Ethics and Professional Responsibility for Paralegals

Editorial Advisors

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Ethics and Professional Responsibility for Paralegals

Sixth Edition

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and Colleges

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This book is dedicated to my father

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Preface

Approach

This book is written for paralegal students and working paralegals, and for lawyers who use the services of paralegals. It is intended for use primarily as a text but is also used by those in practice as a reference manual.

It has been almost 40 years since the advent of the paralegal profession. What started out as a modest proposal to improve the delivery of legal services has become a reality in the legal profession today. Paralegals are embedded in law practice, 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 evermore sophisticated work in all areas of law practice.

The paralegal occupation has been one of the fastest growing in the country for 25 years. It is estimated that there are about 200,000 paralegals employed across the country. The career is 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.

The past 30 years have also witnessed tremendous growth and change in the legal profession generally. The forces of change have been many, including the integration of technology, the use of marketing and advertising, greater competitiveness among firms for clients, an influx of new attorneys, increased attorney mobility, the development of megafirms, the impact of a global economy, more complex laws, and legal specialization. These changes have greatly affected legal ethics, in ways that probably no one anticipated.

The role of nonlawyers in providing legal services directly to the public has been the topic of intense debate as the public and the legal profession seek ways to increase access to legal services and to control legal costs. New ethics 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 that occur in their daily work lives, to develop a framework for ethical decision making, and to keep abreast of changes in ethics rules as they develop.

Organization and Coverage of the Fifth 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 the regulation of attorneys because paralegals must understand how the legal profession is regulated generally to understand their place in it and the impact that their conduct has on the lawyers who employ them. Chapter 2 contains a brief history of the paralegal career, the ways in which the occupation is regulated, and the growth of voluntary paralegal certification. This chapter examines ethics guidelines for paralegals developed by both bar and paralegal associations. Chapter 3 covers the unauthorized practice of law, introducing the history of UPL and definitions of the practice of law, and explaining the specific functions that either are prohibited outright 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. Confidentiality is covered in Chapter 4. In discussing the attorney-client privilege, the work product rule, and the ethics rules regarding confidentiality, the chapter outlines ways to avoid breaches of confidentiality and duties that paralegals have. Special emphasis is given to inadvertent disclosure and technology.

Chapter 5 covers conflicts of interest, a critical concern of paralegals given the mobility of lawyers, clients, and paralegals. This chapter includes an in-depth discussion of conflicts rules and how to avoid conflicts, including the use of screens and conflicts checks. Rules regarding legal advertising and solicitation, with a discussion of the latest cases and trends in marketing of legal services, are covered in Chapter 6. Chapter 7 is devoted to financial matters that arise in the representation of clients and between lawyers and paralegals. It offers a thorough discussion of 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 on competence defines the concept of competence specifically in relation to paralegals and includes a discussion of malpractice. Special issues confronted by litigation paralegals and in 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 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. At the end of each chapter are review questions that 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 that students can be given work to build 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 in professional responsibility with which all paralegals should be familiar. Several new cases are included in the fifth edition, reflecting the rapid changes taking place in unauthorized practice, confidentiality, conflicts of interest, fees, and other areas, as courts address the application of ethics rules to paralegals.

Recognizing that every paralegal program teaches ethics, but each in its own way, I 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 teachers who want to incorporate ethics material into their substantive courses.

Acknowledgments

I 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,

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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
- the American Bar Association and its influence on legal ethics
- sanctions for lawyer misconduct

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 ethical matters in addition to their caseload.

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 "specialty" bar associations have been established in the last 15 years as a result of the trend away

from "general" law practice to practice that is specialized in a few areas of law.

Lawyer disciplinary systems have expanded and reformed in the past 20 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 problems have expanded into all jurisdictions as it has become clear that unethical conduct is often connected to substance abuse. Disciplinary proceedings and records have been made more transparent and open to the public from their initiation. 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. §7245) 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 2010, federal legislation designed to reform financial markets exempted lawyers from the authority of a newly created enforcement agency, recognizing that lawyers are subject to discipline by states.

B. American Bar Association

All states but one (California) have patterned their codes of ethics on the models of the American Bar Association (ABA). The ABA is a national voluntary professional association of lawyers, which currently has more than 400,000 members, nearly half of the 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, 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 quite well received, other 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. Finally, 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, with a major revision completed in 2002. In 2009, the ABA created the Ethics 20/20 Commission, which is examining the rules in view of globalization and the rapidly changing environment for practicing law. Among the topics for review are law firm structures and models of ownership and the continued efficacy of state-by-state regulation.

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 Web sites 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 and Remedies

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 long-term pattern of serious unethical conduct. Although disbarment is in theory permanent, many 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 attorney is deprived of the right to practice law for a specified period of time. Some disciplinary authorities also exercise 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. The 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. Probation may also be imposed following a suspension to allow the disciplinary body ongoing close monitoring of the lawyer.

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 or Reproval
Attorney 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***. 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. In either case, the reprimand 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 attorney cooperated in the investigation and appreciates the seriousness of the matter
- the attorney'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 attorney more or less culpable for the conduct
- whether the offense was a one-time incident because of those 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

In addition to direct discipline by the court or state bar, an attorney 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 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.)

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

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 attorney conduct? In ethics generally?
6. When did the states first begin to adopt ethics codes?
7. Name and describe the different versions of model ethical rules that have been adopted by the ABA.
8. Why did the ABA decide so soon after the Model Code was adopted to undertake a major revision of it?
9. What are some issues that the ABA is now considering as it reviews the current Model Rules?
10. How many states follow the ABA Model Rules?
11. What are ethics opinions? Who writes them? Are they binding on attorneys?
12. Name and describe the three main direct sanctions for attorney misconduct that are enforced by the highest state court or state bar.
13. Name some other sanctions or remedies for attorney misconduct besides those that are imposed by disciplinary authorities.

DISCUSSION QUESTIONS AND HYPOTHETICALS

1. Look at the ABA Model Code and Model Rules and compare the formats. Which do you find easier to work with?
2. Do you think that lawyers and paralegals should be governed by the states or at the national level? 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?
3. Should there be rules that govern lawyers in international practice? How should these interface with state ethics rules and state and federal laws?
4. It has been said that general practitioners are a dying breed. What does this mean for the regulation of lawyers? Should the ethics rules cover individual lawyers or apply broadly to law firms?

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? Does the judiciary work closely with the bar on matters relating to admission and discipline?

2. Does your state have any laws that govern attorney 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?
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 *ABA v. FTC*, decided by the U.S. Court of Appeal for the District of Columbia Circuit in December 2005. Do you agree with this decision? Should lawyers be subject to federal law such as this one? What would have been the impact of the decision if it had been decided the other way?
8. Read *Real Estate Bar Ass'n v. Nat'l Real Estate Information Serv.*, decided by the First Circuit U.S. Court of Appeal in June 2010. The facts in this new case are similar to those in *Bennion* below. Has the Supreme Judicial Court of Massachusetts decided the questions referred back to it by the Court of Appeal? If so, did its opinion align with *Bennion*?

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.

Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.

96 Wash. 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. 4. §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?

2

Regulation of Paralegals and Ethics Guidelines for Paralegals

This chapter traces the evolution of the paralegal profession, examines attempts 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 between 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. The concept is about 50 years old, dating back to the 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 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, a voluntary certification program consisting

of two days of examinations covering general competencies, such as judgment, communications, ethics, human relations, legal terminology and research, and analysis, and substantive practice areas selected by the candidate from a list of eight.

In 1975, the federal government recognized the existence of this new 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), now known as the **International Paralegal 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 for 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 attorneys, 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. Into the Twenty-first Century

Estimates vary on the number of paralegals employed in the United States. Most sources indicate that there are more than 200,000. About a thousand paralegal educational programs are operating, nearly 300 of which are approved by the ABA, and about 300 of which 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 the **Paralegal Advanced Competency Examination** (PACE), designed to measure the competency of experienced paralegals. The NFPA is an umbrella organization of state and local paralegal associations with more than 50 affiliated local associations, representing about 11,000 paralegals. At the time of this writing, nearly 600 paralegals have earned the Registered Paralegal designation that is granted to those who pass the PACE.

NALA represents more than 18,000 paralegals, including more than 6,500 individual members and about 85 state and local affiliated associations. More than 16,000 paralegals have been certified by NALA. More than 1,900 CLA/CPs have obtained advanced certification.

The International Paralegal Management Association, representing managers and supervisors of paralegals, has about 500 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.

Another group that includes paralegals is **NALS**, an 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 people who work in the legal profession. 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 now also administers a paralegal certification examination called the PP, or Professional Paralegal examination. More than 450 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. Even during the 2009-2010 economic recession, paralegals fared better than lawyers in retaining their jobs or finding new ones. Paralegals have become an expected part of the legal team. Employment opportunities are steady and salaries have increased beyond levels of inflation. However, 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 stalled at about three or four 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.

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 CLA/Certified Paralegal 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. Attorneys 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 Attorney-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 or experiential 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 either contracts with or is employed by an attorney, law firm, corporation, governmental agency, or other entity and who performs tasks under the direction and supervision of an active member of the State Bar of California . . . that have 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 so defined the terms paralegal and legal assistant when it amended its Rules of Professional Conduct in the year 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). In 2002, it also added the definition of a paralegal or legal assistant to the Rules Governing the Investigation and Prosecution of the Unlicensed Practice of Law, which now 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.

In 2003, the **Arizona Supreme Court** adopted a definition as part of its newly promulgated rules on the unauthorized practice of law, defining a legal assistant/paralegal 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.

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. 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. The state of Wisconsin plan for mandatory licensing of paralegals was finally rejected by the state supreme court in 2008 after having been stalled since 2000. Earlier licensing proposals in Minnesota, Montana, Nevada, New Jersey, Oregon, South Carolina, and Utah were shelved. In Ontario, Canada, where paralegals can perform some functions that would be considered the practice of law in the United States, paralegals have been licensed since 2008. 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.

While many 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 several practice areas, including family law, civil trial law, criminal law, estate planning and probate, real estate law, and personal injury trial law.

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. There are currently more than 300 certified legal assistants in Texas.

The states of North Carolina, Florida, and Ohio adopted voluntary certification or registration programs in the last few years, North Carolina in 2004 and Ohio and Florida in 2007. 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.

By all accounts, these programs are very successful. Within two years, North Carolina had certified more than 4,200 paralegals; Ohio has certified 165 paralegals; and Florida's program has produced 4,000 registered paralegals in less than three years of operation. However, other states (for example, Indiana and Oregon) have recently rejected proposals for voluntary certification.

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 CLAs. California, Florida, and Louisiana have long had paralegal association and sponsored certification, and they have now been joined by Delaware and Pennsylvania.

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 Attorney-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 this 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 regulation, this is a contentious subject. California Rules of Professional Conduct permit disbarred lawyers to work as paralegals with some specified protections for clients (Rule 1-311). In a recent case, the California court made it clear that it will not condone a disbarred lawyer engaging in work that falls within the definition of the practice of law, including representing clients in administrative hearings. See *Benninghoff v. Superior Court*, 38 Cal. Rptr. 3d 759 (2006). Colorado recently adopted a rule similar to California's but many other states, such as Illinois, Indiana, and Massachusetts, do not allow disbarred lawyers to work in law firms. See, for example, *In the Matter of Scott*, 739 N.E.2d 658 (S. Ct. Ind. 2000).

5. Nonlawyer Legal Service Providers

In the last 20 years, reforming the legal services delivery system to improve **access to legal services** has become a recurring theme. Study after study has demonstrated that the vast majority of Americans do not have access to legal services, cannot afford an attorney when they need one, and do not know how to go about finding an attorney. Persons of modest means need access to the legal system and are more frequently than ever representing themselves with or without the assistance of self-help resources and nonlawyers. Barriers to access include not only inadequate financial resources, but language and physical access. As a result of this diverse array of access barriers, nonlawyer practice has developed in virtually every jurisdiction. More than half the states have considered proposals to regulate nonlawyers who provide legal services directly to the public.

Some consumer groups and nonlawyer practitioners advocate legislation that would authorize nonlawyers to engage in tasks that are otherwise considered the practice of law and therefore within the exclusive domain of licensed attorneys. Although there is substantial resistance to this concept from many practicing attorneys, there has also been support for it going back to the 1970s when the paralegal profession was born. Some commentators favor the idea of **"limited licensing"** of ***nonlawyer legal service providers*** to perform such tasks as handling simple real estate closings and drafting simple wills. However, opposition is strong from those who believe that the system of limited licensure would establish a second tier of legal services that are not as good as those services that lawyers would provide.

Nonlawyer legal service providers
Persons not licensed to practice law who provide legal services directly to the public

Proponents of limited licensure disagree on the appropriate level of regulation. Some favor a simple registration procedure under which practitioners register their names and addresses with an agency or the applicable court. Others want to create higher standards that would protect consumers, favoring educational requirements, a licensing examination, bonding or insurance, and continuing education.

Some states have taken steps to protect consumers from incompetent or unscrupulous providers. In California, ***legal document assistants*** have been required since 2000 to register with the county or counties in which they work. The California law defines and circumscribes their work, specifying that they may not provide legal advice, and sets up minimum education and experience requirements (California Business and Professions Code §§6400, et seq).

Legal document assistants/preparers
Nonlawyer legal service providers who assist persons in preparing legal documents without giving legal advice; called LDAs under California statutes, these persons are called Legal Document Preparers under Arizona court rules

In 2003, Arizona's Supreme Court adopted rules governing the activities of ***legal document preparers,*** defined as nonlawyers who prepare or provide legal documents without lawyer supervision for persons who are representing themselves. Arizona's program sets standards for certification by the court based on education or experience; defines the role of certified LDPs, limiting it to providing and preparing forms, providing information (but not legal advice), filing and arranging for service; and

mandates continuing education (Arizona Code of Judicial Administration §7-208).

It is likely that other states will follow the example of California and Arizona as they address the complex issues of increasing access to legal services, while protecting the public from incompetent or unscrupulous service providers. The most progressive plan yet has been made in the state of Washington, where a Limited Practice Rule for Legal Technicians has been proposed to the state supreme court. Under this rule, certified Legal Technicians would be permitted to work directly with the public in family law, interviewing pro se litigants, explaining procedures, providing materials, reviewing and explaining documents, conducting legal research, drafting documents, selecting and completing forms, and the like, without lawyer supervision. Under the plan as now conceived, Legal Technicians would have to meet qualifications for education and work experience and pass a test, and they would be subject to ethics rules under the jurisdiction of the court. At the time of this writing, no action has been taken on this proposal, submitted to the court in January 2008.

C. State Guidelines for the Utilization of Paralegal Services

In an effort to promote the effective and ethical use of paralegals, more than half of the states have adopted **guidelines** to assist attorneys in working with paralegals. At the time of this writing, the following states have some kind of guidelines: Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, and West Virginia.

In Indiana, Kentucky, New Mexico, North Dakota, Rhode Island, and South Dakota, the guidelines have been adopted by the highest court of the state. In other 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**. Detailed listings of paralegal job functions accompany the Colorado, Georgia, and New York guidelines.

Nearly all the state guidelines cover several critical areas of ethics that come into play when nonlawyers, not subject to discipline in the way that lawyers are, perform professional-level work and are interacting with clients and the public. These key areas, covered in later chapters of this text, are:

- unauthorized practice of law
- disclosure of status as a paralegal

- confidentiality
- conflicts of interest
- supervision and delegation
- financial arrangements between lawyers and paralegals.

The **ABA Model Guidelines for the Utilization of Paralegal Services**, originally adopted in 1991, serve as a model for states and as a guide to help lawyers use paralegal services effectively and appropriately. Many of the jurisdictions with guidelines have adopted all or part of the ABA guidelines.

D. 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 first adopted its **Code of Ethics and Professional Responsibility** in 1975. NFPA adopted its Affirmation of Responsibility in 1977. The current codes of the two organizations are included in Appendix A and Appendix B, respectively. NFPA has also adopted **Model Disciplinary Rules** to establish mechanisms for the enforcement of the ethics rules. The Model Disciplinary Rules set forth procedures for the investigation and prosecution of ethics code violations and for hearings and appeals and institute a system of sanctions.

NALA has both individual members and affiliated local chapters. All members sign a statement of commitment to NALA's code on their membership application. 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 designation from any member who has violated the code. In addition to signing the statement of commitment on the membership application, legal assistants who are certified by NALA must reaffirm their commitment to the NALA code every five years when they submit verification that they have completed their continuing education hours, a requirement for continued status as a CLA.

NALA also publishes **Model Standards and Guidelines for the Utilization of Legal Assistants**. The dual purposes of these guidelines are to serve as an educational and informational tool for individual attorneys and state bars and to provide a model for states seeking to develop their own guidelines.

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

Both organizations make literature on ethics available. Their addresses, phone numbers, and Web sites are as follows:

The National Association of Legal Assistants
1516 S. Boston, Suite 200
Tulsa, Oklahoma 74119
918-587-6828
http://www.nala.org

The National Federation of Paralegal Associations
P.O. Box 2016
Edmonds, WA 98020
425-967-0045
http://www.paralegals.org

In addition to these two national organizations, some local and regional associations have created and adopted their own ethics rules, borrowing from NALA, NFPA, and the ABA.

E. Liability of Paralegals as Agents of Attorneys

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

The ABA Model Rules of Professional Conduct contain an important section on supervision. Rule 5.3 provides as follows:

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

> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
>
> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Although this rule applies to all nonlawyers in the lawyer's office, it has special application for paralegals, who often work closely with clients and work continuously with sensitive and confidential information. The official **Comments** to this **Model Rule** mandate that lawyers provide appropriate instruction and supervision concerning ethical obligations, highlighting the duty of confidentiality. The Comments also advise managing lawyers to have internal procedures and policies that provide reasonable assurance that nonlawyers will act ethically.

Paralegals have one other very meaningful incentive for complying with high standards of conduct — they are **potential defendants** in civil malpractice suits, which can be brought by clients who believe their attorneys have acted negligently. Paralegals are subject to the same general tort principles that apply to lawyers and other professionals. They are liable for negligent or intentional misconduct that injures a client.

The lawyers for whom they work are also liable under the doctrine of **respondeat superior** or **vicarious liability**. Under this principle of agency law, employers are responsible for the acts of their employees carried out in the course and scope of their employment. This responsibility extends to vendors and others to which lawyers may outsource work, a practice that is the subject of considerable discussion in the last decade as lawyers have outsourced work to vendors at locations outside the country.

Because clients always name their attorneys 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. As a general principle, paralegals would be held to the same standard of care, skill, and knowledge common to other paralegals so long as they do not hold themselves out as attorneys and they perform typical paralegal tasks.

Three cases at the end of the chapter provide examples of attorneys being held responsible for the actions of their nonlawyer staff. The *Musselman* case involves a malpractice action in which a paralegal played a part. In the *Lawless* case, a lawyer is disciplined as a result of the actions of a paralegal. *Struthers* involves the discipline of a lawyer who abdicated his responsibility to nonlawyers who were really running his "practice."

Across the country, the number of lawyers who are disciplined for over-delegating and failing to supervise paralegals is increasing. The gravity of the paralegals' breaches of ethics in these cases ranges from embezzling client funds, to misinforming a client that he did not need to show up for a hearing in a criminal case, to improperly executing documents, to overbilling. In one recent case, a lawyer hired two paralegals in a row who embezzled money from his client trust accounts. Cases like these have arisen in a number of practice areas, including civil litigation, criminal defense, bankruptcy, and estate planning.

REVIEW QUESTIONS

1. When did the paralegal profession begin and what was the impetus for its development?
2. What are the two main professional associations for paralegals?
3. What is certification? What is licensing?
4. What states have some form of direct regulation of paralegals? What entity (court or legislature) adopted the regulation in each case?
5. What states have some form of voluntary certification of paralegals? What entity is responsible for these programs in these states?
6. What are the national associations' programs for paralegal certification called? How do they differ?
7. What is limited licensure? How do nonlawyer legal service providers differ from traditional paralegals who work under lawyer supervision? How do they differ from freelance or independent contractor paralegals?
8. What are the arguments in favor of the licensing of traditional paralegals? The arguments against?
9. What is the ABA's position on paralegal certification and licensing?
10. How many states have guidelines for the utilization of paralegals? What is their purpose?
11. What are the ABA Model Guidelines for the Utilization of Paralegal Services?
12. Do NALA and NFPA have rules on the conduct of paralegals? How are these rules enforced?
13. What are the NALA Model Standards and Guidelines for the Utilization of Legal Assistants? What do they contain? What is their purpose?
14. Can a paralegal assistant who is negligent while working on a client's case be sued by the client for malpractice? Can this paralegal's attorney-employer be sued? If so, on what legal basis?
15. Can a lawyer be disciplined for the unethical conduct of a paralegal whom he or she supervises? Can the paralegal be disciplined?
16. What does ABA Model Rule 5.3 say about attorney responsibility for paralegals?

DISCUSSION QUESTIONS AND HYPOTHETICALS

1. Do you think that paralegals working under the supervision of attorneys should be licensed? Why, or why not?
2. Do you think that nonlawyer legal service providers should be licensed? Should they be permitted to give legal advice as they help "customers" who are representing themselves?
3. If you were creating a licensing scheme for nonlawyer legal service providers, what would it include?
4. If nonlawyer legal service providers were licensed in your state, would you be interested in becoming licensed? Why, or why not?
5. Who is covered and not covered by the ABA definition of a paralegal? Do you like this definition? Why, or why not? How would you change it? How does it compare with some of the other definitions of paralegals in this chapter?
6. What methods can you suggest to improve access to legal services for low- and middle-income persons?
7. Do lawyers have an ethical obligation to delegate work to an employee who has the qualifications to do the work and is the least expensive to the client?
8. Many law firms outsource work to vendors, sometimes even offshore vendors. What is the ethical duty to supervise in that situation? Is it possible to supervise effectively at this distance?
9. What would you do if the lawyer you worked for had a heavy caseload and delegated everything but court appearances to you, including getting clients to sign retainer agreements, conducting intake interviews, and preparing pleadings? Would it make a difference if the lawyer came in late at night and reviewed everything that you did?

RESEARCH PROJECTS AND ASSIGNMENTS

1. Is there a local paralegal association in your area? Is it affiliated with NALA or NFPA, or is it independent? What kinds of activities does it have? What are the benefits of membership? How many members does it have? How many are certified by NALA, NFPA, or another entity? Does it have its own ethics code?
2. Does your state or local bar have a committee that addresses paralegal issues? Can paralegals join it? What does it do?
3. Does your state or local bar have guidelines for attorneys who work with paralegals? Has it considered licensing of traditional paralegals or independent paralegals who provide services directly to the public?
4. Has your state bar or court system conducted any studies on access to legal services or access to justice? If so, read the study and report on

the findings about barriers to access and solutions, proposed or implemented. Does the report discuss how paralegals can contribute to solving the access problem?

5. Can you find any legal malpractice cases in your state in which a paralegal was implicated?
6. Is voluntary certification through the state bar, statewide paralegal association, NALA, NFPA, or NALS popular in your state or local area? How many paralegals in your state are certified?
7. Has your jurisdiction adopted Model Rule 5.3 or some version of it? Are there any disciplinary cases or ethics opinions interpreting this rule? Are paralegal-related issues addressed?
8. What are your state's rules about disbarred lawyers working as paralegals? Do you think that disbarred lawyers should be able to work as paralegals? What are the risks to the client? Does this affect the paralegal profession or the image of paralegals? Read the cases cited in this chapter, check for cases that have cited them, and see where they lead you.
9. As mentioned in this chapter, some law firms outsource work, such as legal research and document management, to vendors outside the country. Is it possible to exercise appropriate supervision under these circumstances? Read ABA Ethics Opinion 08-451 to identify the full array of ethical issues that arise in these circumstances.
10. Research the status of the Legal Technician Rule proposed to the Washington Supreme Court by the Practice of Law Board in January 2008. Study the history of the proposal. How did this proposal come about? What areas of law practice were considered? Do you think this plan would increase access to affordable legal services? What evidence does the proposal provide? Would the public be adequately protected? How?

CASES FOR ANALYSIS

The *Musselman* case demonstrates how a paralegal might become involved in a transaction that results in harm to a client, thus becoming the subject of a malpractice suit.

Musselman v. Willoughby Corp.

230 Va. 337, 337 S.E.2d 724 (1985)

This is an attorney malpractice case arising from a real estate transaction. The lawyer represented a corporate client and employed an untrained paralegal who played a significant role in the closing of the transaction.

The relevant facts mainly are undisputed. Appellee Willoughby Corporation, the plaintiff below, was formed in September 1974. . . .

Appellant Robert M. Musselman, a defendant below, represented the bondholders in formation of the Corporation. He became attorney for the Corporation and also served as its Secretary. He was not a member of the Board of Directors. The daily operations of the Corporation were handled from defendant's law office by defendant's employees. . . .

