### UTILIZING IMMIGRATION PARAPROFESSIONALS: THE ETHICAL CONSIDERATIONS

by Mark J. Newman and Russell C. Ford\*

#### **INTRODUCTION**

To meet their tremendous responsibilities, modern immigration attorneys heavily rely on nonattorney assistants. Appropriate utilization of these paraprofessionals carries the responsibility of supervising the delivery of competent legal services, preserving client confidentiality and deterring the unauthorized practice of law.

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Immigration paralegals come from a variety of backgrounds and are now used in innumerable roles. They may have been experienced secretaries, have paralegal certificates, have baccalaureate or law degrees from the United States or abroad, some are licensed attorneys in foreign jurisdictions, have language and cultural affinities, or are former INS/DHS, Department of Labor, or State Department employees. These key support personnel can exert an immense influence over clients and shoulder substantial day-to-day responsibilities for cases. Immigration practices tend to use paralegals to a greater extent than attorneys in many other practice areas. This ranges from general practitioners, whonot limiting their practice to immigration rely to a great extent on their paralegals—to immigration attorneys utilizing immigration dedicated paralegals, to in-house paralegals at Fortune 100 companies.

This article surveys the regulatory landscape and addresses some of the common pitfalls that an immigration practitioner encounters when utilizing paraprofessionals.

#### **DEFINITION OF TERMS**

#### Legal Assistant/Paralegal—General Definition

American Bar Association (ABA) Definition: A legal assistant or paralegal is a person, qualified through 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 the lawyer is responsible.<sup>1</sup>

The National Association of Legal Assistants (NALA<sup>2</sup>) Definition: NALA does not differentiate between "legal assistant" and "paralegal" and de-

<sup>&</sup>lt;sup>1</sup> Article 21.12 of the ABA By-Laws (as amended, August 1997).

<sup>&</sup>lt;sup>2</sup> NALA is a leading professional association for legal assistants and paralegals and provides continuing education, professional development programs, and voluntary certification programs. Information on NALA can be found at www.nala.org.

fines both as a distinguishable group of persons who assist attorneys in the delivery of legal services. Through formal education, training and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law which qualify them to do work of a legal nature *under the supervision of an attorney*.

The National Federation of Paralegal Associations, Inc. (NFPA<sup>3</sup>) Definition: A paralegal is a person qualified through education, training or work experience to perform substantive legal work that requires knowledge of legal concepts and is customarily, but not exclusively, performed by a lawyer. This person may be retained or employed by a lawyer, law office, governmental agency or other entity or may be authorized by administrative, statutory or court authority to perform this work. NFPA does not differentiate between "paralegal" or "legal assistant."

## Legal Assistant/Paralegal—State-by-State (non-inclusive) Definition Survey:

*Arizona*: through case law, has adopted the ABA definition and utilizes the terms, paralegal, legal assistant, and law clerk interchangeably<sup>4</sup>;

California: California Business & Professions Code Secs. 6450, et seq. defines who can use the term "paralegal," education and experience requirements, and mandatory ethical requirements. "Paralegal' means a person who either contracts with or is employed by an attorney, law firm, corporation, governmental agency, or other entity and who performs substantial legal work under the direction and supervision of an active member of the State Bar of California, as defined in Section 6060, an attorney practicing law in the federal courts of this state, that has been specifically delegated by the attorney to him or her."

Colorado: Legal Assistants (and/or paralegals) are a distinguishable group of persons who assist

attorneys in the delivery of legal services. Through education, training and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law which will qualify them to do work of a legal nature under the direction and supervision of a licensed attorney.

Connecticut: Legal assistants or paralegals are persons employed by law offices who are not admitted to practice law but a major part of whose work is performing tasks commonly performed by lawyers and who are under the general supervision and control of lawyers. Paralegals may be salaried employees or independent contractors such as freelance paralegals utilized on occasion by lawyers for special assignments.<sup>5</sup>

Florida: Legal assistant means a person, who, under the supervision and direction of a licensed attorney, engages in legal research, and case development and planning in relation to modifications, initial proceedings, services, processes, or applications, or who prepares or interprets legal documents or selects, compiles, and uses technical information from references such as digests, encyclopedias, or practice manual and analyzes and follows procedural problems that involve independent decisions.<sup>6</sup>

*Illinois*: "Paralegal" means a person who is qualified through education, training, or work experience and is employed by a lawyer, law office, governmental agency, or other entity to work under the direction of an attorney in a capacity that involves the performance of substantive legal work that usually requires a sufficient knowledge of legal concepts and would be performed by the attorney in the absence of the paralegal."

Indiana: State Supreme Court has enacted the Rules of Professional Conduct: Guidelines on the Use of Paralegals states that all lawyers must utilize paralegals according to certain guidelines pursuant to an attorney's duty to supervise in Rule 5.3. The Indiana Code at Section 1-1-4.6 defines "paralegal" as a "person who is (1) qualified through education, training, or work experience; and (2) employed by a lawyer, law office, governmental agency, or other entity, to work under the direction of an attorney in a capacity that involves the performance of substantive legal

<sup>&</sup>lt;sup>3</sup> NFPA is a nonprofit, professional organization comprising state and local paralegal associations throughout the United States and Canada. NFPA affirms the paralegal profession as an independent, self-directed profession which supports increased quality, efficiency, and accessibility in the delivery of legal services. NFPA promotes the growth, development and recognition of the profession as an integral partner in the delivery of legal services. Information on NFPA can be found at www.paralegals.org.

