

Getting legal with paralegals

A look at state regulations

By Catherine R. Durgin

Would regulating paralegals help your firm or legal department? Is regulation needed? Here's a look what's happening now and what could happen in the future.

Paralegals are an inextricable part of American legal practice and are often closely tied to the supervising lawyer's efficiency and even competence. However, regulation of paralegals has largely been scant and inconsistent, though the topic continues to find its way into courtrooms and state legislatures. Across the country, paralegals urge bar associations, state legislatures and courts to consider regulatory programs that go beyond merely defining the term "paralegal."

Emerging regulatory programs vary in context and substance, from merely establishing voluntary qualification criteria to requiring minimum educational standards and mandating continuing legal education for paralegals. While many legal professionals support voluntary regulation, there is a lack of consensus on the need for mandatory paralegal regulation. This article describes and compares paralegal regulatory developments in several states.

The debate about the need for paralegal regulation is as old as the profession. The arguments often parallel a person's view on the role of paralegals in the delivery of legal services. Are paralegals merely assistants to lawyers, or do they represent an independent profession that requires separate regulation and supervision? While some are content letting the supervising lawyer decide the qualifications of the paralegals he or she hires, others call for increased supervision and regulation.

Even the advocates for increased regulation have differing opinions on what needs to be done: Some want to raise the profile of the profession by establishing standards for paralegals, while others call for mandatory regulation that expands the role of paralegals in the delivery of legal services and simultaneously protects the public from the unauthorized practice of law. Proposals at the state and national levels recommend various regulatory schemes as solutions. Some have been successful, others not so successful.

In California, the desire to increase standards has resulted in legislation that sets out a higher standard of education and mandatory continuing education for paralegals. Sponsored by the California Alliance of Paralegal Associations, California Business & Professions Code Sections

6450-6456 became effective on Jan. 1, 2001. Under the California statute, it is unlawful for a person to identify himself or herself as a paralegal unless he or she has met the qualifications of the statute and performs all services under the direction of a qualified lawyer. Further, the terms "paralegal," "legal assistant," "lawyer assistant," "freelance paralegal," "independent paralegal," and "contract paralegal" are synonymous under Section 6454.

The California statute does not establish a governing body, mandatory competency testing, or mandatory registration for the paralegal profession. It does not provide for moral character checks or a disciplinary system. However, it creates a crime enforceable by the courts and allows consumers to bring a cause of action against an individual who violates the law.

In other jurisdictions, such as Texas and North Carolina, courts have approved voluntary certification programs to set higher paralegal standards and raise the profile of the paralegal profession. The Texas Board of Legal Specialization administers a voluntary certification program for paralegals who wish to be board certified in a specialty area of law. The certification process is governed by the Texas Plan for Recognition and Regulation of Legal Assistants, as amended in June of 1999.

Unlike in California, the Texas Plan does not restrict the use of the term "legal assistant." Any legal assistant has the right to work under the supervision of a licensed lawyer in any area of law even though the legal assistant is not certified.

To become board certified under the Texas Plan, a legal assistant must meet several eligibility requirements, including a satisfactory showing of substantial involvement in the particular area of law for which certification is sought. In addition, the legal assistant must have at least five years experience, have peer reviews by professionals associated with the specialty area, pass a four-hour written examination — and in some circumstances — undergo an oral interview as part of the certification process. Currently, there are 320 board certified legal assistants in Texas.

The North Carolina State Supreme Court also recently adopted a program called the Plan for Certification of Paralegals. Approved and administered by the North Carolina State Bar, the North Carolina Plan is a self-funded voluntary certification program.

As in the Texas Plan, the North Carolina Plan does not restrict the use of the term "paralegal" nor does it differentiate between the services that can be performed by a certified or noncertified paralegal. Thus, a paralegal in North Carolina can choose not to be certified and still perform substantive legal work under the supervision of a lawyer using the titles "paralegal" or "legal assistant." North Carolina Certified Paralegals must meet a minimum level of education to be eligible for certification and must have a minimum level of continuing education to remain certified under the plan.

