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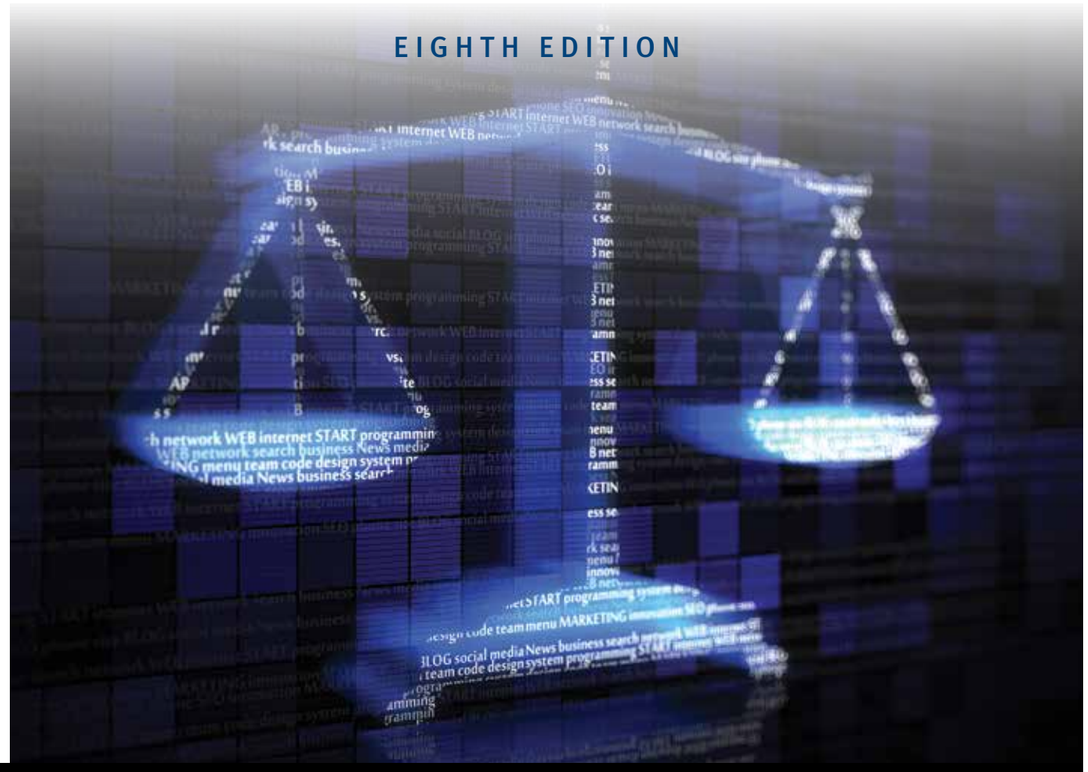
T. Cannon • S. Taylor Aytch

ETHICS AND PROFESSIONAL RESPONSIBILITY FOR PARALEGALS

EIGHTH EDITION



ETHICS AND PROFESSIONAL RESPONSIBILITY FOR PARALEGALS

EIGHTH EDITION

Therese A. Cannon and Sybil Taylor Aytch

Now in its **Eighth Edition**, ***Ethics and Professional Responsibility for Paralegals*** presents timely, authoritative content in a clear and engaging format. Both paralegal students and fledgling paralegals will sharpen their professional skills by working with the cases, hypothetical problems, and research projects in every chapter. As a coursebook or a supplement, ***Ethics and Professional Responsibility for Paralegals*** can be adapted to a variety of approaches and teaching objectives; it's always an excellent choice.

For the **Eighth Edition**, distinguished author **Therese A. Cannon** welcomes a new co-author. Sybil Taylor Aytch is an ethics professor, senior paralegal, and a leader in the paralegal profession.

Written from the perspective of the paralegal, *Ethics and Professional Responsibility for Paralegals* features:

- **Comprehensive coverage** of the professional responsibilities of paralegals
- **Illuminating chapter overviews, key terms, and a student-friendly organization**
- **Discussion questions with hypotheticals** in every chapter
- **Chapter review questions** reinforce learning and facilitate studying
- **Research assignments** that provide depth and practice in applying the rules
- **Landmark cases,** many involving paralegals, that demonstrate how the principles and rules of ethics are applied

New to the Eighth Edition:

- **Major case decisions in legal ethics, such as** *State Bar v. Lang, Committee v. JPMorgan Chase, Lola v. Skadden, Pension Committee v. Banc of America Securities,* and *McDermott v. Superior Court*
- **Recent developments regarding technology in legal practice,** including confidentiality and privilege, competence, conflicts of interest, and advertising

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Ethics and Professional Responsibility for Paralegals

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Ethics and Professional Responsibility for Paralegals

Eighth Edition

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This book is dedicated to the professional paralegals across the country who work diligently every day to deliver quality legal services and uphold the highest standards of professionalism and ethics.

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Preface

New to the Eighth Edition

This book was written and first published 25 years ago. This year the book was co-authored with my accomplished and talented co-author, Sybil Taylor Aytch. As an ethics teacher, senior paralegal, and leader in the paralegal profession, she brings deep knowledge and experience to this task. You will see her mark on these pages now and for years to come.

Approach

This book is written for paralegal students, working paralegals, and lawyers who use their services. It is intended for use primarily as a text but also as a reference for practicing lawyers and paralegals.

It has been 50 years since the advent of the paralegal profession. What started as a modest proposal to improve the delivery of legal services has become a reality in the profession. Paralegals are embedded in law practices, serving as integral members of the legal services delivery team. Lawyers in all kinds and sizes of private law firms and those in corporations, government, and the public sector rely heavily on paralegals to accomplish their work. Paralegals are highly educated and competent, engaging in sophisticated work in all areas of law practice.

The paralegal occupation has been one of the fastest growing in the country for 40 years. It is estimated that there are more than 250,000 paralegals employed across the country. The career is well recognized by the general public, and young people learn of and aspire to it. The roles

and functions of paralegals continue to expand into new and exciting areas. The prestige of the occupation has also risen.

We have also witnessed tremendous growth and change in the legal profession generally. The many forces of change include the integration of technology, the use of marketing and advertising, greater competitiveness among firms, increased attorney mobility, the development of mega-firms, the impact of a global economy, more complex laws, and legal specialization. In the past 10 years, we have seen a dramatic decline in the number of new lawyers entering the profession and a major re-thinking of law practice. These changes have affected legal ethics in ways that probably no one anticipated and have the potential for significant changes in the delivery of legal services and the role of paralegals.

The role of nonlawyers in providing legal services directly to the public continues to be a topic of intense debate as the public and the profession seek ways to increase access to services and control costs. In the past decade, several jurisdictions have taken steps to formalize the nonlawyer role, which is beginning to bend the traditional rules governing the practice of law. New ethics opinions and revisions to rules continue to develop in response to this dynamic environment. Paralegals must have a clear understanding of legal ethics — the concepts and rules that guide them in their work. This grounding is essential for paralegals to function competently and with integrity, to be alert to potential ethical dilemmas in their work, to develop a framework for ethical decision making, and to keep abreast of changes in rules as they develop.

