regarding legal advertising and solicitation are covered in Chapter 5. Chapter 6 is devoted to financial matters, including billing and fees, fee agreements, statutory fee awards that include compensation for paralegal work, fee splitting, referral fees, partnerships between attorneys and nonlawyers, and handling client funds. Chapter 7 defines competence specifically in relation to paralegals and includes a discussion of malpractice. Special issues confronted by litigation paralegals are covered in Chapter 8. Finally, Chapter 9 examines professionalism, issues facing paralegals in today's law firm environment, and pro bono work.

Key Features

Each chapter begins with an overview that lists the topics covered in the chapter. The text of each chapter is divided topically. Key terms are spelled out in italics when first introduced, with definitions in the margins, and key concepts are noted in bold. At the end of each chapter are a few hypothetical fact situations that require students to apply the rules and concepts covered in the chapter. These may be used in class discussion or for assignments. Review questions that test each student's memory and understanding of the material and discussion questions that call for in-depth analysis, legal research, or factual investigation are also included. Selected references, including cases and ethics rules, are found at the very end of each chapter.

Recognizing that every paralegal program teaches ethics in its own way, the concise version has been designed for use in short ethics courses or short segments of courses where there is not enough time to use case

analysis as a teaching method or to pursue in-depth analysis of the ethics rules, including the history and evolution of those rules. Hypotheticals were added in place of actual cases to provide a method for students to test their understanding of the material by synthesizing it and applying it in a new factual context. Discussion of specific sections of the ABA Rules, ABA Guidelines for the Utilization of Paralegal Services, and ethics opinions has been abbreviated, as has coverage of trends.

Acknowledgments

Many people must be thanked for their support and assistance: the American Association for Paralegal Education, National Association of Legal Assistants, National Federation of Paralegal Associations, International Practice Management Association, and the American Bar Association Standing Committee on Paralegals. Special thanks go to the many students we have had the pleasure of teaching and the paralegals who have shared their experiences with us. Our deepest appreciation must be extended to the wonderful people at Wolters Kluwer, especially Betsy Kenny, whose patience, warmth, intelligence, and talents made this book possible.

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Sybil Taylor Aytch
August 2018

Concise Guide to Paralegal Ethics

1

Regulation of Lawyers and Paralegals

This chapter provides basic background on the regulation of lawyers and paralegals. Paralegals who work under the supervision of lawyers need to understand the rules governing lawyer conduct and how those rules affect them. Also covered are a brief history of the paralegal profession and an explanation of how paralegals are regulated directly and indirectly by the states in which they work. Included is an overview of voluntary professional associations for paralegals and certification programs. Chapter 1 covers:

- the inherent power of the courts over the practice of law
- the organized bar's participation in lawyer regulation
- the role of the legislature and state statutes in governing the conduct of lawyers
- the evolution of the paralegal profession
- professional associations for paralegals
- direct regulation of paralegals
- the distinctions among certification, licensing, and limited licensing
- the liability of paralegals and the lawyers who supervise them
- guidelines for the utilization of paralegal services
- ethics guidelines promulgated by paralegal associations

A. Regulation of Lawyers

1. State Courts and Bar Associations

Like other professions that affect the public interest, the legal profession is subject to regulation by the states. Unlike other regulated professions, however, the regulation of the legal profession falls mainly to the judiciary rather than the legislature. Because of the separation of powers and the role of lawyers in the court system, the judiciary has historically asserted inherent authority over the practice of law.

The highest court in each state and in the District of Columbia is responsible for making rules related to admission to the practice of law and to lawyers' ethical conduct. The states' highest courts also create and oversee mechanisms for disciplining lawyers who violate ethics codes. Most state legislatures have also passed statutes that supplement the ethics rules adopted by the courts. Some states consider legislative authority over the practice of law to be concurrent with the judicial authority; others consider legislative action to be only in aid of judicial action. In a few states, such as California and New York, substantial authority over the practice of law rests with the legislature. Sometimes the judiciary and the legislature have conflicting ideas about matters affecting the practice of law, and a court will be called on to strike down legislation that attempts to govern lawyer conduct in some way. Several state supreme courts have held unconstitutional legislation that would have authorized nonlawyers to engage in conduct that might be categorized as the practice of law. Local court rules also govern attorneys' conduct in matters before the courts.

In practice, many state supreme courts rely heavily on state bar associations to carry out their responsibilities for regulating the practice of law. These courts have delegated authority to the bar as a way to relieve the burden of overseeing lawyer conduct, updating the ethics rules, and disciplining lawyers.

Some state bar associations are **integrated** or unified, which means that membership is compulsory. In a state with an integrated bar, annual dues to renew the practitioner's law license carry automatic membership in the state bar. Some states have purely voluntary state bar associations; funds to operate the admissions and disciplinary functions in the state are derived from annual licensing or registration fees. It is estimated that about 60 percent of the lawyers in the U.S. are members of a voluntary bar association. Integrated bars generally play a more active role in the admissions and disciplinary functions of the court and in other matters relating to the legal profession.

2. American Bar Association

All states except California pattern their codes of ethics on the models of the American Bar Association (ABA). The ABA is a national

voluntary professional association of lawyers, and is the largest professional association in the world with about 400,000 members — more than a quarter of the lawyers in the country. Over 100 years old, the ABA is the chief national professional association for lawyers. The ABA carries a strong voice in matters affecting the substantive law, the judiciary, and the administration of justice. Among the ABA's many contributions to the profession is the promulgation of model codes of ethics.

The ABA first published the **Canons of Professional Ethics** in 1908. These Canons were patterned after the first code of ethics for lawyers adopted in 1887 by the Alabama State Bar Association. Prior to the adoption of state codes, lawyer conduct was governed largely by common law and some statutes. The 1908 Canons consisted of 32 statements of very general principles about attorney conduct, mainly conduct in the courtroom. Many states adopted these ABA Canons through court rule or statute.

In 1969, the ABA published a new code, the ***Model Code of Professional Responsibility***, designed as a prototype for states to use in developing their own codes. The Model Code was adopted in whole or in part by every state. After six years of study, debate, drafting, and redrafting, a new code, the ***Model Rules of Professional Conduct***, was adopted by the ABA in 1983.

Model Code of Professional Responsibility
ABA's code of ethics, designed as a prototype for states to use in developing their own codes, adopted in 1969

Model Rules of Professional Conduct
ABA's revised prototype code of ethics, adopted by the ABA in 1983

The current version of the Model Rules is cited throughout this book. Since adopted in 1983, several sections of the Model Rules have been revised to keep pace with changes in practice and new ethical challenges. For example, recent changes have been made in the area of electronic communications and records. The relevant ethics rules in your jurisdiction should always be consulted for the current and accurate rules governing lawyer and paralegal conduct. As of this writing, California is the only state that has not adopted its own version of the Model Rules. California has its own code, which is based on neither the Model Code nor the Model Rules. States generally make some modifications of the ABA Rules when they adopt the rules, so it is important for paralegals to consult the specific state rules that are applicable where they are working and not to rely on the ABA Model Rules.

3. State Statutes, Ethics Opinions, and Case Law

Although the state codes of ethics contain most of the rules with which we are concerned in this text, statutes also govern attorney conduct. For example, some states have statutes that prohibit attorneys from engaging in certain conduct in their professional capacity as lawyers and provide for criminal and civil penalties. As we will see in Chapter 2, most states have laws that make the unauthorized practice of law a crime, usually a misdemeanor.

