

THE ROLE OF INDEPENDENT PARALEGALS IN IMPROVING THE QUALITY AND DELIVERY OF LEGAL SERVICES

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I. INTRODUCTION

A. The Crisis

In the United States, high cost is a barrier to many low- and middle-income consumers in need of legal assistance. According to the American Bar Association (“ABA”) Comprehensive Legal Needs Study (“CLNS”), the legal matters of seventy-one percent of low-income households and sixty-one percent of middle-income households were not brought to the judicial system. The study indicated that cost is one of the primary reasons that Americans failed to seek help from the courts. The study also found that individuals often do not seek legal assistance because of their perception that the involvement of a lawyer will not solve their legal problem.²

Relying upon lawyers alone to increase access to justice has proven to be inadequate. Currently, fewer than seventeen percent of U.S. lawyers accept pro bono cases.³ Moreover, given that there have never been more than four thousand American legal aid lawyers, the federally funded legal aid program is able to serve only a very small percentage of the poor.⁴ While legal needs are unmet for low- and middle-income Americans, a majority of U.S. legal

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² See INST. FOR SURVEY RESEARCH AT TEMPLE UNIV., MAJOR FINDINGS FROM THE A.B.A. COMPREHENSIVE LEGAL NEEDS STUDY (1994) [hereinafter CLNS STUDY]. “Low-income” households are those that have a combined annual income of not more than 125% of the poverty level. “Moderate-income” households comprise the middle three-fifths of the income distribution.

³ Marcus J. Lock, *Increasing Access to Justice: Expanding the Role of Nonlawyers in the Delivery of Legal Services to Low-Income Coloradans*, 72 U. COLO. L. REV. 459, 465 (2001).

⁴ See Jeanne Charn, *A Comment on the Current State of Government and Charitable Funded Legal Services for the Poor in the US*, International Legal Aid Group Conference Paper, Melbourne, Australia 2001 (Dec. 6, 2001), at <<http://www.dmt.canberra.edu.au/ilag/>>.

resources are utilized to serve the wealthiest individuals and corporations.⁵ Left unaddressed, this disparity in access to justice will continue to erode public confidence in the legal system and fuel dissatisfaction with the legal profession.

B. Description of the Independent Paralegal Industry

The fledgling Independent Paralegal industry, which is currently underutilized, could play a significant role in improving the quality and delivery of legal services in the United States. Independent Paralegals are nonlawyers with legal experience and training. They provide legal services directly to the public and do not work under the supervision of an attorney. Independent Paralegals are also known as legal technicians or legal document assistants.

There are over 130,000 paralegals employed in the United States.⁶ Independent Paralegals are unregulated and therefore there are no reliable estimates for the total percentage of paralegals that they comprise. The National Federation of Paralegal Associations (NFPA) estimates that roughly five percent of its members either freelance or work independently.⁷ Unauthorized practice of law is a criminal offense, ranging from a misdemeanor in more than two-thirds of the states to a felony offense in others.⁸ Therefore, the vast majority of independent paralegals are located in the western part of the country where states, such as California and Washington, have created limited exceptions in state unauthorized practice

⁵ See James Podgers, *Chasing the Ideal: As More Americans Find Themselves Priced Out of the System, The Struggle Goes On to Fulfill the Promise of Equal Justice for All*, 80 A.B.A. J. 56 (1994).

⁶ BUREAU OF LABOR STATISTICS, NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE DATA (1997).

⁷ Telephone Interview with Lou Hangle, Managing Director, National Federation of Paralegal Associations (Feb. 21, 2002).

⁸ Margaret F. Brown, *Domestic Violence Advocates' Exposure to Liability for Engaging in the Unauthorized Practice of Law*, 34 COLUM. J. L. & SOC. PROB. 279 (2001).

statutes. Estimates of the number of Independent Paralegals located within the state of California range from 1,100 to 3,000.⁹

The development of the Independent Paralegal profession has been closely related to the development of the legal self-help movement. In the 1970s, the Wave Project - a legal self-help initiative that encouraged consumers to represent themselves in legal matters - established twenty paralegal-run “document preparation offices” across the state of California. Many of these original offices still exist today. Due to opposition from state bar associations, the Independent Paralegal industry was largely an underground movement until mid-1980.¹⁰

Independent Paralegals are now boldly challenging the legal establishment. For example, California-based We the People Forms and Service Centers USA, Inc. established thirty-four franchises that are staffed by legal document assistants. We the People offers low-cost legal assistance to consumers who want to complete routine legal tasks. When the legal problems of clients exceed the scope of the document preparation service, We the People refers clients to attorneys.¹¹

C. The Role of Independent Paralegals in Improving the Quality and Delivery of Legal Services

Independent Paralegals are specialists who develop expertise in a specific area of the law and engage in a particular type of assistance over time. While law school education generally

⁹ Telephone Interview with Diana Wade, President, California Association of Legal Document Assistants (Feb. 26, 2002). See also Brenda Seekins, *Paralegal Workers Threaten Monopoly*, BANGOR DAILY NEWS, Apr. 10, 1995, at 1.