Organization and Coverage of the Eighth Edition

The book is comprehensive and covers all the major areas of legal ethics, placing special emphasis on how the rules affect paralegals. The book begins with a chapter on lawyer regulation because paralegals must understand how the profession is regulated to understand their place in it and the impact of their conduct on the lawyers who employ them. Chapter 2 contains a brief history of the paralegal career, the ways the occupation is regulated, and the growth of voluntary paralegal certification and other moves toward licensing. This chapter examines ethics guidelines for paralegals developed by courts, legislatures, and bar and paralegal associations. Chapter 3 covers the unauthorized practice of law, introducing the history of UPL and definitions of the practice of law, explaining functions that either are prohibited to nonlawyers or are on the borderline. Chapters 2 and 3 both include material on the

provision of legal services directly to clients by nonlawyers and updated information on ways to increase access to legal service through nonlawyers. Chapter 4 covers confidentiality. In discussing the attorney-client privilege, the work product rule, and ethics rules regarding confidentiality, the chapter outlines the duties of paralegals and ways to avoid breaches of confidentiality. Special emphasis is given to inadvertent disclosure and the impact of technology on protected communications.

Chapter 5 covers conflicts of interest, a critical concern given the mobility of lawyers, clients, and paralegals. The chapter includes an in-depth discussion of conflicts rules and how to avoid conflicts, including the use of screens and conflicts checks. Chapter 6 covers rules regarding legal advertising and solicitation, with a discussion of trends in marketing legal services, including the use of social media. Chapter 7 is devoted to financial matters that arise in the representation of clients and between lawyers and paralegals. It discusses billing, fees, statutory fee awards that include compensation for paralegal work, fee splitting, referral fees, partnerships between attorneys and nonlawyers, compensation of paralegals, and handling client funds. Chapter 8 defines the concept of competence specifically in relation to paralegals and includes a discussion of malpractice. Special issues facing litigation paralegals, including communications with clients, courts, parties, and witnesses are covered in Chapter 9. Finally, Chapter 10 examines professionalism and issues facing paralegals in today's law firm environment, including titles, overtime, regulation and changing roles, diversity, and *pro bono* work.

Key Features

Each chapter begins with an overview that describes in a few words the main topics of the chapter. The text body of each chapter is divided topically. Key terms are spelled out in italics when first introduced and are highlighted in the margins and included in the glossary. Review questions at the end of each chapter test each student's memory and understanding of the material. Discussion questions and hypotheticals follow the review questions. These may be assigned to students or used for in-class discussion. Research and outside assignments are also included so students apply their knowledge and skills outside of class through legal or factual research or analysis of cases or issues. Cases at the end of the chapters demonstrate how the rules introduced in the chapters are applied specifically to paralegals. Some cases present key principles with which all paralegals should be familiar. Others are landmark cases that involve paralegals. A few new cases in the

eighth edition reflect the changes taking place as courts address the application of ethics rules to paralegals.

Recognizing that every paralegal program teaches ethics, but each in its own way, we have chosen a comprehensive approach so that professors may use the entire book in full courses on legal ethics or use only selected parts in programs that teach ethics in several courses or across the curriculum. The accompanying Teacher's Manual provides guidance for instructors who want to incorporate ethics material into their substantive courses.

Acknowledgments

We have many people to thank for their support and assistance with this edition of the book. Recognition must go first to the many entities that provided help and information, including the American Association for Paralegal Education, National Association of Legal Assistants, National Federation of Paralegal Associations, and International Practice Management Association.

Our heartfelt appreciation also goes to the wonderful people at Aspen, especially Carol McGeehan, Betsy Kenny, and David Herzig. Their patience, warmth, intelligence, and talents made this book possible.

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Ethics and Professional Responsibility for Paralegals

1

Regulation of Lawyers

This chapter provides basic background on the regulation of lawyers. Paralegals, who work under the supervision of lawyers, need to understand the rules governing lawyer conduct and how those rules affect them. 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 statutes in governing the conduct of lawyers
- codes of conduct for lawyers
- sanctions for misconduct and other actions against lawyers

A. 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, regulation of the legal profession falls mainly to the judiciary rather than the legislature. Because of the function of lawyers in the court system and the separation of powers, the judiciary has historically asserted inherent authority over lawyers.

The highest court in each state and in the District of Columbia is responsible for making rules related to law practice admission and to lawyers' ethical conduct. The codes of ethical conduct promulgated by the states' highest courts include mechanisms for disciplining lawyers who violate the codes. Most state legislatures have also passed statutes that supplement the ethical rules adopted by the courts. Some states consider legislative authority over the practice of law to be concurrent with judicial authority; others consider legislative action to be only in aid of judicial action. A few state supreme courts have allowed the legislature to assert substantial authority over the practice of law. For example, the New York state legislature has the power to regulate the legal profession and has vested the power to impose sanctions on lawyers with the intermediate courts (which are called supreme courts in New York although they are not the highest state courts).

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 regulate some aspect of the legal profession. Several state supreme courts (including Arizona, Colorado, Idaho, and Washington) have held unconstitutional legislation that would have authorized nonlawyers to engage in conduct that the court considered to be the practice of law. (See the *Bennion* and *UPL Committee* cases at the end of this chapter for examples.) 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 to alleviate the burden of handling disciplinary cases.

Integrated bar
A bar association in which the mandatory and voluntary aspects of bar activities are combined, and membership is required.

Some state bar associations are ***integrated***, 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. 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. In addition to state bar associations, hundreds of voluntary "specialty" bar associations have been established in the last 15 years as a result of the trend away from lawyers practicing in several

areas or "general" law practice to increasingly specialized areas, like probate, real estate, family law, and civil litigation.

Many lawyer disciplinary systems have expanded and reformed in recent years to respond to the growth in complaints about lawyers that has accompanied the growth of the legal profession. Mediation and arbitration are now widely used in disputes between lawyers and clients. Integrated bars and disciplinary authorities also offer or require ethics training for lawyers, conduct random audits of client trust accounts, and some have adopted ethics rules that provide for firm-wide responsibility for ethical breaches. Programs for lawyers with substance abuse and emotional problems have expanded into all jurisdictions. Disciplinary proceedings and records have been made more transparent and open to the public. The courts and the bar understand that to retain control over the legal profession through self-regulation, lawyers must be accountable to the public.

Concerns about the role of lawyers in corporate scandals have resulted in the federal government's adoption of new rules governing the conduct of lawyers in advising corporations in matters relating to securities law. The Sarbanes-Oxley Act of 2002 (15 U.S.C. §7201, *et seq*) led to the Securities and Exchange Commission's adoption of rules that require lawyers to report suspected violations of securities laws up the ladder within the corporate governance structure. Not all attempts of the federal government to regulate lawyers have been successful, however.

Some federal cases involve limited application of consumer protection laws to lawyers, in recognition of two important principles: that lawyers are regulated by the states and that lawyers are regulated by the courts. (See *American Bar Ass'n v. F.T.C.*, 430 F.3d 457 (D.C. Cir. 2005).) In another related case, lawyers have successfully asserted that the laws should not apply to them because they are not defined as "financial institutions" or "creditors" under federal laws protecting against identity theft. (See *American Bar Ass'n v. F.T.C.*, 636 F.3d 641 (D.C. Cir. 2011).) However, lawyers may be subject to state and federal laws when they seek to collect debts for clients under state and federal fair debt collection laws. (See, for example, *Heintz v. Johnson*, 514 U.S. 291 (1995)).

B. American Bar Association

All states except one (California) have patterned their ethics rules on the models of the American Bar Association (ABA). The ABA is a national voluntary professional association of lawyers, which currently has about 400,000 members, out of almost 1.5 million lawyers in the country. Over 100 years old, the ABA is the chief national professional association for lawyers, asserting a strong voice in matters affecting revision and development of the law, the judiciary, and the administration of justice.