The Florida State Bar Board of Governors is currently reviewing a two-tier plan recommended by the State Bar Special Committee to Study Paralegal Regulation. Tier one would include those paralegals who meet the requirements of Florida State Bar Rule 10-2.1, which defines a paralegal as a person who performs delegated substantive work for which a lawyer is responsible. Tier two paralegals would have to meet more stringent experience, educational and continuing education criteria to hold themselves out as a "Florida Registered Paralegal." If approved by the State Bar Board of Governors, the plan will be submitted to the Florida Supreme Court for final action.

California, Florida, and Louisiana also have voluntary paralegal certification programs administered through their statewide paralegal associations. To be eligible for these state

certifications, the paralegal typically must first get a national credential. The Certified Legal Assistant/Paralegal program established by the National Association of Legal Assistants (NALA) and the Paralegal Advanced Competency Exam offered by the National Federation of Paralegal Associations (NFPA) are well recognized national professional certification programs.

Established in 1976, NALA's Certified Legal Assistant/Paralegal (CLA/CP) program is a voluntary self-regulatory program that encourages the growth of the paralegal profession and a high level of achievement. The CLA/CP examination is a two-day comprehensive exam with more than 1,000 questions based on federal law and procedure. More than 13,000 paralegals have obtained the CLA/CP credential. Continuing education is required to maintain the credential.

NFPA's Paralegal Advanced Competency Exam (PACE), established in 1994, provides a competency evaluation of paralegals. PACE is a four-hour computer-generated exam. An applicant successfully passing the exam is entitled to the "Registered Paralegal" credential but must obtain continuing education to maintain it.

Some in the legal profession endorse paralegal regulation that expands the role and activities of paralegals in order to improve public access to affordable legal services while protecting the public. NFPA strongly supports this view. In its Statement on Issues Affecting the Paralegal Profession, NFPA states that public protection and professional accountability are integral to any regulatory plan, but first, it is necessary to do the following:

- Identify traditional and nontraditional areas in which paralegal roles and responsibilities can be expanded;
- revise the applicable Rules of Professional Conduct or Code of Professional Responsibility to allow for expanded roles and responsibilities for paralegals, including: (1) revision to the references concerning ultimate responsibility and accountability of a lawyer for paralegal work, rather than under direct supervision and (2) revision to references concerning nonlawyer partnerships with lawyers and fee-sharing arrangements with nonlawyers;
- provide a model for revisions to court rules that would permit expanded roles and responsibilities for paralegals; and
- provide a model for expanded rules of practice in state administrative agencies for representation by paralegals and other qualified nonlawyers.

In line with this expanded role of paralegals, NFPA endorses regulations that recommend mandatory licensing and proposes a two-tier program, including standards for education, standards to measure competency, ethical rules and a disciplinary process. NFPA also believes that any licensure plan should define those tasks that may be performed by paralegals in numerous specialty areas of law. While recognizing that the regulation of nonlawyer activity is best addressed at the state level, NFPA urges the legal community to recognize its responsibility to provide the public with various levels of services at different levels of expertise and costs.

Currently, some voluntary registration programs allow for the expanded role of paralegals. In various counties in Washington, including King County, Pierce County and Spokane County, the bar associations have established voluntary registration programs that allow qualified nonlawyers to perform certain direct services. For instance, a paralegal in these counties can register with the bar or the court to present ex parte orders.

A mandatory registration is required for certain nonlawyer direct service providers in states such as California. For instance, "legal document assistants" and "unlawful detainee assistants" in California are subject to registration and bonding under Business & Professions Code Sections 6402 and 6405 respectively. To be eligible to register, the applicant must meet minimum

educational or experience requirements according to Section 6402.1.

Arizona has a similar provision in its Code of Judicial Administration. Section 7-208 requires legal document preparers in Arizona to meet certain minimum education requirements, experience requirements, and pass a written examination.