In 1976, aware that the Board of Directors wished to sell a portion of the Willoughby Tract, defendant contracted Thomas J. Chandler, Jr., a local real estate broker, who obtained an offer to purchase Parcel 9. The offer was made by Charles W. Hurt, a medical doctor who had been a real estate developer in the Charlottesville and Albemarle County area for a number of years. . . .

Subsequently, another standard form purchase contract for $215,000 was completed dated May 6, 1976. The purchaser was shown to be "Charles Wm. Hurt or Assigns." . . . The contract was executed by Hurt, by Musselman on behalf of the Corporation as corporate Secretary, and by the realtor. . . .

[Stanley K. Joynes, III,] had been employed by Musselman in June 1977. Joynes had just graduated from college but had no formal training either as a lawyer or a paralegal. His main responsibility, under Musselman's direction, was to "shepherd the Willoughby Project along." Joynes attended his first Board meeting in July 1977 and was chosen Assistant Secretary of the Corporation.

In the course of the September 1977 Board meeting, defendant was directed to close the Hurt transaction "as soon as possible." Three weeks later, Stuart F. Carwile, Hurt's attorney, notified Musselman by letter dated September 22, 1977 that his client desired to take title to Parcel 9 as follows:

> Stuart F. Carwile and David W. Kudravetz, as trustees for the Fifth Street Land Trust, pursuant to the terms of a certain land trust agreement dated 22 September 1977.

Carwile advised that after Musselman submitted a draft of the deed, Carwile would forward the proposed deed of trust and note for defendant's approval.

The paralegal then prepared the deed, with "some assistance" from other employees of defendant, in accordance with Carwile's request showing the Land Trust as grantee. Joynes arranged for Frankel to execute the deed, dated October 5, 1977, and on that day participated with Carwile in the closing of the transaction. Musselman was out of town on business on both October 4th and 5th. In the course of the closing on October 5th, the paralegal accepted the deed of trust, and other closing documents prepared by Carwile, which specifically exculpated Hurt from personal liability in the transaction as beneficiary under the land trust.

At this point, we note several important undisputed facts. First, the Board of Directors, upon being advised that Hurt, a man of substantial wealth, was to be the purchaser of Parcel 9, intended to rely on Hurt's

potential personal liability as a part of the security for payment of the deferred purchase price. Second, Musselman maintained in his trial testimony that he was authorized by the Board to execute the contract of the sale on behalf of the Corporation, and this was not contradicted by any witnesses. In addition, Musselman testified that Joynes, the paralegal, represented the Corporation at the closing, acting within his authority as an employee of defendant. Also, none of the Board members, prior to closing, ever examined either the proposed contract of March 26 or the final contract dated May 6. Moreover, no member of the Board knew before closing that the contract showed the purchaser to be "Hurt or Assigns." In addition, Musselman always was of the opinion that the foregoing language in the contract authorized Hurt to escape personal liability under the contract by assigning his rights in the contract to whomever he chose. Also, Musselman never called the language to the Board's attention or explained its meaning to the Board. Finally, the fact that the closing documents exculpated Hurt from personal liability as beneficiary under the land trust was never revealed or explained to the Board of Directors prior to closing. . . .

The Land Trust defaulted under the terms of the $170,000 note in respect to an interest payment due on April 1, 1978. Subsequently, this action to recover the principal sum plus interest, due under the real estate transaction was filed in September 1978 in numerous counts against Hurt and Musselman. The proceeding against Hurt was severed and he was eventually dismissed by the trial court as a party defendant.

The Corporation's action against Musselman was based on alternative theories. The plaintiff charged that defendant breached certain fiduciary duties in his capacity as an officer of the Corporation. In addition, the Corporation alleged that Musselman, in his capacity as attorney for the Corporation, was negligent and breached his fiduciary duty as counsel to the Corporation.

At the March 1982 trial, the jury was permitted, under the instructions, to find against defendant in his capacity either as attorney, or as an officer of the Corporation, or as both attorney and officer. The jury found against defendant in his capacity as attorney only and fixed the damages, which were not in dispute, at $243,722.99. This sum represented the principal amount due on the obligation, plus interest through the last day of trial. The trial court entered judgment on the verdict in June 1982, and we awarded defendant this appeal in July 1983. . . .

Inexplicably, defendant's main contentions on appeal are based on the faulty premise that he lacked corporate authority to act in executing the contract containing the "or Assigns" language and in completing the conveyance to a land trust, while, in the process, exculpating Hurt from personal liability. This argument is totally inconsistent with defendant's trial testimony that he did, in fact, have authority to execute the contract. It is also at odds with the uncontroverted evidence about defendant's "dominant role" in acting for the Corporation. . . .

There is no merit to this argument. Musselman, being authorized to execute the contract and to close the transaction, had the responsibility as counsel to advise his client, immediately upon discovery of the "problem," that it should attempt to rescind the transaction, if we assume an attempt at rescission would have been successful. Instead, defendant at no time advised the Board of Directors that it should pursue rescission. . . .

For these reasons, the judgment of the trial court will be affirmed.

Questions about the Case

1. What functions did the paralegal Joynes perform in this transaction? Do you think any of these duties were inappropriate functions for a paralegal to perform? Were they carried out competently?
2. What were the mistakes made by the attorney Musselman in this case? What should he have done to fulfill his duty to the client without being negligent?
3. Do you think that Musselman adequately supervised Joynes? Why or why not?
4. Why was Joynes not named as a defendant in this action? Did Joynes act negligently? Did the court hold Musselman liable for Joynes's mistakes?
5. How did the fact that Joynes was "untrained" affect the court's thinking? Does a lawyer have a duty to hire a qualified person? A duty to match the person's skills and knowledge to the work that is delegated?

In the following case, a lawyer is disciplined for failure to supervise his "legal assistants," who, like the paralegal in the *Musselman* case, did not have formal paralegal training and education and breached several aspects of the ethics rules.

Supreme Court of Arizona v. Struthers

179 Ariz. 216, 877 P.2d 789 (1994)

Child Support Collections ("CSC"), a debt collection agency, retained Struthers in December 1989 to work with another lawyer who had been handling CSC's cases. The following day, the first lawyer resigned. . . .

When Struthers started with CSC, the agency was owned by Robert Hydrick and run in large measure by John Star, neither of whom was an attorney. . . .

In 1990, at Struthers' suggestion, Hydrick dissolved CSC. This occurred during an investigation by the State Banking Department into

allegations of irregularities in CSC's handling of client funds and that Star was holding himself out as an attorney. Struthers knew about and even represented Star and Hydrick in these matters.

When Hydrick dissolved CSC, Struthers superficially converted its operations into a law practice. In reality, however, CSC simply continued to operate. Star and Hydrick formed a new entity called MIROVI Inc., which was supposed to act as a managing company, providing support personnel and services for Struthers' practice. Star and Hyrick became Struthers' "legal assistants."

From the beginning of Struthers' association with CSC, he had a very large case load. At first he took over from his predecessor about 250 cases, but this number later rose to nearly 750. Although Struthers nominally maintained his status as an independent attorney, CSC (now MIROVI) staff ran his office, his accounting system and performed other tasks, such as conducting client interviews. . . . Under these circumstances, many of the formalities of a law firm were abandoned, giving rise to a number of the violations discussed below. [The violations related to client trust accounts, scope of representation, diligence, communication, fees, safekeeping client property, terminating representation, and professional independence.]

We examine in detail some of the more egregious violations . . . in four categories . . . [including supervision of] nonlawyer assistants. . . .

It is important to note that lawyers are often responsible for the actions of their nonlawyer assistants. Ethical Rule 5.3(a) provides that a lawyer in Struthers' position shall "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance" that nonlawyer assistants conduct themselves according to the rules for lawyers. . . .

In the present case, however, Struthers virtually abandoned responsibility for running his office to Star and Hydrick. Although Struthers knew that the Banking Department has charged Star and Hydrick with serious improprieties, he gave them total control of his office and unfettered access to his trust fund. . . .

[H]e knew about Star's dishonesty early in their relationship. Struthers admitted to the Committee that although Star told him he was an attorney licensed in other states, Struthers knew from that start this was not true. . . . Although there may often be some question of what is a reasonable effort to ensure proper conduct by nonlawyer employees, at a minimum the lawyer must screen, instruct, and supervise. [Citation omitted.] Struthers did little but close his eyes.

Moreover, even if Struthers had been unaware that he placed untrustworthy persons in charge of his affairs, he still violated ER 5.3(c) by knowingly ratifying many of their ethical lapses and by failing to mitigate their consequences. For example, although he knew Hydrick had commingled his own funds with those in Struthers' trust account, Struthers did nothing to stop this. . . .

Struthers violated [Rule 43, State Bar Trust Account Guidelines] "when he allowed incompetent and untrustworthy employees to manage

his trust account, and then failed to properly supervise them to ensure they were complying with the Trust Account Guidelines." . . . For example, Struthers routinely signed pages of blank checks for his employees to complete in his absence. As a result, Star and Hydrick were free to decide whether and how much to pay clients, and often based their decisions on which clients they favored. . . .

Ethical Rule 5.4(a) provides that a "lawyer . . . shall not share legal fees with a nonlawyer. . . ." Struthers' agreement with MIROVI, however, required him to turn over all fees that he received to MIROVI, with any profit left after paying expenses to be "distributed by the agreement of the parties." . . .

We deal here with a lawyer who, by premeditated scheme, has demonstrated that his practice is not designed to serve the public but, rather, to prey on those most in need of his help. He has demonstrated that he is indeed a danger to the public. To allow him to resume an active practice would be to ignore our obligation to that public. . . .

Accordingly Andrew Leeroy Struthers is disbarred. . . .

Questions about the Case

1. What functions did the nonlawyers perform in the lawyer's office? Can each of these duties be properly delegated to a nonlawyer and supervised?
2. Did these "legal assistants" meet any of the definitions of paralegal or legal assistant in this chapter? If not, what is lacking in their background?
3. Could the lawyer have set up a collections practice with a large caseload and run it in a manner that would comport with ethics rules? Describe how. Note that the court refers to recruiting, delegating, and supervising paralegals. Define each one of these aspects of a lawyer's responsibility for paralegals.
4. Do you think that the lawyer should have been disbarred? What do you think should have happened to Hydrick and Star? Can you use this case to argue for regulation of paralegals?

In the following case, a lawyer faces disciplinary charges for the conduct of a paralegal who runs a business providing services in the immigration area.

The Florida Bar v. Abrams

919 So. 2d 425 (Fla. 2006)

Suzanne Akbas, a paralegal, formed a corporate entity titled U.S. Entry, Inc. to provide legal services to persons with immigration issues

who were seeking to gain entry and establish lawful status in the United States. Attorney Daniel Everett Abrams was employed by U.S. Entry as "Managing Attorney" and was paid for "piecemeal legal work," generally at a rate of one hundred dollars per unit of work. Olga Ulershperger and Abdullah Ziya, who were husband and wife, both entered the United States in November 1999 on tourist visas and then in the spring of 2000 sought assistance from U.S. Entry in obtaining further lawful status. Ulershperger was an accomplished gymnast; Ziya was a Turkish Kurd who had suffered persecution, including torture, in his native land.

Akbas told the couple that instead of seeking political asylum based on Ziya's history of persecution, they should apply for employment visas based on Ulershperger's skills as a gymnast. The couple's applications ultimately were denied and their existing visas expired in May 2001. They did not learn of their unlawful status until March or April of 2002, after consulting with an immigration lawyer in California. That lawyer told the couple that they should not have been counseled to seek employment visas but rather should have been counseled to seek political asylum based on Ziya's persecution and torture, but that the one-year time limit for seeking asylum had expired in November 2000. The couple ultimately sought and were granted asylum under an ineffective representation exception to the one-year time limit, which prompted the present proceeding.

Based on the above matters, The Florida Bar filed a two-count complaint against Abrams, and the referee made the following findings of fact:

> . . . [Ulershperger and Ziya] were not notified of the status of their claim or of the lapse of their lawful status. . . . There was no follow-through by the Respondent — not telephone calls, no letters to the INS. . . .
>
> Respondent violated a number of disciplinary rules. . . . Instead of Akbas being employed by and under the Respondent's supervision, it was the other way around. Akbas was the employer and she used Respondent's license to practice law. . . .
>
> The referee recommended that Abrams be found guilty of violating [several sections of] the Rules Regulating the Florida Bar . . . and that the following disciplinary measures be imposed on Abrams: a one-year suspension; restitution in the amount of $2,400; and payment of the bar's costs. . . .
>
> The present record shows that Abrams was listed as the attorney of record on a status extension application submitted by Ziya and was listed as the "Managing Attorney" on the letterhead of a missive used by U.S. Entry in requesting alien labor certification for Ulershperger. The letter was signed, "Suzanne J. Akbas For Daniel E. Abrams, Esq." At the hearing below, [an] immigration lawyer . . . testified . . . that the proper handling of asylum claims requires substantial intake by a lawyer, not a paralegal. . . . Abrams had no contact whatsoever with Ulershperger and Ziya. . . . We approve the referee's recommendation that Abrams be found guilty of violating of rule 4-1.1 [re competent representation]. . . .

> [T]he record shows that even though Akbas worked as a paralegal at U.S. Entry, she actually was the person in control of the corporation's day-to-day operations. She met with clients, conducted client interviews, and made the decisions as to the appropriate course of action for clients. Abrams himself visited the U.S. Entry office only several times a month. Akbas testified that she unsuccessfully tried to get Abrams more involved in the company's operations. We conclude that Abrams's role and course of conduct at U.S. Entry were inconsistent with the title "Managing Attorney," and the title constituted a clear misrepresentation of his status. We approve the referee's recommendation that Abrams be found guilty of violating rule 4-8.4(c) [on dishonesty, fraud, deceit or misrepresentation]. . . .

Based on the foregoing, we approve the referee's findings of fact, recommendations as to guilt, and recommended discipline. . . .

Questions about the Case

1. How would you characterize the relationship of Abrams and Akbas? Who was the employer? Can an employee "supervise" his or her boss?
2. What functions did Akbas perform that might be considered practicing law? Consult Chapter 3 for definitions.
3. Do you think that Abrams should have been held responsible for Akbas's mistakes? Why or why not?
4. Should Akbas have been held responsible for her mistakes? How would this come about?
5. Is there a way for a nonlawyer-run immigration service like U.S. Entry to operate legally and ethically?

Attorneys are responsible for the actions of their employees, including paralegals who work as independent contractors, and may be disciplined when their inaction or neglect results in harm to a client.

Florida Bar v. Lawless

640 So. 2d 1098 (Fla. 1994)

A Canadian couple, Michael and Barbara Seguin, hired Lawless in 1987 to help them acquire permanent residency status in the United States. Lawless initially contracted to acquire residency status for Michael Seguin for a flat fee of $5,000 plus expenses. The Seguins later met with Lawless and paralegal Charles Aboudraah. Although Aboudraah did not work in Lawless's office, Lawless had worked with the paralegal and said he was experienced in immigration cases. Lawless said he would supervise the case, but the Seguins were to contact Aboudraah if they had questions.

From March 19, 1987, through February 11, 1988, the Seguins paid $12,546 to Aboudraah, including $725 to pursue a visa for Barbara Seguin. They thought these payments included the remaining $2,500 of Lawless's flat fee and that Aboudraah gave Lawless a share of these payments. Aboudraah told the Seguins their paperwork had been filed with the Immigration and Naturalization Service and that they were waiting for the INS to send visa cards.

In January 1990 the Seguins received a letter from the INS seeking information about their residency status and indicating that they had not responded to other letters about the matter. When the Seguins asked Lawless and Aboudraah about the letter, they were assured Aboudraah was handling their case.

Soon, however, the Seguins learned that the INS was investigating Aboudraah. Aboudraah became less available to them and he ultimately closed his office. The Seguins contacted Lawless, who discovered that there was no application on file for either Barbara or Michael Seguin. Thus, the Seguins had been living illegally in the United States since 1986.

In April 1990 Lawless told the Seguins he had not received any money from their payments to Aboudraah. He also said he had not been associated with Aboudraah in more than two years. Although Lawless submitted visa applications for the Seguins, they eventually consulted another attorney because they did not think Lawless understood the immigration procedures needed to conclude their case. The Seguins ultimately obtained visas that allowed them to live legally in the United States and operate their business.

The Bar filed a formal complaint against Lawless in 1992. . . .

The Bar argues that given Lawless's disciplinary history, nothing less than a ninety-one-day suspension is an adequate sanction. Lawless contends that a public reprimand is sufficient because this Court has imposed public reprimands in other cases involving a lawyer's failure to supervise nonlawyer employees. . . .

First, we uphold the referee's recommendation that Lawless pay restitution to the Seguins during his probation. We agree with the referee that "had it not been for [Lawless], the Seguins would not have been subjected to Charles Aboudraah's misconduct." Lawless's initial contract with the Seguins called for a $5,000 flat fee plus expenses. After Lawless introduced the Seguins to Aboudraah and assured them he was supervising the case, the Seguins paid $12,546 to Aboudraah. Whether Lawless ever received that money is not the issue: He was responsible for the conduct of his nonlawyer employee and thus must reimburse the Seguins.

Second, we find that the referee's recommendations about supervising paralegals and removing Lawless's name from lawyer referral lists are appropriate in this case. These sanctions will apply during Lawless's suspension and probation. . . .

Accordingly, we suspend Lawless from the practice of law for ninety days, followed by a three-year probationary period. We also impose the other penalties the referee recommended. . . .

Questions about the Case

1. Was the paralegal Aboudraah an employee or an independent contractor? What facts support your conclusion? Does it make any difference in this case?
2. What do Model Rule 5.3 and the definitions of paralegal say about independent contractor paralegals? Is the lawyer's duty any different for them?
3. Did the attorney Lawless supervise the paralegal adequately? What is the basis for your conclusion?
4. Did the attorney Lawless maintain a direct relationship with the clients? What is the basis for your conclusion?
5. Do you believe the sanctions were appropriate?
6. What do you think would have happened if the clients had filed a malpractice suit?

In this interesting case, a paralegal who is the recipient of a gift from an elderly client is held not to be a fiduciary to the client by virtue of her status as a paralegal. This case demonstrates the lack of clear and consistent case law about the liability of legal assistants in their professional capacity.

In re Estate of Divine

263 Ill. App. 3d 799, 635 N.E.2d 581
(Ill. App. 1 Dist. 1994)

Beginning in approximately 1979, Giancola was employed in Chicago by attorney Samuel Poznanovich as a part-time secretary in his law office. Eventually, she became his full-time secretary. Giancola received a paralegal certificate from Roosevelt University in 1980, and took an H & R Block tax course in 1970. Poznanovich employed one other secretary in addition to Giancola.

In 1981, Richard and his wife, Lila, came to Poznanovich's office for income tax services. The Divines did not have any children and both were retired. Giancola estimated that they were in their "early seventies" in 1981. Giancola interviewed the Divines, took tax information from them such as W-2 forms and copies of their previous tax returns, and introduced them to Poznanovich. After this initial meeting, Poznanovich

prepared the Divines' tax returns every year until 1986. Each year, Giancola would interview the Divines and gather their tax information. She never prepared their taxes, but simply gathered information for Poznanovich's use. In 1985, Poznanovich also represented Richard in a personal injury case. Giancola was not involved in that case. Additionally, Richard called Poznanovich occasionally for legal advice on other matters. Before 1986, Giancola and Poznanovich saw the Divines only at the law office, although, according to Poznanovich, the relationship became "more and more friendly" each year.

In December 1986, Lila died. Richard called Giancola at the office to tell her about Lila's death. Giancola stated that Richard had "depended on Lila for just about everything" and was very lonely without Lila. Also, he was "unable to do for himself." Giancola went to visit Richard in his apartment on Coles Avenue "within a day or two" of Lila's death. Richard was afraid to leave the apartment alone and could not walk long distances because "his legs were bad." Richard's relatives and Poznanovich also testified that Richard had physical problems with his legs. Giancola stated that for "the most part," Richard was confined to his apartment. After Giancola's first visit, Richard frequently called her, and she visited his apartment once or twice a week. Richard asked her to assist him in getting his groceries and other necessities. Richard gave Giancola money for the groceries and supplies. She testified that he did not give her a "fee" for her services, but admitted that sometimes he gave her "something for [her]self." He did his own cooking while living in the Coles Avenue apartment.

Giancola believed that the neighborhood around Coles Avenue was too dangerous for Richard, and she did not like going there to visit him. She suggested that he move to a safer area; she also mentioned to Poznanovich that Richard's neighborhood was unsafe. Poznanovich's office is located in a building he and his sister own. There are four residential apartments in that building which are rented by Poznanovich and his sister. Giancola occasionally takes the rent checks from tenants for Poznanovich. When an apartment became vacant in Poznanovich's building, Giancola told Richard it "would be easier" if he moved into that apartment. She did not know that Richard's relatives wanted him to move to Michigan City, Indiana. . . .

In addition to getting his supplies and cooking his meals, Giancola cashed checks for Richard and made bank deposits for him. She wrote out the checks for all his bills. She explained that she would write the checks, he would sign them, and she would mail them. All these transactions involved only Richard's personal checking account. Richard would discuss "personal problems" with Giancola, but did not talk to her about legal matters. . . .

In November, 1987, Richard called Poznanovich and asked him to come to his apartment. In the apartment, Richard told Poznanovich that he wanted to "put his affairs in order." First, he handed two bank account

passbooks to Poznanovich and said "I want this for my sweetheart." Richard told Poznanovich that his "sweetheart" was Giancola, and that he wanted her to have the two accounts. These two accounts were separate from Richard's personal checking account which Giancola used for his finances. Richard told Poznanovich he did not want to leave the accounts to Giancola in his will because he wanted her "to have them now." Richard explained: "As far as I'm concerned, if it were not for her, I would be dead now." Poznanovich suggested that the accounts be made joint accounts, like the accounts Richard had shared with Lila. When Poznanovich assured Richard that a joint tenancy would allow Giancola to have the money immediately, Richard told Poznanovich to change the two accounts to joint accounts. Giancola was not present during this discussion. Poznanovich testified that he did not receive any direct or indirect financial benefit from this transaction.

Next, Richard asked Poznanovich to draft a will for him. The will made Poznanovich executor of the estate and gave $3,000 each to Giancola and Poznanovich. Poznanovich testified: "I had a problem with [Richard] inserting me as a beneficiary under the will, . . . [and] we agreed that if I were to remain in the will as a beneficiary, I would waive my executor's fee, which I did." The will made one other specific bequest of $2,000, then left one half of the residuary estate to the petitioners and one half to four other family members. After his death, the value of Richard's estate, in addition to the joint accounts, was approximately $150,000.

Poznanovich obtained two signature cards from the bank and had the accounts changed to joint accounts. On November 14, 1987, he asked Giancola to sign these signature cards. Neither Richard nor Poznanovich ever discussed the accounts with Giancola before presenting her with the cards. They also did not discuss the transactions with any members of Richard's family. . . .

At the hearing in the trial court and in this court the petitioners argued that the actions of Poznanovich and Giancola are inextricably intertwined and that because Giancola was a paralegal and an employee of the lawyer, Poznanovich, who was a fiduciary as a matter of law, so also is Giancola a fiduciary as a matter of law. They also repeatedly assert that Poznanovich gained financially from the transactions which benefitted Giancola. Nonetheless, they never requested that Poznanovich or Giancola return the $3,000 bequests and they do not challenge the validity of the will. Additionally, they have never made Poznanovich a party to these proceedings. Essentially, the petitioners argue that Poznanovich's questionable action of drafting a will which gave him a gift and his status as an attorney should be imputed to Giancola and that she should be liable because of his actions.

Under certain circumstances, one person will be charged with liability for the actions of or knowledge given to another person. For example, actions by one partner will be imputed to another partner.

[Citation omitted.] Also, an employer will be held liable for certain actions of his employee. [Citation omitted.] There is no case law holding an employee liable for the acts of his employer, however, and the petitioners cite no law to support their position that Giancola should be accountable for Poznanovich's actions. Unfortunately, there also is no case law in Illinois involving the narrower question of a paralegal's fiduciary duty to his employer's client, making this a case of first impression. In fact, we have found no reported case in the United States involving a paralegal's fiduciary responsibility, as a paralegal, to his attorney's client.

Moreover, there is very little case law from Illinois or any jurisdiction generally discussing paralegals. Two cases address the somewhat analogous issue of a paralegal's possible liability for legal malpractice. A divided Nevada Supreme Court, in *Busch v. Flangas* (1992), 108 Nev. 821, 837 P.2d 438, held that an attorney's law clerk or paralegal who attempts to provide legal services can be liable for malpractice to the client. On the other hand, the *Busch* dissent argued that a law clerk or paralegal, as an employee of an attorney, owes no duty to the attorney's client, but is liable only to the attorney. (*Busch*, 837 P.2d at 441 (Springer, J., dissenting).) The Court of Appeals of Ohio, without extensive discussion, determined that a paralegal could not be sued for legal malpractice because she was not an attorney. *Palmer v. Westmeyer* (1988), 48 Ohio App. 3d 296, 549 N.E.2d 1202, 1209.