Ethics advisory opinions
Written opinions from a bar association interpreting relevant ethical precedents and applying them to an ethical issue

Not binding on attorneys but often consulted when ethical issues arise are ***ethics advisory opinions*** issued by state and local bar associations and the ABA. Bar associations have ethics committees that consider ethical dilemmas posed to them by attorney-members. The committees write opinions that are published in bar journals and on bar websites to give additional guidance to other attorneys facing similar dilemmas. Courts sometimes cite these advisory opinions as persuasive authority. Some state and ABA advisory opinions that are important to paralegals are cited in this text.

Of course, **disciplinary cases** and **court decisions** involving lawyer malpractice, disqualification, and breach of lawyers' duties contribute to the body of law that governs lawyer conduct.

4. Sanctions and Remedies for Lawyer Misconduct

Disbarment
Rescinding of a lawyer's license to practice

Suspension
Attorney is deprived of the right to practice law for a specified period of time

Probation
Attorney can practice, but certain requirements must be met

Reprimand
Warning that ethical violations have occurred and will not be tolerated

Four main formal sanctions for ethical misconduct can be imposed on lawyers by the state's highest court or other disciplinary body. The most severe sanction is ***disbarment***, in which a lawyer's license to practice law is revoked. Disbarment is only imposed for the most egregious violations or when there is a long-term pattern of serious unethical conduct. Although disbarment is in theory "permanent," most admitting authorities do occasionally readmit a disbarred lawyer after some period of time if the lawyer can demonstrate complete rehabilitation.

The second most severe sanction is ***suspension***, under which the attorney is deprived of the right to practice law for a specified period of time. Some disciplinary authorities also have the option of imposing ***probation***, under which the disciplined attorney may continue to practice on the condition that certain requirements are met, such as restitution to injured clients, passing an ethics examination, attending ethics "school," or participating in counseling. Sometimes a suspension is stayed but the attorney remains on probation for some period, during which the disciplinary body may reinstitute the suspension if further ethical violations come to light.

The mildest sanction is a ***reprimand***, sometimes called a ***reproval***. This action represents a slap on the hand, a warning that the conduct at issue will not be tolerated. Reprimands may be made public (placed in the public record and published in a bar journal or legal newspaper or on a bar or court website) or private (confidentially communicated in writing to the attorney). In either case, the reprimand becomes part of the attorney's record. A reprimand is considered further in determining the appropriate sanction if other violations occur.

In setting the appropriate sanction, the disciplinary body considers the nature and severity of the offense and whether the attorney has a record of prior misconduct. Other **aggravating and mitigating**

factors may be taken into account, such as the extent to which the lawyer cooperates in the investigation and appreciates the seriousness of the matter, the lawyer's reputation and contributions to the community through public service and professional activities, the circumstances surrounding the offense and the extent to which these make the lawyer more or less culpable for the conduct, and whether the offense was a one-time incident and is unlikely to be repeated or was a pattern of misconduct over time. Whether the lawyer shows remorse and willingness to remedy the problems that may have led to the conduct is also critical in determining the sanction.

In addition to direct discipline by the court or state bar, a lawyer may be **prosecuted criminally** for violations of statutes governing attorney conduct or conduct that may relate to an attorney's practice, such as laws prohibiting solicitation of clients in hospitals and jails and laws limiting the methods that can be used to collect debts. Civil ***legal malpractice*** lawsuits brought by former clients also constitute a major incentive for conforming to ethical requirements and standards of practice. (See Chapter 7 for more on legal malpractice.) The courts also exercise **contempt power** to sanction lawyers appearing before them who engage in improper conduct that affects the administration of justice and the smooth functioning of the courts. (See Chapter 8, Special Issues in Advocacy.) The courts also play a major role in deciding on matters in the area of conflicts of interest because they rule on **motions to disqualify counsel**, which are usually brought by the opposing counsel who claims that a lawyer or law firm has a conflict of interest that jeopardizes client confidentiality. (See Chapter 4, Conflicts of Interest.) It should be noted that disciplinary action may be taken not only against lawyers who are directly involved with the conduct of paralegals, but also against those who have supervisory or managerial authority or are partners in a law firm. Under the rules in most states, a law firm itself may also be held responsible for ethical misconduct, depending on the nature of the violation and the surrounding circumstances and actions by the firm. (See ABA Model Rule 5.3, discussed below.)

Legal Malpractice
Improper conduct in the performance of duties by a legal professional, either intentionally or through negligence

B. Regulation of Paralegals

1. A Brief History of the Paralegal Profession

The use of specially educated and trained nonlawyers to assist lawyers in the delivery of legal services is a relatively new phenomenon in the history of American law. The concept is only about 50 years old.

The paralegal field's **beginnings** can be traced directly back to the late 1960s, when the rapidly rising cost of legal services, combined with the lack of access to legal services for low- and middle-income Americans, caused the federal government, consumer groups, and the organized bar to take a close look at the way legal services were being delivered. Many innovations were instituted, including legal aid clinics, storefront law offices, and prepaid legal plans. Private law firms became aware of the need to manage their operations more efficiently. The concept of using the services of trained nonlawyers to perform certain legal functions was introduced. In 1967, the ABA endorsed the concept of the paralegal, and in 1968, established its first committee on paralegals, which has since become the **Standing Committee on Paralegals**.

During the late 1960s and early 1970s, the ABA and several state and local bar associations conducted studies on the use of paralegals. Although many studies showed initial attorney resistance to the idea of paralegals, the actual use of paralegals rose. The first **formal paralegal training** programs were established in the early 1970s. Only 11 paralegal education programs were offered in 1971, and there are more than 1,000 today. In 1974, the ABA adopted guidelines for paralegal programs, and in 1975, began to approve paralegal programs. There were nine paralegal programs approved that year, and there are now about 300 approved programs.

In the mid-1970s, the first professional paralegal associations were formed. Dozens of groups cropped up locally. The **National Federation of Paralegal Associations** (***NFPA***) and the **National Association of Legal Assistants** (***NALA***) were established. Paralegal educators formed their own organization, the **American Association for Paralegal Education** (***AAfPE***). In the 1980s, a group of paralegal supervisors and managers started the **Legal Assistant Management Association**, which was more recently known as the **International Paralegal Management Association** but has since changed its name to the **International Practice Management Association** (IPMA). ***NALS***, which was an association for legal secretaries formed in 1929, seeks to serve all legal professionals, including paralegals. Finally, the **American Alliance of Paralegals, Inc.** (***AAPI***) is the newest national group for paralegals.

NFPA
National Federation of Paralegal Associations

NALA
National Association of Legal Assistants

AAfPE
American Association for Paralegal Education

IPMA
International Practice Management Association

NALS
An association for legal professionals

AAPI
American Alliance of Paralegals, Inc.

In 1976, the first voluntary **certification** program was established by NALA, called the **Certified Legal Assistant** (CLA) program. It was also at about this time that the U.S. Bureau of Labor Statistics predicted that a paralegal career would be one of the fastest-growing occupations. Job opportunities expanded dramatically in the 1980s, especially in large private law firms, and paralegals started to work as independent contractors.

In the 1990s, NALA developed advanced specialist examinations in a variety of areas, which are taken by paralegals who have already earned the **Certified Paralegal** (**CP**) designation. NALA also offers an Advanced Certified Credential in specialty areas. More than 22,000 paralegals have participated in NALA's certification programs. NFPA offers

two certifications: the **Paralegal Advanced Competency Examination** (PACE), designed for experienced paralegals who may use the designation **Registered Paralegal** (RP) upon passing the examination, which has been passed by more than 600 paralegals; and the **Paralegal CORE Competency Examination** (PCCE) leading to the **CORE Registered Paralegal** (CRP) designation, which more than 300 paralegals have earned. In 2004, **NALS,** the **Association for Legal Professionals** (formerly the National Association of Legal Secretaries) launched the **Professional Paralegal** (**PP**) certification examination program. AAPI, although smaller than the other national groups, also has a paralegal certification program.