Among its 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 1964, the ABA began work on a new set of ethical guidelines at the request of its then-president, Lewis F. Powell, Jr., who later served on the U.S. Supreme Court. This new code, called the **Model Code of Professional Responsibility**, was published in 1969. It was designed as a prototype for states to use in developing their own codes. The Model Code, which was adopted at least in part by every state, contained:

- **Canons**, or statements of general concepts;
- **Disciplinary Rules**, or mandatory rule statements; and
- **Ethical Considerations**, or interpretive comments that are aspirational or advisory.

Although the Model Code was widely adopted, events in the legal field led to a call for a revised code within a very short time. Watergate was one of the most pivotal of these events. The misconduct of lawyers in the Watergate scandal damaged the public image of lawyers. Also during this period the U.S. Supreme Court decided several cases relating to the legal profession that struck down rules prohibiting lawyer advertising. Further, changes in law practice brought about by economic developments and the proliferation of new laws resulted in more and different kinds of ethical problems that were not addressed effectively in the Model Code.

In 1977, the ABA established a new body to revisit the Model Code. The Commission on the Evaluation of Professional Standards, which came to be known as the Kutak Commission after its chair, developed the Model Rules of Professional Conduct, which were adopted by the ABA in 1983. The Model Rules are formatted differently than the Model Code; the difference between mandatory and aspirational language was eliminated and the rules are written as directives and followed by interpretive comments.

Specific amendments have been made many times to the ABA Model Rules since they were adopted. Recent changes of most interest to paralegals are in the areas of electronic communications and records, confidentiality and conflicts of interest, advertising and solicitation, and

nonlawyers outside the law firm. These will be discussed in the relevant chapters of this book. The ABA also publishes several other models, such as the Model Code of Judicial Conduct, Model Rules on Admission by Motion, Temporary Practice by Foreign Lawyers, and Licensing and Practice of Foreign Legal Consultants, which are not integrated into the Model Rules of Professional Conduct.

C. Statutes and Other Forms of Regulation

Although the state codes of ethics contain most of the rules with which we are concerned in this text, attorney conduct is also governed by **statutes**. 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 3, several states have laws that make the unauthorized practice of law a crime, usually a misdemeanor. Federal securities law, referred to earlier in Section A, is another example of how legislatures govern the conduct of lawyers.

Usually not binding on attorneys but often consulted when ethical issues arise are ***ethics opinions*** of 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 their websites to give additional guidance to lawyers facing similar dilemmas. Some state and ABA advisory opinions, especially those that involve paralegals, are cited in this text.

Ethics opinions
Written opinions issued by a bar association interpreting relevant ethical precedents and applying them to an ethical dilemma.

D. Sanctions for Lawyer Misconduct

Three main formal sanctions can be imposed on lawyers for ethical misconduct 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 sustained pattern of serious unethical conduct. Although disbarment is in theory permanent, some admitting authorities allow for re-admission of a disbarred lawyer after some period of time if the lawyer demonstrates complete rehabilitation.

Disbarment
Rescinding of a lawyer's license to practice.

The second most severe sanction is ***suspension***, in which the lawyer is deprived of the right to practice law for a specified period of time. Some

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

Probation
Lawyer can practice, but certain requirements must be met.

disciplinary authorities also exercise the option of imposing ***probation***, under which the disciplined lawyer may continue to practice on the condition that certain requirements are met, such as restitution to injured clients, passing an ethics examination, attending ethics training, or participating in counseling. The suspension is stayed, but the lawyer remains on probation for some period during which the disciplinary body may reinstitute the suspension if further ethical violations come to light. Probation may also be imposed following a suspension to allow the disciplinary body ongoing close monitoring of the lawyer.

Reprimand, Reproval, and Admonition
Lawyer is warned that ethical violations have occurred and further violations will warrant a more severe sanction.

The mildest sanction is a ***reprimand***, sometimes called a ***reproval*** or an ***admonition***. This represents a slap on the hand, a warning that the conduct will not be tolerated. Reprimands may be public — placed in the public record — or private — confidentially communicated in writing to the attorney (usually called an admonition). This kind of sanction becomes part of the attorney's record at the court or the state bar. It is considered in determining the appropriate sanction if other violations occur.

In deciding 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 cooperated 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
- whether the offense was a one-time incident because of specific circumstances or is likely to be repeated
- the degree to which the lawyer is remorseful and willing to remedy the problems that led to the discipline.

For more information on how sanctions are imposed, see *ABA Standards for Imposing Lawyer Sanctions*, adopted in 1986, revised in 1992, and reaffirmed in 2012.

E. Other Actions for Lawyer Misconduct

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

In addition to direct discipline by the court or state bar, a lawyer may be **prosecuted criminally** for violations of statutes governing lawyer conduct or conduct that may relate to a lawyer'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 8 on Competence for more on legal malpractice.) Judges 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 9 on Special Issues in Advocacy.) The courts also play a major role in deciding on matters in conflicts of interest because they rule on **motions to disqualify counsel**, 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 5 on Conflicts of Interest.)

Contempt
Improper conduct that impairs the administration of the courts or shows disrespect for the dignity or authority of the court.

Disqualification
A court order that a lawyer or law firm may not continue to represent a client in a litigated matter before it.

REVIEW QUESTIONS

1. What branch of government is primarily responsible for regulating attorney conduct? What level of government? State or federal?
2. What role do state bar associations play in governing lawyer conduct?
3. What role do the state and federal legislatures play in governing the conduct of lawyers?
4. What is an integrated bar? How does it differ from a voluntary bar? What is a specialty bar?
5. What is the American Bar Association? What role, if any, does it play in overseeing lawyer conduct? In ethics generally?
6. When did the states first begin to adopt ethics codes?
7. Name and describe the different versions of model ethics rules that have been adopted by the ABA.
8. How many states follow the ABA Model Rules?
9. What are ethics opinions? Who writes them? Are they binding on attorneys?
10. Name and describe the three main direct sanctions for lawyer misconduct that are enforced by the highest state court or state bar.
11. Name some other actions that can be taken to address lawyer misconduct besides those that are imposed by disciplinary authorities.

DISCUSSION QUESTIONS AND HYPOTHETICALS

1. Do you think that lawyers and paralegals should be governed by the states or at the national level? Why? Consider how things have changed since ethics rules were first adopted — in the economy, the practice of law, and the nature of legal work. How does the

growing globalization of legal work and law practice affect your thinking?
2. Should there be separate rules that govern lawyers in international practice? How should these interface with state ethics rules and state and federal laws?

RESEARCH PROJECTS AND ASSIGNMENTS

1. Is your state's bar integrated? Does the legislature share in governing lawyers in some way, such as funding for the courts or setting dues for bar membership? Does the judiciary work closely with the bar on matters relating to admission and discipline?
2. What laws in your state govern lawyer conduct? What do these laws say? Where are they found in the state statutes?
3. When were the current rules of ethics in your state adopted? Does your state follow the ABA rules exactly or are some of the provisions different? If some are different, which ones and why?
4. Does your state or local bar association publish ethics opinions? If so, where do you find these? Are there any ethics opinions relating to paralegals in your state?
5. Has your state's highest court decided any cases in which the authority of the legislature to regulate attorneys was an issue? If so, what did the court decide?
6. Read the SEC rules adopted pursuant to Sarbanes-Oxley that govern the conduct of lawyers (17 C.F.R. Part 205). Do you think that these provisions impinge on the inherent authority of the courts to govern lawyer conduct?
7. Read the two cases brought by the ABA against the FTC, and cited above in this chapter. Do you agree with these decisions? Should lawyers be subject to federal laws such as these? Why? What would have been the impact of the decisions if they had been decided the other way? Be sure to compare and distinguish the two cases.