On the other hand, the idea that an attorney is liable, in malpractice or as an ethical violation, for his paralegal's acts is well-supported in Illinois. . . .

Several Illinois cases support the idea that paralegals are an extension of their employing attorney. For example, the presence of an attorney's employee, such as a secretary or law clerk, does not destroy the attorney-client privilege for material disclosed to the attorney in the employee's presence. [Citations omitted.] Also, in the majority of Illinois cases discussing paralegals, which involve disputed attorney fee petitions, the courts have held that an attorney may recover reasonable fees for time properly spent by his paralegal. . . .

Based on these cases, we refuse to treat Poznanovich and Giancola as a unit for purposes of Giancola's liability. It is clear that Poznanovich, as a licensed attorney and as an employer, could be held liable for Giancola's actions. Nonetheless, holding Giancola liable as if she were an attorney is not consistent with general *respondeat superior* law or with the decisions discussed above treating paralegals as subordinate employees of attorneys. The theme running through all these cases is that paralegals do not independently practice law, but simply serve as assistants to lawyers. They are not equal or autonomous partners. Thus, while supervisors properly are held liable for paralegals' actions, the subordinate paralegals should not be liable for the actions of these supervisors. Therefore, we refuse to find that Giancola owed Richard a fiduciary duty simply because she worked for

Richard's attorney, and we refuse to hold that paralegals are fiduciaries to their employers' clients as a matter of law. . . .

We also wish to make it clear that we are not saying that the evidence shows that Poznanovich did anything improper. We have discussed his "actions" only in the general sense to illustrate that, while he was a fiduciary to Richard as a matter of law and if he had been the recipient of the joint account funds, the burden of proof would have been on him to show that the transaction was proper, his fiduciary obligations may not be imposed upon Giancola. Nor are we saying that an improper transfer may never be shown under circumstances like those present in this case. If the petitioners had offered evidence from which it could be inferred that collusion existed between Poznanovich and Giancola or that Poznanovich gained financially in any way from the transfer, our holding would be different. But neither the trial judge nor this court may decide a case on speculation, guess, conjecture or suspicion.

For these reasons, the judgment of the circuit court is affirmed.

Questions about the Case

1. What was the paralegal's relationship with the client, and how did it evolve over time? Was it professional or personal?
2. What evidence might show that the paralegal took advantage of the client? Discuss the adequacy of this evidence.
3. Did the petitioners sue the lawyer? Why or why not? On what grounds did they sue the paralegal?
4. Under this case, can a paralegal be held liable for the actions of his or her employing lawyer? Could the lawyer be held liable for the actions of the paralegal?
5. Does a paralegal have a fiduciary duty directly to a client in Illinois? How would you state this principle?
6. Review the rules in Chapter 5 about accepting gifts from clients and determine if either the lawyer or the paralegal in this case violated those rules. What should they have done to protect against a lawsuit like this one?

3

Unauthorized Practice of Law

This chapter covers the limitations on the practice of law, including what acts constitute the practice of law and how these restrictions affect and guide paralegal conduct. Chapter 3 covers:

- the history of the unauthorized practice of law
- definitions of the practice of law
- the effect of restrictions on the practice of law on access to legal services
- the attorney's ethical responsibility to prevent the unauthorized practice of law and to supervise paralegals
- key functions that may constitute the unauthorized practice of law, including:
  - making court appearances and taking depositions
  - preparation and signing of documents and pleadings
  - giving legal advice
  - accepting cases and setting fees
- analysis of functions that may or may not constitute the practice of law
- nonlawyer practice before administrative agencies
- disclosure of the paralegal's nonlawyer status
- paralegals working as independent contractors

A. A Brief History of Unauthorized Practice of Law

1. The Early Years

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 by lawyers and mandated that lawyers 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" attorneys, to stop incompetence that harmed clients and impaired the administration of justice and dignity of the courts, and to prevent exploitive, excessive fees.

These early limitations on the practice of law evolved to their present state incrementally and not always in a smooth and linear way. Many of these rules, along with later rules that governed the training of lawyers and their admission to the bar, were eliminated during an era of deprofessionalization in the early nineteenth century, only to reemerge in the late nineteenth century. State and local bar associations began to gain strength during this period, in part because of concern over the large numbers of lawyers competing with one another for legal work and with newly developing businesses, such as collection agencies, banks and trust companies, and accounting firms, and the establishment of administrative agencies that permitted lay appearances. The first unauthorized practice statutes were passed in several states during the 1850s, prohibiting court appearances by anyone not licensed as an attorney and prohibiting the practice of law by court personnel such as bailiffs. The first unauthorized practice prosecutions were also brought during this period. These cases held it improper for an unlicensed person to hold himself or herself out as an attorney and for a nonlawyer to form a partnership with a lawyer.

The definition of the practice of law that was formulated in early cases gradually broadened to cover activities beyond court appearances. Early cases held that the practice of law also includes the preparation of documents by which legal rights are secured. Gradually new justifications for restricting the right to practice law to licensed attorneys were developed, including the lawyer's professional independence, proven moral character, and special training. Advocates for tight controls over the practice of law also used public protection arguments by pointing out that lawyers are subject to sanctions for breaches of ethics or competence, unlike unlicensed practitioners.

Legal historians believe that the height of unauthorized practice restrictions came during the Depression when lawyers needed most to

protect their economic interests from competition. Bar associations became especially powerful trade organizations during this era. Unauthorized practice statutes were passed in virtually all states, making it a crime to practice law without a license. The definition of the practice of law was further expanded to include "all services customarily rendered by lawyers."

In 1930, the American Bar Association created its powerful Special Committee on the Unauthorized Practice of Law, which by the late 1950s had agreements called Statements of Principles with accountants, collection agencies, insurance adjusters, life insurance underwriters, publishers, and realtors, to name a few. These agreements, later rescinded when it became apparent that they would be found illegal under the Sherman Antitrust Act, delineated the legal activities that these other nonlawyer professionals could engage in without stepping into the protected realm of the practice of law. Most state and local bar associations had committees that monitored the activities of competitor organizations, and many also entered into Statements of Principle with nonlawyer legal service providers. The California State Bar, for example, had 20 such agreements, which were rescinded in 1979.

Criminal prosecutions and civil suits to restrain unauthorized practice slowed during the 1960s and 1970s. During this period the sale of legal self-help kits and books began, and soon most courts determined this activity not to constitute the unauthorized practice of law (UPL). These decisions signaled the beginning of a new movement to expand access to legal services by alternative means.

2. Recent UPL History: Nonlawyer Legal Service Providers and Access to Legal Services

The 1980s saw a **resurgence of unauthorized practice prosecutions** because of the increased number of nonlawyer legal service providers providing low-cost legal services directly to the public. Many factors converged to create the great need for alternative legal service providers: the decrease in federal funding for the Legal Services Corporation, which had supplied legal services to low-income persons; the increase in the need for legal services by every socioeconomic group because of the proliferation and complexity of laws; and the rising cost of legal services provided by lawyers, which makes it difficult or impossible for most Americans to employ a lawyer when they need one.

Most nonlawyer legal service providers work in areas of law in which low- and moderate-income people need assistance, such as landlord-tenant matters; family law matters including **divorce**, paternity, domestic violence, and child support; consumer matters including **bankruptcy**;

and **immigration**. Some run "typing services" that assist persons only by typing documents, usually to be filed with the court, after the "customer" fills in the blanks on forms. Others provide more complete information and assistance, helping the customer decide what forms to use, what information to include on the forms, where to file them, and advising the customer on procedural matters and court appearances. Increasingly, these providers use electronic programs to complete standard court forms. Nonlawyer legal service providers call themselves by a variety of titles, including independent paralegals, legal technicians, and document preparers. Some providers are offering their services through We the People (WTP), a national organization that provides help to self-represented persons through offices owned and operated locally. See *In re Finch* at the end of this chapter for a WTP office that crossed the line into UPL.

The unmet need for legal services is well documented, but lawyers are largely opposed to giving up any of their traditional functions to nonlawyers. Clearly, lawyers have both monopolistic, economic reasons for this stance and legitimate professional and societal concerns about the quality of legal services that someone not trained as a lawyer can provide. The debate takes on national proportions as courts throughout the country attempt to address the needs of pro se litigants who attempt to represent themselves.

Prosecutions against nonlawyer legal service providers have been rising. No formal studies document the exact increase in prosecutions; however, starting in the early 1990s most states reported criminal prosecutions for UPL and for injunctive relief against nonlawyer legal service providers after decades of virtually no such cases. Most cases are brought against bankruptcy, landlord-tenant, immigration, and family law practitioners where there has been egregious or incompetent conduct that harmed consumers. But some prosecutions have resulted from lawyer complaints, rather than from complaints from disgruntled consumers.

Defendants in UPL cases sometimes argue, although unsuccessfully, that they are not giving legal advice but are simply assisting lay persons in the preparation of legal documents; that is, giving legal information. Some defendants in unauthorized practice prosecutions have argued unsuccessfully that a statutory power of attorney from a client gives a nonlawyer the authority to represent the client in litigation. (See, for example, *Whitehead v. Town House Equities, Ltd.*, 8 A.D.3d 369, 777 N.Y.S.2d 917 (2004); and *Drake v. Superior Court of San Diego County*, 21 Cal. App. 4th 1826, 26 Cal. Rptr. 2d 829 (1994).) Similarly, it has been consistently held that nonlawyers who are serving as conservators, executors, and other representatives of estates cannot make appearances in court on behalf of these estates. (See, for example, *Hansen v. Hansen*, 114 Cal. App. 4th 618 (2003).)

Some defendants have claimed, to no avail, a public necessity defense based on the lack of availability of legal services for their clients.

For additional justifications on constitutional grounds, see *Board of Commissioners of the Utah State Bar v. Petersen* at the end of this chapter. As we moved into the twenty-first century, several states have increased penalties for unauthorized practice of law. Arizona, which for many years was the only state without a UPL statute or rule, adopted a court rule asserting the state supreme court's authority over anyone who practices law, whether authorized or not. In 2000, the American Bar Association's House of Delegates adopted a resolution calling on the states to vigorously investigate, report, and eliminate incidents of UPL.

The tremendous increase in foreclosures during the economic recession that began in 2008 has given rise to a new form of unauthorized practice, one that has sometimes drawn in lawyers. Foreclosure consultants and loan modification agencies, which seek to negotiate more affordable loans for homeowners with lenders, have been found by courts to be engaged in the unauthorized practice of law. Some of these firms also hire lawyers or use them as outside counsel, which has resulted in disciplinary action against lawyers for a variety of ethics violations, including aiding in unauthorized practice of law, unethical solicitation of clients (see Chapter 6), and fee splitting (see Chapter 7). See *The Cincinnati Bar Ass'n v. Mullaney* for a disciplinary case on lawyers working with a loan modification company.

Another development of note has been the proliferation of electronic resources for persons seeking to represent themselves in various kinds of legal matters. Although one might expect that electronic resources would fall into the protected category of self-help books and materials, some bar associations and courts have challenged this interpretation. For example, in 1997 the Unauthorized Practice of Law Committee of the Supreme Court of Texas investigated the publication of electronic self-help resources, contending that the publication of these resources was tantamount to giving legal advice. These increasingly popular programs guide users to specific options and forms and help them to complete forms by asking them a series of questions that trigger selection and completion of forms. One of the Committee's contentions was that this process constituted legal advice that could only be given in Texas by a lawyer licensed in the state of Texas. The final result of this dispute, after several hearings and much publicity, was that the Texas legislature passed a law allowing self-help companies to publish this material without threat of a UPL prosecution. The use of technology to increase access to legal services through programs like these is growing dramatically despite ongoing controversy over whether it violates UPL rules. See *In re Reynoso*, 477 F.3d 117 (9th Cir. 2007), at the end of this chapter for a recent case in this ongoing debate.

Some states have taken action to regulate nonlawyers who assist persons with **immigration** matters, including Arizona, Illinois, and Oregon. 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 in the immigrant community.

Several states have determined that the preparation of **living trust documents** constitutes the practice of law and have prosecuted nonlawyers running companies that market and prepare living trust plans. These decisions hold that the client's decision about having a living trust, the attendant preparation and execution of documents, and the funding of the trust are functions that require an attorney's judgment and involvement. (See, for example, Florida Bar re: Advisory Opinion on Nonlawyer Preparation of Living Trusts, 613 So. 2d 426 (Fla. 1992); California State Bar Ethics Opinion 97-148; South Dakota Bar Ethics Opinion 91-14; Colorado 90-87; Pennsylvania 90-65; Kansas Advisory Opinion 96-08; and Texas Prof. Eth. Comm. Opinion 95-498.)

In another notable development, in 2009 the Oregon State Bar rejected a proposal that would have provided for paralegals to make court appearances under lawyer supervision in order to increase access to legal services.

3. Other Recent UPL Activity

As noted earlier, lawyers in several jurisdictions have been disciplined for aiding the unauthorized practice of law by participating in businesses that promoted and sold **living trusts**. In most of these cases, nonlawyer living trust marketers had all the client contact, and the lawyer did not counsel the clients about the decision to create a living trust or the provisions and funding of the trust. Courts have found that these lawyers have abdicated their responsibility to advise clients and to exercise independent professional judgment. Many lawyers in these cases failed to supervise the work of their employees in counseling clients or preparing the documents for them. The consequences have been disastrous for many elderly people who thought they were protecting their estates from probate, but were setting up these trusts unnecessarily and paying exorbitant commissions to fund the trusts. One such case is *In re Morin*, found at the end of this chapter. A few others of note are *In re Phillips*, 338 Or. 125, 107 P.3d 615 (2005); *In the Matter of Flack*, 272 Kan. 465, 33 P.3d 1281 (2001); and *Doe v. Condon*, 341 S.C. 22, 532 S.E.2d 879 (2000). (See also Texas Ethics Opinion 95-498 and Arizona Ethics Opinion 98-08.)

Another category of recent UPL cases are those in which lawyers have been disciplined for running **large-volume practices** without adequately supervising their paralegals and other employees. In most of these cases, the firms were set up so that paralegals were accepting cases, having clients sign retainer agreements, preparing legal documents for them, and counseling them about their legal rights with little or no lawyer involvement and no direct relationship between the lawyer and the

client. In some cases, these violations were coupled with unlawful solicitation of clients by the nonlawyers and compensation arrangements that violate rules against fee splitting and lawyers and nonlawyers entering into a partnership for the practice of law. Finally, in a few cases, the lawyers have been hired by nonlawyer legal service provider companies to legitimize their work, an arrangement that has repeatedly been found unacceptable by the courts and in advisory opinions. (See, for example, Iowa Ethics Advisory Opinion 96-19 regarding a divorce business and *The Cincinnati Bar Ass'n v. Mullaney* regarding a foreclosure consulting business at the end of the chapter.) Related solicitation and fee-splitting issues are covered, in Chapters 6 and 7, respectively.

The unauthorized practice of law by lawyers who are licensed in one state but practicing in another has been a subject of much discussion within the organized bar in the past decade. Because of the nature of the economy, which does not recognize neatly drawn **jurisdictional lines**, lawyers often engage in legal work in states other than the one(s) in which they are licensed. Sometimes this work takes place in a bordering state and sometimes across the country. States have become more protective of their authority over the practice of law and have been making it more difficult for lawyers to engage in this kind of work. The California Supreme Court in *Birbower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal. 4th 119, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998), determined that a New York law firm doing some work in California could not collect its fees because the lawyers were not licensed to practice in California and had therefore engaged in unauthorized practice of law, a crime that voided the contract with the clients. Similar cases followed in other jurisdictions. To provide exceptions and clear guidance, the ABA adopted Model Rule 5.5, setting up carefully drawn exceptions for limited out-of-state practice.

Another interesting UPL question is whether a corporate officer who is not a lawyer can represent the corporation in legal matters. Few cases have addressed this issue but most allow this practice in actions in small claims court or in administrative hearings. (See, for example, *Dayton Supply v. Montgomery Bd. of Rev.,* 111 Ohio St. 3d 367 (2006), in which the court allowed a corporate office to appear for the company in a matter concerning the valuation of property.)

Finally, questions have been raised about the rights of nonlawyers and parents to represent their children under the federal Individuals with Disabilities Education Act (IDEA). At least two states have found that nonlawyers cannot represent parents or children in the administrative hearings (see *In re Arons,* 756 A.2d 867 (2000), and Oklahoma Attorney General Opinion 06-27). The law gives parents the right to advocate for their children in administrative hearings, but the courts are split on whether parents can represent their children in federal court judicial reviews of these administrative decisions. Most federal circuits have found that parents cannot represent their children in IDEA actions in

federal court as this would constitute unauthorized practice of law. They may, however, represent their own interests in such actions. See *Winkelman v. Parma City School Dist.*, 550 U.S. 516, 127 S. Ct. 1994 (2007), and *Cavanaugh v. Cardinal Local School Dist.*, 409 F.3d 753 (6th Cir. 2005).

B. Practice of Law Defined

No one definitive list of activities captures the meaning of the practice of law. As you can see from the foregoing history, the concept is flexible; it changes over time with 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." Efforts to build a national consensus for a definition of the practice of law have been unsuccessful. For example, in 2003, an ABA Task Force on the Model Definition of the Practice of Law had to withdraw its proposed definition when it was met with harsh criticism from the Department of Justice, the Federal Trade Commission, and other organizations that believed that it was overly broad and illegally noncompetitive. States continue to establish their own definitions in statutes and court rules and rely on court decisions that provide tests for determining what defines the practice of law. The traditional tests for determining if an act constitutes the practice of law are found in Charles W. Wolfram's treatise Modern Legal Ethics (1986):

1. *The professional judgment test:* whether the activity at issue is one that requires the lawyer's special training and skills. Wolfram suggests that a better version of this test would be "whether the matter handled was of such complexity that only a person trained as a lawyer should be permitted to deal with it." Id. at 836.
2. *The traditional areas of practice test:* whether the function in question is one that would traditionally be performed by an attorney or is commonly understood to be the practice of law. Id.
3. *The incidental legal services test:* whether the activity is essentially legal in nature or is a law-related adjunct to some business routine or transaction, that is, completing a simple legal document incidental to a banking or real estate transaction, for which no separate fee is charged, would not constitute the practice of law under this definition. Id.

Some scholars add other tests, such as whether the activity in question is characterized by a personal relationship between lawyer and client or whether the activity is one for which the public interest would best be served by limiting it to licensed attorneys.

Examples of definitions of the practice of law in a few major UPL cases may be instructive.

> [I]t embraces the preparation of pleadings and other papers incident to actions of special proceedings, and the management of such actions and proceedings on behalf of clients before judges in courts. However, the practice of law is not confined to cases conducted in court. In fact, the major portion of the practice of any capable lawyer consists of work done outside of the courts. The practice of law involves not only appearance in court in connection with litigation, but also services rendered out of court, and includes the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.

Davies v. Unauthorized Practice Committee of State Bar of Texas, 431 S.W.2d 590, at 593 (Tex. Civ. App. 1968).

> [O]ne is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply the possession and use of legal knowledge and skill. . . . Practice of law includes the giving of legal advice and counsel, and the preparation of legal instruments and contracts of which legal rights are secured. . . . Where the rendering of services for another involves the use of legal knowledge or skill on his behalf — where legal advice is required and is availed of or rendered in connection with such services — these services necessarily constitute or include the practice of law.

In re Welch, 185 A.2d 458, 459 (Vt. 1962).

> [The] definition of law practice has two aspects: exercise of professional judgment and application of legal principles to individual cases. An exercise of professional judgment occurs any time there is "informed or trained discretion exercise in the selection or drafting of a document to meet the [legal] needs of persons being served"; "an intelligent choice between alternative methods of drafting a legal document"; or advice given that "involves the application of legal principles." [Citations omitted.]

Oregon State Bar v. Taub, 190 Or. App. 280, 78 P.3d 114 (2003). Also see the definitions offered by other courts in each of the cases at the end of this chapter.

States have adopted some definitions that are more specific than those commonly adopted in the past. For example, the Arizona Supreme Court defines the practice of law as follows:

> "Practice of law" means providing legal advice or services to or for another by:
>
> (1) preparing any document in any medium intended to affect or secure legal rights for a specific person or entity;

> (2) preparing or expressing legal opinions;
> (3) representing another in a judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution process such as arbitration and mediation;
> (4) preparing any document through any medium for filing in any court, administrative agency or tribunal for a specific person or entity; or
> (5) negotiating legal rights or responsibilities for a specific person or entity.

Arizona Supreme Court Rule 31(a)(2)A.

Hundreds of published opinions on UPL help to define the practice of law. UPL cases come to the courts by a variety of paths:

- criminal prosecutions of a nonlawyer or out-of-state lawyer (UPL is a misdemeanor in more than 30 states and a felony in a few)
- civil contempt proceedings brought when a nonlawyer appears in court on behalf of a client (a remedy in more than 25 states)
- actions for injunctive relief, usually brought by bar associations or courts (a remedy in at least 40 jurisdictions)
- contempt proceedings brought against nonlawyers appearing before a court (a proper remedy in every jurisdiction)

Additional deterrents to unauthorized practice include liability for negligent performance, unenforceability of the contract for legal services, court dismissal of an action brought by a nonlawyer for a client, and a court's voiding of a judgment in which a nonlawyer represented the prevailing party.

C. The Lawyer's Responsibility to Prevent the Unauthorized Practice of Law

Rules that prohibit the unauthorized practice of law affect lawyers and nonlawyers alike. Lawyers engage in UPL if they practice in a state in which they are not licensed or practice while they are suspended or after they have been disbarred. Nonlawyers engage in UPL when they perform services for the public that fall under the definition of the practice of law. As you will see in the next sections, some of the prohibited activities are absolutely prohibited, whereas others may be done with **lawyer supervision**. In a traditional legal setting where paralegals are supervised by lawyers, paralegals may engage in UPL by overstepping the accepted boundaries.

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. In others, the ethical codes contain such a restriction. See ABA Model Code DR 3-101(A) and ABA Model Rule 5.3(b), also discussed in Chapter 2.

Under ethics rules, lawyers are responsible for the training and supervision of paralegals and for the proper delegation of work to paralegals. The obligation of adequate supervision runs to all areas of ethics — such as confidentiality, conflicts, and competence — but carries special force in the area of unauthorized practice. Cases interpreting ethics rules make clear that lawyers are responsible for the actions of their nonlawyer assistants, including actions that constitute UPL. Further, lawyers must maintain professional independence and may not form partnerships with nonlawyers or divide legal fees with nonlawyers (ABA Model Rule 5.4). Chapter 7 discusses the financial restrictions on the lawyer-nonlawyer relationship.

As discussed in Chapter 2, Rule 5.3(b) of the ABA Model Rules requires lawyers to make "reasonable efforts to ensure that the [nonlawyer assistant's] conduct is compatible with the professional obligations of the lawyer" and makes lawyers accountable for the conduct of their paralegals. Guideline 1 of the ABA Model Guidelines for the Utilization of Paralegal Services (ABA Model Guidelines) and all state guidelines on paralegal utilization state that lawyers are responsible for all the professional actions that their paralegals perform at the lawyer's direction. Guidelines typically note the attorney's duty to employ and delegate work to paralegals who are competent for the task.

Guideline 2 of the Model Guidelines provides an expansive definition of permissible paralegal functions and notes that lawyers are prohibited from delegating to paralegals those tasks proscribed to one not licensed as a lawyer by statute, administrative rule or regulation, or controlling authority.

See also Guidelines IV, V, and VII of the NALA Model Standards and Guidelines for the Utilization of Legal Assistants, Canons 1 through 5 of the NALA Code of Ethics and Professional Responsibility, and Section 1.8 of the NFPA Model Code of Ethics and Professional Responsibility. NALA and NFPA codes are found in this book's Appendices.

D. What Constitutes the Practice of Law

1. Court Appearances

The one function that is universally considered to be the exclusive province of licensed attorneys is the representation of a client in court proceedings. Recall from the brief 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.

The rationale for this rule is strongly supported by the avowed purposes of unauthorized practice rules generally. 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 specialized education, training, and experience. Many would say that appearing in court on behalf of a client represents the highest use of an attorney's professional judgment and skills. In addition to benefiting from an attorney's special competence, the client is protected by ethics and related rules to which only an attorney is bound on matters relating to attorney-client privilege, conflicts of interest, and confidentiality. A court appearance is an event that decides a client's rights and responsibilities. The client should have the best representation possible at this critical moment. Further, incompetent representation in a hearing or trial may not only damage the client, but may also impair the administration of justice.

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 principle of self-representation. The **right of self-representation** in federal courts is guaranteed by statute (28 U.S.C. §1654 (1948)). Any doubt about the constitutional right to represent oneself in state court was resolved in *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.