IPMA, representing supervisors of paralegals and practice support professionals mainly in large law firms and corporate law departments, has about 500 members and has local chapters in major cities across the United States and in Canada.

2. Direct Regulation of Paralegals: Certification and Licensing

Definitions of Terms

Certification of an occupation is usually a form of voluntary recognition of an individual who has met specifications of the granting agency or organization. NALA's CLA program and the NFPA's RP are forms of certification. ***Licensing*** is a mandatory form of regulation by which a government agency grants permission to an individual to engage in an occupation and to use a particular title. Only a person who is so licensed may engage in this occupation. There is no licensing of paralegals at the present time in the United States. Attorneys are "licensed" by the state in which they practice. Typically, both licensing and certification require applicants to pass an examination and meet specified requirements regarding education and moral character.

Certification
Voluntary recognition of an occupation based on a person's having met specified qualifications

Licensing
Mandatory form of regulation in which a government agency grants permission to engage in an occupation and use a title

The term *paralegal* is used in this book as it is now the most accepted term for the profession. All of the professional entities involved in the paralegal profession use this title as opposed to *legal assistant*. In part, this usage has come about because lawyers in many firms started to give the title "legal assistant" to their legal secretaries.

The ABA adopted a **definition** of *paralegal/legal assistant* in 1997, which reads: "A paralegal is a person, qualified by education, training or work experience, who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible." Although states, bar associations, and paralegal organizations deviate slightly from the ABA definition, they generally subscribe to the basic

ideas set forth in this definition: (1) paralegals meet certain qualifications, (2) paralegals work for lawyers who delegate work to them, (3) paralegals do substantive legal work, and (4) the lawyer is responsible for their work.

Regulation of Supervised Paralegals

Throughout the history of the paralegal profession, the need for certification or licensing has been raised and debated. Gradually, some minimal forms of regulation have been adopted.

Early in the profession's development, Oregon had a **voluntary certification** program, which was abolished after a few years because of low participation. Texas adopted a voluntary certification program for paralegals in 1994. Texas administers its program through its Board of Legal Specialization. Certification examinations are given in a number of areas, including family law, civil trial practice, criminal law, and personal injury practice. Certification, valid for five years, is renewable upon demonstrated participation in continuing education, employment by a Texas attorney, and substantial involvement in a specialty area. Since 2004, the North Carolina and Ohio bar associations established voluntary certification programs for paralegals, and the Florida Supreme Court adopted rules for a Registered Paralegal Program, which is based on a paralegal's having specified educational credentials or work experience and passing one of the major certification exams of NALA or NFPA. Nearly 10,000 paralegals are certified by those three states.

A few states have taken steps toward the **regulation** of paralegals. In 1992, South Dakota's Superior Court adopted rules governing the use of the title legal assistant/paralegal. And in 1999, Maine adopted a statute that defines "paralegal" and "legal assistant" and restricts the use of the title to those persons. Anyone who does not fit the definition, which requires the person to work under lawyer supervision, may be fined. Both Florida and Arizona limit the use of the title "paralegal" and similar titles by Supreme Court Rule to persons working under lawyer supervision.

In 2000, California enacted a statute that defines who may use the title "paralegal" (and comparable titles) and sets qualifications and continuing education requirements. The statute requires paralegals to be supervised by lawyers and distinguishes them from "legal document assistants," a title used in other state legislation for nonlawyer legal service providers who do not work for lawyers. This statute is not enforceable through any particular state agency and no registration or licensing is involved. Criminal penalties are available, however, for anyone using the title while providing legal services directly to the public. Arizona, Florida, and New Mexico have court rules limiting the use of the title "paralegal" as well.

The ABA has issued policy statements that reject the notion that paralegals should be licensed, indicating that the public is protected by the extensive ethical and disciplinary requirements to which lawyers are

subject. IPMA also adheres to the position that licensing of paralegals who work under lawyer supervision is unnecessary for the protection of the public and would unduly interfere with a lawyer's prerogative to hire the best-qualified person for the job. NALA is also against mandatory licensing, mainly on the basis that there is no need for it to protect the public. NFPA has historically promoted regulation as a means to enhance and expand the role of the paralegal.

The Regulation Debate

Arguments **favoring licensing** of paralegals who work under lawyer supervision center mainly on the benefits to the paralegal occupation, in terms of establishing it as a separate and autonomous but allied legal career, one with its own identity and a concomitant increase in societal status and rewards.

Proponents believe regulation would:

- provide appropriate public recognition for paralegals as important members of the legal services delivery team
- ensure high standards and quality of work by paralegals
- expand the use of paralegals, thereby expanding access to legal services and lowering costs
- provide assurance to clients and employers of paralegals of their qualifications
- encourage needed standardization in paralegal education

Some proponents favor regulation only if it permits paralegals to expand their role by permitting them to engage in work that they are not currently permitted to do under state statutes and case law.

The primary arguments **against licensing** of traditional paralegals contend that licensing would:

- not benefit the public because attorney-employers are already fully accountable to clients
- increase the cost of employing paralegals and therefore increase the cost of legal services
- stifle the development of the profession
- inappropriately limit entry into the profession
- unnecessarily standardize paralegal education
- restrict the movement of paralegals into new areas of practice or duties

One important concern cited by opponents is the practical difficulty of determining exactly what legal tasks and functions could be assigned exclusively to paralegals through this regulatory process.

Nonlawyer Legal Service Providers

The need to reform the legal services delivery system to provide **access to legal services** for low- and middle-income Americans is one of the greatest challenges facing the legal profession. Study after study has indicated that most Americans do not have access to legal services, cannot afford a lawyer when they need one, and do not know how to go about finding a lawyer. Low- and middle-income persons who need legal services are more frequently than ever representing themselves, with or without the assistance of self-help manuals and nonlawyers. It is not unusual in many parts of the country for the majority of marital dissolutions to be handled in *propria persona*.

The ABA and some state supreme courts and bars have researched and studied access issues extensively, with an eye toward increased use of nonlawyers as one method of addressing the unmet need for legal services. Most studies find some form of nonlawyer practice in virtually every jurisdiction; many states have considered proposals related to the regulation of nonlawyer practice. Recommendations usually include expanding the role of supervised paralegals and granting limited authority to nonlawyers to provide legal services, with appropriate oversight and regulation to protect consumers.

In some states, court rules and legislation have authorized nonlawyers to perform certain tasks that might otherwise be reserved exclusively to lawyers. For example, some courts have **court facilitators** who assist persons who are representing themselves in completing forms to be filed with the court, a function that might require the facilitator to give legal advice. Court facilitators have been widely used in family law courts. California has legislation that regulates nonlawyer legal services providers, called ***legal document assistants*** and ***unlawful detainer assistants***, by requiring them to register in the county in which they work. This statute does not, however, expand their role; in fact, it specifically prohibits them from providing legal advice. Similarly, Arizona has court rules much like California's statutes, which authorize ***legal document preparers*** to assist the public (without providing legal advice, of course).

Legal document assistants/legal document preparers
Nonlawyers who are authorized to assist members of the public in representing themselves, but who are not permitted to give legal advice or represent clients in court

Although not much progress has been made officially in expanding the role of nonlawyers in the delivery of legal services, nonlawyer practitioners continue to provide assistance to people who need legal help — and the debate continues. In the state of Washington, the Supreme Court, some years ago, created the Practice of Law Board with the purpose of increasing access to legal services. In 2012, the Washington Supreme Court adopted the Limited Practice Rule for Limited License Legal Technicians (LLLTs). Under this rule, the court established a board that will recommend areas of the law in which such persons might be licensed to provide services to clients. The rule also sets educational and experience requirements, defines permitted activities, and sets prohibitions and ethical and financial requirements. LLLTs can interview clients,

inform clients of procedures, provide self-help materials, explain legal documents, select and complete forms, perform research, and draft letters and documents. LLLTs cannot engage in the practice of law or appear in court. In 2013, family law was selected as the first area in which legal technicians could be licensed. As of this writing, 17 family law legal technicians have been granted limited licenses. This program is the most progressive plan anywhere for increasing access to legal services through the use of nonlawyers. (For more on nonlawyer practitioners see Chapter 2, Unauthorized Practice of Law.)