CASES FOR ANALYSIS

The Washington Supreme Court case that follows demonstrates how the courts assert their inherent authority over the practice of law. In this case, state legislation that authorized escrow agents and officers to perform duties found by the court to constitute the practice of law was struck down as violating the court's constitutional authority to regulate the practice of law. Later, the Washington Supreme Court adopted the Limited Practice Rules for Closing Officers, which authorize much of the activity described in this statute.

Hagen v. Kassler Escrow, Inc.

96 Wn.2d 443, 635 P.2d 730 (1981)

Defendant petitioner is a registered escrow agent under the Escrow Agent Registration Act . . . and employs licensed escrow officers for closing real estate transactions. Petitioner closed several real estate transactions and in the process prepared documents and performed other services. Two of these transactions involved earnest money agreements specifying that the place of closing was to be the office of the plaintiff respondent, a law firm. Respondent brought suit alleging that the escrow company had engaged in the unauthorized practice of law. . . . Respondent sought a permanent injunction enjoining petitioner from performing any acts constituting the practice of law.

Subsequent to the filing of the action, the legislature enacted RCW 19.62 authorizing certain lay persons to perform tasks relating to real estate transactions. Specifically, the act allows escrow agents and officer to

> select, prepare, and complete documents and instruments relating to such loan, forbearance, or extension of credit, sale, or other transfer of real or personal property, limited to deeds, promissory notes, deeds of trusts, mortgages, security agreements, assignments, releases, satisfactions, reconveyances, contracts for sale or purchase of real or personal property, and bills of sale. . . .

RCW 19.62.010(2).

Petitioner, in reliance upon the statute, moved to dismiss the action for injunctive relief, which motion was denied by the trial court. Respondent moved for, and the trial court granted, a partial summary judgment declaring RCW 19.62 unconstitutional.

The line between those activities included within the definition of the practice of law and those that are not is oftentimes difficult to define. Recently, in *Washington State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n*, 91 Wash. 2d 48, 586 P.2d 870 (1978), we concluded that preparation of legal instruments and contracts that create legal rights is the practice of law. . . .

The statute in question is a direct response to our holding. We reaffirm that definition. RCW 19.62 authorizes a lay person involved with real estate transactions to "select, prepare, and complete documents and instruments" that affect legal rights. As such the statute allows the practice of law by lay persons. Petitioner requests this court to redefine the practice of law so that the conduct allowed by the statute does not constitute the practice of law. Petitioner asserts that there is a trend allowing lay persons to perform certain services such as those authorized by RCW 19.62 and our holding RCW 19.62 unconstitutional would not protect the public in any way. We disagree. . . .

Petitioner's activities and those activities authorized by RCW 19.62 constitute the practice of law and do not come within any exception. Inasmuch as RCW 19.62 authorizes lay persons to perform services we have defined as the practice of law, it must fall. The statutory attempt to authorize the practice of law by lay persons is an unconstitutional exercise of legislative power in violation of the separation of powers doctrine.

Const. art. IV §1 provides in pertinent part: "judicial power of the state shall be vested in a supreme court. . . ." An essential concomitant to express grants of power is the inherent powers of each branch. See generally *In re Juvenile Director*, 87 Wash. 2d 232, 552 P.2d 163 (1976). Inherent power is that

> authority not expressly provided for in the constitution but which is derived from the creation of a separate branch of government and which may be exercised by the branch to protect itself in the performance of its constitutional duties.

In re Juvenile Director, at 245, 552 P.2d 163.

It is a well-established principle that one of the inherent powers of the judiciary is the power to regulate the practice of law. The court's powers include the power to admit one to the practice of law and this necessarily encompasses the power to determine qualifications and standards.

The court, in *Graham* [citation omitted], citing to *Sharood v. Hatfield*, 296 Minn. 416, 210 N.W.2d 275 (1973), held that the

> regulation of the practice of law and " 'the power to make the necessary rules and regulations governing the bar was intended to be vested exclusively in the supreme court, free from the dangers of encroachment either by the legislative or executive branches.' "

86 Wash. 2d at 633, 548 P.2d 310. "The unlawful practice of law by laymen is a judicial matter addressed solely to the courts." *Washington Ass'n of Realtors*, 41 Wash. 2d at 707, 251 P.2d 619.

Since the regulation of the practice of law is within the sole province of the judiciary, encroachment by the legislature may be held by this court to violate the separation of powers doctrine. The separation of powers doctrine is a fundamental principle of the American political system. For a historical discussion of the doctrine and its importance, see *In re Juvenile Director*, 87 Wash. 2d at 238-43, 552 P.2d 163. We have previously held:

> The legislative, executive, and judicial functions have been carefully separated and, notwithstanding the opinions of a certain class of our society to

> the contrary, the courts have ever been alert and resolute to keep these functions properly separated. To this is assuredly due the steady equilibrium of our triune governmental system. The courts are jealous of their own prerogatives and, at the same time, studiously careful and sedulously determined that neither the executive nor legislative department shall usurp the powers of the other, or of the courts.

In re Bruen, 102 Wash. at 478, 172 P. 1152.

Thus, the power to regulate the practice of law is solely within the province of the judiciary and this court will protect against any improper encroachment on such power by the legislative or executive branches. In passing RCW 19.62, allowing lay persons to practice law, the legislature impermissibly usurped the court's power. Accordingly, RCW 19.62 is unconstitutional as a violation of the separation of powers doctrine.

We affirm the trial court's summary judgment on the constitutional issue as well as that court's refusal to dismiss the request for injunctive relief. The cause is hereby remanded for trial.

Questions about the Case

1. In your jurisdiction, who handles escrows and real estate closings on residential property — lawyers or licensed agents or brokers? What is the impact on consumers of having only lawyers perform this function?
2. If nonlawyers handle these functions, how are they regulated?
3. Do you think the functions that agents were licensed to perform under the Washington statute are rightfully classified by the court as the practice of law?
4. What is the basis of the court's authority for striking down the statute?
5. Are you convinced by the court's reasoning that it should have exclusive authority over the practice of law?
6. How should proponents of measures that affect the practice of law proceed to avoid having their rules or statutes held unconstitutional?
7. Do you think it is best for the court to have sole authority over the practice of law? Why or why not? What role, if any, should be played by the legislative and executive branches?

In this case, the state's highest court exercised its exclusive authority over the practice of law to endorse legislation that authorized nonlawyers to assist persons in ways that are typically categorized as the practice of law.

Unauthorized Practice of Law Committee v. State Department of Workers' Compensation

543 A.2d 662 (R.I. 1988)

This case comes before us on appeal by the defendants from a judgment entered in the Superior Court declaring portions of two statutes enacted by the General Assembly (citations omitted) unconstitutional as violative of this court's exclusive power to regulate the practice of law. We reverse. . . .

At its 1985 session the General Assembly enacted a set of comprehensive statutory provisions that created a Department of Workers' Compensation. . . .

The General Assembly, in attempting to implement the scheme of establishing informal hearings within the department as an initial procedure to supplement the formal hearings before the Workers' Compensation Commission, created an office of employee assistants. The function and purpose of these employee assistants are set forth in §42-94-5 as follows:

> The director of the department of workers' compensation shall provide adequate funding for an office of employee assistants and shall, subject to the personnel law, appoint the assistants to the staff of the department. Assistants should, at a minimum, demonstrate a level of expertise roughly equivalent to that of insurance claims analysts or adjusters. The purpose of employee assistants shall be to provide advice and assistance to employees under the workers' compensation act and particularly to assist employees in preparing for and assisting at informal conferences under §28-33-1.1. . . .