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 pro se. Cal. Code of Civ. Proc. §371. However, parents cannot generally represent their children in actions before the courts (e.g., cases brought under the federal IDEA, discussed above). And nonlawyer plaintiffs cannot represent other nonlawyer co-plaintiffs.

All jurisdictions have rules permitting **law students** to engage in limited practice under lawyer 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.

In some local jurisdictions, **paralegals are allowed to make appearances** for their attorney-employers in uncontested matters. Some enlightened courts permit such appearances under local court rules,

including courts in the states of Indiana and Washington. For example, Seattle-King County, Washington, has a court rule that permits paralegals who are registered with the local bar association to present stipulated, *ex parte,* and uncontested orders in court when such orders are based solely on the documents in the record. Paralegals must have six months of work experience with an attorney, must devote at least half their work time to paralegal tasks, and must have a certificate from an ABA-approved program or the equivalent.

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 attorney asks questions in person 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 transcript of the questions and answers. A deposition may be introduced in court. 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 in lieu of direct testimony if the deponent is no longer available.

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

The attorney'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 attorney 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 attorney wants to learn about the facts of the case and to assess the credibility of the deponent as a potential witness. This work requires not only a full understanding of the factual and legal issues but highly developed skills in phrasing questions that will elicit candid and thorough responses, perhaps beyond those the party intends to reveal.

For the foregoing reasons, paralegals may not conduct a deposition. Although rarely challenged, two states have issued an ethics opinion on the question. In Opinion 87-127 (1987), the Pennsylvania state bar ethics committee said that a lawyer may not allow a paralegal to conduct a deposition even when she or he has a series of attorney-approved questions. The basis for this opinion was that the paralegal would not be qualified to answer any questions that might arise and may be called on to give legal advice. In 1996, the Iowa Bar issued a similar opinion indicating that paralegals may not ask questions at a deposition even when supervised by an attorney. (Iowa Bar Ethics Opinion 96-3.) See *State v. Foster*, 674 So. 2d 747 (1996) at the end of this chapter for a case involving nonlawyers who were prosecuted for taking depositions.

Almost three-quarters of the paralegals in the country work in litigation. Paralegals are involved in all phases of the litigation process, from legal research and drafting of pleadings and motions through the discovery process (including preparing and answering interrogatories, and handling subpoenas *duces tecum* and document productions) and trial preparation to

settlement, trial, and post-judgment matters. Paralegals 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 attorneys in preparing for depositions by assisting in identifying areas of questioning. Many also 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, taking notes, assisting with the introduction of evidence, and otherwise handling a variety of details, functions that generally have been supported by the courts and the organized bar.

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

Related is the prohibition on paralegals signing a pleading or other document filed with the court on behalf of the client. A ***pleading*** constitutes a written "appearance" in court that only a licensed attorney can make. The lawyer's failure to sign a pleading may also imply that the lawyer has not properly reviewed the document before it was filed. A few ethics opinions address this matter. See, for example, Florida State Bar Ethics Opinion 87-11, warning against allowing a nonlawyer to sign pleadings and notices with the nonlawyer's initials. One state may allow a narrow exception: the North Carolina State Bar Ethics Council issued an ethics opinion that allows a lawyer to delegate the signing of a pleading in "exigent circumstances" for the protection of the client (N.C. Formal Ethics Opinion 2006-13).

2. Giving Legal Advice

The largest and most complex category of conduct that constitutes the practice of law is giving legal advice. (See ABA Model Guideline 3(c).) Like representing a client in court, formulating a substantive legal opinion to guide a client's conduct is a core lawyer function that cannot be delegated. A lawyer's legal advice lies at the heart of his or her value because it requires the application of the attorney's knowledge of law; judgmental and analytical abilities; and understanding of the client's situation, context, and goals.

The cases and advisory opinions about what constitutes "giving legal advice" can be summed up as follows:

- recommending a course of conduct or a particular action to a client;
- evaluating the probable outcome of litigation, negotiations, or other proposed action for or with a client;
- outlining legal rights or responsibilities to a client;
- interpreting and applying statutes, decisions, or legal documents to a client.

In practice, many paralegals have frequent **contact with clients**, which creates the potential for the paralegal to give legal advice. Paralegals

generally get considerable satisfaction from working with clients and have an important role as liaison between the lawyer and clients. The benefits to the firm and the client are countless. Paralegals are often easier to reach than attorneys, who may often be in court or meetings. Paralegals are sometimes more patient with clients and may use less legal jargon. It is also more cost-efficient for the client and the lawyer to have the client speak with a paralegal.

Clients frequently develop good rapport with paralegals and eventually may ask a paralegal a question that requires a response that would amount to giving legal advice. That the paralegal knows the answer to the question further exacerbates this dilemma. To avoid giving legal advice, the paralegal must first consult with the attorney before relaying the lawyer's advice to the client. The paralegal may then communicate the lawyer's legal advice, so long as it is the exact legal opinion of the attorney, delivered without expansion or interpretation. Attorneys can delegate to a paralegal the function of conveying legal advice so long as the paralegals are not formulating and giving advice without lawyer approval and the lawyer still maintains a direct relationship with the client, exercising independent professional judgment.

One exception to the prohibition against nonlawyers giving legal advice has been created for so-called ***jailhouse lawyers***. In *Johnson v. Avery*, 393 U.S. 484 (1969), the Supreme Court held that a state may not bar inmates from helping one another to prepare post-conviction writs unless the state provides a reasonable alternative. This opinion was upheld and expanded in *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963 (1974), in which the court specifically held that prisons could not prohibit inmates from giving or receiving legal assistance to other inmates without providing a reasonable alternative. The Board of Corrections of the State of Arizona decided to hire paralegals to help inmates with their appeals and writs after a similar opinion in *Lewis v. Casey*, 518 U.S. 343, 116 S. Ct. 2174 (1996). However, there has been a trend toward restricting the exercise of these rights. See *Shaw v. Murphy*, 532 U.S. 223, 121 S. Ct. 1475 (2001).

Jailhouse lawyers
Inmates who help other inmates to prepare post-conviction writs

The prohibition against nonlawyers giving legal advice has been challenged by persons seeking to aid those representing themselves in legal matters. As noted above, ***self-representation*** aids such as do-it-yourself legal kits and books, typing services, and most electronic resources do *not* constitute the unauthorized practice of law as long as they are not sold in conjunction with direct personalized assistance in completing the forms or procedures. Whether or not electronic programs that pro se litigants use to fill out legal forms does amount to UPL is something of an open question. (See, for example, *In re Reynoso,* at the end of this chapter.)

Self-representation
The act of representing oneself in legal proceedings before a tribunal

A related concern is the advent of court-sponsored resources to help pro se litigants without the use of an intermediary or adviser. User-friendly **computer programs** have been set up in courthouses in several

states, including California, Colorado, Florida, and Arizona, enabling users to prepare court-approved forms in domestic relations, small claims, and landlord-tenant matters. Users answer a series of questions, and forms and instructions are filled in automatically and printed out for filing.

There is a nationwide trend toward expanding the role of nonlawyers in providing legal assistance to pro se litigants despite the unauthorized practice prohibitions. Most of the progress in this area has come about as the result of legislation that narrowly circumscribes the role of the nonlawyer within a particular area of practice where there is a great need for access to the civil legal system by persons who cannot afford attorneys and seek to represent themselves. In California, government-employed small claims advisers are authorized by statute to assist litigants in filling out and filing forms and preparing for trial. Legislation in California, Maryland, and a few other states permits private nonlawyer practitioners to assist litigants in unlawful detainer and summary ejection proceedings. In Washington and other jurisdictions, court facilitators assist pro se litigants in child support and family law proceedings.

As noted in Chapter 2, two states, California and Arizona, have officially recognized the role of nonlawyer legal service providers in assisting consumers to prepare and file documents. Under California statutes, **legal document assistants** (LDA)are required to meet certain educational or experiential requirements and to register with the county in which they do business. Similarly, but in a more comprehensive system, an Arizona Supreme Court Rule created the category of **legal document preparers** (LDP), who are certified by the court on payment of minimal fees and proof of meeting educational or experiential requirements. LDAs and LDPs are required to comply with legal and ethical restrictions. In both states, provisions prohibit them from giving legal advice. In California the related statute on unlawful detainer assistants (UDAs) has been used to prosecute UDAs who failed to register, did not meet the requirements of the law concerning written contracts with clients, and committed UPL. (See *Brockey v. Moore* at the end of this chapter.)

As described in Chapter 2, the state of Washington has adopted a court rule that creates a practice of law board, the purpose of which is to establish licensing of nonlawyers who will be authorized to provide legal services in designated areas of law. This rule, which went into effect in 2001, has not yet been effectuated.

Another emerging area of interest concerns the dispensing of **legal advice on the Internet**. Whether on a legal Web site, electronic bulletin board, or in a chat room, nonlawyers are prohibited from giving legal advice on the Internet. Lawyers must take care as well when operating in this medium not to establish an attorney-client relationship inadvertently and not to give legal advice. It is important in this context to keep in mind the distinction between legal information and legal advice. Providing general legal information, such as that given in a self-help book or

program, or in a newspaper column about the law, is encouraged. However, legal advice that is specific to a person's case cannot be given by a person who is not licensed to practice law, including a lawyer who is licensed in one state but gives the advice to someone about a legal matter in another state.

One final word of warning about nonlawyers who assist persons with their legal matters directly, whether as a legal document preparer or as a jailhouse lawyer: communications between persons and their nonlawyer advisers are not protected by the ***attorney-client privilege.*** This rule applies to all nonlawyer representatives. Courts have consistently refused to extend the privilege to communications between nonlawyers of all kinds and their "clients" or "customers." As you will learn in Chapter 4, if a communication is not protected by the privilege, a court can require the persons involved to testify about the contents of the conversation, even if the "customer" or client believed that the communication was privileged.

Attorney-client privilege
Rule of evidence that protects confidential communications between lawyer and client during their professional relationship

3. Establishing the Attorney-Client Relationship and Setting Fees

The last main category of conduct that is reserved exclusively for lawyers is establishing the lawyer-client relationship and setting the fees to be charged for the legal services. As stated in ABA Model Guideline 3, a lawyer may not delegate responsibility for establishing an attorney-client relationship or the amount of a fee to be charged for a legal service.

The attorney-client relationship and fee arrangements between attorney and client are considered sacrosanct. A lawyer should establish a **direct relationship** with a client and not allow a paralegal to make the decision independently about whether or not to undertake the representation. The related matter of what fee to charge for the service should be determined by the lawyer.

This prohibition does not prevent a paralegal from communicating standard or specific fee information to a client at the lawyer's instruction, drafting retainer agreements or engagement letters, or presenting lawyer-approved documents for the client's signature. It should be noted that there are cases and ethics opinions that dictate against a paralegal's signing such a document on behalf of the lawyer. (See, for example, *Attorney Grievance Commission of Maryland v. Hallmon*, 343 Md. 390, 681 A.2d 510 (1996), and Pennsylvania Bar Association Formal Opinion 98-75.)

In addressing the question of establishing the lawyer-client relationship and the fee agreement, courts look at the facts of the case to see if the lawyer has a direct relationship with the client, has met with the client, has properly reviewed documents, and has exercised **independent**

professional judgment on behalf of the client. If the lawyer has abdicated the exercise of judgment to the nonlawyer employee, the lawyer may be found in breach of ethical obligations and the paralegal may be seen as engaging in unauthorized practice of law.

The ABA Model Rules and the predecessor Model Code both emphasize early on the importance of the attorney-client relationship. (See ABA Model Rule 5.4.) NALA Model Standards and Guidelines and most state guidelines on working with paralegals also make reference to these matters. See NALA Guideline VI.1; NALA Code of Ethics Canon 3.

E. Paralegal Tasks That May Constitute the Unauthorized Practice of Law

Throughout this chapter, a number of legal tasks have been discussed as falling within or outside the boundaries of the practice of law. Because the concept of unauthorized practice is vague and changes with time and place, creating a definitive list of functions that fall on either side of the boundary is not really possible. Such a list is likely to be quickly outdated or to be inaccurate for one locale or another.

1. Common Paralegal Functions

The following is a short list of generic paralegal functions, not specific to any particular area of practice, that are commonly performed by paralegals under the supervision of a lawyer:

- conduct legal and factual research and investigation
- draft memoranda, pleadings, and other legal documents
- prepare standard form documents
- prepare correspondence for attorney and paralegal signature
- interview clients and witnesses
- act as liaison with clients and others outside the firm
- organize, analyze, and summarize legal documents
- file documents with courts and government agencies
- handle procedural, administrative, and scheduling matters

There is little dispute over the propriety of paralegals performing the above functions under attorney supervision; however, other, very specialized tasks present special ethical challenges for paralegals and the lawyers who utilize their services, as the rest of this section describes.

2. Will Executions

A ***will execution*** is 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. Few states have addressed this issue. In an early ethics opinion, the New York State Bar Association recommended against paralegals handling these proceedings on their own. NYSBA Ethics Opinion 74-343 concluded that the delegation of the task of supervising a will execution is "tantamount" to "counseling a client" and constitutes the practice of law. Iowa guidelines, adopted in 1988, indicate that "generally, a lawyer should be present for the execution of legal documents." However, newer guidelines, such as those in Connecticut, specifically allow paralegals to attend and supervise will executions so long as the paralegal does not give any legal advice.

Will execution
The formal process of signing and witnessing a will

Rhode Island and Colorado list witnessing the execution of documents or wills as permissible functions for paralegals. See *In re Morin* at the end of this chapter for an example of the problems that arise when wills are not properly executed.

3. Real Estate Closings and Related Matters

The role of paralegals and other nonlawyers in the real estate industry in handling ***real estate closings*** has been the subject of ongoing controversy. The jurisdictions that have issued opinions are split. For example, the Illinois State Bar Association reaffirmed its opinion on the subject in a 1984 position paper with the following language:

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

> Attorney assistants may attend real estate closings of all types, but only in the company of the employing attorney and at such closings prepare computations, revisions of agreements and perform similar tasks, but only at the direction of, and under the supervision of, the employing attorney.

Position Paper of the Illinois State Bar Association Real Estate Section Council and Unauthorized Practice of Law Committee Re: Use of Attorney Assistants in Real Estate Transactions, Approved by the State Bar Board of Governors, May 16, 1984.

Georgia, Pennsylvania, and some of the bar associations in New York have issued comparable advisory opinions. (See, for example, Georgia's Formal Advisory Opinions 86-5 and 00-3.) North Carolina Advisory Opinion 00-13 (July 12, 2000) recommends that although a nonlawyer can oversee the execution of documents, a lawyer should be available to confer with clients. Pennsylvania's guidelines, found in Formal Opinion

98-75, state that the closing may involve the "legal interpretation of documents, . . . and advice to the clients as to the course of action to be taken. . . ." Others entities, like the Federal Trade Commission and the U.S. Department of Justice, have advocated allowing nonlawyers a greater role in real estate closings to increase competition and lower the cost of services.

As noted in the Pennsylvania opinion, the rationale for this prohibition is that the client might need or want legal advice, particularly 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 that may require the services of the attorney. A paralegal who explains the legal consequences of documents or attempts to resolve a dispute over terms would likely be giving the kind of legal advice that constitutes the unauthorized practice of law.

These concerns are addressed by bar association opinions that endorse the use of paralegals to attend real estate closings unaccompanied by a lawyer. For example, a Florida Bar advisory opinion states that "[a] law firm may permit a paralegal or other trained employee to handle a real estate closing at which no lawyer in the firm is present if certain conditions are met." The conditions listed in the opinion include attorney supervision and review up to the time of the closing; attorney availability to give advice during the closing if needed; client consent; a determination that the closing will be purely ministerial and that the client understands the documents in advance; and a prohibition against the legal assistant giving legal advice or making legal decisions during the closing. Imposing these limitations on the paralegal role protects the client's interests adequately and prevents the unauthorized practice of law (Florida Professional Ethics Committee Advisory Opinion 89-5 (1989)).

Several states have followed this reasoning and adopted similar opinions. See, for example, Virginia State Bar Unauthorized Practice of Law Committee Opinion No. 91-47, New York State Bar Association Ethics Opinion 95-677, Wisconsin Ethics Opinion 95-3, Connecticut Bar Association Ethics Opinion 96-14, and Vermont Bar Association Formal Opinion 99-3.

4. Negotiating Settlements

Special mention also needs to be made about one paralegal function that is fairly common in personal injury practices — negotiating settlements. Paralegals in many personal injury firms handle client contact and documentation of cases. "Working up" the case typically involves collecting medical bills, assisting the client with medical insurance claims, and discussing the case with insurance claims adjusters. Paralegals handling these matters often have ongoing communications with adjusters,

providing information about the nature and extent of the client's injuries, treatment, and property damage. Adjusters may make offers to settle to the paralegal, who, of course, must convey the offer to the attorney, who in turn is ethically obligated to discuss the offer to settle with the client.

Few jurisdictions have addressed the matter of paralegals negotiating settlements. South Carolina Ethics Advisory Opinion 89-24 indicates that permitting a nonlawyer to do the "actual negotiation, even without authority to settle the case, may be an inappropriate delegation of responsibility by the attorney." Georgia Bar Guidelines for Attorneys Utilizing Paralegals, found in the State Bar of Georgia Advisory Opinion 77-21, indicate that "[n]egotiation with opposing parties or their counsel on substantive issues in expected or pending litigation" and "[c]ontacting an opposing party or his counsel in a situation in which legal rights of the firm's client will be asserted or negotiated" are both tasks that should not be delegated to paralegals. An early Florida ethics opinion also endorses this view, indicating that lawyers may not delegate to nonlawyers the handling of negotiations with insurance company adjusters (Op. 74-35).

These opinions are very limiting and in practice are not followed in many firms. As long as the paralegal does not commit the client to a particular settlement without lawyer approval or argue the legal merits of a case with opposing counsel, the rationale for prohibiting this task is weak. Paralegals who work in this area, however, must take special care to act as the conduit for information in the negotiations, and not to interpret the law or value of a case in a way that would affect the client's position. (See *The Florida Bar v. Neiman*, 816 So. 2d 587 (2002), for a case where a paralegal's involvement in settlement negotiations crossed the line into the practice of law.) Finally, the cases that are starting to be decided about nonlawyer loan modification services hold that some aspects of negotiating a loan modification do constitute the practice of law. (See *Cincinnati Bar Ass'n v. Mullaney* at the end of this chapter.)

REVIEW QUESTIONS

1. When were the first rules limiting the practice of law passed in the United States? What did the rules limit? What were the purposes of these rules?
2. What was the role of bar associations in limiting the practice of law to licensed attorneys? Describe the ABA's Statements of Principle entered into with other professional associations. What happened to these agreements?
3. What kinds of legal functions do most nonlawyer legal service providers perform? Whom do they serve? What areas of law do they work in? How do UPL rules circumscribe their work? What titles do nonlawyer legal service providers use?

4. Give the most complete and accurate definition of the practice of law that you can.
5. What are the potential consequences of engaging in the unauthorized practice of law? Are prosecutions for unauthorized practice of law increasing or decreasing? Why?
6. What are an attorney's responsibilities to prevent the unauthorized practice of law? What might happen to an attorney whose paralegal engages in the practice of law?
7. Make a list of the specific functions that constitute the practice of law and may not be performed by paralegals. What rationale lies behind each prohibition?
8. What are the exceptions to the general rule against a nonlawyer appearing in court on behalf of a client? Describe each exception and the rationale.
9. Give your best definition of what constitutes giving legal advice. Why are nonlawyers prohibited from giving legal advice? What is the difference between giving legal advice and giving legal information?
10. What are the exceptions to the general prohibition against giving legal advice?
11. Does selling a self-help divorce kit constitute giving legal advice? What about developing and selling electronic programs that help someone to prepare a will or complete the forms required to file for divorce?
12. Does answering someone's questions about legal matters constitute giving legal advice? Why, or why not? If a lawyer does this, is an attorney-client relationship formed?
13. What kinds of work can legal typing services perform without engaging in the unauthorized practice of law?
14. Why are paralegals prohibited from setting legal fees? From accepting a case? Can a paralegal quote a fee to a prospective client over the phone? Sign a retainer agreement with a client?
15. Should a paralegal supervise a will execution without an attorney present? Why, or why not?
16. Should a paralegal supervise a real estate closing without the supervising attorney present? Why, or why not?
17. Should a paralegal negotiate a settlement in a case? What steps should the paralegal take to be sure that he or she does not practice law unethically when negotiating?
18. Can parents represent their children in court cases? Are there any statutes that allow parents to represent their children in administrative agencies?
19. Can a nonlawyer set up a service to help people to renegotiate their bank loans and avoid foreclosure? Can a lawyer work for such a company?

DISCUSSION QUESTIONS AND HYPOTHETICALS

1. Do you agree that only licensed attorneys should be able to give legal advice and represent clients in court? Why, or why not? What are the consequences of limiting these functions to lawyers only?
2. Do you think that a sole practitioner lawyer who has ten paralegals working in her or his office can adequately supervise that many paralegals adequately? Is the answer the same for every area of law practice? What office procedures and policies might ensure adequate supervision under these conditions? What if the lawyer is in court every day and only spends a few hours a week in the office?
3. Do you think that a lawyer who hires a paralegal without any formal paralegal training is violating his or her duty to supervise? Why, or why not? Might this be appropriate or inappropriate depending on the circumstances? What factors would you consider in deciding? Glance back at the *Musselman* case from Chapter 2 for some insight.
4. How can a lawyer engage in the unauthorized practice of law? How has multijurisdictional practice affected UPL?
5. Why should law students, and not paralegals, be permitted to represent clients in court?
6. Based on *Faretta v. California*, do you think a constitutional argument could be made that citizens should be able to choose their representative in court, even if that person is a nonlawyer? Try to formulate that proposition and then develop the arguments against it.
7. Because it is essential for lawyers to have a direct relationship with their clients, and paralegals are prohibited from giving legal advice, why are paralegals allowed to have any client contact?
8. Which of the following acts by a paralegal would be permissible and which prohibited under the definitions of legal advice given in this chapter?
   a. interviewing a client to obtain the facts relating to an automobile accident
   b. telling the client that the firm probably would be able to get a $10,000 recovery
   c. explaining to the client what happens at a deposition
   d. discussing the questions that the opposing counsel might ask at the deposition
   e. attending a deposition without the lawyer present
   f. explaining to the client the meaning of an affidavit given to the client for signature
   g. telling a client that his or her case is likely to settle
   h. telling a client that the best course of action would be to file a small claims action

i. answering a client's questions about the meaning of terms in a contract
j. giving a client the legal opinion that she or he knows the lawyer would give
k. relaying a message from the attorney to the client, which tells the client that it is okay to sign a contract
l. talking with opposing counsel about the legal grounds for the client's case
m. attending a real estate closing without the lawyer present and explaining the purpose of each document to be signed

9. Could you use *Johnson v. Avery* to make an argument that poor people who do not have access to legal services have a right to legal advice from whomever they choose unless the state provides an alternative? Is this argument convincing? Why, or why not?
10. The cases that hold self-help kits not to be prohibited by unauthorized practice of law statutes also hold that helping customers to use those kits does violate unauthorized practice of law statutes. Do you think this an appropriate place to draw this line? Do any of the cases in this chapter help you to draw this line?
11. What are the policy reasons for permitting nonlawyers to give legal advice in small claims or unlawful detainer cases, or to serve as family court facilitators for pro per litigants? Why do these reasons not apply to other kinds of legal matters? How do you reconcile this exception with the policy reasons for prohibiting nonlawyers from giving legal advice?
12. In a personal injury law firm that takes every case that comes to it and that charges the same contingency fee, why should it be necessary for the lawyer to set the fee and establish the relationship with the client? Should this be an ethical rule, or is it really a matter of good practice? Suppose the initial contact between the attorney and client is a five-minute meeting to formalize the relationship and the client never speaks to the attorney again because the paralegal "works up" the case, negotiates the settlement, and has all the client contact. Is the attorney maintaining a direct relationship with the client? Does the *Lawless* case in Chapter 2 help you to decide?
13. What kinds of prohibited tasks might be made permissible for paralegals in the future?
14. Legal Documentation Company, also known as Divorce Documentation Service, prepares documents for persons representing themselves in all kinds of legal transactions. The company's owner interviews a person who wants to file for divorce; asks this customer questions about the length of the marriage, children, property, whether or not the customer wants support; and then fills in the blanks on the forms and provides sample testimony for uncontested divorces. Is this UPL?

What facts do you need to make this analysis? See *Statewide Grievance Committee v. Zadora*, 772 A.2d 681 (Conn. 2001).