3. State Guidelines for the Utilization of Paralegal Services

In an effort to promote the effective and ethical use of paralegals, some states have adopted guidelines to assist lawyers in working with paralegals. These guidelines, directed specifically to attorneys, highlight the key ethical matters that come into play when a nonlawyer is involved in the delivery of legal services, such as the unauthorized practice of law, confidentiality, conflicts, and fee splitting.

At the time of this writing, about 30 states have some kind of guideline. In a handful of states, the guidelines have been adopted by the highest court of the state. In a few states, the legislature has acted. In most states, the guidelines have been approved by the state bar association, a state bar committee on paralegals, or both. Some of the states that have adopted guidelines have also prepared accompanying statements on the effective use of paralegals.

In 1991, the ABA adopted its first **Model Guidelines for the Utilization of Paralegal Services**. These guidelines were written to provide a model for states that want to adopt such guidelines and to encourage attorneys to use paralegals effectively and appropriately. Several jurisdictions have either adopted the ABA guidelines or amended their existing guidelines utilizing the ABA model.

4. Paralegal Association Codes of Ethics and Guidelines

The two major national paralegal professional associations both have codes of ethics to guide the conduct of their members. NALA calls its code the **Code of Ethics and Professional Responsibility**, included in Appendix A at page 203. NFPA has a **Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement**, which it encourages its affiliated local associations to adopt (included in Appendix B at page 207).

NALA has both individual members and affiliated local chapters. Members sign a statement of commitment to NALA's code on their membership application, and a mechanism is in place at the national level to investigate allegations of code violations and to remove from membership or to remove the CLA/CP designation from any member who has violated the code.

NFPA issues ethics opinions on current concerns of interest to practicing paralegals. These opinions have addressed such matters as communications over the Internet and the role of paralegals who work in the corporate setting.

Both organizations make literature on ethics available. Their websites are:

- The National Association of Legal Assistants: www.nala.org
- The National Federation of Paralegal Associations: www.paralegals.org

5. Responsibility of Lawyers for Paralegal Conduct

Because paralegals are not lawyers, they are neither directly bound by state codes of ethics for lawyers nor subject to direct sanctions for breaches of those codes. Without state certification, licensing, or some other form of direct regulation of the paralegal occupation, paralegals are bound to comply with high standards of professional behavior primarily because the lawyers for whom they work are responsible for any lapses in their behavior. Lawyers therefore have a strong incentive to ensure that the paralegals they employ are familiar with the state's ethics code and comply with it. Some states specifically require lawyers to take affirmative steps to educate the paralegals they employ about ethical obligations and to ensure their compliance.

The ABA Model Rules of Professional Conduct contain an important provision on supervision, Model Rule 5.3, which requires partners, supervising lawyers, and lawyers with managerial authority to "make reasonable efforts" to ensure that nonlawyer conduct is compatible with the lawyer's ethical obligations. Further, a lawyer is responsible for a paralegal's unethical conduct if the lawyer ordered it or ratified it, or if the lawyer is a partner in the firm, has managerial authority, or is the paralegal's supervisor and fails to take remedial action. Most states follow the principles of this rule and hold lawyers responsible for the unethical conduct of paralegals and other nonlawyers who work for them. As a result, lawyers may be disciplined for the unethical conduct of their paralegals. Comments to Model Rule 5.3 confirm that this rule applies to paralegals and other nonlawyers outside the firm who are retained to

assist the lawyer and states that the extent of the lawyer's oversight depends on "the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed. . . ."

Lawyers are also liable in civil suits for the negligent conduct of paralegals who they employ or retain. Paralegals themselves are potential defendants in civil legal malpractice suits brought by clients who believe paralegals in their attorney's employment may have acted negligently. Paralegals are subject to the same general tort principles that apply to lawyers and other professionals; that is, they are liable for negligent or intentional misconduct that injures a client.

Because clients always name their lawyers and rarely name paralegals as defendants in malpractice cases, there is little case law available defining the standards of conduct to which paralegals are held. However, it is generally accepted that a paralegal is held to the same standard of care, skill, and knowledge as other paralegals, so long as the paralegal does not hold himself or herself out as a lawyer and performs typical paralegal tasks. Most lawyers carry insurance that provides coverage in the event that a client names a paralegal in a malpractice action. This coverage ordinarily extends to all the nonlawyer personnel who are employed by the lawyer.

REVIEW QUESTIONS

1. When and why did the paralegal profession begin?
2. What are the two main professional associations for paralegals?
3. What is certification? What is licensing?
4. What state(s) have some form of voluntary certification of paralegals?
5. What are the national associations' programs for paralegal certification called?
6. What is limited licensure? How do nonlawyer legal service providers differ from traditional paralegals who work under the supervision of attorneys?
7. What are the arguments in favor of the licensing of traditional paralegals? The arguments against?
8. To what extent are paralegals directly regulated at the present time?
9. How many states have guidelines for the utilization of paralegals? What is the purpose of these guidelines?
10. What are the ABA Model Guidelines for the Utilization of Paralegal Services?
11. Do NALA and NFPA have rules on the conduct of paralegals? If so, how are these rules enforced?

12. May a paralegal who is negligent while working on a client's case be held liable for malpractice? May this paralegal's attorney-employer be held liable? If so, on what grounds?
13. Is a lawyer responsible for a paralegal's breaches of conduct such that the appropriate state entity may discipline the lawyer? Can the same state body discipline the paralegal?

HYPOTHETICALS

1. Lawyer Ann Adams and paralegal Ben Burns have been hired by client Carl Carlson to sue a grocery store where Carl, who is 85, fell down when he slipped in a puddle of water in the produce aisle. Ann delegates the task of preparing the complaint to Ben. Ben mis-calendars the date that the complaint must be filed and the statute of limitations passes. What are Carl's remedies? Can he name Ben as a defendant if he brings a lawsuit? What kind of lawsuit can he bring? What will happen if he reports the matter to the proper disciplinary authorities? Is the failure to file the complaint on time an ethical breach? Can Ann and/or Ben be disciplined for this conduct by the state supreme court or another disciplinary authority? What if Ann already has a private reprimand on her record for a similar violation? What if three other clients have reported Ann for failing to return calls and show up for court dates?
2. The state of Aurora is determined to regulate paralegals. A group of paralegals is lobbying hard for regulation so that the paralegals can be distinguished from nonlawyer legal service providers who often use the title "paralegal." Two years earlier, the Aurora Supreme Court struck down legislation that would have allowed nonlawyers to represent clients in workers' compensation cases. The proposed legislation regulating paralegals is passed and signed into law. A group of lawyers files suit, requesting that the court declare the legislation invalid. Under what theory might the court strike down the legislation? Would the same result be likely in all jurisdictions? If the legislation is found unconstitutional and is struck down, what should the paralegals do to get the regulation they want?

DISCUSSION QUESTIONS AND PROJECTS

1. Find out where you can locate the recent decisions of disciplinary cases in your jurisdiction. What are the usual reasons for discipline? Do any of these cases involve paralegals?
2. Research your state statutes to find where paralegals are mentioned.