<sup>&</sup>lt;sup>4</sup> See Continental Townhomes East Unit One Association v. Brockbank, 152 Ariz. 537, 545 n. 9 (1986).

<sup>&</sup>lt;sup>5</sup> Special Inter-Committee Group to Study the Role of Paralegals, December 1985, Connecticut State Bar Association.

<sup>&</sup>lt;sup>6</sup> Florida Statutes Annotated Section 57.104.

<sup>&</sup>lt;sup>7</sup> Illinois State Statutes, 5 ILCS 70/1.35.

work that usually requires a sufficient knowledge of legal concepts and would be performed by the attorney in the absence of the paralegal."

*Iowa*: The Iowa legislature adopted a detailed set of guidelines outlining when an attorney could delegate to a non-lawyer, but did not specifically define paralegal, legal assistant or otherwise.

Kentucky: The Kentucky State Supreme Court in Rule 3.700 defines "paralegals" as persons under the supervision and direction of a licensed lawyer, who may apply knowledge of law and legal procedures in rendering direct assistance to lawyers engaged in legal research, preparing or interpreting legal documents and writing detailed procedures for practicing in certain fields of law; select, compile and use technical information from such references as digests, encyclopedias or practice manuals, and analyze and follow procedural problems that involve independent decisions.

*Maine*: "Paralegal" or "legal assistant" means a person who is 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.<sup>8</sup>

Michigan: A "paralegal" is any person currently employed or retained by a lawyer, law office, governmental agency, or other entity engaged in the practice of law, in a capacity or function which involves the performance under the direction and supervision of an attorney of specifically delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts such that absent that legal assistant, the attorney would perform the tasks and which is not primarily clerical or secretarial in nature.

*Missouri*: The Missouri State Bar adopted guidelines for using paralegals and defined "paralegal" as a person qualified through education, training or work experience, employed or retained by an attorney, law firm, government agency, corporation, or other entity to perform substantive and procedural legal work under the ultimate direction and supervision of an attorney or as authorized by administrative, statutory, or court authority.

*Montana*: "Paralegal" or "legal assistant" means a person qualified through education, training, or work experience to perform substantive legal work that requires knowledge of legal concepts and that is customarily but not exclusively performed by a lawyer and who may be retained or employed by one or more lawyers or law offices, or pursuant to administrative, statutory, or court authority to perform this work.<sup>10</sup>

Nevada: Nevada State Bar Association, Division of Legal Assistants, defines a legal assistant (or paralegal) as a person, qualified through education, training or work experience, who is employed or retained by a lawyer, law office, governmental agency, or other entity, in a capacity or function which involves the performance, under the ultimate direction and supervision of an attorney, of specifically delegated substantive legal work which work for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.

New Hampshire: State Supreme Court issued Administrative Rule 3, which defines "paralegals" as a person not admitted to the practice of law in N.H. who is an employee of or an assistant to an active member of the N.H. Bar, a partnership comprised of active members of the N.H. Bar, a professional association within the meaning of RSA Chapter 294-A, and, who, under the control and supervision of an active member of the N.H. Bar renders services related to but not constituting the practice of law.

*New Mexico*: State Supreme Court issued a definition of "legal assistant" as a person not admitted to the practice of law who provides assistance to a licensed lawyer and for whose work that licensed lawyer is ultimately responsible.

North Carolina: State Bar Association adopted requirements for "legal assistants" to be eligible to join the "Legal Assistant Section." These requirements defined a "legal assistant" as a person, qualified through education and work experience, who is employed as an employee and not as an independent contractor, on a full-time basis (at least 800 hours), by either one attorney, a single law firm, one governmental agency, or one other business entity in a capacity or function which involves the performance of a substantial amount of specifically delegated substantive legal work, which work, for the most

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<sup>&</sup>lt;sup>8</sup> Maine Revised Statutes Annotated, Title 4, Section 921.

<sup>&</sup>lt;sup>9</sup> Michigan State Bar, Bylaws, Article 1.

<sup>&</sup>lt;sup>10</sup> Montana Code 37-60-101.

part, requires a sufficient knowledge of legal concepts that, absent such person doing the work, the attorney would perform the task; the performance of legal work to be under the actual direction and supervision of an attorney who is licensed to practice law in the state of N.C. and who has ultimate responsibility and accountability for such person's work—the supervising attorney to be the attorney who employs such person.

[Editor's Note: According to the North Carolina Academy of Trial Lawyers, on July 16, 2004, statutory changes to NCGS 84-23 and 84-37 were enacted. If signed by the Governor, the changes become effective on October 1, 2004. The statutes authorize the North Carolina State Bar to regulate NC certified paralegals and seek injunctive relief for the improper use of the titles.

On July 16, 2004, the North Carolina State Bar Council voted to approve the Plan for Paralegal Certification contingent upon the Governor signing it. Once signed, the Plan for Paralegal Certification will be sent to the NC Supreme Court for approval.

The NC State Bar Council anticipates appointing the initial Board of Paralegal Certification during its October Council meeting.]

North Dakota: State Supreme Court adopted Rule 1.5, which defines "legal assistant (or paralegal)" as a person who assists lawyers in the delivery of legal services, and who through formal education, training, or experience, has knowledge and expertise regarding the legal system and substantive and procedural law which qualifies the person to do work of a legal nature under the direct supervision of a licensed lawyer.<sup>11</sup>

Oklahoma: State Bar Association defines "legal assistant" or "paralegal" as 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 who performs specifically delegated substantive legal work for which a lawyer is responsible, and absent such assistant, the lawyer would perform the task.