15. An insurance company distributes to claimants a flyer entitled "Do I Need an Attorney?" that apparently attempts to advise claimants about the efficacy and costs of hiring a lawyer. Is this UPL? Is it speech that should be protected under the First Amendment? For an interesting analysis, see *Allstate Ins. Co. v. W. Virginia State Bar*, 233 F.3d 813 (U.S.C.A. 4th Cir. 2000).
16. Hanna is a family law paralegal with ten years of experience. She works very independently and really knows the process well. Her friend, Isabel, wants to file for divorce. Isabel and her husband, Jim, did not have any children; both work and have good benefits and own a couple of pieces of property. Isabel asks Hanna to help her do the divorce papers because Isabel and Jim don't want to pay a lawyer to do it. It seems that the situation is not contentious and that the couple will be able to end the relationship without a fight. What should Hanna do? Can she help them fill out the paperwork? Can she fill it out for them? Can she draft a settlement agreement for them? If she helps them and the court finds an error in her work, what are the consequences? If she helps them and the situation becomes contentious between them, what happens? Can Hanna be called to testify about what she knows?
17. Paralegal Joan Johnson works for the corporate department of a large law firm. The partner in charge, Susan Smith, always introduces Joan to clients and encourages them to call her directly for updates and information. Joan values this client contact and the trust that Susan has placed in her. Joan has developed a good relationship with a client, Ken Kaplan, who owns several small companies. Ken calls Joan frequently to check on the status of matters that the firm is handling for him. One day, Ken calls asking Joan about a new corporate entity that he wants formed. He is trying to decide in what jurisdiction the corporation should be formed. Joan knows that it would be most favorable to form the corporation in Delaware. Can Joan answer? What might be the consequences of her different actions? How should she handle this situation?
18. Lon Lane is a business litigation paralegal for a firm that handles construction litigation. A prospective client, Cathy Connor, who is also a friend of Lon's, comes in to see the lawyer, Mat Moore, who is unexpectedly called away. Mat asks Lon to interview Cathy. Cathy tells a detailed story about the faulty construction on her major house-remodeling job. Cathy asks Lon, "Do I have a good case? Can you represent me? How much do you think I will get?" Lon is 100 percent certain that Mat will want to take the case and that Cathy will get some compensation for damages. How should Lon answer each of the three questions? Can Lon get Cathy to sign an agreement for Mat to represent her? Can Lon tell Cathy what kind of fee agreement

Mat would normally make with a client in a case like this? Does it make any difference that Cathy and Lon are friends?

19. Fran Francis has just gone to work for Georgia Graham, who is genius litigator and fiery advocate but is notoriously disorganized and hard to get along with. Fran is the third in a series of paralegals who have worked for Georgia in a year. Georgia is away on vacation for two weeks, giving Fran time to get organized and situated. Among other tasks, Fran has taken it upon herself to straighten Georgia's office. While Fran is going through Georgia's desk, she finds a file in the back of the bottom drawer. It appears to relate to a case on which the statute of limitations will run out the next day, and it looks like nothing has been filed. On top of her worries about this the case, Georgia did not give permission to Fran to go through her desk. Fran knows how to prepare the complaint and file it and also realizes that it could be amended later. What should Fran do? Can she prepare the complaint? Sign it? File it?

RESEARCH PROJECTS AND ASSIGNMENTS

1. Interview five litigation paralegals in your area and ask them what kinds of tasks they perform. Find out if they attend trials and depositions with the attorneys for whom they work. Ask them if they have client contact and if they are ever asked questions that elicit "legal advice."
2. Contact the local legal aid organization in your area and find out how many paralegals and other nonlawyers they employ and use as volunteers and what these persons do. Do any of the functions they perform cross the line into unauthorized practice under the definition used in this book? If so, why do you think that this situation is permitted?
3. What are the rules governing will executions in your state? Does the state or local bar association have an advisory opinion about paralegals supervising will executions without the presence of an attorney? Interview three probate/estate-planning paralegals and find out what the practice is in their firms.
4. Do parties to residential real estate transactions in your state usually utilize the services of lawyers? If not, who does? If so, are paralegals who work for real estate lawyers permitted to handle closings without an attorney present? Is it common practice? Does the state or local bar have an opinion about it? Do you find the Illinois or the Florida rules most appropriate? Why?
5. Has your state bar or supreme court studied the problem of increasing access to legal services? What are the nature and extent of the problem in your state? What are some of the solutions that have been proposed in your state?

6. Research cases and disciplinary actions in your jurisdiction concerning loan modification services and foreclosure consultants. Have any nonlawyers been prosecuted for UPL in doing this work? Have any lawyers been disciplined? Has an ethics opinion been issued? Given the legitimate need of many homeowners for help in dealing with these issues, what kinds of services should be available and what should be the role of the legal community in providing them? (See *The Cincinnati Bar Ass'n v. Mullaney* at the end of this chapter for an example.)
7. Research the ABA and your state bar's Web site for information on "unbundling of legal services." What is this concept and how does it work? Do you see a role for paralegals in unbundling?
8. Research the questions of UPL and technology-based programs designed for the self-represented in law reviews and report on some these articles and their views. See, for example, Lanctot, C. "Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law" 30 Hofstra L. Rev. 811 (2002); French, S. "When Public Policies Collide . . . Legal 'Self-Help' Software and the Unauthorized Practice of Law" 27 Rutgers Computer & Tech L.J. 93 (2001); Fountaine, C. "When Is a Computer a Lawyer?: Interactive Legal Software, Unauthorized Practice of Law, and the First Amendment" 71 U. Cin. L. Rev. 147 (2001).
9. What do you think of disbarred lawyers working as paralegals? Is this practice permitted in your state? Is it more likely that a disbarred lawyer would engage in unauthorized practice of law than a paralegal? Why do you think this? Research cases in your state. For a start, see *In re Scott*, 739 N.E.2d 658 (Ind. 2000), where a lawyer is disciplined for hiring a disbarred lawyer and allowing him to serve as the main contact with clients and to prepare and file various legal documents without adequate supervision.
10. Read *Ohio State Bar Ass'n v. Burdzinski, Brinkman, Czarzasty & Lanwehr, Inc.*, 112 Ohio St. 3d 107, 858 N.E.2d 372 (2006), which addresses the question of nonlawyer consultants providing advice and counsel in labor election campaigns. What did the court decide? How does this fit with the definitions of UPL in this chapter?
11. If you are interested in the use of paralegals in criminal cases, read and brief *Mississippi Bar v. Thompson*, 5 So. 3d 330 (Miss. 2008), a disciplinary case about a lawyer who hired a former inmate who then engaged in UPL.

F. Practice before Administrative Agencies

Administrative agency
A government body responsible for the control and supervision of a particular activity or area of public interest

Administrative agencies are created by state and federal legislatures to provide for the regulation of certain highly **specialized** fields. A few

examples of administrative agencies are the Environmental Protection Agency, the National Labor Relations Board, and the Patent Office at the federal level, and workers' compensation, unemployment insurance, public utility, 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 non-legal subject matter make it impractical and inefficient to adjudicate disputes in these fields through regular court procedures.

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

Someone representing a client before an administrative agency requires legal skills that are comparable to those needed by a lawyer representing a client in a trial. The advocate must have knowledge of the law and of the procedures used by the agency; 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 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 and the skills necessary for success in this setting are similar to a trial lawyer's.

Despite the similarities just described, many administrative agencies do not require advocates to be lawyers. 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 appearing 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 require a J.D. degree or a license as a lawyer or certification as a public accountant, or recommendations of others admitted to practice, or passing an exam. 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 Small Business Administration, Social Security Administration, and Bureau of Indian Affairs.

There is no consistency among the states about nonlawyer practice before administrative agencies. Some state statutes authorize representation

by nonlawyers before many or all state administrative 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. See, for example, *Denver Bar Association v. P.U.C.*, 154 Colo. 273, 391 P.2d 467 (1964), and an opinion of the Illinois State Bar Association, which holds that employers cannot utilize non-attorney representatives in termination hearings held before the Illinois Department of Employment Security. Another way of limiting nonlawyer representation without actually banning it is by prohibiting nonlawyers from collecting fees. (See, for example, California Labor Code §§4903 and 5710.) Also recall the case in Chapter 1, *UPL Committee v. State Department of Workers' Compensation*, in which the court upheld legislation that created a job for nonlawyer advisers to assist persons filing claims.

Some debate revolves around whether paralegals employed by attorneys may represent clients before state administrative agencies that allow nonlawyer representation. Most states allow it. For example, the State Bar of California opines that "a law firm may delegate authority to a paralegal employee, provided that the employee is adequately supervised, to make appearances at Workers' Compensation Appeals Board hearings." Advisory Opinion 88-103 (1988). For another example, see Michigan Ethics Opinion RI-125 (1992).

There is also periodic conflict between the states' authority to regulate the practice of law and the federal government's authority over its administrative agencies. The key case of *Sperry v. Florida*, 373 U.S. 379 (1963), would seem to have resolved this conflict when it held that the U.S. Patent Office regulations authorizing nonlawyer practice supersede state law by virtue of the U.S. Constitution's Supremacy Clause. However, unauthorized practice charges are still brought occasionally against nonlawyer practitioners who appear before federal agencies. See, for example, *Unauthorized Practice Committee, State Bar of Texas v. Cortez*, 692 S.W.2d 47 (Tex. 1985).

G. Disclosure of Paralegal Status and Job Titles

Many paralegals act as the liaison to persons outside the law firm — clients, witnesses, co-counsel, opposing law firms, courts, and so forth. This contact may take the form of telephone conversations, e-mail communications, correspondence, and meetings in person. A key ethical aspect of the liaison role is ensuring that the person with whom the paralegal is dealing is fully aware that the paralegal is not a lawyer.

Disclosure of status fits in this chapter on unauthorized practice of law for two reasons. First, a nonlawyer **may appear to be engaging in unauthorized practice** if he or she seems to others to be a lawyer. Not clearly identifying one's status may mislead the other person into believing that the paralegal is a lawyer. It is not difficult to see how someone, especially a lay person such as a client or witness, might misconstrue the paralegal's status because he or she "sounds" like an attorney. To the other person, a paralegal's inadvertent lack of disclosure may appear to be intentional. A severe consequence is that the paralegal could be charged with holding himself or herself out as an attorney, which in many states is considered unauthorized practice of law and is a misdemeanor. Disciplinary action against the attorney may also result, as many states have rules prohibiting attorneys from aiding in the unauthorized practice of law.

The second reason that disclosure fits into the context of unauthorized practice of law is that a paralegal who is mistaken for a lawyer may be called upon **to give legal advice**. If a client mistakenly believes that a paralegal is an attorney, the client may ask questions that require the paralegal to respond with legal advice. This situation places the paralegals in the uncomfortable position of having to refrain from responding to clients and to backtrack by explaining their nonlawyer status and why it would be unethical to give a legal opinion.

ABA Model Guideline 4 and similar state guidelines hold lawyers responsible for **informing clients** and others that the paralegal is not licensed to practice law. Some state guidelines on paralegal utilization advise "routine, early disclosure" or disclosure at the "outset" of the communication with the third party. Using a proper **title** for a paralegal is an important aspect of disclosure. The title must reflect that the person is not a lawyer, but should also accurately designate the role that the person has on the legal services delivery team. The title "associate," for example, is not appropriate for paralegals as it is commonly used for lawyers who are working for a firm but have not achieved partnership status.

The preferred and proper titles for paralegals have been the subject of some debate over the years. In the last several years, many firms started to call legal secretaries legal assistants. This usage accelerated the trend toward use of the title paralegal. It is noteworthy that this title cannot be used for legal secretaries in California unless they meet the statutory requirements to qualify as a legal assistant and maintain their continued education.

Although the titles **legal assistant** and **paralegal** have usually been used interchangeably, they carry different connotations in some regions of the country, and one or the other appellation may be preferred within the local paralegal community. Frequently, a legal specialty is attached to a title to indicate the area of practice in which the paralegal works, for instance, probate or litigation paralegal. As more firms have developed

career paths for paralegals, new titles have been created, such as senior paralegal and litigation support specialist. As a general rule, any title that does not potentially mislead a third party into believing that the paralegal is a lawyer is permissible.

Paralegals are permitted to use their certification designations with their titles, e.g., Certified Paralegal or Registered Paralegal. Iowa, Mississippi, and New York have opinions that support this practice. (See, for example, Mississippi Ethics Opinion 95-223 and New York State Bar Association Ethics Opinion 97-695.) In another twist on titles, New York issued an opinion endorsing the terms *paralegal* and *senior paralegal*, but finding unacceptable and ambiguous the terms *paralegal coordinator, legal associate, public benefits advocate, family law advocate, housing law advocate, disability benefits advocate*, and *public benefit specialist*. New York State Bar Ethics Opinion 640 (54-92) (1992).

Paralegals are also permitted to **sign correspondence** with their job titles. Many states have ethics opinions or guidelines that endorse the signing of correspondence by paralegals so long as the paralegals use an accurate job title that is not misleading. Early in the development of the paralegal occupation, the ABA issued an informal ethics opinion that supported this practice:

> The lawyers' use of assistants to perform specialized tasks . . . is becoming increasingly common, and, indeed essential to the efficient practice of law. The Committee is of the opinion that it is appropriate for Legal Assistants to sign correspondence which is incident to the proper conduct of his or her responsibilities but care should be taken to identify accurately the capacity of the person who signs the letter so that the receiver is not misled.

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1367 (1976).

A more problematic practice is communicating legal advice in correspondence signed by the paralegal. In theory, this practice is not different from a paralegal relaying legal advice orally from the lawyer to the client, with the added benefits of the advice being spelled out in writing. The e-mail or letter documents the advice being issued by the lawyer through the paralegal. However, some states have opinions that indicate that allowing a paralegal to sign a letter containing legal advice or threatening legal action constitutes the unauthorized practice of law. (See, for example, Georgia Formal Advisory Opinion 00-2 and the Utah State Bar Legal Assistant Guidelines, which state that paralegals may "[a]uthor and sign letters provided the legal assistant's status is clearly indicated and the correspondence does not contain independent legal opinions or legal advice." Guideline D.8.) Care should be taken in wording letters that might contain legal advice to ensure that the client will understand that the advice was formulated by the lawyer and is only being communicated by the paralegal.

State rules on the use of business cards by paralegals and listing of paralegals on law firm letterhead have not been uniform across the country. Some bar associations were concerned that **business cards** might be misused to solicit clients (discussed in Chapter 6). Most states have balanced the benefits of disclosure about a paralegal's status in favor of having business cards. The ABA has long supported the use of business cards by paralegals, as indicated in a 1971 opinion:

> The term "legal assistant" appears to be coming into general use as connoting a lay assistant to a lawyer, as evidenced by its use in the title of the American Bar Association's Special Committee on Legal Assistants. . . . Informal Opinion 909 permits the designation on a business card of an employee of a law firm who does investigation work for the firm as an "Investigator." By the same reasoning, it would appear to be proper to designate a legal assistant as such on a business card, provided that the designation is accurate, and the duties involved are properly performed under the direction of the lawyer. . . .

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1185 (1971).

Related is the question of listing paralegals' **names and titles on law firm letterhead**. The ABA Model Code (in effect from 1969 to 1980), which had been adopted in whole or in part by nearly all jurisdictions, originally prohibited the listing on an attorney's letterhead of virtually anything other than attorneys' names and the firm's address and phone numbers. ABA Model Code DR 1-102(A)(4) (1969, amended 1980).

The decision of *Bates v. State Bar of Arizona*, 430 U.S. 350 (1977), raised questions about the constitutionality of these restrictions. This case, which appears in Chapter 6, held that the state could not impose blanket restrictions on lawyer advertising. In its opinion, the Supreme Court emphasized that consumers need information about legal services to make legal services more accessible and to help consumers to select a lawyer.

Because of this case and several that followed it, all states and the ABA revised the ethics rules that limited the kind of information that may appear on lawyers' letterhead, in announcements, and the like. Several states that prohibited the listing of paralegals on letterhead adopted new rules permitting this practice. All but a few states that have opinions on the subject permit the listing of paralegals on letterhead.

The ABA ethics opinion, adopted after *Bates*, reads in part:

> The listing of nonlawyer support personnel on lawyers' letterheads is not prohibited by these [Model Rules 7.1 and 7.5] or any other Rules so long as the listing is not false or misleading. In order to avoid being misleading, the listing must make it clear that the support personnel who are listed are not lawyers. The listing of support personnel, such as the law firm administrator or office manager, administrative assistants, paralegals or others,

> appropriately designated may furnish useful information to the public in determining whether to engage the firm and in learning the status of members of the support staff with whom they have contact.
>
> A law firm also may list nonlawyer personnel on business cards, written advertisements and the like, provided the designation is not likely to mislead those who see it into thinking that the nonlawyers who are listed are lawyers or exercise control over lawyers in the firm.

ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1527 (1989).

The ABA Model Guidelines also conform to this policy. Guideline 5 states that a lawyer "may identify paralegals by name and title on the lawyer's letterhead and on business cards identifying the lawyer's firm."

Hence the general practice permits paralegals to be listed with appropriate job titles on business cards and letterhead, in firm announcements, in firm newsletters, in telephone directory advertisements or listings, in print advertisements, on firm Web sites, and so forth. In practice, most law firms provide paralegals with business cards but do *not* list them on the firm letterhead or on the door. Practice regarding paralegal listings on letterhead and on Web sites varies with the locale, the size of the firm, and the nature of its practice. Small and midsized firms are more likely to list paralegals than are large firms for both practical and firm-culture reasons. However, many firms provide paralegals with customized stationery that has the firm name and the paralegal's name and title.

The NFPA Model Code addresses the issue of disclosure in Section 1.7, which requires that titles be fully disclosed. Canon 5 of the NALA Code also requires disclosure "at the outset of any professional relationship. . . ."

H. Paralegals Working as Independent Contractors

Many paralegals offer their services as *independent contractors*, handling projects for attorneys on an as-needed basis. In the 1970s, the first ***freelance paralegals*** worked in the probate area, which lends itself well to effective paralegal use because the probate process is highly structured and procedural. In addition, many firms handle only a small amount of probate work, not enough to warrant having a full-time paralegal on staff. Gradually, freelance paralegals came to offer their services in other areas of practice, especially litigation. Many work as litigation support specialists, focusing on trial preparation, usually in large civil lawsuits. They assist law firms in organizing and managing the sometimes massive numbers of documents in large cases and assisting in discovery.

Freelance paralegals Legal assistants who work as independent contractors providing services to lawyers on an as-needed basis

The use of independent contractors in the legal field is not limited to paralegals. Contract attorneys and a wide array of support services are now provided to firms in this fashion. Outsourcing to vendors and the growing use of part-time and freelance workers constitute a major trend in the economy. This practice gives businesses more flexibility in meeting their needs. It appears to be growing into all sectors of the economy and is now firmly a part of the legal landscape.

Many paralegals find that working as an independent contractor is an attractive career path. Many freelance paralegals work for themselves, running their own businesses. Paralegals with an entrepreneurial spirit often find this kind of work more rewarding than working 9 to 5 (or longer) for a paycheck. They enjoy the added responsibility of working for themselves, the freedom and flexibility of choosing their own hours, the power to decline an assignment if they choose, and the earning potential.

Working as a freelance paralegal presents special ethical concerns in many areas — such as confidentiality and conflicts of interest — and issues are also present in the area of unauthorized practice of law. One concern is to distinguish the independent paralegal who is supervised by a lawyer from a nonlawyer legal service provider who works directly with the public and sometimes uses the title of independent paralegal. The confusion between these two categories of nonlawyers has resulted in legislation and court rules in some states that prohibit nonlawyer legal service providers from calling themselves paralegals. (See more on this earlier and in Chapter 2.)

ABA Model Rules of Professional Conduct allow attorneys to use the services of all kinds of independent contractors, including paralegals. Rule 5.3, which outlines attorneys' ethical responsibilities regarding nonlawyer assistants, specifically includes nonlawyers "retained by" a lawyer as well as those employed by a lawyer, and the accompanying comment to Rule 5.3 emphasizes that assistants may be "independent contractors."

The 30-year history of the paralegal profession is characterized by a tremendous expansion in the nature and extent of legal tasks that paralegals perform. The trend is toward continued growth into new areas and functions that neither attorneys nor paralegals might have expected when the profession was just beginning. The pressures to expand the functions performed by supervised paralegals and to allow some legal services to be delivered directly to the public by nonlawyers will undoubtedly continue. In the coming years, social and economic forces will change the way we view the practice of law and will redefine the rules prohibiting the practice of law by nonlawyers.

REVIEW QUESTIONS

1. Why are nonlawyers allowed to practice before some administrative agencies?
2. Name five federal agencies that permit nonlawyer practice.
3. Do states allow nonlawyers to represent clients before their administrative agencies? Discuss.
4. Can paralegals who work under the supervision of a lawyer represent clients before administrative agencies for their attorney-employers? Discuss.
5. Can a state court prohibit a nonlawyer from practicing before a federal administrative agency within the state on grounds that such representation constitutes the unauthorized practice of law? Why, or why not?
6. Why must paralegals be careful to disclose their status as a paralegal/nonlawyer?
7. Name three job titles that are appropriate for paralegals to use in identifying their status. Name some titles that are not acceptable.
8. May paralegals sign correspondence on firm letterhead? What limitations might be placed on the form and content of such correspondence?
9. May paralegals have business cards? How should a card read? How might it be misused?
10. May paralegals' names be listed on law firm letterhead? Why, or why not? Why have policies about this changed? Is this practice common?
11. Are freelance paralegals who work for lawyers engaging in the unauthorized practice of law? How might they be more susceptible to allegations that they have engaged in UPL?

DISCUSSION QUESTIONS AND HYPOTHETICALS

1. How can the prohibition against nonlawyers representing clients in court be reconciled with nonlawyer representation of clients before administrative agencies? Do you think that the differences in these two settings are substantial enough to warrant the difference in policy?
2. How can independent paralegals who work under the supervision of lawyers distinguish themselves from those who serve the public directly? Do different job titles make a difference? For example, nonlawyer direct service providers are called legal document assistants in California and legal document preparers in Arizona. Will this solve the problem in those states?

3. Do you think freelance paralegals who provide services to attorneys are engaged in the practice of law? Might lawyers who use the services of independent contractors be more likely to fail in their responsibility to select, train, supervise, and review the work of these paralegals than those who are employed full-time by a firm? What about other independent contractors who serve lawyers, for example, process servers, investigators, accountants, and experts?
4. A lawyer hires an independent paralegal who will (1) conduct initial interviews of clients that have requested estate planning services, and (2) supervise execution of estate planning portfolios prepared by the lawyer. Is this UPL? What do you need to know to decide? See State Bar of Arizona Ethics Opinion 98-08 (1998) for one state's analysis.

RESEARCH PROJECTS AND ASSIGNMENTS

1. Are there any state administrative agencies in your jurisdiction that permit nonlawyer practice? Do nonlawyers appear before these agencies frequently or infrequently? What about paralegals working under the supervision of lawyers? Are there any state or local bar ethics opinions on this matter?
2. Do any statutes in your state disallow fees for nonlawyer representatives in administrative agencies? Which ones? Do lawyers represent clients in these agencies or do most people represent themselves?
3. Contact ten local law firms, five large and five small, and find out:
   a. if their paralegals have business cards;
   b. if their paralegals are listed on the law firm letterhead;
   c. if their paralegals have individualized letterhead;
   d. if their paralegals' names appear in advertisements, firm brochures, or newsletters;
   e. if their paralegals' names are listed on the door to the firm;
   f. if their paralegals' names are listed in the directory to the firm in the lobby of the building;
   g. if their paralegals' names and credentials are on the law firm Web site;
   h. if their paralegals sign correspondence to clients; and
   i. what job titles their paralegals use.
4. Contact your local paralegal association and find out if independent contractor or freelance paralegals are widely used in your area. Interview five freelance paralegals and the attorneys who utilize their services. Ask them what special ethical problems they face. Does the freelance paralegal work in the attorney's office or elsewhere? How does the attorney select an independent contractor? How does the attorney supervise and review the work of the independent contractor?

5. Contact the paralegal managers of five large law firms in your area and ask if they outsource any paralegal work. If they do, find out if the work is done locally or overseas and what measures are in place to guard against ethical violations.
6. Is it UPL for a company to represent a debtor in negotiations with a creditor's lawyer? See the Supreme Court of Georgia In re UPL Advisory Opinion 2003-1 (2005) or *Cincinnati Bar Ass'n v. Telford*, 85 Ohio St.3d 111, 707 N.E.2d 462 (1999).
7. Is it UPL for a financial service company to prepare loan documents and charge a fee for their preparation in connection with a mortgage transaction? See *King v. First Capital Financial Services Corp.*, 828 N.E.2d 1155 (Ill. 2005).
8. Read Johnstone, Q. "Unauthorized Practice of Law and the Power of the State Courts: Difficult Problems and Their Resolution" 39 Willamette L. Rev. 795 (2003) for an interesting discussion of UPL issues facing state courts and proposals for more effective resolution of these matters.
9. Read and brief *The Florida Bar v. Neiman*, 816 So. 2d 587 (Florida 2002), for a compelling example of a paralegal engaged in the unauthorized practice of law while in the employ of lawyers.