3. Obtain the position papers on regulation of all the paralegal-related groups mentioned in this chapter and compare their views. Have a debate in class. Bring in representatives of the local paralegal associations to discuss their views.
4. Research nonlawyer legal service providers working in your area. How many are there? Who uses their services? What titles do they use? In what areas of law practice do they work?
5. Does your state or local bar association allow paralegals to join as associate members? Does your state or local bar have a committee that concerns itself with paralegals? Does your state or local bar have guidelines for lawyers who work with paralegals? Has it considered the licensing of traditional paralegals or independent paralegals who provide services directly to the public? If you are in a state with a certification or registration program (Ohio, North Carolina, or Florida), how many paralegals are now certified or registered?
6. What developments have taken place in the LLLT program in Washington since this book was written?
7. Who is covered and not covered by the ABA definition of *paralegal*? Do you like this definition? Why or why not? How would you change it?
8. Is voluntary certification through NALA or NFPA popular in your state or local area? Why or why not?

SELECTED CASES

Hagen v. Kassler Escrow, Inc., 96 Wash. 2d 443, 635 P.2d 730 (1981) (case in which state supreme court struck down legislation relating to the practice of law).

Florida Bar v. Lawless, 640 So. 2d 1098 (Fla. 1994) (freelance paralegal whose mistakes resulted in lawyer discipline).

In re Phillips, 26 Ariz. 112, 244 P.3d 549 (2010) (lawyer with high-volume practice sanctioned for failure to supervise).

Musselman v. Willoughby Corp., 230 Va. 337, 337 S.E.2d 724 (1985) (paralegal involved in malpractice).

State Bar of Arizona v. Lang, No. 1 CA-CV 12-0629 (Ariz. Ct. App. 2014) (law school graduate who was not admitted to the bar enjoined from practicing law).

Supreme Court of Arizona v. Struthers, 179 Ariz. 216, 877 P.2d 789 (1994) (lawyer allows untrained "paralegals" to run his law practice and share fees).

Unauthorized Practice of Law Committee v. State Department of Workers' Compensation, 543 A.2d 662 (R.I. 1988) (case in which state supreme court upheld legislation relating to the practice of law).

SELECTED REFERENCES

ABA Model Rules of Professional Conduct, Rule 5.3.
Also see your jurisdiction's rules of professional conduct and court rules and guidelines for paralegals, if any.

2

Unauthorized Practice of Law

This chapter defines the practice of law and describes the functions that fall within this definition. Special emphasis is placed on how these limitations affect paralegals. Chapter 2 covers:

- a brief history of the unauthorized practice of law from the colonial era to the present
- definitions of the practice of law
- the lawyer's ethical responsibility to prevent the unauthorized practice of law and to supervise paralegals
- key areas of special importance to paralegals, including:
  - court appearances, depositions, pleadings, and giving legal advice
  - establishing the attorney-client relationship and setting fees
  - job functions that may constitute the unauthorized practice of law
  - nonlawyer practice before administrative agencies
  - disclosure of status as a paralegal

A. Brief History of the Unauthorized Practice of Law

Limitations on who can practice law in the United States can be traced back to the **colonial era**. At that time, a proliferation of untrained practitioners caused local courts to adopt rules requiring attorneys who appeared before them to have a license granted by the court. Additional rules adopted during this period limited the amount of fees that could be charged and dictated that a lawyer could not refuse to take a case. The stated purposes of these rules were to prevent stirring up of litigation by unscrupulous "pettifoggers" and "mercenary" lawyers, to stop incompetence that harmed not only the clients but the administration of justice and dignity of the courts, and to prevent exploitive, excessive fees.

The rules establishing entry to the practice of law evolved slowly and unevenly through American history. In the **mid- to late 1800s**, state and local bar associations began to gain strength, and the first ***unauthorized practice of law*** (***UPL***) statutes were passed. These laws prohibited court appearances by anyone not licensed as an attorney, prohibited the practice of law by court personnel such as bailiffs, and made it illegal for an unlicensed person to hold himself or herself out as a lawyer and for a nonlawyer to form a partnership with a lawyer.

UPL
Unauthorized practice of law

The definition of *practice of law* being formulated in these cases was gradually broadened to cover activities beyond court appearances. Most early cases defined the term as the preparation of documents by which legal rights are secured. New justifications for restricting the right to practice law to licensed attorneys emerged, including the lawyer's professional independence, moral character, and special training, and the fact that, unlike unlicensed practitioners, lawyers are subject to sanctions for breaches of duty or competence.

Some legal historians and commentators believe that the height of unauthorized practice restrictions came during the **Depression**, when lawyers sought to protect their economic interests from competition. Bar associations became especially powerful trade organizations during this era. Passed in virtually all states, unauthorized practice statutes made it a crime to practice law without a license. The definition of *practice of law* was further expanded to include "all services customarily rendered by lawyers." In the **1930s**, the ABA and state bars entered into agreements with accountants, collection agencies, insurance adjusters, life insurance underwriters, publishers, realtors, and other professionals that delineated the law-related activities that nonlawyers could perform without encroaching on the practice of law. These agreements were rescinded in the 1970s when it became apparent that they would be found illegal under the Sherman Antitrust Act.

Criminal prosecutions and civil suits to restrain unauthorized practice slowed during the 1960s and 1970s. Courts in several states

found that the sale of legal self-help kits and books did not constitute UPL. And the movement to expand access to legal services by alternative means started to take hold.

The **1980s and 1990s** saw a resurgence of unauthorized practice prosecutions because of the increased number of independent "paralegals" providing low-cost legal services directly to the public. Studies since 2000 show that about half of the states actively enforce the UPL rules although several states do little or no enforcement.

B. Trends in the Unauthorized Practice of Law

1. Nonlawyer Legal Service Providers and Related Trends

Many factors that have together created the need for ***nonlawyer legal services providers*** include the decrease in federal funding for the legal services corporation, which in turn funds organizations that provide legal services to persons of low and moderate incomes; the increase in the need for legal services because of the proliferation and complexity of laws; and the rising cost of legal services provided by lawyers, which makes it difficult or even impossible for most Americans to retain a lawyer when they need one.

Most nonlawyer legal service providers work in the **areas of practice** in which low- and moderate-income people need assistance, such as in landlord/tenant matters, divorce, child support, bankruptcy, and immigration. Some run "typing services" that assist persons only by filling in form documents, usually to be filed with the court, after the "customer" tells the provider what to put in the blanks. Others provide more complete information and assistance, helping the customer decide what forms to use, what information to include on the forms, and where to file them and answering questions. Nonlawyer legal service providers use a variety of titles, including "independent paralegal," "legal technician," or "document preparer." As noted in Chapter 1, California uses the titles "***legal document assistant***" and "unlawful detainer assistant" in statutes that require such persons to register with the county in which they work. Arizona uses "***legal document preparer***" as the designation for its nonlawyer legal service providers and Washington uses ***legal technician*** for nonlawyers who are licensed to offer limited legal services.

Legal document preparer/assistant
A nonlawyer legal service provider who is authorized by court rule or statute to assist persons in representing themselves, without being authorized to give legal advice or appear in court

Although the unmet need for legal services is well documented, lawyers are largely opposed to giving up any of their traditional functions. Clearly, lawyers have both monopolistic and economic reasons for this stance and legitimate concerns about the quality of legal services that someone not trained as a lawyer can provide.

Defendants in UPL **prosecutions** in several states have argued unsuccessfully that they are not giving legal advice but are simply assisting laypersons in the preparation of legal documents. Some have argued unsuccessfully that a statutory power of attorney from a client gives a nonlawyer the authority to represent the client in litigation. Some have argued, to no avail, that they have a public necessity defense to a UPL prosecution based on the lack of availability of legal services for their clients.