Rhode Island: State Supreme Court adopted Rule 5.5, which sets guidelines for the use of "legal assistants" and defines these non-lawyers as one who, under the supervision of a lawyer, applies knowl-

edge of law and legal procedures rendering direct assistance to lawyers, clients and courts. 12

South Dakota: State Legislature has passed several laws regarding paralegals. "Legal assistants" are a distinguishable group of persons who assist licensed attorneys in the delivery of legal services. Through formal education, training, and experience, legal assistants have knowledge and expertise regarding the legal system, substantive and procedural law, the ethical considerations of the legal profession, and the Rules of Professional Conduct as stated in Chapters 16-18, which qualify them to do work of a legal nature under the employment and direct supervision of a licensed attorney.<sup>13</sup> South Dakota also requires that legal assistants be certified by successfully completing the Certified Legal Assistant examination issued by NALA or through other means enunciated in Chapter 16-18-34.1 and 16-18-34.2, which will be discussed in further detail in Section II, Duty of Attorney to Supervise Paralegal.

Texas: State Bar issued "General Guidelines for the Utilization of the Services of Legal Assistants by Attorneys," which defined "legal assistant" as a person who must work under the supervision of an attorney and not provide legal advice or engage in the unauthorized practice of law. Legal assistants may perform delegated services so long as (1) the client understands the legal assistant is not an attorney, (2) the attorney maintains direct relationship with the client, (3) the attorney directs and supervises the legal assistant, and (4) the attorney remains professionally responsible for the client and the client's legal matters.

Virginia: State Bar Committee on the Unauthorized Practice of Law adopted the following definition of "paralegal/legal assistant:" one who is a specially trained individual who performs substantive legal work that requires a knowledge of legal concepts and who either works under the supervision of an attorney who assumes professional responsibility for the final work product, or works in areas where lay individuals are explicitly authorized by statute or regulation to assume certain law-related responsibilities.

Washington: State Court of Appeals defined "legal assistant" as one who is qualified through education, training, or work experience, is employed or

<sup>&</sup>lt;sup>11</sup> North Dakota Rules of Professional Conduct, Rule 1.5.

<sup>&</sup>lt;sup>12</sup> Rhode Island Rules of Professional Conduct, Rule 5.5.

<sup>&</sup>lt;sup>13</sup> South Dakota Rules of Professional Conduct 16-18-34.

retained by a lawyer, law office, governmental agency or other entity in a capacity or function which involves a performance under the ultimate direction and supervision of an attorney, of specifically delegated legal work, which work for the most part requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.<sup>14</sup>

West Virginia: State Bar Association defined "legal assistant" as a person, qualified through education, training, or work experience, who is employed or retained by a lawyer, law office, governmental agency, or other entity, in a capacity or function which involves the performance, under the ultimate direction and supervision of an attorney of delegated substantive legal work, which work, for the most part, requires sufficient knowledge of legal concepts that, absent such assistance, the attorney would perform the task.

Wisconsin: State Bar Paralegal Task Force defined "paralegal" as a person, qualified through education and training, who supervised by a lawyer licensed to practice law in WI, to perform substantive legal work requiring sufficient knowledge of legal concepts that, absent the paralegal, the attorney would perform the work.

## Common Theme—"Under the supervision of an attorney"

Nearly all states, organizations representing lawyers and paralegals, and courts, have stated that a paralegal should not perform any substantive legal work *unless* that work is *properly* supervised by an attorney. We will discuss the attorney's duty to supervise a paralegal among other ethical considerations that lawyers face in the employment of and reliance upon paralegals within their practice.

## THE TWO MAJOR PARALEGAL ORGANIZATIONS

#### **National Association of Legal Assistants:**

#### Introduction

NALA is a leading professional association for legal assistants and paralegals and was incorporated in 1975. Currently, NALA has more than 18,000 members and 92 state and local affiliated associa-

tions. NALA was formed to increase the professional standing of legal assistants, provide uniformity among the states in the utilization of legal assistants, and establish national standards of professional competence. NALA's contact information is 1516 S. Boston, #200, Tulsa, OK 74119, (918) 587-6828.

NALA has introduced Model Standards and Guidelines for the Utilization of Legal Assistants as "the proper utilization of legal assistants contributes to the delivery of cost-effective, high-quality legal services" and to provide an educational document to legal professionals.<sup>15</sup>

#### Standards

Legal assistants should meet one of the following minimum standards to demonstrate professional abilities:

- Successful completion of the Certified Legal Assistant certifying examination of NALA (discussed below<sup>16</sup>);
- Graduation from an ABA-approved program of study for legal assistants;
- Graduation from a course of study for legal assistants, which is institutionally accredited but not ABA approved, and which requires not less than the equivalent of 60 semester hours of classroom study;
- Graduation from a course of study for legal assistants other than set forth above and not less than six months of in-house training as a legal assistant;
- A baccalaureate degree in any field plus not less than six months of in-house training as a legal assistant;
- A minimum of three years of law-related experience under the supervision of an attorney including at least six months of in-house training as a legal assistant; or
- Two years of training as a legal assistant.<sup>17</sup>

<sup>&</sup>lt;sup>14</sup> See Absher Construction Co. v. Kent School District, 9 P.2d 1086 (1995).