In the course of proceedings in the Superior Court, evidence was adduced concerning regulations of the Department of Workers' Compensation and also a position description filed in the department of personnel which defined the duties of employee assistants as follows:

> To provide technical advice and assistance to various parties involving their rights and obligations under the Workers' Compensation Act.
>
> To assist the injured employee in preparation for and at informal Workers' Compensation hearings, and to help in providing the necessary documentation at said hearings.
>
> To provide both routine and technical advice and/or information to the general public regarding rights and responsibilities under the Workers' Compensation Act.
>
> To attempt to settle disputes between injured workers, insurance companies, employers, purveyors of services, and any other interested parties prior to an informal hearing.
>
> To conduct in person interviews; both in office and field.

To gather and prepare information necessary for use at informal hearings.

To do related work as required.

At the conclusion of the presentation of evidence and argument in the Superior Court, the trial justice held that the duties of the employee assistants constituted the practice of law under definitions recognized by this court. . . .

It has long been the law of this state that the definition of the practice of law and the determination concerning who may practice law is exclusively within the province of this court and, further, that the Legislature may act in aid of this power but may not grant the right to anyone to practice law save in accordance with standards enunciated by this court. (Citations omitted.)

However, it should be noted that since 1935 the General Assembly has without interference by this court permitted a great many services that would have come within the definition of the practice of law to be performed by insurance adjusters, town clerks, bank employees, certified public accountants, interstate commerce practitioners, public accountants (other than certified public accountants), as well as employee assistants. The plain fact of the matter is that each of these exceptions enacted by the Legislature constituted a response to a public need. In each instance the Legislature determined that the persons authorized to carry out the permitted activities were qualified to do so. . . .

We must remember that the practice of law at a given time cannot be easily defined. Nor should it be subject to such rigid and traditional definition as to ignore the public interest. . . .

We are of the opinion that the informal hearings, together with lay representation, may well serve the public interest. We concluded from the evidence introduced that the employee assistants will be adequately trained to carry out the relatively simple and repetitive functions which they will be called upon to perform. We do require, however, that in the event an employee is denied compensation at such a hearing the employee be given an opportunity to consult with an attorney of his choice in order to determine whether he or she will appeal to the Workers' Compensation Commission. This consultation should be paid for at state expense at a reasonable fee to be determined by the director. In the event that an attorney chooses to represent the employee before the commission, such attorney would be paid by the employer if the employee prevails as presently provided by law. See G.L. 1956 (1986 Reenactment) §28-35-32.

In authorizing the employee assistants to carry out the functions authorized by §42-94-5, we are dealing with a question of first impression and are relying to a great extent upon the legislative findings that declare the necessity for an informal prompt hearing in the event of controversy. Therefore, this grant of authorization is made upon a somewhat

experimental basis. Consequently we shall leave the matter open for the Unauthorized Practice of Law Committee to come again before the court in the event that the public, and particularly employees, are not adequately protected by the services of the employee assistants. Meanwhile the act may be implemented in the form in which it is presently cast, with the single modification set forth in this opinion.

For the reasons stated, the defendants' appeal is sustained. The judgment of the Superior Court is reversed. The papers in the case may be remanded to the Superior Court with directions to enter judgment for the defendants but without prejudice to the plaintiff to bring a new complaint in the event that the public interest shall so warrant in the future, as indicated heretofore in this opinion.

MURRAY, Justice, dissenting.

I respectfully disagree with the majority. I would affirm the trial justice's decision on the basis that the language in G.L. 1956 (1984 Reenactment) §42-94-5, as amended by P.L. 1986, ch.1, §3, allows a group of nonlicensed employees to perform duties which are equivalent to those reserved for qualified, licensed attorneys. Employee assistants who engage in the unauthorized practice of law serve to the detriment of the public, and this court, by permitting such conduct, compromises established professional standards requisite for the proper administration of justice. . . .

Questions about the Case

1. How did the Rhode Island Supreme Court come to hear this case? What was the lower court's ruling?
2. What system did the Workers' Compensation statute establish that was objectionable to the lower court?
3. Examine the definitions of the practice of law in Chapter 3 and evaluate whether employee assistants functioning under the authority of this statute would be engaging in the "practice of law."
4. What are the reasons that this court decided to endorse the legislation? Are these good reasons? Why was the outcome different from that in *Bennion*, above?
5. What does the court say about other inroads into the practice of law by nonlawyers? Is this important to the court's ruling?
6. Does the court abdicate its exclusive authority over the practice of law?

In the following case, the state's highest court affirmed the ruling of the Superior Court in enjoining a law school graduate who was not admitted to practice law from engaging in the unauthorized practice of law.

State Bar of Arizona v. Lang

No. 1 CA-CV 12-0629 (Ariz. Ct. App. 2014)

Petitioner is a law school graduate and is admitted to practice law in the San Carlos Apache Tribal Court. He has never been admitted to the practice of law by the Arizona Supreme Court and was enjoined from practicing law in Arizona by order of the Maricopa County Superior Court based on evidence that he repeatedly engaged in the unauthorized practice of law. The Arizona Supreme Court affirmed the Superior Court decision, stating that "the injunction is reasonable in its scope."

Pursuant to Ariz. R. Sup. Ct. 32(a), the Bar is tasked with regulating and disciplining persons engaged in the practice of law in Arizona. From 2007 to 2009, the Bar received a series of reports that Lang had engaged in the unauthorized practice of law. After each report was received, Lang was notified by the Bar which demanded that he cease any activity defined under Ariz. R. Sup. Ct. 31 as the practice of law. Lang did not comply with these demands. The Bar commenced an action against him in the Superior Court, alleging five counts of unauthorized practice of law and requested an injunction to prevent Lang from continuing his unlawful conduct. Lang answered and asserted a counterclaim which was later dismissed for lack of prosecution.

In September 2011, the Bar moved for summary judgment on three counts of its complaint and voluntarily withdraw the remaining two counts. Lang objected to the Bar's motion and filed a motion to dismiss Counts 1, 4, and 5 for lack of subject matter jurisdiction.

Count 1- In September 2006, Lang entered an "Attorney-Client Agreement" with T.M., a former professional boxer "to provide attorney services to Boxer [T.M.] as his personal attorney and counselary on a worldwide basis on all matters concerning Boxer [T.M.]". The agreement was printed on letterhead that showed Lang's name, the name "Integrated Legal Services & Associates," an Arizona address not located on the San Carlos Apache reservation, and Arizona fax and phone numbers, including an "Office" number. Lang signed the contract as "Attorney." Using similar letterhead, Lang also identified himself as T.M.'s "personal attorney" in a letter that he wrote to the Missouri parole board regarding T.M.'s incarcerated brother.

Count 2- In March 2008, Lang met with S.J. in Arizona and agreed to represent S.J., a Washington resident, in a federal employment law matter. In connection with that representation, Lang drafted a notice of appeal in which he identified himself as S.J.'s "Attorney," "Personal Attorney," and "counsel," and indicated that he worked for I.L.S. & Associates in Arizona. I.L.S. & Associates charged S.J. an initial consultation fee and a flat-fee retainer for "Legal Service."