Meanwhile, several states have seen proposed **legislation** that would define the practice of law more expansively or would institute harsher penalties for UPL, or have stepped up their efforts to prosecute unauthorized practice cases. Bankruptcy reform legislation adopted in the 1990s contains provisions that limit the role of nonlawyer practitioners in Chapter 7 filings, including barring the use of the terms "legal" or "paralegal" in business names. Several states have taken action to regulate nonlawyers who assist persons with immigration matters. Although federal statutes establish nationwide standards for accredited visa consultants, some immigration "consultants" do not fall within the reach of these federal laws, and widespread abuses of clients have been documented. Related is the practice of "notarios" providing legal services; in most of Latin America, notaries are also lawyers whereas in the U.S., notaries witness and authenticate documents, which is confusing for consumers.

Several states have determined that the **preparation of living trust documents** constitutes the practice of law, thus paving the way for the prosecution of companies that market living trust plans. Most decisions hold that the client's decision on whether a living trust is appropriate, the attendant preparation and execution of documents, and the funding of the trust are functions that require an attorney's judgment and involvement. Lawyers in several jurisdictions have been disciplined for aiding in UPL where they have participated in businesses that promote and sell living trusts. Most courts find that these lawyers have abdicated their responsibility to advise clients about the ramifications of such an important legal decision as making a living trust. The lawyers in these cases either failed to supervise the work of their employees in counseling clients and preparing the documents for them or were asked to review documents by the nonlawyer operators who had already advised the clients and prepared documents for them with no attorney involvement whatsoever. Similarly, foreclosure consultants and loan modification agencies that operated during the recession that started in 2008 have been found to be engaging in UPL.

Finally, there is a growing trend toward the **discipline of lawyers** who are running large-volume practices and inadequately supervising their paralegals and other employees. In most of these cases, the paralegals or other nonlawyers are accepting new matters from new clients, having them sign retainer agreements, preparing and filing legal documents, and counseling clients about their legal rights with little or no lawyer involvement and no direct relationship between the lawyer and the client. Some recent cases like this involved lawyers who were operating large-volume

businesses to assist people in fighting foreclosures and who delegate most of the legal functions, including signing up clients, to nonlawyers. In some cases, there has also been unlawful solicitation of clients by nonlawyers, coupled with compensation arrangements that violate rules against fee splitting and/or with partnerships between lawyers and nonlawyers to engage in the practice of law. These fee-related and solicitation issues are covered in Chapters 5 and 6.

2. Multijurisdictional Practice Issues

As stated in Chapter 1, lawyers may practice law only in the jurisdictions in which they are licensed. Therefore it is UPL for a lawyer to provide legal services in another state. Practicing law in more than one state is called **multijurisdictional practice**. Under long-standing traditions and rules, lawyers may be admitted ***pro hac vice*** by courts to represent clients in a litigated matter in a state in which they are not licensed to practice. This special court permission to practice in the state applies only to the one specific case in which the lawyer is acting. In other situations, the out-of-state lawyer employs co-counsel who is licensed in the state where the matter is being worked on. However, more complicated cases are arising all the time because of the global nature of the economy and the mobility of lawyers and clients.

pro hac vice
Special rules that allow a lawyer to represent a client in a court in a state where the lawyer is not licensed to practice

For example, a lawyer who represents a corporation may have to handle litigation and transactional work that is done partially or wholly in another state or relates to an incident or transaction in another state. Is the lawyer who does this engaging in UPL? The ABA Model Rules (Model Rule 5.5) provide "**safe harbors**" for lawyers who are in these situations. In addition to these traditional exceptions, lawyers may participate in alternative dispute resolution in one state if related to work in the state where they are licensed, may do other work reasonably related to work where they are licensed, and may advise corporate clients in a state where they are not licensed, unless it would require *pro hac vice* admission.

C. The Practice of Law Defined

No one definitive list of activities constitutes the practice of law. As you can see from the foregoing history, the concept is somewhat flexible and has changed over time by the push and pull of economics, political and professional activity, public pressure and consumerism, and the complexity of laws. The oft-quoted ABA Model Code of Professional Responsibility (ABA Model Code) EC 3-5 states: "It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what

constitutes the practice of law." Court rules, court decisions, statutes, and advisory opinions have produced several tests for determining what defines the practice of law. A few unauthorized practice statutes attempt to define the practice of law; most do not. Several states have a definition in a court rule. The cases interpreting the unauthorized practice of law statutes analyze the facts in determining if specific conduct constitutes the practice of law. In doing so, they may consider:

- Whether the services require the skills and knowledge of a lawyer
- Whether the activity is one that is traditionally performed by a lawyer
- Whether the services are essentially legal or are "incidental" to some other transaction

Most comprehensive **definitions** of the practice of law contain some of the foregoing language, and some specifically prohibit anyone but a lawyer from doing the following:

- Preparing pleadings and legal instruments, such as wills, contracts, deeds, leases, and trusts
- Preparing any document by which legal rights are secured
- Preparing documents for or making statements to a client that contain legal opinions, arguments, or interpretations of the law
- Appearing in court on behalf of clients or acting as an advocate in a representative capacity
- Giving legal advice — that is, applying knowledge and judgment to a client's particular situation and advising of rights and responsibilities and possible courses of action

Injunctive relief
A court order to stop someone from engaging in certain conduct; in this chapter, the unauthorized practice of law

The unauthorized practice of law is a **misdemeanor** in more than 30 states and subjects a person to civil contempt proceedings in more than 25 states. A common remedy is ***injunctive relief***, which may be requested by prosecutors, bar associations, or courts to stop a nonlawyer from engaging in activities believed to be the practice of law. Other consequences of UPL include liability for negligent performance, unenforceability of the contract for legal services, court dismissal of an action filed by someone engaging in UPL, and voiding of a judgment in which a nonlawyer represented the prevailing party.

D. The Attorney's Responsibility to Prevent the Unauthorized Practice of Law

Rules that prohibit the unauthorized practice of law affect both paralegals who work under lawyer supervision and nonlawyer legal service

providers who deal directly with the public. Ample opportunity exists in a traditional legal setting for a nonlawyer — especially a paralegal — employed by a lawyer to overstep the accepted boundaries into the practice of law.

Lawyers are obligated by various rules not to **aid the unauthorized practice of law**. In many states, a statute prohibits a lawyer from aiding unauthorized practice and, in most states, the ethics code contains such a restriction. This prohibition makes lawyers responsible for the training and supervision of, and delegation of legal work to, the nonlawyers they employ. The obligation of adequate supervision applies to all areas of ethics — such as confidentiality, conflicts, and competence — but carries special force in the area of unauthorized practice. Allowing a nonlawyer under a lawyer's supervision to engage in the practice of law is considered an abdication of the lawyer's fundamental obligation to "exercise independent professional judgment" on behalf of the client. Forming a partnership and dividing legal fees with a nonlawyer are also forbidden under this principle. Chapter 6 discusses these topics in more depth.

As noted in Chapter 1, ABA **Model Rule 5.3**, adopted in most states, establishes the duty of a partner, lawyer with managerial authority, and supervising lawyer to make "reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the [nonlawyer assistant's] conduct is compatible with the professional obligations of the lawyer." Lawyers with managerial authority and the law firm as a whole are included on the list of lawyers who are ethically responsible for paralegal conduct. The rule also makes any lawyer who employs or directly retains the nonlawyer responsible for the nonlawyer's ethical breaches if the lawyer orders, knows of, or ratifies the conduct. Partners and supervising and managing lawyers are also responsible if they learn of the conduct and do not take remedial action. The comment to Rule 5.3 speaks to the lawyer's duty to instruct and supervise assistants, especially with regard to confidentiality.