<sup>&</sup>lt;sup>15</sup> NALA's Model Standards and Guidelines for Utilization of Legal Assistants, Preamble.

<sup>&</sup>lt;sup>16</sup> The Certified Legal Assistant examination established by NALA in 1976 is a voluntary nationwide certification program for legal assistants.

<sup>&</sup>lt;sup>17</sup> NALA's Model Standards and Guidelines for Utilization of Legal Assistants, Section III, Standards.

## Guidelines Relating to Standards of Performance and Professional Responsibility

In general, under ABA Model Rules of Professional Conduct, Rule 5.3, a legal assistant is allowed to perform any task that is properly delegated and supervised by an attorney, as long as the attorney is ultimately responsible to the client and assumes complete professional responsibility for the work product (emphasis added). <sup>18</sup>

#### **NALA Guidelines**

Legal Assistants should:

- Disclose their status as legal assistant at the outset of any professional relationship;
- Preserve attorney-client privilege; and
- Understand the attorney's Rules of Professional Conduct and avoid any action which would involve the attorney in violation of the Rules or give the appearance of professional impropriety.<sup>19</sup>

Legal Assistants should NOT:

 Establish attorney-client relationships, set legal fees, give legal opinions or advice, or represent a client before a court, unless authorized to do so by said court; or  Engage in, encourage, or contribute to any act which would constitute the unauthorized practice of law.<sup>20</sup>

Legal assistants may perform services for an attorney in the representation of a client, provided:

- The services performed do not require the exercise of independent professional legal judgment;
- The attorney maintains a direct relationship with the client and maintains control of all client matters;
- The attorney supervises the legal assistant;
- The attorney remains professionally responsible for all work on behalf of the client including any actions taken by the legal assistant in connection therewith; and
- The services performed supplement, merge with and become the attorney's work product.<sup>21</sup>

In supervising the legal assistant, consideration should be given to:

- Designating work assignments that correspond to the legal assistant's abilities, knowledge, training and experience;
- Educating and training the legal assistant with respect to professional responsibility, local rules and practices, and firm policies;
- Monitoring the work and professional conduct of the legal assistant to ensure that the work is substantively correct and timely performed;
- Providing continuing education for the legal assistant in substantive matters through courses, institutes, workshops, seminars and in-house training; and
- Encouraging and supporting membership and active participation in professional organizations.<sup>22</sup>

## Certified Legal Assistant (CLA) Certifying Examination

Facts:

 Currently, 11,801 legal assistants maintain a CLA credential;

<sup>&</sup>lt;sup>18</sup> NALA's Model Standards and Guidelines for Utilization of Legal Assistants, Section IV, Guidelines. ABA Model Rules of Professional Conduct, Rule 5.3 states "With respect to a nonlawyer employed or retained by or associated with a lawyer: (a) a partner 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 lawver 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 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 remedial action.

<sup>&</sup>lt;sup>19</sup> NALA's Model Standards and Guidelines for Utilization of Legal Assistants, Section V, Guideline 1.

<sup>&</sup>lt;sup>20</sup> NALA's Model Standards and Guidelines for Utilization of Legal Assistants, Section V, Guideline 2.

<sup>&</sup>lt;sup>21</sup> NALA's Model Standards and Guidelines for Utilization of Legal Assistants, Section V, Guideline 3.

<sup>&</sup>lt;sup>22</sup> NALA's Model Standards and Guidelines for Utilization of Legal Assistants, Section V, Guideline 4.

- Two-day examination divided into five sections:
  - Communications;
  - Ethics:
  - Legal Research;
  - Judgment and Analytical Ability; and
  - Substantive Law.

The examination is voluntary and is not required by any state in order to be employed as a legal assistant.

To qualify for the CLA, a candidate must meet *one* of the following criteria:

- Graduation from a legal assistant program that is:
  - Approved by the ABA;
  - Associate degree program;
  - Post-baccalaureate certificate program in legal assistant studies;
  - Bachelor degree program in legal studies; or
  - Legal assistant program which consists of a minimum of 60 semester hours of classroom study of which 15 semester hours are substantive legal courses.
- A bachelor degree in any field plus one year of experience as a legal assistant.
- High school diploma or equivalent plus seven years of experience as a legal assistant under the supervision of a member of the Bar plus evidence of a minimum of 20 hours of continuing legal education credit within the two-year period preceding the exam date.<sup>23</sup>

CLA credential is valid for five years and can be renewed only with submission of evidence demonstrating completion of at least 50 hours of continuing legal education credit.

#### **National Federation of Paralegal Associations**

Formed in 1974, the National Federation of Paralegal Associations, Inc. (NFPA) is the largest and oldest national paralegal association. Created as a non-profit federation, NFPA is an issues-oriented, policy-driven professional association, directed by its membership. The NFPA contact information is: 2517 Eastlake Avenue East, Suite 200, Seattle, WA 98102. (206) 652-4120 or *info@paralegals.org*.

NFPA is comprised of local and state paralegal associations, as well as individual members. NFPA has grown from eight charter members to more than 60 associations located throughout the United States. This membership includes more than 15,000 paralegal professionals working in traditional and nontraditional roles at law firms, corporations, government agencies, legal service agencies, and other law-related entities.

NFPA was formed to:

- Foster, promote and develop the profession;
- Monitor legislation, case law and ethics' opinions affecting the profession;
- Maintain a nationwide communications network;
- Advance the educational standards of the profession; and
- Conduct seminars, research issues and engage in other matters relating to the profession.