Count 5- In July 2008, Lang entered into an "Attorney-Client Fee Agreement" with J.C., a California resident, by which "DPL, Inc."

agreed to provide "legal services." The agreement was prepared by Lang's assistant, who had also helped him to form an Arizona corporation named "Debt Protection, Inc." The agreement was printed on "Debt Protection Legal, Inc." letterhead that showed an Arizona address not on the reservation, toll-free office phone and fax numbers, and an Arizona mobile number for the "Managing Attorney," who was identified in the signature block as Lang.

After oral argument, the Superior Court denied Lang's motion to dismiss and granted summary judgment for the Bar on all three counts. The Court ordered restitution to S.J. and J.C. and entered a permanent injunction restraining Lang from performing acts constituting the practice of law in Arizona. Lang contends that the Superior Court lacked subject matter jurisdiction to consider his conduct, that summary judgment was not warranted based on the undisputed evidence, and that the injunction is overbroad.

Lang entered into a purported "Attorney-Client Agreements" by which he agreed to provide "attorney services" as a "personal attorney" from an office in Arizona located outside the reservation. Lang contends that the agreements were protected commercial speech under the First Amendment. But an attorney's First Amendment interest in commercial speech may yield to the state's interest in regulating the profession, *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1073 (1991), and "[t]here is 'no constitutional value in false statements of fact.'" *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984). Arizona's prohibition against the unauthorized practice of law is not a broad regulation of speech, but a narrowly tailored set of rules aimed at conduct by persons not admitted to the Bar. Lang's speech falls into the zone of speech that the First Amendment allows the state to regulate — his speech was nothing more than an attempt to facilitate unlawful conduct, and he had no First Amendment privilege that could immunize him from the enforcement of the Arizona Supreme Court rules.

The undisputed evidence shows that in his dealings with and for T.M., S.J., and J.C., Lang repeatedly held himself out to be an attorney practicing in an Arizona office. Yet Lang was not admitted to the practice of law by the Arizona Supreme Court. His conduct therefore constituted the unauthorized practice of law under Ariz. R. Sup. Ct. 31(a)(2)(B)(2), 31(b), and 42, E.R. 5.5(b). The Superior Court properly entered summary judgment in the Bar's favor on Counts 1, 4, and 5.

The injunction against Lang is not inconsistent with *Sperry v. Florida*, 373 U.S. 379 (1963). In *Sperry*, the Court held that a practitioner registered to practice before the United States Patent Office, but not licensed to practice law by any state, should not have been enjoined from engaging in his patent practice from Florida. *Id.* at 381, 404. Relying on federal supremacy, *see id.* at 383-85, the Court explained that "the State maintains control over the practice of law within its borders except to the limited extent necessary for the accomplishment of the federal

objectives [of the United States Patent Office]" and that "it is entirely reasonable for a practitioner to hold himself out as qualified to perform his specialized work, so long as he does not misrepresent the scope of his license." Id. at 402 & n.47. The San Carlos Apache Tribe is a dependent sovereign nation whose authority to regulate its courts does not enjoy supremacy over the Arizona Supreme Court's authority to regulate the practice of law outside the Tribe's reservation.

Consistent with Ariz. R. Sup. Ct. 31(a)(2)(B)(2), the injunction does not prohibit Lang from referring to his law degree, education, or tribal court admission so long as the reference does not reasonably imply that he is admitted to practice law in Arizona. This limitation is constitutional. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383-84 (1977). Further, the requirement that Lang expressly disclaim admission in Arizona in his letterhead and advertising material is reasonably tailored to prevent client confusion while still recognizing Lang's actual qualifications. We also reject Lang's contention that the injunction should anticipate his future admission to other tribal courts. Should Lang actually become admitted in additional jurisdictions, he may at that time ask the Superior Court to modify the injunction.

Questions about the Case

1. What conduct did Lang engage in that the State Bar alleges constituted the unauthorized practice of law?
2. Is admission to a tribal court analogous to admission to a state supreme court? Why or why not? Identify all necessary steps required by a law school graduate to be admitted to the practice of law by a state supreme court.
3. Did the Superior Court properly grant the State Bar's motion for summary judgment? What was the Court's reasoning for the injunction?
4. What was the basis for Lang's claim that the Superior Court lacked subject matter jurisdiction to consider his conduct?
5. Which rules of the Arizona Supreme Court did the Court primarily rely on in reaching its opinion?
6. Since Lang is enjoined from engaging in the unauthorized practice of law in Arizona, is he precluded from practicing law in another non-tribal jurisdiction in the United States? Is he precluded from practicing law outside of the United States?

2

Regulation of Paralegals and Ethics Guidelines for Paralegals

This chapter traces the evolution of the paralegal profession, examines initiatives to regulate the profession, and discusses the ways in which paralegals are currently regulated. Chapter 2 covers:

- the development of the paralegal profession since its inception in the late 1960s
- the American Bar Association's involvement in the field
- the role of professional paralegal associations
- past and present efforts to regulate paralegals
- distinctions among kinds of regulation: certification, licensing, and limited licensing
- liability of paralegals as agents of attorneys
- guidelines on the utilization of paralegal services
- ethics codes promulgated by paralegal associations

A. A Brief History of the Paralegal Profession

1. The Beginnings

The use of specifically educated nonlawyers to assist lawyers in the delivery of legal services is a relatively new phenomenon in the history of American law. In the 1960s, the rapidly rising cost of legal services, combined with the lack of access to legal services for low- and middle-income Americans, caused the government, consumer groups, and the organized bar to take a close look at the way legal services were being delivered.

In response to the unmet need for legal services, the federal government established the Legal Services Corporation to provide funding for legal services to the indigent, low-cost legal clinics started to appear, and prepaid legal plans were developed. Practitioners and the organized bar also attempted to develop alternatives to the traditional practice model that would keep costs down without sacrificing quality. The answers they came up with included better management, increased automation, and the use of **legal assistants** or **paralegals**.

In 1967, the American Bar Association (ABA) endorsed the concept of the paralegal and, in 1968, established its first committee on legal assistants, which later was made a standing committee of the ABA under the name Standing Committee on Legal Assistants. Its name was changed to the **Standing Committee on Paralegals** in 2003 in recognition of the growing preference for the title "paralegal." During the late 1960s and early 1970s, the ABA and several state and local bar associations conducted studies on the use of paralegals. Many studies showed initial attorney resistance to paralegals, but actual use was on the rise.

2. Growth Through the 1970s

The first **formal paralegal training** programs were established in the early 1970s. In 1971, there were only 11 programs scattered across the country. In 1974, the ABA adopted guidelines for the paralegal curriculum and, in 1975, began to approve paralegal education programs under those guidelines. There were nine paralegal programs approved that year.

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 **National Association of Legal Assistants** (NALA) were established. Paralegal educators formed their own organization, the **American Association for Paralegal Education** (AAfPE). In 1976, NALA established its **Certified Legal**

Assistant (CLA) program (now called **Certified Paralegal**), a voluntary certification program. It covers general competencies, such as judgment and analytical ability, communications, ethics, legal research, and general substantive law in a range of areas.

In 1975, the federal government recognized the existence of the paralegal occupation by creating a new job classification. States, counties, and cities soon followed suit. In 1978, the U.S. Bureau of Labor Statistics predicted that the paralegal career would be one of the fastest growing occupations through the year 2000.

