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California Regulates Paralegals

By Therese A. Cannon

California has enacted major legislation that defines the occupational title "paralegal," sets standards for persons to use "paralegal" and comparable job titles, and defines and limits the functions that paralegals can perform. The new law makes it unlawful for persons to identify themselves as paralegals unless they meet the qualifications set forth in the statute and work under lawyer supervision. Other key provisions establish mandatory continuing education and the paralegal's duty of confidentiality. The impact of this controversial and unique approach to the regulation of paralegals will be watched carefully as paralegal regulation is considered in several states, including Texas, Arizona, Wisconsin, Hawai'i and Rhode Island.

Background and Context

Knowing some of the background and history of this legislation is essential to understanding why and how it came about, especially because the California legislature has repeatedly rejected regulation of paralegals for three decades. Efforts at licensing through the legislature have been summarily dismissed several times since the inception of the paralegal field in the early 1970s. And similar initiatives to endorse limited law practice by nonlawyers as a means to increase access to legal services have been dashed, even when promoted by entities of the State Bar of California.

This time was different, in large part, because of earlier legislation, passed in 1998, that sets minimum qualifications for "legal document assistants" and requires them to register in the county where they are working. Legal document assistants are defined as persons who provide, for compensation, self-help assistance to members of the public who are representing themselves in legal matters. Legal document assistants are specifically prohibited from providing legal advice and are only permitted to complete documents in a ministerial manner, to provide attorney-authored general information and published legal documents, and to file and serve documents at the direction of the customer. (California Business and Professions Code §§6400, et seq.)

Until the time that the LDA law was enacted, most LDAs had used the title "paralegal" in their businesses. Some LDAs have continued to use that title. Many paralegals/legal assistants working in traditional settings objected to the use of this title by nonlawyer legal service providers. California paralegals have worked hard to build recognition of the paralegal occupation among lawyers and the public. Legal assistants affiliated with the California Alliance of Paralegal Associations were especially disturbed by complaints they got from consumers who had been defrauded by persons holding themselves out as "paralegals." It is evident that members of the public are confused about the meaning of this title, some people mistakenly assuming that "paralegals" are authorized by law to work independently of lawyers in the provision of legal services. The CAPA paralegals decided to go to the legislature to try to get some protection for their job title.

The legislature was receptive because it perceived of the proposal as a consumer protection bill - one that would prevent unqualified persons working independently from misusing the title "paralegal" in order to attract customers. Especially helpful in getting the legislation passed were individual stories about consumers whose legal matters were dramatically worsened by poor services provided by these nonlawyers. What the paralegals promoting this legislation probably did not anticipate is the transformation that the bill made from one that protected the title "paralegal" to one that sets qualifications, requires continuing education, and has many other components that are commonly found in licensing legislation. (The law can be found at California Business & Professions Code §§6450 through 6456.)

Key Provisions of the Law

The law defines a paralegal as "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 . . . or an attorney practicing law in the federal courts of this state that has been specifically delegated by the attorney to him or her." Included as synonymous with paralegal are the titles "legal assistant," attorney assistant, and "freelance," "independent" and "contract paralegal."

A nonexclusive list of common paralegal tasks is provided in the statute. Among these tasks is the representation of clients before administrative agencies if permitted by law. A list of prohibited activities is also provided. This list includes functions that normally fall under the definition of the practice of law, such as giving legal advice, representing a client in court, and selecting, explaining, drafting or recommending legal documents except under a lawyer's supervision. This provisions also prohibits paralegals from soliciting clients as "runners" or cappers" and from establishing the fee to be charged for their own services. Finally, it prohibits paralegals from contracting with anyone other than an attorney for their paralegal services.

Paralegals must meet educational/experiential qualifications in one of the following ways:

- Completion of an ABA-approved paralegal certificate program;
- Completion of 24-semester unit paralegal program at a state-approved or accredited institution;
- Completion of a baccalaureate degree and one year of law-related experience under a three-year California-licensed lawyer or a lawyer practicing in the federal courts in California; or
- Completion of high school or GED and three years of law-related experience under a three-year California-licensed lawyer to a lawyer practicing in the federal courts in California. This provision sunsets on December 31, 2003.

The last two provisions, which require law-related experience, also mandate that the paralegal have a written declaration from the supervising attorney stating that she or he is qualified to perform paralegal tasks.

The law also establishes continuing education requirements as follows:

- Four hours of ethics every three years, and
- Four hours of "general" or "specialized" law every two years.

Courses must be approved by the State Bar of California as Minimum Continuing Legal Education courses under California's MCLE statute. (California lawyers must take 25 hours of approved MCLE every three years.) Paralegals are responsible for keeping records of the course and certifying them to their supervising lawyers.

In keeping with the original intent of the legislation, one provision requires legal document assistants to remove the word "paralegal" from their business name the next time they renew their LDA registration.