#### Mission Statement

NFPA is a nonprofit professional organization comprised of state and local paralegal associations throughout the United States and Canada. NFPA affirms the paralegal profession as a self-directed profession which supports increased quality, efficiency and accessibility in the delivery of legal services. NFPA promotes growth, development and recognition of the profession as an integral partner in the delivery of legal services. <sup>24</sup>

According to the NFPA, paralegals perform the same functions as an attorney except those prohibited by unauthorized practice of law statutes. Therefore, NFPA is in favor of professional regulation to protect the public and a Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement (adopted in 1993, revised in 1997):

- A paralegal shall maintain and achieve a high level of competence through education, training and work experience to include at least 12 hours of continuing legal education every two years;<sup>25</sup>
- A paralegal shall maintain a high level of personal and professional integrity including maintaining client confidences and refraining from

National Association of Legal Assistants Certified Legal Assistant Program – Fact Sheet, June 2003.

<sup>&</sup>lt;sup>24</sup> National Federation of Paralegal Associations: *www.paralegals.org*.

<sup>&</sup>lt;sup>25</sup> NFPA Model Disciplinary Rules and Ethical Considerations, Section 1-1.1.

engaging in any activity that could be perceived as an unauthorized practice of law;<sup>26</sup>

- A paralegal's title shall be fully disclosed in all business and professional communications including business cards, brochures, directories, and promotional materials;<sup>27</sup>
- Paralegals shall be subject to discipline under the Model Code.<sup>28</sup>

NFPA endorses the regulation of paralegals through the following plan:

- Two-tiered licensing plan, which constitutes mandatory regulation;
- Second form of regulation through certification and/or registration;
- Standards for ethics;
- Standards for discipline including a disciplinary process;
- Standards for education;
- Method for assessing the competency of paralegals;
- Defining "unauthorized practice of law" through allowable tasks for paralegals in different substantive subject areas.<sup>29</sup>

#### Paralegal Advanced Competency Exam (PACE)

Instituted in 1996 by NFPA to be consistent with two-tier licensing program discussed above. Voluntary credentialing program that is not currently required by any State to practice as a paralegal.

Tier One would test thinking and problem solving skills including general legal questions. Criteria to sit for Tier One:

- Associate's Degree in paralegal studies obtained from an institutionally accredited and/or ABAapproved paralegal education program, and six years of substantive paralegal experience; or
- Bachelor's Degree and completion of a paralegal program from an institutionally accredited

<sup>26</sup> NFPA Model Disciplinary Rules and Ethical Considerations, Section 1-1.2, 1-1.5, and 1-1.8.

- school, and three years of substantive experience as a paralegal; or
- Bachelor's Degree and completion of a paralegal program with an institutionally accredited school, and two years of substantive paralegal experience: or
- Four years of experience as a paralegal before 12/31/2000.<sup>30</sup>

Tier Two would test knowledge of specific legal practice areas.

#### **CERTIFICATION? LICENSURE?**

# What, if anything, is required, and what, if anything, are states doing to regulate the paralegal profession?

Generally, most states "regulate" paralegals through unauthorized practice of law statutes and through the State Bar's regulation of attorneys charged with supervising the paralegal. These general concepts will be discussed in more detail below.

Currently, *no* state licenses or certifies paralegals and only California has adopted educational and/or work experience requirements for individuals who wish to utilize the title "paralegal."

The American Bar Association (ABA) has issued Model Guidelines for the Utilization of Legal Assistant Services designed to provide attorneys with safeguards to employing and supervising paralegals in the course of their daily duties. These Guidelines were adopted by the ABA House of Delegates in 1991 and are generally governed by Rule 5.3 of the ABA Model Rules of Professional Conduct:

- A lawyer is responsible for all of the professional actions of a legal assistant performing legal assistant services at the lawyer's direction and should take reasonable measures to ensure that the legal assistant's conduct is consistent with the lawyer's obligations under the ABA Model Rules of Professional Conduct;<sup>31</sup>
- A lawyer must maintain responsibility for the work product of the legal assistant and cannot permit the legal assistant to conduct any activities

<sup>&</sup>lt;sup>27</sup> NFPA Model Disciplinary Rules and Ethical Considerations, Section 1.1-6.

<sup>&</sup>lt;sup>28</sup> NFPA Model Disciplinary Rules and Ethical Considerations, Section 2 *et seq.* 

<sup>&</sup>lt;sup>29</sup> NFPA Statement on Issues Affecting the Paralegal Profession, Paralegal Regulation.

<sup>&</sup>lt;sup>30</sup> NFPA Statement on Issues Affecting the Paralegal Profession, Paralegal Advanced Competency Exam.

<sup>&</sup>lt;sup>31</sup> ABA Model Guidelines for the Utilization of Legal Assistant Services, Guideline 1.

prohibited by statute, court rule, administrative rule or regulation, or controlling authority;<sup>32</sup>

- A lawyer may not delegate to a legal assistant the ability to establish the attorney-client relationship, establishment of fees, or legal opinions;<sup>33</sup>
- A lawyer must ensure that the legal assistant makes all parties involved in the process (client, court, etc.) aware that the legal assistant is not licensed to practice law;<sup>34</sup>
- The lawyer must ensure that the legal assistant maintains all client confidences:<sup>35</sup>
- The lawyer may include a charge for the work performed by a legal assistant in charging legal services:<sup>36</sup> and
- The lawyer may not split legal fees with a legal assistant nor pay a legal assistant for the referral of legal business, nor can the legal assistant's compensation be contingent, by advance agreement, upon the profitability of the lawyer's practice.<sup>37</sup>

#### Should paralegals be licensed?

#### Issues to Consider

While attorneys are licensed to practice law, paralegals, notwithstanding the expansion of paralegal duties, are not required to obtain a license to practice in any state.