3. New Directions in the 1980s and 1990s

Job opportunities expanded and changed dramatically during the late 1970s and into the 1990s. Although the first paralegals were employed primarily in small law firms and legal aid organizations, large private law firms soon became the biggest employers of paralegals. As a result, large firms and corporate law departments developed paralegal manager and supervisor positions so that the large numbers of paralegals they employed could be effectively deployed. In the 1980s, a group of paralegal supervisors and managers started the **Legal Assistant Management Association** (LAMA), recently known as the **International Paralegal Management Association** and since 2014 as the **International Practice Management Association** (IPMA).

During the 1980s, paralegals began freelancing, handling specialized matters for attorneys on an as-needed, independent-contractor basis. Some worked alone in a specialized area of practice, such as probate, and others worked for full-service paralegal support companies.

Since the 1980s, the United States has experienced tremendous growth of the paralegal profession. Job opportunities have expanded in all sectors of employment. Clients have come to accept paralegals and even to demand that they be included on the legal services delivery team as a way of keeping costs down. Paralegals, like lawyers, have become more specialized, particularly in large law firms, corporate law departments, and government agencies, where most paralegals work in only one area of practice.

Paralegals have been granted recognition by the organized bar and practitioners. Many state bar associations have guidelines for the use of paralegals and established paralegal committees or divisions.

4. The Twenty-First Century

Estimates vary on the number of paralegals employed in the United States. Most sources indicate that there are about 300,000. About a thousand paralegal educational programs are operating, nearly 300 of

which are approved by the ABA. About 300 are members of the American Association for Paralegal Education. Most surveys show that well over half of paralegals hold a baccalaureate degree and even more have some formal paralegal education.

Voluntary certification by one of the paralegal associations has gradually become more common. In addition to NALA's program mentioned above, the National Federation of Paralegal Associations (NFPA) has offered the **Paralegal Advanced Competency Examination** (PACE) for experienced paralegals since 1996, and added the Paralegal CORE Competency Exam for entry-level paralegals in 2011. The NFPA is an umbrella organization of state and local paralegal associations with more than 40 member local associations, representing about 10,000 paralegals. At the time of this writing, more than 600 paralegals have earned the Registered Paralegal designation that is granted to those who pass the PACE and over 300 paralegals have earned the CORE Registered Paralegal (CRP) designation.

NALA represents more than 18,000 paralegals, including more than 7,500 individual members and about 90 state and local affiliated associations. Over 18,000 paralegals have been certified by NALA and over 9,000 can use the Certified Paralegal (CP) designation, which has been accredited by the National Commission for Certifying Agencies. In addition, more than 3,600 CPs have obtained advanced certification through a curriculum-based model. NALA offers advanced certification in at least 20 areas of practice.

IPMA, representing managers and supervisors of paralegals and other practice support managers in law firms, has about 400 members, local chapters in several major cities across the country, and members in other parts of the world. IPMA leads the way in promoting the expanded and effective utilization of paralegal services and other practice support professionals.

Another group that includes paralegals is **NALS**, the Association for Legal Professionals. This group was established many years ago as a group for legal secretaries, but in the 1990s changed its name to reflect its changing mission of representing the interests of all legal support professionals. NALS has about 6,000 members but does not track how many of its members are paralegals. It has long offered a certification program for legal secretaries and also administers a paralegal certification examination called the PP, or Professional Paralegal examination. More than 600 paralegals have passed this examination.

The job market for paralegals vacillates with the ebb and flow of the economy, but overall has continued to grow. The legal profession is undergoing deep and extensive change in the twenty-first century, especially because of the ever-expanding use of technology, which is eliminating some functions and some jobs. Paralegal employment opportunities are steady and salaries have increased beyond levels of

inflation. As has always been the case, small law firms still do not employ paralegals to the same degree as large ones, and the ratio of lawyers to paralegals in most firms has slightly increased to about four or five to one.

Several important trends characterize the paralegal profession at this point in its history. Levels of education for paralegals are increasing every year. Firms often expect a baccalaureate degree and paralegal education. **Certification** and **licensing** and the role of nonlawyer legal service providers continue to dominate the discussion of paralegal professional organizations. Opportunities for growth have been developed in new areas of employment and law practice, and exciting alternative and niche paralegal careers are flourishing. All of these trends point to the maturation and evolution of the paralegal profession. Discussed in more detail below, some experts are predicting a major paradigm shift in the legal services industry, which would have an impact on the role of paralegals. These changes have led to substantial declines in law school enrollments over the past six years because of concerns that the need for new lawyers will not return to previous levels.

B. Regulation of Paralegals: Certification and Licensing

1. Definitions of Terms

Certification of an occupation, as used in the context of paralegal regulation, is a form of recognition of an individual who has met specifications of the granting agency or organization. It is usually voluntary, although some proposals for certification of paralegals by courts have been framed as mandatory. NALA's CP program, NFPA's PACE/RP, and NALS's PP are forms of certification, as are some state bar-sponsored programs, described later in this section.

Certification
A form of recognition of an occupation based on a person's having met specific qualifications, usually undertaken voluntarily.

Licensing is a mandatory form of regulation in which a government agency grants permission to an individual to engage in an occupation, to use a particular title, or both. 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. Lawyers are "licensed" by the state or states in which they practice.

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

Typically, both licensing and certification require applicants to meet specified requirements regarding education and moral character and to pass an examination. Additional requirements usually include adoption of an ethics code, a mechanism for disciplining licensed persons who violate ethics rules, and requirements for continuing education.

2. State Regulation of Lawyer-Supervised Paralegals

Since the beginning of the paralegal profession, the need for and value of regulating paralegals has been a topic of discussion and debate. The paralegal profession is split, without a clear consensus about regulation. However, the push for regulation has become stronger as paralegals have sought to professionalize the occupation and to distinguish themselves from persons who provide legal services directly to the public.

South Dakota's Supreme Court took a step toward regulation in 1992 when it adopted rules that define legal assistants/paralegals and set qualifications for persons seeking to use that title (South Dakota Supreme Court Rule 92-5, Codified Laws, §16-18-34). Later, Maine became the first state in the country to legislate the use of the titles paralegal and legal assistant. In 1999, **Maine** adopted a state law that defines paralegal or legal assistant as:

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

M.R.S.A. §921.

The Maine law establishes fines for persons using the title legal assistant or paralegal without meeting the terms of the definition. The intention of this law is to deter nonlawyer practitioners from using these titles.

The efforts of California paralegals to get similar protection for the paralegal occupation led to adoption of the **first regulatory scheme for paralegals** in the country. The **California statutes** create a form of regulation that is neither certification nor licensing. Effective in 2001, California's law requires persons who fit the statutory definition of a paralegal to meet certain education requirements and to engage in specified continuing education. Only persons working under the supervision of a lawyer can use the titles paralegal, legal assistant, and other comparable titles. The statute also makes it unlawful for those not meeting the statutory definition and requirements to hold themselves out as paralegals. Compliance with this law is not monitored by the state in any formal way, as it would be in a full-blown licensing program, but law firms and paralegals in the state generally do comply.

Under the California law, a paralegal, or any other person using one of several similar titles, is defined as:

> A person who holds himself or herself out to be a paralegal, who is qualified by education, training or work experience, who either contracts with or is employed by an attorney, law firm, corporation, governmental

> agency, or other entity, and who performs substantive legal work under the direction and supervision of an active member of the State Bar of California . . . that has been specifically delegated by the attorney to him or her.

California Business and Professions Code §6450(a).

It should be noted that one federal court in California has acknowledged this statute is setting the qualifications for paralegal time to be compensated in a fee petition. See *Sanford v. GMRI, Inc.* (CIV-S-04-1535 DFL CMK (E.D. Cal. 2005)), which is excerpted in Chapter 7.