CASES FOR ANALYSIS

The following is the most well known of the early unauthorized practice cases involving nonlawyer legal service providers. Like the *Brumbaugh* case cited by the court, it involves a secretarial service that prepared legal documents for laypersons.

The Florida Bar v. Furman

376 So. 2d 378 (Fla. 1979)

PER CURIAM.

The Florida Bar has petitioned this Court to enjoin Rosemary W. Furman, d/b/a Northside Secretarial Service, from unauthorized practice of law in the State of Florida. . . . We find the activities of the respondent to constitute the practice of law and permanently enjoin her from the further unauthorized practice of law.

The Florida Bar alleged . . . that Furman, a non-lawyer, engaged in the unauthorized practice of law by giving legal advice and by rendering legal services in connection with marriage dissolutions and adoptions in the years 1976 and 1977. The bar specifically alleges that Furman performed legal services for at least seven customers by soliciting information from them and preparing pleadings in violation of Florida law. The bar further contends that through advertising in the *Jacksonville Journal*, a

newspaper of general circulation, Furman held herself out to the public as having legal expertise in Florida family law and sold "do-it-yourself divorce kits." The bar does not contend that Furman held herself out to be a lawyer, that her customers suffered any harm as a result of the services rendered, or that she has failed to perform the services for which she was paid.

In describing her activities, Furman states that she does not give legal advice, that she does prepare pleadings that meet the desires of her clients, that she charges no more than $50 for her services, and that her assistance to customers is in aid of their obtaining self-representative relief from the courts. In general, the respondent alleges as a defense that the ruling of this court in *Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978), violates the first amendment to the United States Constitution by restricting her right to disseminate and the right of her customers to receive information which would allow indigent litigants access to the state's domestic relations courts. She alleges that our holding in Brumbaugh is so narrow that it deprives citizens who are indigent of equal protection of the laws as provided by the Florida and United States constitutions. . . .

. . . The Respondent admits that the customer returns with the intake sheet not completed, because the people are unfamiliar with the legal terms and some are illiterate and, of course, she then proceeds to ask questions to complete the intake sheet for preparing the Petition for Dissolution of Marriage. Then after she types the Petition for Dissolution of Marriage, she advises the customer to take the papers for filing to the Office of the Clerk of Circuit Court, and Respondent follows the progress of the case every step of the way until it is at issue. She then notifies the customer to come in for a briefing session preferably the day before the date set for trial. In the course of briefing Respondent furnishes the customer with a diagram of the Court chambers and where to find the Judge to which that particular case has been assigned. . . . She also explains the full procedure that will take place before the Judge, including the questions the customer should ask. . . . The facts in the record of this case establish very clearly that the Respondent performs every essential step in the legal proceedings to obtain a dissolution of marriage, except taking the papers and filing them in the Clerk's office and going with the customer to the final hearing and interrogating the witness.

Respondent admitted that she could not follow the guidelines as set forth in the *Florida Bar v. Brumbaugh*, for the reason that the customers who come to obtain her services are not capable for various and sundry reasons, mainly not being familiar with legal terminology or illiterate, and were unable to write out the necessary information. Therefore, she was compelled to ask questions and hold conferences with her customers. . . .

We do not write on a clean slate in this case. Last year we took the opportunity to clearly define to non-lawyers the proper realm in which they could operate without engaging in the unauthorized practice of law.

In *Brumbaugh*, we clearly stated what services a similar secretarial business could lawfully perform. . . .

Before the referee and before this court, Furman admitted that she did not abide by the dictates of *Brumbaugh*. She says that it is impossible for her to operate her "do-it-yourself divorce kit" business in compliance with this court's ruling in that case. The bar alleges that Furman has engaged in the unauthorized practice of law as previously defined by this court. The referee so found. She so admits. We believe the referee's findings are supported by the evidence.

In other portions of the referee's report, he urges that as part of our disposition in this case we require the bar to conduct a study to determine how to provide effective legal services to the indigent. . . .

Therefore, we direct The Florida Bar to begin immediately a study to determine better ways and means of providing legal services to the indigent. We further direct that a report on the findings and conclusions from this study be prepared and filed with this court on or before January 1, 1980, at which time we will examine the problem and consider solutions.

Accordingly, we find that Rosemary Furman, d/b/a Northside Secretarial Service, has been guilty of the unauthorized practice of law by virtue of the activities recited herein and she is hereby permanently enjoined and restrained from further engaging in the unauthorized practice of law in the State of Florida.

It is so ordered.

Questions about the Case

1. Did Furman ever hold herself out as an attorney? Did any of her customers believe she was an attorney? Did her customers complain about her services? Who brought this action against her, and what relief was sought?
2. Make a list of the services Furman performed for her customers. Do these functions fall under the definitions of the practice of law cited in this chapter?
3. Do you think that nonlawyers should be prohibited from performing these tasks? Why, or why not?
4. What does the effective delivery of legal services to the indigent have to do with this case? What did the referee recommend to the court about this? How did the court respond?

In this more recent Florida case, the court is faced once again with constitutional arguments about the UPL statute, this time in a prosecution involving two paralegals who took depositions.

State v. Foster

674 So. 2d 747 (Fla. 1996)

The State of Florida appeals from orders issued in separate cases (1) dismissing charges against Scott E. Foster, Jr., and his wife, Martha J. Foster, purportedly arising from the unauthorized practice of law and (2) finding [the Florida UPL statute] vague and violative of federal constitutional protections or unconstitutional in its application to the appellees. . . .

Mr. Foster was charged with four counts of unauthorized practice of law for his participation in four depositions by questioning four witnesses in two different cases. . . . [T]he state likewise charged Mrs. Foster for her participation in one deposition by questioning a witness.

The applicable statute provides:

> Any person not licensed or otherwise authorized by the Supreme Court of Florida who shall practice law or assume or hold himself out to the public as qualified to practice law in this state, or who willfully pretends to be, or willfully takes or uses any name, title, addition, or description implying that he is qualified, or recognized as qualified, to act as a lawyer in this state, and any person entitled to practice who shall violate any provisions of this chapter shall be guilty of a misdemeanor of the first degree. . . .

Neither of the appellees disputes the fact that each participated in the respective depositions by questioning one or more witnesses. The Fosters are paralegals who own a business that performs paralegal functions. Neither one is a licensed attorney. . . .

The first issue to be resolved is whether taking a deposition constitutes the practice of law. . . . The Supreme Court of Florida considered an analogous question in *Florida Bar v. Riccardi*, 304 So. 2d 444 (Fla. 1974). . . . The court held that Mr. Riccardi's conduct constituted the unauthorized practice of law. . . . [W]e agree that appellee's questioning of witnesses in depositions likewise constituted the unauthorized practice of law in violation of [the Florida statute].

The second issue is whether the lower courts correctly found the statute to be unconstitutionally vague. . . . The Supreme Court of Arizona has described the practice of law as follows: "We believe it sufficient to state that those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries must constitute 'the practice of law.' " [Citation omitted.]

. . . [T]he definition of the practice of law in Florida is not confined to the language of [the statute], but rather is shaped by decisional law and court rules as well as common understanding and practices. . . . The Supreme Court of Florida has defined various acts as constituting the practice of law, including "appearing in Court or in proceedings which are part of the judicial process," [citation omitted] and, specifically,

active participation in depositions, the conduct for which appellees were charged. *Riccardi*, 304 So. 2d at 445. . . . The appellees have not pointed out, nor have we found, any instance where [the statute] has been found unconstitutional on any of the grounds argued at trial or set forth on appeal. We note that foreign courts that have reviewed comparable "unlicensed practice of law" provisions consistently have found no unconstitutional vagueness. [Citations omitted.] . . .

In supporting its ruling . . . , the trial court noted the Supreme Court of Florida's statement in the *Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978) that "it is somewhat difficult to define exactly what constitutes the practice of law in all instances." In its very thorough opinion, the trial court reasoned that, if Florida's highest court cannot "define exactly" the practice of law, then the statute addressing the unauthorized practice of law must necessarily be unconstitutionally vague. We respectfully disagree, finding that the quoted language in *Brumbaugh* must be considered within the factual context of that case. . . . We agree that "any attempt to formulate a lasting, all encompassing definition of 'practice of law' is doomed to failure 'for the reasons that under our system of jurisprudence such practice must necessarily change with the ever changing business and social order.' " *Id.* at 1191-92. . . .

The quoted comment was not intended, and should not be construed, to suggest that the practice of law cannot be defined or that an attempt to interpret [the Florida statute] must involve guesswork and chance. Were we to adopt the appellees' suggestion that . . . renders a statute void for vagueness, the State would be effectively precluded from establishing minimum qualifications for practice in the regulated and licensed professions and occupations. . . .

We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect[s] important rights of a person under the law and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law. *State ex rel. The Florida Bar v. Sperry*, 140 So. 2d 587 (Fla. 1962). . . .

A deposition is an important, formal, recorded proceeding in which lawyers must observe the Florida rules of court and must rely on their training and skills to question witnesses effectively. The activities and services involved . . . often implicate ethical questions and strategic considerations of utmost importance. The effectiveness of a person deposing a witness can have a significant impact on whether objectionable information is identified and addressed or waived, whether a case is made, and how the evidence therefore is used in any subsequent proceeding.

Depositions are transcribed by a court reporter for possible use later in court. . . .

We conclude that, lacking adequate legal training, a nonattorney participating in the examination of a witness poses . . . dangers of "incompetent, unethical, or irresponsible representation." [Citations omitted.]

The third question is whether [the Florida statute], although facially constitutional, is unconstitutional in its application to the appellees' particular conduct. . . . [W]e decline to apply the overbreadth doctrine to the instant case, where the appellees' active participation in depositions does not lie at the fringe of conduct constituting the practice of law. . . . Reversed. . . .

Questions about the Case

1. What do you think of the language in the Arizona case cited in this case? Does it give notice to the public about what functions fall under the Florida statute?
2. How persuasive is the appellees' argument that if the court cannot define the practice of law it is necessarily vague?
3. Is a definition in a court opinion sufficient to give notice to nonlawyers who are involved in providing legal services? How might such persons find out about the rule?
4. Did you find the *Sperry* case formulation of the practice of law useful? How might you break down the long sentence cited here into more useful components?

In the following case, a "paralegal" who is prosecuted for the unauthorized practice of law raises multiple defenses.

Board of Commissioners of the Utah State Bar v. Petersen

937 P.2d 1263 (Utah 1997)

Petersen, a nonattorney, has worked in Manti, Utah, since 1991. During that time, he has prepared wills, divorce papers, and pleadings and conducted legal research on behalf of clients for a fee. Petersen also advertised his services in local publications. Just prior to moving to Manti, Petersen had completed a nine-month correspondence course through the N.R.I. Paralegal School. Petersen subsequently registered as a paralegal through the National Paralegal Association, the Pennsylvania organization which offered the correspondence course. However, Petersen was never

employed by an attorney, and none of his law-related work was supervised by an attorney. Petersen's activities were brought to the attention of the Board of Bar Commissioners of the Utah State Bar, and the Bar filed a formal complaint in 1993. The Bar claimed that Petersen has engaged in the unauthorized practice of law in violation of section 78-51-25 of the Utah Code and sought a permanent injunction against him. Section 78-51-25 of the Utah Code states in relevant part as follows:

> No person who is not duly admitted and licensed to practice law within this state . . . shall practice or assume to hold himself out to the public as a person qualified to practice or carry on the calling of a lawyer within the state.

Petersen filed two pretrial motions to have section 78-51-25 declared unconstitutional. . . . The trial court denied both motions.

The case was tried to a jury. . . . The jury returned a verdict in favor of the Bar and against Petersen, and the court ordered Petersen to stop the unauthorized practice of law. . . .

On appeal, Petersen argues that section 78-51-25 is constitutionally vague, . . . overbroad, . . . [and that it] violates the separation of powers doctrine . . . by purporting to authorize the legislature to pass a law that regulates the unauthorized practice of law. . . .

Petersen claims that an ordinary reader would not understand . . . section 78-51-25 to prohibit the kinds of activities in which he was engaged. He asserts that the obvious reading of the statute is that a non-lawyer is prohibited from either claiming to be or working as a lawyer, neither of which Petersen did. . . . We disagree. . . . The obvious reading of the statute is that unless a person is licensed to practice law within the state, he cannot practice as a lawyer, act as a lawyer, or even *present himself to the public as a person qualified* to act as a lawyer. . . .

Although "the practice of law" has not been exactly defined, an "ordinary reader" would understand that certain services, when performed on someone else's behalf, are part of such practice. Such services would include not only appearing in court, but also drafting complaints, drafting or negotiating contracts, drafting wills, counseling or giving legal advice on matters, and many other things. . . .

Further, when such services are performed for a fee, it is even more likely that they constitute the practice of law. . . .

Petersen's conduct falls within the clear sanction of section 78-51-25. Although not licensed to practice law, he met with and counseled clients on how best to proceed in their particular cases; with the aid of forms he selected, he drafted such things as complaints, summonses, motions, orders, and findings of fact and conclusions of law for pro se clients; he drafted wills; and he advertised his services in local publications. Thus Petersen held himself out to the public as a person qualified to provide, for a fee, services constituting the practice of law.

Petersen claims that section 78-51-25 is unconstitutionally overbroad . . . because it would make it "illegal for anyone to aid in the legal process" and thus would deprive many individuals, including Petersen, of their right to employment . . . [including] police officers who inform individuals in custody of their *Miranda* rights, nonattorney justice court judges when rendering a judgment, and court clerks who assist in the filing of court documents. . . . Petersen's arguments are without merit. . . . He may work under the supervision of an attorney. In addition, it is absurd to argue that the statute prohibits the activities of policemen, justice court judges, and clerks of court. None of these individuals offer legal advice, draft legal documents, or in any way represent clients for a fee. . . .

Petersen also claims that it is a violation of the . . . Utah Constitution to treat him any differently . . . than a paralegal working under the supervision of an attorney. . . . The legislative objective of section 78-51-25 was to protect the public. . . . As Petersen himself concedes, it is certainly a legitimate objective to want to protect the public from people claiming to be qualified to practice law even though they are not so qualified. . . . [I]t is reasonable to classify individuals based on a license to practice law. There are many safeguards built into the licensing process that offer protection to the public . . . including those laws which hold attorneys responsible for the actions of their paralegals. . . .

Petersen next claims that section 78-51-25 . . . violates the separation of powers doctrine. . . . This court's power over the regulation of the practice of law is a power over "members of the legal profession as officers of the Court." [Citation omitted.] The scope of article VIII, Section 4, does not extend to the unauthorized practice of law. Therefore, section 78-51-25 does not encroach on any exclusive jurisdiction of the Utah Supreme Court and does not violate the separation of powers doctrine. . . .

Therefore, we affirm the trial court's judgment and injunction. . . .

Questions about the Case

1. What were the paralegal's educational credentials? Was Mr. Petersen a paralegal as that term is commonly understood in your state? Did he work under lawyer supervision?
2. What was Mr. Petersen charged with, and what sanction was imposed by the trial court?
3. What were the three arguments with which he defended himself against the UPL charge? Set forth each argument and the response of the court to each argument. Do you agree with the court's analysis or Mr. Petersen's?
4. Think back to the separation of powers discussion in Chapter 1. Does it make sense to you that the court has authority over the practice of

law and the legislature over the "unauthorized" practice of law? Note the recent court rules about unauthorized practice that are referenced in this chapter. Do most states embrace this distinction?

In this case, a bankruptcy court considers the conduct of the owner-operators of an office of We the People, a company that provides services to people who are representing themselves in court, usually in bankruptcy and family law matters. The case addressed statutory violations as well as negligence, contract, and UPL.

In re Finch

(Bankr. M.D. Tenn. 2004)

All of the debtors involved in these matters consulted We the People [WTP] to prepare bankruptcy petitions. In each case, Chapter 7 petitions were filed, and Vincent Gould was listed as the petition preparer. . . . The trustee found inaccuracies and omissions in the Statements and Schedules of the debtors in *Finch, Toalson*, and *Smith*. Accordingly, the trustee filed dischargeability actions pursuant to 11 U.S.C. §727 seeking to deny the debtors' discharges for omitting or providing inaccurate information on their petitions, Statements, and Schedules.

Each of these debtors filed their petitions *pro se*, but following the dischargeability complaints filed by the Chapter 7 trustee, each debtor retained counsel to defend the adversary proceedings. In all three cases, the debtors filed third-party actions against Vincent and Shannon Gould and WTP alleging that the negligence, breach of contract, and/or violations of 11 U.S.C. §110 led to the omissions and inaccuracies in their bankruptcy filings. Accordingly, in the *Finch, Toalson*, and *Smith* cases, the debtors seek a judgment over Vincent and Shannon Gould and WTP. . . .

Harry David Finch is a former contractor who is in the process of obtaining disability. His wife died in 2001, and he has had no steady income since that time. He has a 10th grade education and difficulty reading. The debtor had been on medication for his multiple medical problems for more than two years prior to filing bankruptcy. He contacted WTP after his friend, Felicia Stevens, saw their advertisement on a bus stop. Stevens testified that she told Finch that WTP advertised bankruptcy filings for $199. Finch remembered WTP's phone number as having "LEGAL" in the number and contacted them. At his WTP meeting, he signed a "Contract for Services" provided by WTP, received information about bankruptcy, and received a "workbook" to fill out and return to WTP.

Finch testified that a WTP employee named Sandy or Cindy told him that they would file everything, and that he thought WTP was

representing him. When Finch got to a question asking about real property, he explained to Sandy/Cindy that he had owned some real property, but had sold it and gotten some money for it. The debtor testified that Cindy/Sandy told him that he did not have to list the property.

Finch's friend, Felicia Stevens, helped Finch finish filling out the workbook at his house. She testified that when they got to the question concerning ownership of real property, the question had been marked through. Stevens thought maybe it should have been filled out, and she testified that she heard the debtor call WTP to confirm that the question should be blank. Although she did not hear the entire conversation, she heard Finch call WTP, and Finch then told her that WTP said it should be left blank. The debtor left the real property question blank, and it was left blank on the bankruptcy petition that WTP filed. The debtor paid WTP $199 for their services, and another $199 for the filing fee.

WTP filed the debtor's voluntary petition under Chapter 7 of the Bankruptcy Code on October 9, 2003. The debtor signed his petition, Statements and Schedules indicating that the information contained therein was correct. However, at the 11 U.S.C. §341 Meeting of Creditors, when asked by the trustee, the debtor indicated that he had owned and sold property located at 1066 Chestnut Road, Ashland City prior to filing. Finch indicated he received $15,000.00 from the sale. Upon request of the trustee, the debtor provided bank records showing that the debtor used the money to pay bills from January 2003 until July 2003. The property had not been disclosed in the debtor's Statements and Schedules because Finch had relied on WTP's advice to leave the question blank. . . .

[Finch] hired an attorney after the trustee filed a §727 action against him seeking to deny his discharge. The debtor's attorney then helped him amend his Statements and Schedules to include the property transfer and a pending consumer protection lawsuit that the debtor had brought against Nissan. The debtor testified that he would have told the trustee about the lawsuit if he had been asked about it at the Meeting of Creditors, and he did not know he should have listed it until consulting his attorney.

The trustee's dischargeability action seeks to deny the debtor's discharge based on the omission of the property transfer and the omission of the lawsuit. The debtor counters that the property transfer was not listed based on advice given by WTP, and that he did not know to list the pending lawsuit until meeting with an attorney. No money is or was remaining from the sale of the property as of the filing of bankruptcy or the Meeting of Creditors.

Michael Scott Toalson has not worked for several years except for a few months in the summer of 2003. He testified that he is disabled due to health issues including cardiovascular problems, back troubles, and foot problems. In 1999, he lived in Fulton, Kentucky on his late parents' property he owned jointly with his brother and sister. He and his brother

took out a loan to buy out his sister's 1/3 interest, and Toalson lived in the Fulton, Kentucky home until it was sold in November of 2002 for $45,000. He and his brother divided the sale proceeds evenly after repaying the loan.

Toalson used the sale proceeds to pay living expenses. Although the debtor had receipts documenting some of the expenses paid, he could not account for every dollar received from the sale proceeds. Toalson's testimony was credible, however, that all of the proceeds had been expended on reasonable living expenses. When he was down to his final $200, he decided to file bankruptcy.

Toalson explained that he saw WTP's advertisement in a "Sensible Shopper" flyer stating that if he called "44-LEGAL," he could file bankruptcy for $200. He called WTP and spoke to Cindy and made an appointment. At the first meeting, he met with Cindy for about 10-15 minutes. She gave him a packet of information containing informational brochures about bankruptcy, a WTP Contract for Services, and a bankruptcy "workbook." Toalson testified that Cindy went through some of the workbook highlights, but that Shannon Gould took over when he needed help with Question 10 asking about real property. Toalson explained that Shannon Gould marked through questions that did not pertain to him. . . . Toalson stated that Mrs. Gould told him that because he did not transfer the Fulton, Kentucky property to a creditor or family member, he did not have to list the transfer. This advice was given after Mrs. Gould consulted with Mr. Vincent Gould, who in turn referenced a book source and confirmed the omission. . . .

The debtor returned to WTP to sign his petition, Statements, and Schedules and on October 7, 2003 paid an additional $215 to Mr. Gould to cover the filing fee and copy fee. He was told where to sign, and was not offered an opportunity to compare his workbook with his finalized papers. In fact, under questioning by the UST, the debtor identified several instances where WTP had made changes, such as: (1) WTP marked out questions; (2) WTP inserted corrections without the debtor's permissions; (3) WTP added information without asking the debtor; (4) WTP suggested to Toalson to include such things as exemption statutes; (5) WTP recommended assigning a "yard sale" value for personal property and exemptions; and (6) WTP "helped" with whether a claim was priority, secured, or unsecured. WTP filed the debtor's voluntary petition under Chapter 7. . . . The debtor signed his petition, Statements, and Schedules indicating that the information contained therein was correct. However, the debtor disclosed at his Meeting of Creditors, when asked by the trustee, that he had sold his parents' house seven months prior to filing. The property had not been disclosed in the debtor's Statements and Schedules because Toalson had relied on WTP's advice to leave the question blank.

The trustee told the debtor after his Meeting of Creditors that he might need to consult an attorney because of the omissions in the

Toalson testified that Mr. Gould told him that he could do an amendment for $30, and when Toalson stated he had no money, Mr. Gould said he would take care of it, but Toalson never heard from WTP again. . . .

The trustee's dischargeability action seeks to deny the debtor's discharge based on the omission of the property transfer. The debtor counters that the property transfer was not listed based on advice given by WTP. No money is or was remaining from the sale of the property as of the filing of bankruptcy or as of the Meeting of Creditors. . . .

In 2003, Linda Smith and her husband decided to divorce. In the divorce negotiations, Smith quitclaimed her interest in the marital residence in exchange for expediting the divorce. Smith testified that there was no equity in the house, and she received nothing in return for giving up her interest. She got her divorce in June, 2003, but continued to suffer from financial problems.

In July of 2003, Smith lost her job at Shoney's Restaurant and testified that five minutes after leaving the restaurant, she called WTP at "44-LEGAL" and talked to a man about how to file bankruptcy. At WTP, she paid the $199 fee, and was given a workbook by Shannon Gould. Smith testified that she had difficulties with the workbook and took it back twice to ask questions. Specifically, she asked about Question 10 regarding transfer of property. According to Smith, Vincent Gould told her that the property transfer "wouldn't matter" and therefore, she left Question 10 blank. Smith testified that she told WTP about her divorce, and that she had left Question 4a, asking for suits or administrative proceeding to which she had been a party within one year, blank as well.

Smith explained that Shannon Gould later called her to discuss the exemptions and the valuation of her car. Mrs. Gould told her Tennessee had a "wildcard exemption." Smith asked her what value to place on the car, and was told by Mrs. Gould that she could not advise her on that issue. When Smith then asked if $3,000 would work because she did not understand what Gould was talking about, she was told by Gould that it would.

When Mrs. Smith went back to sign her bankruptcy petition, she told WTP that she had obtained a job making about $1,400 per month. She thought this information was in the petition, Statements, and Schedules that she signed. Smith paid Mr. Gould $200 for the filing fee and asked WTP to file her petition.

WTP filed the debtor's voluntary petition under Chapter 7. . . . The debtor signed her petition, Statements, and Schedules indicating that the information contained therein was correct. However, at the 11 U.S.C. §341 Meeting of Creditors, upon questioning by the trustee, the debtor indicated that: (1) she had recently divorced; (2) that she had owned and quitclaimed her interest in real property to facilitate her divorce; (3) that she was employed at the time of filing her petition; and (4) that she did own an engagement ring (later valued at $1,000) that was not listed in the petition. Smith thought that she had properly filled Statements and Schedules. The debtor returned to WTP with his brother.

out her petition, and she testified that she was completely cooperative with the trustee once she realized the errors and omissions contained in her original petition. . . .