Licensing would require all paralegals to meet minimum education and/or work experience requirements.

NFPA is in favor of a state determined regulation process that would benefit the public by maintaining minimum standards for the profession.

NALA supports voluntary certification and selfregulation, and opposes licensing requirements for paralegals. Currently, although several states define the term in statute or State Bar Codes of Conduct, no state has mandatory licensing or certification requirements. Only California has codified "minimum" standards that an individual must meet in order to utilize the term "paralegal." Licensing and/or certification legislation has been discussed and debated in New Jersey, North Carolina, Wisconsin, Colorado, Utah, South Dakota, Washington, and Hawaii, but has not been passed.

California—"the leader of the pack": California Business and Professions Code Sections 6450-6456: Defining "Paralegal" and setting industry standards:

'Paralegal' means a person who either contracts with or is employed by an attorney, law firm, corporation, governmental agency, or other entity and who performs substantial legal work under the direction and supervision of an active member of the State Bar of California, as defined in Section 6060, an attorney practicing law in the federal courts of this state, that has been specifically delegated by the attorney to him or her.<sup>38</sup>

A paralegal shall possess one of the following:

- A certificate of completion of a paralegal program approved by the ABA;
- A certificate of completion of a paralegal program at, or a degree from, a postsecondary institution that requires the successful completion of a minimum of 24 semester, or equivalent, units in law-related courses and that has been accredited by a national or regional accrediting organization or approved by the Bureau for Private Secondary and Vocational Education:
- A baccalaureate degree or an advanced degree in any subject, a minimum of one-year of lawrelated experience under the supervision of an attorney who has been an active member of the State Bar of California for at least the preceding three years or who has practiced in the federal courts of this state for at least the preceding three years, and a written declaration from this attorney stating that the person is qualified to perform paralegal tasks;
- A high school diploma or G.E.D., a minimum of three years of law-related experience under the supervision of an attorney who has been an active member of the State Bar of California for at least the preceding three years or who has prac-

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<sup>&</sup>lt;sup>32</sup> ABA Model Guidelines for the Utilization of Legal Assistant Services, Guideline 2.

<sup>&</sup>lt;sup>33</sup> ABA Model Guidelines for the Utilization of Legal Assistant Services, Guideline 3.

<sup>&</sup>lt;sup>34</sup> ABA Model Guidelines for the Utilization of Legal Assistant Services, Guideline 4.

<sup>&</sup>lt;sup>35</sup> ABA Model Guidelines for the Utilization of Legal Assistant Services, Guideline 6.

<sup>&</sup>lt;sup>36</sup> ABA Model Guidelines for the Utilization of Legal Assistant Services, Guideline 7.

<sup>&</sup>lt;sup>37</sup> ABA Model Guidelines for the Utilization of Legal Assistant Services, Guideline 9.

<sup>&</sup>lt;sup>38</sup> California Business and Professions Code Section 6450 (a).

ticed in the federal courts of this state for at least the preceding three years, and a written declaration from this attorney stating that the person is qualified to perform paralegal tasks. This experience and training shall be completed no later than December 31, 2003.<sup>39</sup>

All paralegals shall be required to certify completion every three years of four hours of mandatory continuing legal education in legal ethics as well as four hours in general law.<sup>40</sup>

A paralegal may not perform any services for a consumer except under the direction and supervision of an attorney, law firm, corporation, government agency, or other entity that employs or contracts with the paralegal, or unless otherwise allowed by statute, case law, court rule, or federal or state administrative rule or regulation.<sup>41</sup>

A paralegal can only identify himself or herself as such if he or she has met the requirements of Section 6450 (c). 42

New Jersey: New Jersey Supreme Court formed a committee that studied the paralegal industry for five years. The committee recommended to the New Jersey Supreme Court that the New Jersey Supreme Court should adopt required licensing for paralegals. To date, New Jersey has not adopted a licensing requirement for paralegals.

*Utah*: The Utah State Bar Legal Assistant's Division's Licensing of Legal Assistants Committee issued a report to the Utah Board of Bar Commissioners recommending licensing requirements for paralegals. To date, the Utah State Bar does not require a paralegal to be certified or obtain a license.

Hawaii: Hawaii State Bar Association's Task Force on Paralegal Certification approved two proposals imposing regulation of paralegal use and certification requirements for paralegals. The certification program did not win the State Bar Association's approval and is before the Hawaii Supreme Court.

*Indiana*: As part of the Indiana Rules of Professional Conduct, the Indiana Supreme Court adopted Guidelines on the Use of Legal Assistants. Although not requiring certification or licensure, it does pro-

vide attorneys with more coherent guiding principles in the supervision of non-lawyers.

*Maine*: Paralegal or legal assistant mean 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. A person may not use the title paralegal or legal assistant unless the person meets the definition in section 921.

*Pennsylvania*: Pennsylvania Consolidated Statutes, Title 42, Section 2524(a) prohibits a paralegal from providing legal services unless supervised by an attorney.

Although many states define the term, provide guidelines for the use of legal assistants, and have unauthorized practice of law statutes, no state currently "regulates" the paralegal profession through certification or licensure requirements. As such, attorneys must be sure to maintain proper supervision of paralegals so as to ensure that the attorney avoids any possible bar misconduct as a result of a non-attorney's actions.