The **Florida Supreme Court** has also limited the use of the titles paralegal, legal assistant, and other similar terms to those persons who work under the direct supervision of a lawyer. It first defined the terms paralegal and legal assistant when it amended its Rules of Professional Conduct in 2000 by adding the definition of paralegal to the general rule on supervision of nonlawyers, which is based on ABA Model Rule 5.3, discussed later (Florida Rule 4-5.3). Later, the definition of paralegal/legal assistant was added to the Rules Governing the Investigation and Prosecution of the Unlicensed Practice of Law, which indicate that it constitutes unauthorized practice for someone who does not meet the definition of a paralegal or legal assistant to use that term in providing legal services. Florida has also adopted a registration program for paralegals; see the discussion below.

The **Arizona Supreme Court** adopted a definition of paralegal/legal assistant as part of its 2003 rules on the unauthorized practice of law, as follows:

> a person qualified by education and training who performs substantive legal work requiring a sufficient knowledge of and expertise in legal concepts and procedures, who is supervised by an active member of the State Bar of Arizona, and for whom an active member of the state bar is responsible, unless otherwise authorized by supreme court rule.

Rules of the Supreme Court of Arizona, Rule V.A.

The **New Mexico** court rules define paralegals and set minimum qualifications, and recommend that lawyers not use the designation of paralegal for persons who do not meet these requirements, falling short of prohibiting the use of the title. This may be seen as an interim step toward the kind of "soft" regulation that has been adopted in states like California.

All these initiatives show some acceptance of the idea that paralegals should be regulated, but efforts to regulate paralegals in a more comprehensive way have been met with substantial resistance by the organized bar, which generally holds to the view that paralegal regulation is unnecessary. Lawyers sometimes also express concerns that regulated paralegals would compete for work with lawyers, especially lawyers who are in solo

and small practices and serve individuals in areas such as divorce, bankruptcy, and landlord-tenant matters.

Several jurisdictions have seen unsuccessful initiatives to regulate paralegals. Most recently, in 2011 and 2012, bills were introduced in Florida and New York, but failed to move forward. Earlier, a plan in Hawaii to establish mandatory certification of paralegals by the state supreme court was rejected even with strong support among influential leaders on the bench. AWisconsin plan for mandatory licensing of paralegals was finally rejected by the state supreme court in 2008 after having been stalled since 2000. In the 1980s and '90s, licensing proposals in Minnesota, Montana, Nevada, New Jersey, Oregon, South Carolina, and Utah were shelved.

In Ontario, Canada, under the auspices of the Law Society of Upper Canada, paralegals can perform some functions that would be considered the practice of law in the United States. Ontario started licensing paralegals in 2008 and has about 7,500 paralegal licensees. Requirements include formal education at an accredited program and passing an examination. Paralegals are subject to an ethics code and discipline just as lawyers are.

NFPA continues to promote mandatory regulation, publishing a model act for the licensure of paralegals. While some paralegals across the country continue to promote regulation, several associations have changed strategy and are working to establish state-sponsored programs of voluntary certification.

3. Voluntary Certification of Paralegals

Early in the profession's evolution, **Oregon** adopted a **voluntary certification program** for legal assistants. It was abolished after a few years because of low participation. The second state to venture into certification, Texas, has been more successful. Texas adopted a voluntary certification program for paralegals in 1994. The program is administered through its Board of Legal Specialization. Certification examinations are given in seven practice areas. Certification, valid for five years, is renewable on demonstrated participation in continuing education, employment by a Texas attorney, and substantial involvement in the specialty area. The states of North Carolina, Florida, and Ohio have also adopted voluntary certification or registration programs in the last 10 or 12 years. The North Carolina and Ohio programs were established by the state bar association and both require applicants to meet entrance standards and pass an examination. Florida's was adopted by the state supreme court. North Carolina's certification is designed for paralegals who have met educational requirements or have a specified level of experience, whereas the Ohio plan requires applicants to have designated levels of legal experience in addition to meeting educational criteria. Florida's registration program has two tiers, with paralegals meeting the higher level requirements

eligible to call themselves Florida Registered Paralegals. Close to 10,000 paralegals are certified by these states.

As noted above, the national paralegal associations continue to promote voluntary certification and have increased the numbers of paralegals with these credentials substantially in the last decade. On a national level, these organizations want to be poised for regulation when it comes by having proven examinations in place that can be adopted by states.

At the state level, a growing number of statewide paralegal organizations have developed state-specific certification examinations, usually in connection with NALA and designed for CPs. California, Florida, Louisiana, Delaware, Pennsylvania, Kentucky, and New Jersey have such programs.

The ABA Standing Committee on Paralegals continues to hold fast in opposing regulation and maintains a more neutral stance toward voluntary certification, adhering to policy statements on certification and licensing issued in 1975 and 1986. In both instances, the Standing Committee rejected the notion that paralegals need to be licensed, contending that the public is protected by the extensive ethical and disciplinary requirements to which lawyers are subject as the appropriate means to protect consumers. IPMA also opposes licensing of paralegals, asserting that licensing of paralegals who work under lawyer supervision is unnecessary for the protection of the public and would unduly interfere with lawyers' prerogative to hire the best-qualified persons for the job they need done.

The ABA Standing Committee on Paralegals has long had a **definition of legal assistant/paralegal**, which was adopted by the House of Delegates. As revised in 1997, it reads as follows:

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

4. The Arguments About Regulation of Lawyer-Supervised Paralegals

The issues relating to regulation of paralegals who work under the supervision of attorneys are significantly different from those who sometimes call themselves "independent paralegals" or "legal technicians" and who seek to provide legal services directly to the public.

The primary arguments **against licensing** of lawyer-supervised paralegals are that it:

- is unnecessary because attorney-employers are already fully accountable to clients;

- would increase the cost of legal services as the costs of employing paralegals would rise;
- would stifle the development of the profession by limiting the functions that paralegals can perform;
- would inappropriately limit entry into the profession;
- would unnecessarily standardize paralegal education; and
- would limit paralegals from moving into new areas of practice or duties.

In addition, opponents cite the practical difficulty of determining exactly what legal tasks and functions could be assigned exclusively to paralegals through a regulatory process. In other words, what could paralegals be authorized to do that other workers in the legal environment could not do? What would prevent lawyers from having other nonlawyers perform those tasks under different job titles?

Arguments **favoring the licensing** of traditional paralegals center mainly on the benefits to the profession, in terms of establishing it as a separate and autonomous 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 guidance to clients and to lawyers regarding the paralegal role and qualifications; and
- encourage needed standardization in paralegal education.

The most progressive regulatory models would expand the scope of paralegal work into areas where it might not currently be permitted because of unauthorized-practice-of-law rules and statutes, reinforcing the notion that lawyers could provide general oversight and supervision. This model is based on the idea that paralegals can be used to increase access to legal services by lawyers and nonlawyers working hand in hand as opposed to playing separate but similar roles in the delivery of legal services.

Even among supporters of regulation, there are wide differences about the details of a good regulatory plan. Contentious issues relate to what level and kind of formal education should be required; whether experienced paralegals without formal education should be licensed; the necessity for a competency-based examination, a moral character check, continuing education, and a separate ethics code; whether the legislature or court is the most appropriate entity to regulate; how discipline should be handled; and how the entire process should be funded.

A related and much-debated concern is whether disbarred or suspended lawyers should be able to work as paralegals. Even without