The debtor hired an attorney after the trustee filed a §727 action against her seeking to deny her discharge. The debtor's attorney then refiled her entire petition to accurately reflect the property transfer, her divorce, her employment, and her engagement ring. The debtor provided all information requested of her to both the UST and the chapter 7 trustee. . . .

The trustee contends that these debtors' discharges should be denied pursuant to 11 U.S.C. §§727(a)(2), (a)(3), (a)(4), and/or (a)(5). [These provisions relate to providing false information in the documents filed with the court.] . . . The Section 727 provisions are to be construed liberally in favor of debtor and strictly against the movant. [Citation omitted.] In these cases, the court finds that the trustee is unable to show by a preponderance of the evidence that their discharges should be denied based upon any of the §727 provisions relied upon. Accordingly, the court dismisses all of the trustee's §727 complaints against all three debtors in the *Finch, Toalson*, and *Smith* cases. . . .

Section 110 provides for monetary sanctions and injunctive relief against bankruptcy petition preparers who violate the specific provisions of the statute. For most of these requirements, the statute allows the court to impose a $500 fine for each violation. 11 U.S.C. §§110(b)(2), (c)(3), (d)(2), (e)(2), (f)(2), and (g)(2). The court may also disallow and order the turnover of any petition preparer fee found to be excessive. 11 U.S.C. §110(h)(2). In addition, the Bankruptcy Court shall certify all violations of this section to the District Court, and a debtor, trustee, or creditor may then move that court for actual damages, a penalty of $2,000 or twice the fees paid to the petition preparer, whichever is greater, and attorneys' fees and costs. 11 U.S.C. §110(i)(1). The Bankruptcy Court may enjoin the petition preparer from engaging in further violations of the statute, or may permanently enjoin a petition preparer from preparing any petitions in the future. 11 U.S.C. §110(j)(1). . . .

A bankruptcy petition preparer is defined in section 110(a)(1) to be a "person, other than an attorney, who prepares for compensation a document for filing." In this case, Mr. Vincent Gould testified that he and his wife were co-owners of the franchise "We the People" in Nashville, Tennessee. Mr. Gould explained that he and his wife were "partners with each other" in operating the business they called "We the People Nashville." They owned and operated WTP Nashville for approximately 11 months from April 2003 until March 2004. Both Mr. and Mrs. Gould testified that they accepted compensation for their role as "glorified secretaries" for preparing bankruptcy petitions. Although Mrs. Gould testified that only her husband had actually signed the petitions, the proof was uncontradicted and even acknowledged by the Goulds, that both Mr. and Mrs. Gould prepared documents for filing with the anticipation of compensation.

The court finds that Vincent Gould, Shannon Gould, and We the People Nashville are all bankruptcy petition preparers within the meaning of section 110(a)(1). All of the debtors independently testified that the phone number for WTP was "44-LEGAL." Section 110(f) prohibits a bankruptcy petition preparer from using the word "legal" or "any similar term" in an advertisement. Each violation subjects WTP to a fine of not more than $500 for each violation. This is a strict liability provision. [Citation omitted.] In other words, there is no "reasonable cause" exception, and proof of each violation results in a fine of not more than $500 per violation. . . . Accordingly the court finds that the third-party defendants should be fined $500 for each violation of section 110(f) in each of the three bankruptcy cases. The court finds a total fine of $1,500 shall be assessed jointly and severally among Vincent Gould, Shannon Gould, and WTP Nashville.

Section 110(g) prohibits WTP from collecting or receiving any payment from the debtor for the court fees in connection with filing a petition. Although there is minor disagreement about the scope of this provision, it is clear that a petition preparer accepting money, that is later used to pay court filing fees, is a violation. . . . In all three cases, however, these debtors testified that they paid WTP either in cash or money order made payable to Vincent Gould. Mr. Finch had receipts showing that he had paid WTP's fee and later paid WTP for the filing fee. His receipt shows $215 paid for "chapter 7 BK filing fee plus copy fee," and is signed by Vincent Gould. Likewise, Mr. Toalson paid WTP's fee on his first visit, and testified that he later paid the filing fee by a money order payable to Mr. Gould. Ms. Smith also paid the WTP fee of $199 and testified that she later made payment to Mr. Gould for the court costs and filing fees at the time of filing the petition. . . .

[T]he court finds that Vincent Gould and WTP violated section 110(g). There was absolutely no attempt to comply with the statutory requirements of section 110(g), and therefore, the court finds that a $500 fine for each of the three violations should be imposed. A total fine of $1,500 shall be assessed jointly and severally among Vincent Gould, Shannon Gould, and WTP Nashville.

Section 110(h)(2) prohibits a preparer from charging an excessive fee. This section allows the court to disallow and order the immediate turnover of any fee received within 12 months immediately prior to the filing of the case that is found to be excessive. . . . In deciding whether fees are excessive, the Court must determine the reasonable value of the services rendered. Courts have found bankruptcy petition preparers' services to be of no value or negative value where those services accomplished little benefit and, in some instances, harmed the debtor or put his or her bankruptcy discharge at risk. [Citations omitted.] . . .

The fee charged by WTP in all three cases was at least $199, exclusive of the filing fee. Because WTP cannot engage in the unauthorized practice of law, the type of services for which WTP is eligible for compensation under state law is limited to its "typing service." . . . Based

on the proof in this case, the value of services provided to these debtors is unquestionably negative. WTP's involvement with the debtors has created incredible problems in these debtors' cases. All debtors had dischargeability actions brought against them by the chapter 7 trustee caused by inconsistencies and omissions in the petitions, and all of the debtors were forced to hire bankruptcy counsel to defend the dischargeability actions and to prosecute the third-party actions. Accordingly, the Court finds that the services rendered to these debtors by the Goulds and WTP had no value to the debtors. Pursuant to 11 U.S.C. §110(h)(2), the Court will disallow and order the immediate turnover by Vincent Gould and WTP to the trustee of all fees paid by the debtors. . . .

Section 110(i) provides that if a bankruptcy petition preparer violates this section or commits any fraudulent, unfair, or deceptive act, then this court shall certify the findings of such to the district court. Fraudulent, unfair, or deceptive acts cover a broad spectrum of conduct. . . . [U]nfair acts and deceptive practices include such conduct or omissions that are likely to mislead a reasonable consumer. . . . The proof in all three cases before the court is replete with evidence demonstrating unfair and deceptive practices by the third-party defendants.

All three debtors allege that the third-party defendants' "advice" caused the section 727 actions to be brought by the trustee, and made it necessary to hire counsel to defend those actions and prosecute WTP. The court finds that WTP's "assistance" to these debtors constituted unfair acts and deceptive practices, negligence, and a breach of their contract to provide "typing services." Mr. and Mrs. Gould's testimony was unhelpful in their defense of the section 110(i) allegations. Mrs. Gould had no recollection of dealings with any of the debtors. Mr. Gould remembered only his dealings with Mr. Finch and his testimony was inconsistent with Mr. Finch's version of events. Mr. Gould testified that he would never provide legal advice to the debtors. He explained that based on his WTP cultural training, that he and his wife were provided "scripts" of what to say to the debtors, and that it was office policy not to provide legal advice. Mr. Gould testified that if a debtor had a question, he simply re-read the question to them, and then if a debtor still did not understand, it was office policy to refer the clients to the "supervising attorney." Mr. Gould testified that he does not think he has ever deviated from that office policy.

Mrs. Gould also testified that everything that was said to the debtors was "scripted." She also followed office policy of referring clients to the supervising attorney if they had a question. Although she did not remember any of the debtors specifically, Mrs. Gould testified that she had never provided valuation information. She explained that she and her husband bought the business to help people and making a judgment call might hurt someone; so, she did not do it.

Each of the debtors did have specific recall of their dealings with WTP, Mr. and Mrs. Gould. All three debtors assert that their

recollections demonstrate negligence, breach of contract, the unauthorized practice of law, and unfair and deceptive conduct by the third-party defendants. . . .

In Tennessee, a claim of common law negligence requires proof of the following elements: a duty of care owed by the defendant to the plaintiff; conduct falling below the applicable standard of care that amounts to a breach of that duty; an injury or loss; cause in fact; and proximate or legal cause. [Citation omitted.] Non-attorneys who attempt to practice law will be held to the same standards of competence demanded of attorneys and will be liable for negligence if these standards are not met. *See Tegman v. Accident & Medical Investigations, Inc.*, 30 P.3d 8, 13 (Wash. Ct. App. 2001), *rev. granted in part*, 43 P.3d 21 (Wash. 2002), *and remanded*, 75. P.3d 497 (Wash. 2003). In all three of these cases, all of the negligence elements are plainly met. If WTP is required to meet the same standard of competence demanded by attorneys, the conduct of the Goulds and WTP fell substantially below that bar.

Examples of the negligence by the third-party defendants are numerous, including instructing Mr. Finch to omit a recent property transfer. Likewise, Mr. Toalson was told by WTP to omit the sale of the Kentucky real property. WTP also marked out questions, suggested property valuations, added exemption statutes, and suggested how to classify claims for Mr. Toalson. In Mrs. Smith's case, WTP instructed her to leave out the recent quitclaim of her marital residence to her soon-to-be ex-husband, excluded her new employment from the petition after being informed of such by Smith, and "helped" the debtor with the valuation of her vehicle for exemption purposes. This course of conduct is actionable as negligence, breach of contract, the unauthorized practice of law, and/or violations of 11 U.S.C. §110(i) as unfair and deceptive.

When the third-party plaintiffs "helped" these debtors by filling in unsolicited answers, supplying relevant code sections, suggesting valuations, determining what court the petitions should be filed in, providing advice on how to answer certain questions, and crossing out questions that should have been answered, they did so negligently. As a direct result of that negligence, all of these debtors had their discharges challenged by the chapter 7 trustee, and were forced to hire counsel to defend themselves and prosecute the third-party defendants. The court finds the third-party defendants were negligent in their conduct as it relates to these debtors, and that negligence was the proximate cause of these debtors' losses. . . .

Several courts have found that the unauthorized practice of law constitutes a fraudulent, unfair, or deceptive act under section 110(i). [Citations omitted.] The Tennessee Attorney General has spoken on the unauthorized practice of law by document preparation services in Tenn. Op. Atty. Gen. No. 94-101, 1994 WL 509446 (Tenn. A.G. 1994). The Opinion provides in relevant part: . . . (a) The "practice of law" is defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings, or documents

or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee, or commission constituted by law or having authority to settle controversies. (b) The "law business" is defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation, as to any secular law, or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document, or instrument affecting or relating to secular rights, or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to secure for any person, firm, association, or corporation any property or property rights whatsoever.

The provisions of T.C.A. §23-3-101 are mirrored in rules regulating the practice of law adopted by the Tennessee Supreme Court. . . . The purpose of the aforementioned provisions regulating the practice of law is "to prevent the public's being preyed upon by those who, for valuable consideration, seek to perform services which require skill, training and character, without adequate qualifications." [Citations omitted.] . . .

In these cases, WTP stepped over the line. Mr. and Mrs. Gould's general denials that they followed office policy of referring all questions to the supervising attorney are not only self-serving, but pale under the weight of the specific and credible testimony of all three debtors. "Section 110 itself proscribes virtually all conduct falling into the category of guidance or advice, effectively restricting 'petition preparers' to rendering only 'scrivening/typing' services." [Citation omitted.] The court finds that under even the most generous definition of "unauthorized practice of law," WTP has engaged in the practice of law without a license. Whether the court characterizes their conduct as negligent, unauthorized practice of law, or otherwise, the result is the same — "unfair and deceptive" within the meaning of section 110(i). The credible testimony of the debtors amply supports a finding that the third-party defendants have committed unfair and deceptive acts.

The debtors also assert that the third-party defendants breached their services contract by providing legal advice. WTP's obligation to the debtors, as outlined in the Contract for Services, was to "complete a BANKRUPTCY form with information supplied by [the debtor] for the purpose of filing Pro Se (For Self) in the appropriate court." The contract further states that WTP are not attorneys and "will not provide legal advice in any form whatsoever." Clearly this contract was breached by the outpouring of "assistance" given by the Goulds and WTP in all three cases. For all of the same reasons that the third-party defendants were negligent, they also breached their contract. Anything more than the promised scrivener service was a breach of contract. . . .

This matter is CERTIFIED to the United States District Court for the Middle District of Tennessee. Under section 110, upon motion of the

debtor, trustee, or a creditor, the district court shall order the payment of damages following a hearing. . . .

Questions about the Case

1. What kinds of activities are bankruptcy preparers allowed to perform and what kinds are they prohibited from performing under the statute? What specific provisions were violated by these preparers? What were the remedies or sanctions?
2. What did the court find about the petitioners' claims of fraud? Breach of contract? Negligence?
3. What definition of the practice of law was used? Which aspects of this definition applied to the facts here?
4. What did WTP say in its defense? Did this defense comport with the claims of Finch and others? How did the court handle this matter?

In this case of first impression, an online program designed for consumers to use in preparing forms to file for bankruptcy was found by a court to be the practice of law.

In re Reynoso

477 F.3d 1117 (9th Cir. 2007)

This appeal arises from an adversary proceeding initiated by the United States Trustee ("Trustee"), during the bankruptcy proceeding of Debtor Jayson Reynoso, against Henry Ihejirika, d/b/a Frankfort Digital Services, Ltd. and Ziinet.com (collectively "Frankfort"). . . .

The United States Bankruptcy Court for the Northern District found that Frankfort . . . acted as a "bankruptcy petition preparer" within the meaning of 11 U.S.C. 110 . . . [and concluded that] Frankfort had committed fraudulent, unfair or deceptive conduct, and had engaged in the unauthorized practice of law. . . . [The decision was affirmed by the Bankruptcy Appellate Panel.]

Frankfort sold access to websites where customers could access browser-based software for preparing bankruptcy petitions and schedules, as well as informational guides promising advice on various aspects of relevant bankruptcy law.

. . . Reynoso accessed one of Frankfort's websites . . . , [which] represented to potential customers, like Reynoso, that its software system offered expertise in bankruptcy law:

> Ziinet is an expert system and knows the law. Unlike most bankruptcy programs that are little more than customized word processors the Ziinet

> engine is an *expert system*. It knows bankruptcy law right down to the state in which you live. . . .

It explained that its program would select bankruptcy exemptions for the debtor and would eliminate the debtor's "need to choose which schedule to use for each piece of information."

The site also offered customers access to the "Bankruptcy Vault" — a repository of information regarding "loopholes" and "stealth techniques." For example, according to the site, the Vault would explain how to hide a bankruptcy from credit bureaus and how to retain various types of property.

Reynoso paid $219 for a license to access the Ziinet Engine, including the Vault. . . . The online software prompted Reynoso to enter his personal information, debts, income, assets, and other data into dialog boxes. The program then used the data to generate a complete set of bankruptcy forms. . . .

Reynoso printed the forms and filed his chapter 7 bankruptcy petition. . . . During the first meeting with creditors, the chapter 7 trustee noticed errors in the petition and, upon questioning Reynoso, learned that he had paid for the assistance of an "online bankruptcy engine." . . .

Frankfort argues that the creation and ownership of a software program used by a licensee to prepare his or her bankruptcy forms is not preparation of a document for filing under the statute. Whether a software provider may qualify as a bankruptcy preparer under 11 U.S.C. 110(a)(1) is a question of first impression in the Ninth Circuit. We hold that the software at issue in this case qualifies as such.

Frankfort charged fees to permit customers to access web-based software. Frankfort's software solicited information from the customers. Critically, it then translated that information into responses to questions on the bankruptcy forms, and prepared the bankruptcy forms for filing using those responses. . . .

In sum, for a fee, Frankfort provided customers with complete bankruptcy petitions. . . . This is materially indistinguishable from other cases in which individuals or corporations have been deemed bankruptcy preparers. . . .

Since "bankruptcy petition preparers" are — by definition — not attorneys, they are prohibited from practicing law. [Citations omitted.] . . .

Several features of Frankfort's business, taken together, lead us to conclude that it engaged in the unauthorized practice of law. To begin, Frankfort held itself out as offering legal expertise. Its websites offered customers extensive advice on how to take advantage of so-called loopholes in the bankruptcy code, promised services comparable to those of a "top-notch bankruptcy lawyer," and described its software as an "expert system." . . .

The software did, indeed, go far beyond providing clerical services. It determined where (particularly, in which schedule) to place

information provided by the debtor, selected exemptions for the debtor and supplied relevant legal citations. Providing such personalized guidance has been held to constitute the practice of law. [Citations omitted.] . . .

The judgment of the Bankruptcy Appellate Panel of the Ninth Circuit is affirmed.

Questions about the Case

1. Did the court say that a software program can engage in the practice of law? What do you think of this idea?
2. Do you think that the outcome would have been different if the advertising for the software had not made claims about its expertise? Was this an important factor?
3. Under the bankruptcy statutes, petition preparers are required to include their names on petitions. Why do you think that this provision was included in the bankruptcy law?
4. What would a court decide if a bankruptcy petition preparer used another company's software to help petitioners fill in forms? For one court's view of this unsettled area, see *In re Gross*, Bankr. E.D. Va. 8-27-2009, where the court said, "Even though [the preparer] may have relied on a computer program rather than her own knowledge or analysis, she, rather than the debtor, effectively chooses which exemptions [to claim]. The act of selecting exemptions requires 'the exercise of legal judgment.' . . ."
5. What are the ramifications of this decision for other legal software providers? How is this different from software to prepare a will or a divorce? What might companies that provide this software do to protect against UPL claims?

Landlord-tenant law is another area in which nonlawyer legal service providers commonly work. In the following case an eviction service is prosecuted under the state unauthorized practice and consumer protection statutes.

People v. Landlords Professional Services

215 Cal. App. 3d 1599, 264 Cal. Rptr. 548 (1989)

In 1982 the Orange County Apartment News carried an advertisement for the eviction services provided by LPS. The ad stated "Evictions as low as $65" and showed the picture of a purposeful and authoritative looking man, arms folded across his chest, stating: "One low price $65

plus costs uncontested or contested in pro per. Attorney for trial extra if needed." Below the picture were the words "Time to Act!" and "Call & talk to us." The advertisement ended with an address and telephone number.

In 1982 Roberta Spiegel decided to evict the tenants of an apartment she owned. A friend recommended LPS. Roberta spoke to Bill Watts, an employee of LPS, who told her to come to the LPS office and bring all documentation related to the rental. On arrival Roberta was given a booklet with Mr. Watts's business card attached. The card was imprinted with the words "Landlord's Professional Services" and the name Bill Watts. Beneath Mr. Watts's name was the word "Counselor."

The booklet begins with a chronology of an unlawful detainer action as carried out by the eviction service. The chronology was generally factual. However, at the end of the chronology, this bit of advice is imparted concerning what to do after the tenants have been evicted: "*You must change the locks at that time*. If you do not change the locks you may have a problem. The defendant may re-enter and take possession, and the ball game starts from the beginning."

The following pages of the booklet contain examples of the types of forms used in an unlawful detainer action and provide a guide for how those forms should be completed. Often the guidance is purely factual, i.e., where a form requires the name of the city in which the subject property is located the guide states "enter city." The advice given, however, can be more useful. In discussing the "Notice to Pay Rent or Quit," for example, the guide states: "Acceptance of any money after service may void notice. You don't have to accept money after notice expires."

Bill Watts reviewed the normal routine in an unlawful detainer action with Roberta, who was unfamiliar with eviction procedures. Roberta asked questions about the procedure and Bill answered them. Roberta told Bill she had already mailed the tenants a three-day notice. Bill told her this was insufficient and she would have to take another notice to the apartment. Bill asked Roberta questions and completed the documents and forms necessary for the unlawful detainer action and eventually filed them.

On December 7, 1982, Ralph Lopes, an investigator with the Orange County District Attorney's Office, called LPS and stated he was a property owner who was interested in eviction services. . . . The procedure for commencing and carrying through an unlawful detainer action was explained by Jacqueline Sutake, an LPS employee. . . . Lopes asked what it meant in the LPS ad when it stated "pro per." Sutake explained LPS was not an attorney and Lopes would be representing himself. Sutake stated LPS could not represent him in court. If an answer was filed by the tenant, LPS would type up Lopes's testimony and he could read it in court. Lopes asked if he would need an attorney. Sutake stated if an answer is filed by an attorney, LPS recommends its client

obtain one as well but that it is possible to prevail without the assistance of counsel.

Lopes asked if he could turn off the utilities at the rental property. Sutake stated he could not. Lopes asked what would occur if he needed an attorney during the process. Sutake stated he could use his own attorney or "we have attorneys here."

Ms. Sutake testified she did not advise her clients on questions of law. She did, however, explain the unlawful detainer procedure and would share with clients her personal experiences as a landlord. If the case presented was more complex than the routine uncontested unlawful detainer action, she would suggest the client contact an attorney. Ms. Sutake explained her activities were always supervised by an attorney. When an unfamiliar situation arose she would ask an attorney for help and the attorney would determine if the complexity of the case required the services of a lawyer. In most cases her work was reviewed by an attorney before being filed.

In February 1983, the Orange County District Attorney filed a civil complaint against LPS and five other eviction services, alleging the unauthorized practice of law. (Bus. & Prof. Code. §§6125, 6126.) The complaint sought monetary penalties . . . and injunctive relief. At the conclusion of the hearing below the trial court ordered LPS to pay $8,000 in civil penalties for eight violations of Business and Professions Code section 17200 and $9,000 for nine violations of Business and Professions Code section 17500. . . .

The trial court also granted the following permanent injunction: "Defendants, their agents, officers, employees and representatives are enjoined from engaging in or performing directly or indirectly any and all of the following acts: '1. the preparation, other than at the specific and detailed direction of a person in propria persona or under the direct supervision of an attorney, of written instruments relating to evictions such as: three day notices, summons and complaints, at issue memoranda, judgments, writs of execution or other legal documents relating to evictions.

'2. Explaining orally or in writing, except under the direct supervision of an attorney, to individual clients: (A) the effect of any rule of law or court; (B) advising such persons as to the requirements for commencing or maintaining a proceeding in the Courts of this state; or (C) advising or explaining to such clients the forms which are legally required or how to complete such forms.

'3. Holding themselves out or allowing themselves to be held out to newspapers, magazines, or other advertising, or representing themselves as being able to provide, except through an attorney, any of the following: legal advice, the preparation of legal documents (other than as a secretarial service), or any explanation of any rules of law or court in relation to evictions or as being qualified to do any of the above activities.

'4. Any employee, agent, officer, or representative of L.P.S., not a licensed member of the California Bar, is prohibited from practicing law

in any form or holding themselves out as having the right to practice law in any form.' " . . .

Business and Professions Code section 6125 states: "No person shall practice law in this State unless he is an active member of the State Bar." Business and Professions Code section 6126, subdivision (a), provides: "Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, is guilty of a misdemeanor."

The code provides no definition for the term "practicing law." In *Baron v. City of Los Angeles* (1970) 2 Cal. 3d 535, 542 [86 Cal. Rptr. 673, 469 P.2d 353, 42 A.L.R.3d 1036], our Supreme Court noted that as early as 1922, before the passage of the State Bar Act, it had adopted a definition of "practice of law" used in an Indiana case: "[A]s the term is generally understood, the practice of law is the doing and performing services in a court of justice in any manner depending therein throughout its various stages and in conformity with the adopted rules of procedure. But in a larger sense it includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in court." [Citations omitted.] . . .

The eviction service offered by LPS was designed to assist clients in the preparation, filing and resolution of unlawful detainer actions. LPS, therefore, offered to assist clients in advancing their legal rights in a court of law. We believe general California law and the approach taken by other states with respect to divorce services teach that such services do not amount to the practice of law as long as the service offered by LPS was merely clerical, i.e., the service did not engage in the practice of law if it made forms available for the client's use, filled the forms in at the specific direction of the client and filed and served those forms as directed by the client. Likewise, merely giving a client a manual, even a detailed one containing specific advice, for the preparation of an unlawful detainer action and the legal incidents of an eviction would not be the practice of law if the service did not personally advise the client with regard to his specific case.

With these principles in mind, we conclude LPS was engaged in the unauthorized practice of law. The advertisement used by LPS implies its eviction services were not limited to clerical functions. The tenor of the advertisement was that the service accomplished evictions. The advertisement's statement "Call & talk to us" was a general invitation for clients to discuss the matter of eviction with LPS. Bill Watts's LPS business card listed his title as "Counselor." In short, LPS cast about itself an aura of expertise concerning evictions.