## ETHICAL CONSIDERATIONS IN EMPLOYING NONLAWYER ASSISTANTS

#### **Supervision of Paralegals**

Paralegals have become essential for any immigration practitioner who wishes to remain competitive in today's legal market. The U.S. Bureau of Labor Statistics predicts that the paralegal job market will double in size from its current level of more than 100,000 nationwide in the next decade. In many immigration practices, paralegals outnumber the attorneys three to one. In Just 20 years ago, the majority of paralegals tasks were limited to administrative office tasks and the occasional research project. Fueled by a combination of factors, the role of the paralegal has been steadily increasing and today's paralegals represent a diversity of education, experience, and backgrounds. The tasks paralegals

<sup>&</sup>lt;sup>39</sup> California Business and Professions Code Section 6450 (c)(1)–(4).

<sup>&</sup>lt;sup>40</sup> California Business and Professions Code Section 6450(d).

<sup>&</sup>lt;sup>41</sup> California Business and Professions Code Section 6451.

<sup>&</sup>lt;sup>42</sup> California Business and Professions Code Section 6452.

<sup>&</sup>lt;sup>43</sup> Maine Revised Statutes, Title 4, Chapter 18, Section 921.

<sup>&</sup>lt;sup>44</sup> Maine Revised Statutes, Title 4, Chapter 18, Section 922.

<sup>&</sup>lt;sup>45</sup> Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2002, "Paralegals and legal assistants."

<sup>&</sup>lt;sup>46</sup> Although not a "scientific" survey, an informal poll of several immigration practices reveals the average ratio to be more than three paralegals for every attorney.

perform, especially in an immigration practice, are limited only by creativity, legal authority, and the established parameters of the supervising attorney.

#### What are the three keys for a paralegal?

- The paralegal must be aware of the ethical and legal responsibilities arising from the attorneyclient relationship, why they exist, and how they affect the paralegal;
- The paralegal must be aware that the ethical duties imposed on attorneys by state law affect paralegals; and
- Paralegals are indirectly regulated by attorney ethical codes and by state laws that prohibit nonlawyers from practicing law.

#### Attorneys Practicing with Paralegals— Practical Concerns

The Duty of Competence: an attorney owes his client a degree of competence including maintaining a system to monitor, track, and "hit" deadlines for submission of documents. This duty extends from the attorney through the paralegal in the representation of a client and the attorney must be aware of all cases being worked on by the paralegal and any deadlines pertinent to that matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation – this duty flows through the attorney to the paralegals working directly under the attorney's supervision on a given matter.

Duty to Supervise: All Model Rules and "paralegal" definitions listed above state that an attorney must supervise a paralegal in the course of his or her daily duties. Webster's Dictionary defines "supervise" in the following manner: "To oversee for direction; to superintend; to inspect with authority." Generally, case law seems to indicate that the attorney must supervise the manner in which the work is produced including its efficiency and effectiveness. A paralegal should not provide any communication or conduct any activity which could be construed as "legal activity" unless under the direct supervision of the attorney and with the attorneys full consent and knowledge.

Confidentiality of Information: All information relating to the representation of a client must be kept confidential unless the client consents to disclosure.

Paralegals must understand that the attorney-client privilege extends to them and that they have an affirmative duty to uphold this privilege.

As discussed above, paralegals may perform virtually any legal task so long as the work is supervised by an attorney, the attorney assumes responsibility for the paralegal's work, and the work does not constitute the unauthorized practice of law. Therefore, attorneys must be aware of the blurred line between "authorized" and "unauthorized" practices for their support staff.

#### **Lawyers Aiding Unauthorized Practice of Law**

A lawyer is subject to discipline if he or she assists a nonlawyer in engaging in the unauthorized practice of law. For purposes of this prohibition, nonlawyers include not only those without legal training, but also disbarred, suspended, or out-of-state lawyers not licensed in the jurisdiction.

Lawyers may violate the prohibition against assisting in others' unauthorized practice by:

- Improperly delegating duties to nonlawyer staff or inadequately supervising their work;
- Offering legal services to or accepting referrals from businesses whose nonlawyer employees provide legal service to customers; or
- Working with disbarred, suspended, or out-ofstate lawyers who are improperly practicing law.

Source: ABA/BNA Lawyers Manual on Professional Conduct

#### **Practice Pointers**

- Hold periodic meetings with your paralegal preferably on a weekly basis to review law changes, office procedures and client matters.
- Encourage your paralegals to update their skills and take advantage of training opportunities, including attending legal seminars.
- Provide close supervision and give your paralegals complete access to you as their supervising attorney.
- Utilize the paralegals in nontraditional roles such as maintaining the library/research materials, monitoring AILA InfoNet, and/or working on special projects such as marketing, computer support, or outbound visas.

<sup>&</sup>lt;sup>47</sup> Webster's Unabridged Dictionary (1913).