The Wisconsin Supreme Court is currently considering a proposed form of paralegal licensure. Endorsed by the Wisconsin State Bar, the proposed licensure program was drafted by State Bar's Paralegal Task Force. It is intended both to establish professional standards for paralegals and to improve the use of paralegals in an effort to meet some of the legal needs that currently go unserved. If enacted, it would be unlawful for a person in Wisconsin to use the title "paralegal" unless licensed. To be eligible for a paralegal license in the proposed system, the person must meet certain post-secondary education, training requirements, and continuing education standards.

Not everyone agrees on the need for mandatory regulation of paralegals. Certain courts and paralegal organizations believe that consumers of legal services are adequately protected by the license of the lawyer for whom the paralegal works, and that regulation may hinder the growth of the profession.

In 1999, the New Jersey Supreme Court declined to adopt a paralegal licensing system and concluded that paralegal oversight is best conducted by the lawyers who supervise the paralegals and are accountable for their work. The court recommended that the New Jersey Bar Association work with the paralegal community to create a certification program as a means to recognize and identify qualified paralegals.

The Washington State Bar Association Board of Governors also turned down a paralegal licensing proposal by the Washington State Practice of Law Board, which would have established a process to license certain nonlawyers to render assistance or advice in defined areas of law.

Several paralegal organizations have published statements against licensing paralegals. NALA, with a membership composed of more than 18,000 paralegals, through individual membership and its 90 state and local affiliated associations, opposes any mandatory regulation. In its statement to the New Jersey Supreme Court, NALA argued that there is no demonstrated public need to regulate paralegals who work under the supervision of a lawyer. NALA instead supports voluntary self regulation through its national professional certification program.

Likewise, the International Paralegal Management Association (IPMA), an international association of paralegal managers, opposes any type of mandatory regulation of paralegals. In its Position Paper on Paralegal Regulation, IPMA argues that regulation will not increase the standards of the profession nor expand the role of paralegals.

It is the job of the consumer to determine the value of legal services. Clients will continue to protest fees for inadequate or overpriced legal services, and the courts will also play a role by awarding fees for substantive paralegal work and refusing to award fees for clerical work whether performed by a lawyer or a paralegal.

Like NALA, IPMA believes that mandatory regulatory programs may hinder the growth of the profession. It argues that such programs are costly to implement and may be translated into higher salaries and higher billing rates, which in turn will increase the cost of paralegal services.

Regulatory requirements, IPMA argues, may deter college graduates considering law school from first working as paralegals and may deter those in other industries from considering the paralegal field as a second career. This may deprive firms from hiring other types of otherwise qualified candidates. Regulation may also prevent firms from collecting court-approved fees for paralegals who do not meet regulatory requirements.

Whether the paralegal regulation is voluntary or mandatory, lawyers are ultimately accountable for the work done by a paralegal under their supervision. Needless to say, lawyers must verify academic credentials and prior work history when considering a paralegal and must ensure that their paralegals are informed of changing laws and ethical concerns.

An established certification or licensure system will be helpful for lawyers to ascertain paralegals' qualifications and their continuing education. As employers and consumers of paralegal services, lawyers have a strong voice in making changes in paralegal regulation.

Defining regulation

The requirements of regulatory programs vary from state to state. In general, regulation comes in several forms, including registration, certification and licensure.

Registration involves the process by which individuals or institutions list their names with an association or agency. It may be voluntary or mandatory. Education, training or bonding requirements are sometimes associated with registration.

Certification programs are designed to validate an individual's specific skill and knowledge at or above an established performance level. Elements of professional certification programs include established standards, consistent and relevant testing, and regular updating and renewal. Certification programs can be administered through private organizations or public agencies. Certification is typically not a legal precedent to gain employment in a particular field.

Licensure is the process by which an agency or branch of government grants permission to persons meeting predetermined qualifications to engage in a given occupation or use a particular title. Licensure is a mandatory legal condition for employment and is generally enacted by legislation. The impetus behind a legislature to license a profession is the health, welfare and safety of the public.

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