Other provisions make it unlawful for paralegals to provide legal services directly to the public without lawyer supervision and for persons not qualified under the statute to identify themselves as paralegals in ads, or on cards, letterhead, signs and the like. Business cards must have the name of the employing law firm or a statement that the paralegal is employed or retained by a lawyer. If either of these provisions is violated, the person may be charged with an infraction punishable by fines up to \$2500 as to each consumer for the first offense. Second and subsequent violations can bring misdemeanor charges with fines and/or county jail up to one year. Restitution to the victim is also provided for.

In the civil liability area, one provision makes lawyers liable for harm caused by their paralegals' negligence, which merely codifies existing case law. Another provision creates a consumer action based on violations of the statute.

Paralegals employed by the state of California are exempt from the statute.

Finally, the statute subjects paralegals to the same duty of confidentiality as lawyers under a related statute, and adds language requiring paralegals "to preserve the attorney-client privilege." No other ethical obligations are covered by the statute.

The Reaction of the Legal Community

The paralegals who fought for this legislation, such as those associated with CAPA, are elated with their success and believe that this law is a victory for consumer protection and for paralegals. They believe that this law gives much-deserved formal recognition to the paralegal occupation by setting it apart from other nonlawyers who do not work under lawyer supervision.

Other paralegals, including many who are active in local paralegal associations affiliated with National Federation of Paralegal Associations, lobbied against the law and are still opposed to the law both in principle and in the details of the various provisions. Some of these paralegals have formed a group called the California Paralegal Legislative Advocacy Alliance.

The paralegals who oppose the law object to the bright-line distinction between paralegals who are supervised and those who are not, and believe that the law inhibits the expansion of the paralegal field and the growth of the paralegal profession. Some are seeking clean-up legislation that will revise or remove some of the offending provisions. Most of the opponents contend that the legislation was not necessary to protect the public and that its provisions far exceed what was needed to protect against the misuse of the title "paralegal."

Lawyers are learning about the law through articles in major legal publications and from their paralegals. Most large law firms are setting up systems to check and record the qualifications of current employed paralegals and new hires and to monitor their paralegals' continuing education coursework.

The Impact of the Law and Issues for the Future

While this law dictates the qualifications and functions of paralegals in California, it is NOT licensing or certification by a state agency nor does it require registration of paralegals with a state or local government entity. There is no governing body, no competency testing, no moral character check, no ethics code, no disciplinary system, no reporting. Penalties for violation of the two provisions noted above and civil liability are the only enforcement mechanisms. This law is not, therefore, a typical regulatory scheme, such as that being considered in Wisconsin. (The Wisconsin proposal was covered in the last issue of the SCOLA Update.)

The law contains several provisions that raise questions and issues of concern. Some of these matters maybe rectified with further legislation; some may remain in the law. For example,

- One of the ways a person can become a paralegal is by taking 24 units of law-related coursework in a paralegal program. "Law-related" is not defined. Does this category include legal secretarial courses? College courses in Business Law or Constitutional Law and the like? Are courses like these appropriate preparation for paralegal work?
- Another way a person can qualify is by having a certificate from an ABA-approved paralegal program. Many programs in California grant an associate degree, not a certificate. Will this educational credential qualify? Will programs have to start issuing "certificates of completion"?
- Continuing education courses must be approved by the State Bar of California as lawyer MCLE courses. The State Bar does not have the authority or a mechanism to approve courses specifically for paralegals. In order for courses to be approved, lawyers must be in attendance. Will paralegal associations and other providers of paralegal continuing education have to change their intended audience for their courses to attract lawyers? Will these organizations have to become approved as MCLE providers? Is this system an improvement over the extensive array of continuing education now offered by paralegal associations and commercial providers? Will the increased costs be passed on to paralegals and the firms that pay for their continuing education?
- Some paralegals working in corporations and government agencies perform work with indirect supervision by outside counsel or in-house counsel that is only peripherally involved in overseeing their work. Are these persons in violation of the statute?
- The law requires paralegals to "preserve the attorney-client privilege." There is no comparable provision for lawyers. Does the statute unintentionally create a legal or ethical duty for paralegals that differs from or exceeds that of lawyers?
- Can and will paralegals and their employers simply use different job titles for persons to take them out of the coverage of the statute?

Time will tell whether this law will serve its intended purpose of protecting consumers and whether it will promote or stifle the growth of the paralegal profession. What will the impact of the law be? Will lawyers and paralegals comply with the law? Will legal document assistants refrain from using the title "paralegal"? Will the qualifications set by the statute screen out unqualified paralegals? Will violations be prosecuted? Will the law be amended to clarify and rectify some of its problematic provisions? Will new job titles be developed to take persons outside the scope of the law? The legal community in California and the rest of the country will be waiting and watching.

Therese A. Cannon is the Educational Consultant to the ABA Standing Committee on Legal Assistants and the Editor of the SCOLA Update.

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