Guideline 1 of the **ABA Model Guidelines** for the Utilization of Paralegal Services phrases this responsibility a bit differently, stating that a lawyer is "responsible for all of the professional actions of a paralegal performing services at the lawyer's direction. . . ." The comment to Guideline 1 emphasizes the lawyer's duty to provide instruction to paralegals concerning ethics and to supervise paralegals.

Guideline 2 provides an expansive definition of the permissible functions of a paralegal by allowing lawyers to delegate any task except "those tasks proscribed to a nonlawyer by statute, administrative rule or regulation, controlling authority," or the relevant ethics rules.

E. What Constitutes the Unauthorized Practice of Law

1. Making Court Appearances

The one lawyering function that is universally considered to be the exclusive province of licensed attorneys is the representation of a client in court proceedings. You will recall from the history of unauthorized practice at the beginning of this chapter that this was the first kind of restriction placed on nonlawyer practitioners in the early days of the United States.

Presumably, a court appearance, especially an adversarial one such as a pretrial motion or a trial, requires **knowledge and skills** that only a lawyer possesses by virtue of extensive and specialized education, training, and experience. A court appearance is the legal event that decides a client's rights and responsibilities; therefore, the client deserves the best protection and most highly **qualified representation** at this critical moment. Further, incompetent representation in court harms not only the client but also the administration of justice.

Depositions

Deposition
Method of discovery in which a witness or party makes statements under oath in question-and-answer form

The rationale for prohibiting nonlawyer representation in court appearances extends to another aspect of the litigation process: the taking of depositions. In a ***deposition***, one of the key discovery tools, the lawyer asks questions, usually in a face-to-face setting, of an opposing or a third party. The responses are given orally under oath and are recorded by a court reporter or stenographer, who then produces a verbatim transcript of the questions and answers.

A deposition may be **introduced in court** as evidence. It carries the same weight as testimony given under oath in court. This testimony may be used at trial to impeach the credibility of the deponent, or may be admitted in place of direct testimony if the person deposed is no longer available.

The lawyer's role in representing a client being deposed includes **making objections** to questions on evidentiary grounds and preserving these objections for the record. Typically, objections are based on relevancy or privilege. The lawyer who is deposing a party or witness is performing a task similar to that of direct examination in a trial and therefore must be familiar with the complex rules of evidence.

During a deposition, the lawyer asking the questions wants to learn as much as possible about the facts of the case from the witness's perspective, especially if there is information that weakens the opponent's case.

This function requires not only a full understanding of the factual and legal issues, but also highly developed skills in **framing questions** so as to elicit candid and thorough responses.

Nonlawyers, including paralegals, may not conduct a deposition. State ethics opinions have advised that a lawyer may not allow a paralegal to conduct a deposition even where the paralegal has a written list of lawyer-approved questions. The basis for this rule is that the paralegal would not be qualified to answer any questions that might arise, to make objections for the record, or to give legal advice if called upon to do so.

Paralegals nonetheless play an active role in the discovery and trial phases of the litigation process. They are often the **factual experts** in cases and, as such, work with lawyers in preparing for depositions by assisting in identifying areas of questioning. Many paralegals help to **prepare clients** for the experience of being deposed or testifying at trial. Some accompany clients to independent medical examinations. It is common for paralegals to **attend depositions and trials**, where they take notes, assist with the introduction of evidence, and otherwise handle last-minute details or unanticipated matters that arise during trial. One open question is whether paralegals can attend the deposition of a witness without a supervising lawyer present for the sole purpose of observing the witness. Most ethics experts believe that this is acceptable, but a few do not on the basis that the paralegal must state for the record the party he or she is "representing."

Pleadings

In addition to being restricted from representing clients in court and taking depositions, paralegals cannot **sign pleadings** or other documents filed with the court on behalf of a client. A ***pleading*** constitutes a written **"appearance"** in court that only a licensed lawyer can undertake. Paralegals often prepare pleadings and other documents that are filed with courts. Lawyers must review these documents so that, in essence, the lawyer adopts the paralegal's work and it merges into the lawyer's.

Pleading
A written document filed with a court that sets forth the facts of a party's case or the defendant's grounds for defense

Exceptions

Despite the clear rules and strong rationale for these prohibitions on the nonlawyer's role in court-related matters, a few notable exceptions do exist. Perhaps most important is the general rule of ***self-representation***. The right of self-representation in federal courts is guaranteed by statute (28 U.S.C. § 1654) and upheld in court cases such as *Faretta v. California,* 422 U.S. 806 (1975). However, cases in federal and several state courts have determined that the right to self-representation does not encompass a right to be represented by a nonlawyer.

pro per/pro se
A person representing himself or herself in a legal matter

Some states have carved out narrow exceptions for the **marital relationship**. A California statute, for instance, permits one nonlawyer spouse to represent the other if both are joined as defendants in the same case and are appearing in **propria persona** (sometimes shortened to ***pro per*** or else called ***pro se***). However, parents cannot generally represent their children in actions before the courts, nor can a nonlawyer-plaintiff represent other nonlawyer co-plaintiffs. A California court has held that a nonlawyer representing an estate in pro per may not act for the estate in a non-probate matter.

All jurisdictions have rules permitting **law students** to engage in limited practice under a lawyer's supervision, and nearly all allow law students to represent clients in court. This exception has been created for the dual purposes of providing practical training for law students and increasing the availability of legal services. Rules governing law student practice vary from jurisdiction to jurisdiction. Most states' rules identify specific qualifications that the law student must meet, require certification of the student by the law school dean and attorney-sponsor, and impose strict limitations on the kind of court appearances that the law student may make without being accompanied by the supervising attorney. It should be noted, however, that, except for these special rules, law students, law school graduates who have not yet been admitted to the bar, and former lawyers who are inactive or have been suspended or disbarred have the same status as other nonlawyers when applying the UPL rules.

In some local courts, paralegals are allowed to make appearances for their attorney-employers in uncontested matters under **local court rules**. These rules usually permit paralegals who are registered with the local bar or court to present stipulated, *ex parte*, and uncontested orders in court when such orders are based solely on the documents in the record. Paralegals must meet specified educational and work experience requirements and must be sponsored by the employing lawyer. One recent state ethics opinion endorses a paralegal's signing a pleading in exigent circumstances for the protection of the client.

Administrative Agencies

Administrative agency
A government body responsible for control and oversight of a particular activity, usually in a highly specialized field

An ***administrative agency*** is created by a state or the federal legislature to provide for the regulation of a highly specialized area. A few examples of administrative agencies are the Patent Office and Social Security Administration (at the federal level) and workers' compensation, unemployment insurance, public utilities, and disability boards (at the state level). Many administrative agencies handle an extremely large volume of cases that do not require much more than a mechanical application of rules. The volume of cases and the specialized nonlegal subject matter involved make it impractical and inefficient to adjudicate disputes in these fields through regular court procedures.

Administrative agencies are **quasi-judicial** in nature, which means that disputes before these agencies are resolved through a hearing similar to, although usually less formal than, a trial. Proceedings are conducted before an administrative law judge or hearing officer or examiner, with advocates representing the parties. Procedures include the issuance of subpoenas, testimony under oath, admission of evidence, and oral and written arguments.

Practice before administrative agencies would constitute the practice of law without a specific **exception**. Someone representing a client before an administrative agency needs advocacy skills similar to those required of an attorney representing a client in a trial. The representative must have knowledge of the law and of the procedures used by the agency; must be able to apply this knowledge to the specific facts and context of the case, using the proper analytical and judgmental abilities in doing so; and must be able to advocate the client's case competently in an adversarial setting. Although the area of law might be narrower and the rules of evidence and procedure more informal than in a court, the functions of the advocate-representative and the required knowledge and skills in this setting are essentially the same as those of a trial lawyer.