- Do not allow paralegals to sign correspondence or applications sent to or filed with any government agencies—only counsel should sign.
- Do not allow paralegals to set legal fees with clients; however, they may provide information that is set forth in a published price list, or, for example, they can indicate the hourly rates charged by the firm for attorneys or paralegals.
- It is highly recommended that the attorney conduct the initial interview, although you may wish to have your paralegals phone-screen potential clients. When the client initially comes to the office, it is critical the client meet with the attorney and that any fee agreement be signed by the client and the attorney, even though the paralegal may be present during those activities.
- Cross-train your paralegals in order to protect them in a down-sizing market so that they have proper skills to be able to handle various kinds of immigration matters. While some practices use a model of compartmentalizing paralegals into various specialties, it is important to continually cross-train your paralegals in various aspects and allow them to move about within your immigration practice.
- Promote the broadening of the paralegal's horizons, including attending EOIR hearings, visiting the local DHS offices, attending AILA functions including luncheons when appropriate, seminars, and conferences. Additionally, encourage your paralegals to complete their bachelor's degree, a paralegal certificate program, or apply to and attend law school.

The Unauthorized Practice of Law: Although it is convenient, economical, and often essential for the immigration practitioner to use the services of a paralegal or other "nonlawyer" assistant, the immigration practitioner cannot lose sight that the paralegal is the ultimate responsibility of the attorney and the attorney is responsible for ensuring that the paralegal performs the work in a manner consistent with the state rules on unauthorized practice of law as well as the lawyer's own ethical obligations. Furthermore, in several states, paralegals are governed by the unauthorized practice of law statutes, which sanction individuals for engaging in the practice of law without a license.

#### Case Study: Georgia

*Background:* There are no certification or licensure requirements for paralegals working in Georgia,

individual certification is only a voluntary process, and there are no formal education requirements to become a paralegal in the state of Georgia.<sup>48</sup>

The State Bar of Georgia expressly prohibits a lawyer from assisting a nonlawyer in the performance of activities that would constitute the unauthorized practice of law. The unauthorized practice of law statute in Georgia is found at OCGA sec 15-19-50, et seq.

The practice of law is defined as: (1) representing litigants in court and preparing pleadings and other papers incident to any action or special proceedings in any court or other judicial body; (2) Conveyancing; (3) *Preparation of legal instruments of all kinds whereby a legal right is secured* (emphasis added); (4) Rendering of opinions as to the validity or invalidity of titles to real or personal property; (5) Giving of legal advice; and (6) Any action taken for others in any matter connected with the law.<sup>49</sup>

It shall be unlawful for any person other than a duly licensed attorney at law: (1) To practice or appear as an attorney at law for any person other than himself in any court of this state or before any judicial body; (2) To make it a business to practice as an attorney at law for any person other than himself in such courts; (3) To hold himself out to the public or otherwise to any person as being entitled to practice law; (4) To render or furnish legal services or advice; (5) To furnish attorneys or counsel; (6) To render legal services of any kind in actions or proceedings of any nature; and (7) To advertise that either alone or together with, by, or through any person, whether a duly or regularly admitted attorney at law or not, he has, owns, conducts, or maintains as an office for the practice of law or for furnishing legal advice, services or counsel.<sup>50</sup>

State Bar of Georgia's Rules of Professional Conduct provides specific guidance to lawyers who employ paralegals. For example, Georgia Rules of Professional Conduct 5.3 provides that "with respect to a nonlawyer employed or retained by or associated with a lawyer:

 A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the per-

<sup>&</sup>lt;sup>48</sup> See generally, State Bar of Georgia, Rules of Professional Conduct.

<sup>&</sup>lt;sup>49</sup> Unannotated Georgia Code 15-19-50.

<sup>&</sup>lt;sup>50</sup> Unannotated Georgia Code 15-19-51.

son's conduct is compatible with the professional obligations of the lawyer;

- 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;
- A lawyer shall be responsible for conduct of such a person that would be a violation of the Georgia 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 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. 51

Delegation is allowed only if the lawyer supervises the nonlawyer and retains responsibility for the work. Failure to provide adequate supervision also could create a situation permitting the paralegal to overstep proper bounds and commence giving legal advice. For example, in an advisory opinion issued by the State Bar of Georgia on February 11, 2000, the State Bar noted that a lawyer could be found to have aided a nonlawyer in the unauthorized practice of law in allowing the nonlawyer to "prepare and sign correspondence which threatens legal action *or provides legal advice* or both ... a lawyer should

never place a non-lawyer in situations in which he or she is called upon to exercise what would amount to independent professional judgment for the lawyer's client (emphasis added)."53 With the advent of the Internet and e-mail, the gray line of "providing legal advice" is blurred even further. Immigration practitioners must adequately supervise all e-mail correspondence to ensure that any e-mail from a paralegal contains language that reflects the opinion of the attorney or firm, *i.e.*, "the attorney with whom I [paralegal] work indicates that ..." or "it is the policy of our firm ..."

#### **CONCLUSION**

What is the moral to be learned from the above discussion? Ethical training for paralegals, adequate supervision, and consistent review of a paralegal's work are tasks that an immigration practitioner cannot ignore. Clear office procedures and job descriptions provided to the paralegal, in writing, with comprehensive and continuous training, can greatly assist the immigration practitioner in demonstrating that the attorney has made a reasonable effort to ensure compliance by paralegals with the Rules of Professional Conduct and the attorney's own ethical standards. Additionally, the immigration practitioner should have written supervision guidelines requiring that a lawyer review, approve, and personally sign all legal documents and correspondence.

 $<sup>^{51}</sup>$  State Bar of Georgia, Rules of Professional Conduct, Rule 5.3.

<sup>&</sup>lt;sup>52</sup> *Id.* rule 5.5.

<sup>&</sup>lt;sup>53</sup> Formal Advisory Opinion No. 00-2, State Bar of Georgia, February 11, 2000.