While an eviction may not be the most difficult of procedures, it is, nonetheless, a legal procedure carried out before a court with specific legal requirements for its accomplishment. As we have seen, some courts have held that providing advice as to which forms to use, which blanks to

fill in with what information or in which courts an action must be filed is itself the practice of law. Here, of course, LPS's eviction advice went further. It provided specific information to its clients concerning eviction procedure. This it did in the context of personal interviews where it was able to provide additional information and advice addressed to the specific problems and concerns of its clients. . . . Given the aura of expertise created by the business practices of LPS such advice would undoubtedly be relied upon by its clients, perhaps to their serious detriment. . . .

The judgment is affirmed.

Questions about the Case

1. What specific conduct by LPS constituted unauthorized practice of law? What conduct constituted false or misleading advertising?
2. What definition of the practice of law does this court use? How does it compare to other definitions cited in this chapter?
3. How did the prosecutor's office investigate LPS?
4. Does it make any difference that an eviction is simple and many nonlawyers could file the appropriate papers without any help?
5. Did the court cite any instances where LPS customers were given bad advice or were harmed?

In this California landlord-tenant matter, plaintiffs seek damages and an injunction against a nonlawyer legal service provider who should have been registered under state law as an Unlawful Detainer Assistant. Related UPL and false advertising claims are also covered in the case.

Brockey v. Moore

107 Cal. App. 4th 86, 131 Cal. Rptr. 2d 746 (2003)

In adopting the Unlawful Detainer Assistants Act (Bus. & Prof. Code 6400 et seq.) the Legislature found in part that "there currently exist numerous unscrupulous individuals . . . who purport to offer protection to tenants from eviction. They represent themselves as legitimate tenants' rights associations, legal consultants, professional legal assistants, paralegals, attorneys or typing services. . . . The acts of these unscrupulous individuals . . . are particularly despicable in that they target low-income and non-English-speaking Californians as victims for their fraudulent practices." [Citation omitted.]

Under names such as "Legal Aid" and "Legal Aid Services" defendant Walter Moore operates a business which purports to offer typing services, particularly in eviction cases. Victims of Moore's deception Brockey [and others] were eventually directed to Legal Services of Northern

California's Redding office and obtained representation in the underlying cases and in this action seeking monetary and injunctive relief.

A jury found [that] Moore practiced law in violation of the State Bar Act (Bus. & Prof. Code 6125), violated the Consumer Remedies Act (Civ. Code 1750, et seq.) and awarded damages of $150 to each of the plaintiffs. . . .

Plaintiffs lived in a mobile home park . . . [T]hey received unlawful detainer summonses they wanted to fight. None had the means to hire a lawyer and they tried to obtain free legal help.

The Judicial Council summons form for unlawful detainer actions states . . . "if you do not know an attorney, you may call an attorney referral services or a legal aid office. . . ." The Judicial Council information sheet on waiver of costs states "If you have any questions and cannot afford an attorney, you may wish to consult the legal aid office, legal services office, or lawyer referral services in your county. . . ."

Brockey (who lived with Gayler) looked in his local telephone directory under "Legal Aid" . . . and found a local number which he called. That number was forwarded to Moore's Modesto business. . . . [Moore using the name Jay] told Brockey that he had to wire money. . . . Brockey did not tell [Moore] which boxes to check, that he wanted each party to bear its own fees, or that he wanted to raise an affirmative defense by talking to the judge at the time of trial. Gayler thought that they had contacted a law office "that offered services to low income people, [maybe on] a sliding scale of some sort." . . .

Plaintiff Pavloff called "411" information to get the number for free "Legal Aid Services," which he had used before, and was given Moore's number by the operator. He was told to wire $85, which he did. He did not tell [Moore] how to fill out the forms. . . .

The plaintiffs had to sign an "agreement & disclosure" form for the "Legal Aid Services Processing Center" in Modesto after paying money but before receiving their answers. The form states that "[t]his office is a professional document preparation and typing service only," that is not a law office and "will not provide any legal advice." It suggests that clients contact an attorney. . . .

[Six other persons not participating as plaintiffs had similar experiences in seeking free or low-cost legal services.]

Moore's former employee . . . testified he was told not to tell callers where the company was, to use aliases, and not to refer callers to the "real" legal aid. . . . When [he] worked there . . . , the company received from 60 to 200 calls a day. . . . [Testimony from various nonprofit groups and Legal Aid confirmed Moore's practices. An instruction was given to the jury indicating that the reference to Legal Aid on the Judicial Council forms and instructions refers to a "publicly funded nonprofit law corporation, which provides free legal services to low-income eligible clients."]

Moore was the owner and manager of "Legal Aid" and "Legal Aid Services" and "Premiere Marketing." He was not a lawyer or paralegal,

but claimed to have an attorney "on staff," though he did not [at the time that he performed services for the plaintiffs.] [He claimed that he had a business license as Legal Aid and that he only typed what people told him to. Various discrepancies in his testimony came to light, including false statements about his Web site and the availability of a 900 number. Moore had been sanctioned by the local Bankruptcy Court for using the word "legal" in his advertisements and ordered to disgorge fees.] Moore . . . admitted that he was not registered under the UDAA and had not posted the required bond. . . .

The judgment recites that the jury found Moore practiced law without a license, violated the UDAA and acted with fraud, oppression or malice. The annexed injunction prohibits Moore in part from using names "Legal Aid Services" or "Legal Aid" or "Legal Services" because these three names signify a non-profit law office providing free legal services to low-income persons and families; using the term "legal" except as a paralegal; and using "local" telephone numbers which forward to his Modesto business. The injunction requires Moore to change his website, tell his customers he is not an attorney, place newspaper advertisements regarding the lawsuit and so forth.

In our view, the way Moore words his telephone book listings is calculated to mislead and is likely to mislead consumers. . . . [The court dismissed various grounds for appeal and affirmed.]

Questions about the Case

1. If Moore had been registered as an Unlawful Detainer Assistant, would the outcome have been different?
2. Which of Moore's acts appear to constitute UPL?
3. Why was the court at trial and on appeal concerned about the use of the word "legal" in the name of Moore's business?
4. Describe the background of the people that were Moore's "clients." Did this make a difference in the court's analysis?
5. Do you find it troubling that the court does not prohibit Moore from calling himself a "paralegal"? Remember that other California legislation prohibits the use of the term "paralegal" by anyone who is not working for a lawyer and does not meet the qualifications set forth in the statute.

In recent years, preparing living trusts for consumers has become a popular business for lawyers and nonlawyer practitioners alike. In this case, an attorney working with paralegals was found to have violated several ethics rules in the conduct of his living trust practice.

In re Morin

319 Or. 547, 878 P.2d 393 (1994)

The facts relating to this case are undisputed. The accused was licensed to practice law in California in 1974 and was admitted to practice law in Oregon in 1984. During the spring of 1988, the accused began conducting "living trust" seminars and selling "living trust packages," which included pour-over wills and directives to physicians.

The accused and two of his employees, who were paralegals, travelled throughout Oregon and northern California, conducting seminars and preparing the living trust packages. If a person at a seminar indicated that he or she was interested in discussing a living trust package, the accused or one of the paralegals would make an appointment and return to meet with the client. The accused or the paralegal would gather information from the client and then prepare the documents for the living trust package in the accused's Medford office.

At trial, Monnett, a paralegal employed by the accused, testified that he usually travelled alone, conducted seminars before groups, collected information from prospective clients, and assisted clients in executing the documents contained in the trust packages. He testified that the questions that he answered at the seminars were general and did not apply to individual clients' problems.

Monnett also testified that, during meetings with individual clients, he read their wills and explained to them the operative parts of the will. He also testified that he inquired into the clients' assets and advised them whether or not they needed a trust. He reviewed the trusts and other legal documents with the clients. Some of the clients never met the accused and dealt only with Monnett throughout the process. Both Monnett and the other paralegal employed by the accused, Pesterfield, testified that the accused instructed them to call him if they had legal questions. Both also testified that they believed that the accused reviewed all the documents that were prepared because he signed all of them and because occasionally he discussed the contents of the documents with Monnett.

Ordinarily, after the documents were prepared, the accused or one of the paralegals scheduled an additional appointment with the client to execute the documents. . . .

The accused testified that clients in the Medford and Ashland area ordinarily executed the documents in the living trust packages in the accused's office, where the accused's office staff members served as witnesses. When the accused or the paralegals executed documents at seminar sites, however, it was difficult for them to have the wills and directives to physicians witnessed.

The accused and the paralegals began a practice of taking the wills and directives to physicians back to the accused's office in Medford after they were signed by the clients at the seminar sites and directing the office

staff to sign the documents as witnesses. The signatures of the "witnesses" on the wills were notarized either by the accused or by one of his employees. The signatures on the directives to physicians were not notarized. The accused then mailed the signature pages back to the clients. . . .

[T]he accused admitted that he had caused the wills and directives to physicians of approximately 300 clients to be executed outside the presence of the witnesses, who later signed the wills and directives to physicians.

The accused stated before the trial panel that he knew that a will is invalid unless it is either executed or affirmed by the testator in the presence of two witnesses. He also testified that part of the fee he charged his clients was for a valid will and that he understood that his clients believed that they were receiving valid wills as part of the living trust packages. . . . Here, the accused charged his clients a fee for the performance of certain services, including the preparation and execution of a *valid* will and a valid directive to physicians. The accused intentionally failed to provide his clients with the valid documents for which they had paid. The accused intentionally charged clients for services that he knew he would not provide. Accordingly, the fee was excessive and the accused violated DR 2-106(A). . . .

There is insufficient evidence for us to conclude that the paralegals engaged in the unlawful practice of law by giving the seminars on living trusts and by answering general questions about the living trust packages. Disseminating information that is "directed to the general public and not to a specific individual" is not the practice of law. *Oregon State Bar v. Gilchrist*, 272 Or. 552, 558, 538 P.2d 913 (1975). Apparently, the seminars and questions answered by the paralegals in the seminars went to general information about the advantages of living trusts and about the contents of the packages. The dissemination of that information did not involve the practice of law.

It appears, however, that at least Monnett went beyond the mere dissemination of general information to the public. The Bar alleges that it was Monnett's interactions with individuals that constituted the practice of law. In *Gilchrist*, this court held that advertising and selling do-it-yourself divorce kits did not constitute the practice of law. 272 Or. at 557-60, 538 P.2d 913. This court also held, however:

> [A]ll personal contact between defendants and their customers in the nature of consultation, explanation, recommendation or advice or other assistance in selecting particular forms, in filling out any part of the forms, or suggesting or advising how the forms should be used in solving the particular customer's marital problems does constitute the practice of law. . . .

Id. at 563-64, 538 P.2d 913. . . .

This court set forth the test for ascertaining what conduct constitutes the practice of law in *State Bar v. Security Escrows, Inc.*, 233 Or. 80,

89, 377 P.2d 334 (1962): "[T]he practice of law includes the drafting or selection of documents and the giving of advice in regard thereto any time an informed or trained discretion must be exercised in the selection or drafting of a document to meet the needs of the persons being served."

In *State Bar v. Miller & Co.*, 235 Or. 341, 347, 385 P.2d 181 (1963), this court held that an insurance salesperson that assisted people in preparing estate plans could:

> explain to his prospective customer alternative methods of disposing of assets . . . which are available to taxpayers *generally*. . . . He cannot properly advise a prospective purchaser with respect to his *specific* need for life insurance as against some other form of disposition of his estate, unless the advice can be given without drawing upon the law to explain the basis for making the choice of alternatives. [Emphasis in original.]

In this case, Monnett examined wills and interpreted them for clients of the accused. Moreover, Monnett discussed clients' individual assets with them to determine whether a living trust would be an appropriate device for the particular client to use. Monnett also told the accused's clients his opinion of the usefulness of another trust format, telling them that it "didn't do much." In short, Monnett advised clients and potential clients of the accused on legal decisions specific to them, and he used discretion in selecting between using a trust and a will and among trust forms. Accordingly, Monnett, a nonlawyer, practiced law.

The accused argues that, even if Monnett practiced law, he did not assist Monnett. He argues that he "took pains to tell these paralegals not to practice law at the seminars." He also told them to call him at the office or at home "[i]f any legal questions arose." Furthermore, the accused argues that he did not know of Monnett's conduct nor did he aid in that conduct: therefore, he did not violate the rule.

This court's decision in *In re Jones*, 308 Or. 306, 779 P.2d 1016 (1989), is instructive. In that case, the accused allowed a nonlawyer to use pleading paper and a letterhead stamp with the lawyer's name on it in the nonlawyer's dissolution-processing business. . . . The accused knew that the nonlawyer had been warned by the Bar not to practice law. . . . The accused instructed her to bring any legal questions that she had to him. . . . This court held that the accused aided a nonlawyer in the practice of law because he "took no steps to enforce his instruction or to test her ability to determine when legal help was needed." . . . This court also found it to be important that the clients were never required to speak with the accused. . . .

Here, as in *Jones*, although the accused told his paralegals not to practice law, he did not tell them the precise contours of what constituted the practice of law. Moreover, the accused created the situation in which at least one of his paralegals had the opportunity to practice law. The accused sent the paralegals to meet with clients alone, and he failed to

supervise them properly. Thus, even if the accused did not intend for the paralegals to practice law, he assisted in that unlawful practice by allowing them too much freedom in dealing with clients, thereby allowing at least Monnett to provide legal advice to those clients. Accordingly, we conclude that the accused assisted in the unlawful practice of law. . . .

Accordingly, considering the ABA Standards and the prior decisions of this court, we conclude that the trial panel's decision of disbarment is correct.

Questions about the Case

1. What exactly did the paralegals do in this case that constitutes unauthorized practice of law?
2. Could the attorney have run his practice in a way that avoided the ethical violations cited? How?
3. What was wrong with the way the wills were executed? What was the result for the client? Is this legal malpractice? (See Chapter 8.)
4. What did the court say about the attorney charging fees for the invalid wills?
5. Did the court condemn the activities of the paralegals as unauthorized practice of law?
6. What definition of the practice of law did this court use?

The following case illustrates what can happen when lawyers affiliate with an organization of nonlawyers. This specific scenario involves a foreclosure consulting company and a law firm. Similar cases could be found throughout the country during the economic recession that started in late 2007.

Cincinnati Bar Ass'n v. Mullaney

119 Ohio St. 3d 412 (2008)

Respondents Brooking and Moeves are principals in Brooking, Moeves & Halloran, P.L.L.C. ("the Brooking firm"), a law firm established in September 2004. . . . Respondent Mullaney was employed as an associate of the Brooking firm and its predecessors . . . from May 2004 until May 2006. Foreclosure Solutions, L.L.C., is a company located in Ohio that purports to serve homeowners threatened with foreclosure by helping them set up a savings plan, so that after the homeowners follow the plan, Foreclosure Solutions can use the money saved to negotiate with the lenders to reinstate the loan and avoid foreclosure.

In 2003, Moeves . . . worked out a deal with Timothy Buckley, president of Foreclosure Solutions, agreeing to represent Foreclosure

Solutions' customers in Kentucky courts. Pursuant to their agreement, Moeves began accepting clients from Foreclosure Solutions, who routinely obtained a limited power of attorney to hire an attorney for its customers, and Moeves collected a flat fee from Foreclosure Solutions of $125 for each client. With the formation of the Brooking firm in the fall of 2004, Moeves and Buckley extended their agreement to include representation of Foreclosure Solutions' customers in Ohio courts. . . .

Foreclosure Solutions' customers paid between $700 and $1,100 for the company's services, the goal of which was to stall pending foreclosure proceedings while trying to negotiate a settlement with the lender. The company is not a licensed or accredited consumer-credit-counseling agency. Nor is Buckley or any of his employees, to the respondents' knowledge, licensed to practice law in any jurisdiction.

Foreclosure Solutions advertised to attract customers and often sent advertisements to defendants listed on court foreclosure dockets. Agents of the company told prospective customers that an attorney and legal services would be furnished to them as part of their fee. The company then hired a lawyer for the customer-client to respond in court to the recently filed foreclosure action. The client had no choice in the lawyer's selection, and after the lawyer was hired, Foreclosure Solutions' agents continued to negotiate directly with the foreclosing creditors.

Foreclosure Solutions' agents met with customers to collect the company's fee and had the customer sign a standardized contract, the "Work Agreement," containing the basic terms and conditions of the engagement. The agent also had the customer sign a standardized limited power of attorney appointing Foreclosure Solutions as the customer's attorney-in-fact, which, in addition to authorizing the hiring of an attorney, allowed company agents to negotiate on the customer's behalf with creditors. Neither the Work Agreement nor the limited power of attorney identified any particular lawyer, established when a lawyer was to be hired, or informed the client of the amount of the lawyer's fee.

As the solution to a customer's foreclosure troubles, the Work Agreement provided for the customer to set up a savings account and deposit a certain amount of money into it on a regular basis; Foreclosure Solutions would then use that money as a bargaining chip in negotiations with the creditor. Foreclosure Solutions determined the amount the client was to periodically deposit in the savings account. The Work Agreement specified that bankruptcy was considered a last resort.

Once the Foreclosure Solutions customer had signed the Work Agreement and limited power of attorney, the agent completed a financial worksheet and determined the savings recommendation. The agent then collected Foreclosure Solutions' fee, none of which was designated as attorney fees. From this $700 to $1,100 fee, Foreclosure Solutions paid the lawyers their flat fee. . . .

Under the arrangement with Foreclosure Solutions, the Brooking firm represented approximately 2,000 clients in Ohio foreclosure

proceedings during 2005 and 2006, at first accepting $125 and later $150 for each case. . . . Brooking represented Foreclosure Solutions' customers during the spring and summer of 2006. . . . Respondents did not oversee solicitations or have any other involvement with Foreclosure Solutions' customers before the company sent its customers' files to the Brooking firm. When received by the firm, the files typically contained the Work Agreement, the limited power of attorney, an intake sheet that had been completed by a Foreclosure Solutions' agent, and a copy of the complaint in foreclosure. The intake sheet, another standardized form, contained the client's financial information. The Brooking firm often received several client files at a time, together with one check for all the fees.

When it accepted a new case, the Brooking firm routinely sent the client an informational brochure entitled "The Nuts and Bolts of an Ohio Foreclosure" that Moeves and Mullaney had prepared. As the foreclosure actions went forward, Mullaney, Brooking, or Moeves responded in court with standardized pleadings and other filings, sending copies to the clients. Cases rarely if ever went to trial, and if the parties could not negotiate a resolution, trial courts granted judgment to the lenders and ordered the sale of the property. At that time, Mullaney, Brooking, or Moeves notified the client of the sale date and sent a standardized letter recommending that the client contact a bankruptcy lawyer. . . .

In following its typical procedure, the Brooking firm lawyers did not as a rule meet with the Foreclosure Solutions clients to determine their particular objectives or complete financial situation or to discover facts that could be defenses to foreclosure. The lawyers generally communicated with the clients through boilerplate correspondence, which the lawyers had no indication that the clients understood. As an example, one standard Brooking firm letter asked whether the client knew of any defenses to the foreclosure, relying on the client to guess what factors might be useful in his or her case.

In this way, Mullaney, Brooking, and Moeves failed to determine what action, including filing bankruptcy immediately, was in any one particular client's best interest. Respondents instead simply followed the Foreclosure Solutions "savings plan" strategy and allowed the foreclosure action to proceed until either a settlement could be negotiated with the lender or the court granted judgment in favor of the lender and ordered the property to be sold, with the lawyers filing routine pleadings and motions at critical stages to delay the process. Only when a sale was imminent did Mullaney, Brooking, and Moeves advise the clients to consider another remedy by contacting a bankruptcy attorney. . . .

In restricting a lawyer's use of referral services to those that serve the public interest and otherwise comply with the rule, DR 2-103(C) prohibits lawyers from using "a person or organization to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner." Foreclosure Solutions is not a referral

service as described by the rule, yet Mullaney, Brooking, and Moeves accepted clients from that company. We therefore find that respondents violated DR 2-103(C).

DR 3-101(A) prohibits lawyers from aiding nonlawyers in the unauthorized practice of law. We have held that by advising debtors of their legal rights and the terms and conditions of settlement in negotiations to avoid pending foreclosure proceedings, laypersons engage in the unauthorized practice of law. *Cincinnati Bar Assn. v. Telford* (1999), 85 Ohio St. 3d 111, 707 N.E.2d 462. Here, Mullaney, Brooking, and Moeves facilitated nonlawyers' negotiations with the creditors of debtors facing foreclosure by doing business with Foreclosure Solutions. We therefore find that respondents violated DR 3-101(A).

Except in circumstances not relevant here, DR 3-102(A) prohibits lawyers from sharing legal fees with nonlawyers. By accepting a portion of the compensation that the customers paid Foreclosure Solutions for legal services, Mullaney, Brooking, and Moeves shared legal fees with nonlawyers. We therefore find that respondents violated DR 3-102(A).

DR 3-103(A) prohibits a lawyer from forming a partnership with a nonlawyer if any activities of the partnership consist of the practice of law. Brooking and Moeves, principals in the Brooking firm, partnered with Foreclosure Solutions in representing debtors facing foreclosure. We therefore find that these two respondents violated DR 3-103(A).

DR 6-101(A)(2) prohibits a lawyer from handling a legal matter without preparation adequate under the circumstances. DR 7-101(A)(1) prohibits a lawyer from intentionally failing to seek a client's lawful objectives. These rules prohibited Mullaney, Brooking, and Moeves from surrendering their professional judgment to Foreclosure Solutions.

Counseling debtors in financial crisis as to their best course of legal action requires the attention of a qualified attorney. *Columbus Bar Assn. v. Flanagan* (1997), 77 Ohio St. 3d 381, 383, 674 N.E.2d 681. Expert testimony in this case discredited respondents' approach to their foreclosure clients' cases. John Rose, an experienced bankruptcy attorney, explained a few of the adverse consequences that the tactics used by Foreclosure Solutions and respondents could have.

Rose first pointed out that stall tactics usually result in mounting arrearages for the debtor and increased legal fees for the creditor, lessening the debtor's chances of getting ahead financially and of reaching an agreement with the creditor. Moreover, delay in seeking bankruptcy relief may result in lost opportunities to obtain maximum relief. . . . [I]n keeping with Brooking-firm practice, Mullaney did not explore . . . any other legal remedy for the clients referred by Foreclosure Solutions. . . .

Mullaney, Brooking, and Moeves failed to evaluate their clients' situations and develop a strategy to meet their individualized needs, and instead stuck to Foreclosure Solutions' single strategy to obtain relief. By not investigating and evaluating each client's debts and assets and other potential resources in order to assess the opportunities presented by

existing law, respondents were inadequately prepared to represent their clients and failed to seek the clients' lawful objectives. We therefore find that respondents violated DR 6-101(A)(2) and 7-101(A)(1). . . .

When imposing sanctions for attorney misconduct, we consider relevant factors, including the duties violated and sanctions imposed in similar cases. . . . Regarding similar cases, we find respondents' misconduct most analogous to that of attorneys sanctioned for providing legal services in affiliation with nonlawyers marketing living trusts and related products to consumers. . . .

Respondents engaged in a pattern of misconduct and committed multiple offenses. . . . The vulnerability of respondents' clients also weighs against these lawyers. . . . "Many, if not all, of the clients harmed by the respondents' misconduct were in desperate financial circumstances, about to lose their homes and vulnerable to purveyors of a scheme to save their homes and assets. Respondents' participation as lawyers lent an aspect of legitimacy to the sale of a plan of otherwise dubious value. . . .

A number of mitigating factors are also common to all respondents. None of the respondents has a prior disciplinary record . . . ; the Brooking firm stopped accepting Foreclosure Solutions clients shortly after relator filed the formal complaint, . . . and respondents cooperated with disciplinary authorities and established their good character and reputation apart from their misconduct. . . .

As a new attorney, Mullaney devoted many hours trying to assist the clients assigned to him; however, practices in place at the Brooking firm necessarily constrained his efforts. For his part in representing Foreclosure Solutions customers, a public reprimand is appropriate. Brooking, on the other hand, is a seasoned practitioner. . . . [A] one-year suspension of Brooking's license to practice, all stayed on the condition that he commit no further misconduct, is appropriate. Moeves is also a seasoned practitioner but is not admitted to the Ohio bar. Moeves entered into the agreement with Foreclosure Solutions and then put into place the practices that led to all the charges against him and the other respondents. For his integral role in this ill-advised undertaking, an injunction prohibiting his pro hac vice practice in this state for two years is appropriate. . . .

Questions about the Case

1. What were the individual ethics violations, and what facts support the court's findings for each violation?
2. What specific conduct by Foreclosure Solutions constituted the practice of law?
3. What kinds of services could this company have provided to help people in danger of losing their homes without violating the UPL rules?

4. Could this law firm have worked out an arrangement with a foreclosure consulting firm that would be acceptable under the ethics rules? What might this arrangement look like?
5. Also see *Cincinnati Bar Ass'n v. Foreclosure Solutions*, 123 Ohio St. 3d 107 (2009), in which the company and the individuals who established it were found to have violated unauthorized-practice-of-law rules, were enjoined from engaging in further unethical conduct, and were fined $50,000.