Despite these similarities, many administrative agencies do not require persons appearing before them to be lawyers. And lawyers and the organized bar have not fought very hard to keep administrative agencies within the exclusive domain of the practice of law. Some administrative cases involve low-income individuals and small amounts of money. The fees paid or awarded by the agencies are also relatively small and provide little economic incentive for a turf battle over unauthorized practice.

The **federal government** has long permitted nonlawyer practice before many of its administrative agencies. The purpose of doing so is twofold: to allow easy access to these agencies and to make the process as informal, efficient, and inexpensive as possible. The Administrative Procedure Act, 5 U.S.C. § 555(b) (1994), specifically authorizes individual federal administrative agencies to permit nonlawyer practice. It states that persons compelled to appear before an agency may be "accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative." This provision leaves the decision about nonlawyer practice to the agency itself. Some agencies have set very specific criteria (for example, a degree such as a JD or a license as a lawyer or as a certified public accountant, the recommendation of others admitted to practice, or an exam that must be passed) for nonlawyers to practice before the agencies. A few such federal agencies are the U.S. Patent Office, Internal Revenue Service, and Interstate Commerce Commission. Other agencies allow all nonlawyer representatives without requiring them to meet any specific standards. Examples of these agencies include the National Labor Relations Board, Small Business Administration, Social Security Administration, and Bureau of Indian Affairs. State

decisions about UPL can also affect practice before administrative agencies. For example, at least two states and several federal courts have held that nonlawyers cannot represent parents or children in hearings held under the Individuals with Disabilities Education Act.

There is no consistency among the **states** about nonlawyer practice before administrative agencies. Some state statutes authorize representation by nonlawyers before the state's agencies, and some do not. In states that have a strong judicial history supporting the inherent power of the court to oversee the practice of law, legislation authorizing nonlawyer practice before state administrative agencies has been struck down. Most states that have considered the matter endorse a lawyer's use of a paralegal employee to represent a client before an administrative agency if a nonlawyer is otherwise allowed to make such appearances, with the proviso that the paralegal be adequately supervised.

2. Establishing the Attorney-Client Relationship

The lawyer-client relationship is a **fiduciary relationship** that is held sacrosanct under ethics rules and statutes that relate to lawyers. Lawyers are held to a high standard of care in serving clients and are bound by duties of loyalty and confidentiality. Lawyers' communications with clients are protected by the attorney-client privilege, discussed in Chapter 3. The privilege and the duties of the lawyer generally begin with the formation of the relationship.

Only the lawyer should agree to represent a client. A paralegal should not state orally or in writing to a prospective client that the lawyer will represent the client without lawyer approval and should not sign a retainer or other agreement on behalf of the lawyer. The lawyer must be directly involved in making the decision to undertake the representation and in making the arrangements with the client concerning the **scope of the representation** and the **fees** to be charged for the work. Chapter 6 includes a discussion of what should be contained in the agreement between the lawyer and the client.

The prohibition on a paralegal establishing the lawyer-client relationship is sometimes stated in terms of the paralegal not "**setting fees**" or "**accepting cases**." One distinction that needs to be made is between "setting" fees and "quoting" fees. The prohibition on "setting fees" does not preclude a paralegal from quoting standard fees to a prospective client or a client with the lawyer's permission and with the proviso that only the lawyer can actually contract with the client for legal services and determine the fee that will be charged to handle the client's case.

The ethical violation of setting fees or accepting cases usually arises in combination with other **unauthorized practice** matters. For

example, there have been many disciplinary cases in which a lawyer is operating a high-volume law practice with many nonlawyer employees who handle the cases completely on their own up until the time the case goes to a hearing or to court. In some of these cases, the nonlawyers (called "paralegals" whether trained as such or not) interview the prospective clients and have them sign a standard retainer agreement without the lawyer's involvement. The nonlawyers usually prepare and file all the documents with little or no lawyer review. The clients do not meet the lawyer until they have to go to court.

Bear in mind that this ethical prohibition on forming the lawyer-client relationship does not protect the lawyer if the client later claims that no relationship was formed. Courts have found that the lawyer-client relationship was formed because of the **apparent authority** of the nonlawyer employee to establish that relationship.

Finally, paralegals should be aware that lawyers have **duties to prospective clients**, including the duty not to reveal information learned in a consultation and not to agree to represent a client if there is a conflict. (See Chapters 3 and 4.)

3. Giving Legal Advice

Formulating a **substantive legal opinion** that will guide a client's conduct is one of the most important and critical functions an attorney undertakes. Determining what legal advice to give to a client requires the application of the lawyer's knowledge of law gained through extensive formal education and experience, judgment and analytical abilities, and an understanding of the client's situation, context, and goals.

Defining the parameters of "giving legal advice" is complex and contains a lot of gray. In general, giving legal advice may be any of the following:

1. **directing or recommending** a course of action to a client about how to proceed in a matter that may have legal consequences;
2. **explaining** to a client his or her legal rights and responsibilities;
3. **evaluating** the probable outcome of a matter, including litigation; or
4. **interpreting** statutes, decisions, or legal documents to a client.

Many paralegals and other nonlawyers in legal settings have frequent contact with clients, which may open the door to situations where they are asked a question that calls for legal advice. Paralegals often cite **client contact** as an area of their work that affords considerable job satisfaction. Paralegals are often easier to reach by telephone than lawyers, who are frequently unavailable because they are in court or meetings. Because most paralegals enjoy client contact, they may be more patient with clients than lawyers are, especially with clients who need a lot of

attention. Paralegals may use less legal jargon than lawyers and may be able to explain matters in simple language. Finally, it is more cost-efficient for the client to speak with a paralegal rather than a lawyer.

It is not uncommon for a client to develop an especially good rapport with a paralegal who works with that client over time, and for the client to ask questions that would require the paralegal to give legal advice in response. That the paralegal may know the answer to the question exacerbates this dilemma. To avoid engaging in unauthorized practice, the paralegal must consult with the lawyer before relaying advice to the client. The paralegal may communicate such advice so long as it is the advice of the lawyer. And the paralegal must convey the exact legal opinion of the attorney without expansion or interpretation.

A lawyer cannot avoid all client contact by delegating to the paralegal responsibility for a matter without providing oversight and reviewing the paralegal's work. Lawyers must maintain a "**direct**" **relationship** with clients and must exercise independent professional judgment. Over-delegation creates great potential for ethical problems to arise.

A Few Examples

There is general agreement that most common paralegal functions can be performed within the bounds of ethics so long as the functions are performed with appropriate supervision and a lawyer reviews the work. However, there is not a uniform opinion on some functions. One of these is ***will executions***, a relatively simple but critical step in the process of estate planning. Whether by case law or statute, very specific rules exist in every state about the signing and witnessing of wills, including the number of witnesses, their relationship to the person(s) making the will, and their presence during the signing. In early ethics opinions, some state bars took the position that delegating the task of supervising a will execution is tantamount to having the paralegal counsel the client, and therefore constitutes the practice of law. The weight of opinions is now to the contrary, and most states that have addressed the matter say that a paralegal may oversee a will execution or serve as a witness to a will so long as he or she does not give legal advice.

Will execution
The formal process of signing and witnessing a will

Likewise, a few states prohibit lawyers from allowing a paralegal to assist with ***real estate closings*** without the supervising lawyer present, based on the rationale that the client is likely to ask the paralegal for legal advice, particularly for an explanation of the meaning and legal consequences of the various legal documents that must be signed. In addition, there is always the potential for last-minute disputes to arise over terms, disputes that the lawyers would need to resolve. A paralegal who gives legal advice by explaining the legal implications of documents or by attempting to resolve a dispute over terms would likely be engaging in UPL.

Real estate closing
The consummation of the sale of real estate by payment of the purchase price, delivery of the deed, and finalizing collateral matters