¹⁰ See Kathleen Eleanor Justice, *There Goes the Monopoly: The California Proposal to Allow Nonlawyers to Practice Law*, 44 VAND. L. REV. 179, 182-185 (1991). “Over the last half-century, state bars repeatedly have fought publication of self-help law books; opposed introduction of standardized forms; prevented court clerks from providing routine legal assistance; shut down form preparation services; and blocked licensing systems for nonlawyer practitioners.” See also Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 1 J. INST. STUD. LEG. ETH. 197, 202 (1996).

¹¹ See Crystal Nix Hines, *Without a Lawyer; Chain of Legal Self-Help Centers Is Expanding Across U. S.*, N.Y. TIMES, July 31, 2001, at C2.

emphasizes theory over practice, paralegal training and education is structured to emphasize practical application of the law.¹²

Independent Paralegals can serve an integral role in increasing access to justice in the United States. This paper argues that policymakers should decriminalize the provision of skilled legal assistance by paralegals. In section two, it argues that eliminating unauthorized practice statutes could: 1) reduce the cost of legal services in the U.S. market, 2) expand the range of legal services that satisfy the particular needs of low- and moderate-income consumers, and 3) facilitate pro se representation for consumers who do not want or cannot afford representation by a lawyer. Section three challenges the assumption that licensing Independent Paralegals will create a group of “second-class” legal service providers. It argues that Independent Paralegals can provide high-quality legal service, and in certain contexts, may even achieve greater client satisfaction than lawyers. Section four assesses consumer protection arguments against eliminating unauthorized practice laws, and concludes that unauthorized practice laws are not the best approach to address these concerns. Lastly, this paper recommends a regulatory framework for licensing Independent Paralegals.

II. THE ROLE OF INDEPENDENT PARALEGAL PRACTICE IN SERVING UNMET LEGAL NEED

Case law, statutes, and court rules regulate the unauthorized practice of law and violation of these laws is a criminal offense punishable by fine or imprisonment. Violations of unauthorized practice rules are treated as misdemeanors in more than two-thirds of U.S. states. Other states such as Nevada, Virginia, and New York treat this violation as a felony offense.¹³ As the state bar interprets Nevada’s unauthorized practice law, paralegals may not decide for

¹² See Interview with Lynn Dahlborg, Director, Suffolk University Paralegal Studies Program (Mar. 6, 2002).

¹³ See Siobhan Roth, *ABA Report Proposes Multidisciplinary Practices*, CONN. L. TRIB., June 21, 1999.

clients which legal documents to use, which type of action to file, or deal with third parties on their behalf.¹⁴ Paralegals violate the unauthorized practice law in Nevada if any person relies upon their judgment or opinion “in relation to their legal rights or obligations.”¹⁵ A first time violation of the statute is a misdemeanor offense. A third conviction within seven years amounts to a class E felony and is punishable by imprisonment for up to four years.¹⁶ Statutes such as Nevada’s impede the delivery of legal services to low- and moderate-income consumers because they penalize the provision of skilled legal assistance by persons other than lawyers and prevent lower-cost providers from entering the legal market.

A. Reducing the Cost of Quality Legal Services in the United States’ Market

Data is quite limited on the provision of legal services by Independent Paralegals in the United States and the impact paralegals have had on reducing costs in the U.S. legal market. Notwithstanding the lack of available data, evidence suggests that in the future Independent Paralegals could play a significant role in increasing access to justice as they typically charge substantially less than lawyers for identical services, which alleviates cost barriers to the legal market.¹⁷ As the New Jersey Supreme Court Committee on Unauthorized Practice of Law reported: “Independent Paralegals confer an invaluable benefit on the public in the form of reduced legal fees.”¹⁸

A February 2002 survey conducted by the California Association of Legal Document Assistants (CALDA) indicated that California attorneys charge, on average, between \$1500-2500

¹⁴ See David A. Clark, *Status Report: Unauthorized Practice of Law Initiative*, 9 NEVADA LAWYER 30, March 2001; NEV. REV. STAT. §7.285 (2001).

¹⁵ Clark, *supra* note 14.

¹⁶ *Id.*

¹⁷ See Catherine Brennan, *Attorneys Argue Over Wisdom of Letting NonLawyers Practice as Lawyers; Have Failed to Fill Market Niche Now Held By Paralegals*, THE DAILY RECORD, June 17, 1996, at 15 (stating that Independent Paralegals “often charge roughly half of a lawyer’s fee”).

to file a divorce while legal document assistants charged between \$250-\$400 to prepare and file a divorce petition. The CALDA data suggests that attorneys are charging approximately six times more for the same services.¹⁹ Attorneys' retainers and fees for consumer bankruptcies, like divorces, are not affordable for many debtors. In the Los Angeles area for example, a no-asset Chapter 7 filing by a competent attorney costs between \$700 and \$1200 while Independent Paralegals' fees are more affordable.²⁰ Another example of lower cost can be found in the context of a simple name change. In the Houston area, lawyers charge \$150-165 to prepare a petition for a name change while Independent Paralegals charge roughly forty-five dollars.²¹

The principal explanation for the lower fees of Independent Paralegals is that their entry into the legal profession costs considerably less than lawyers. Due to the high costs of obtaining a juris doctorate degree, law school students graduate, on average, more than eighty thousand dollars in debt.²² The cost of a paralegal certificate is dramatically lower than the cost of a juris doctorate. For example, tuition at the University of San Diego Paralegal School is approximately five thousand dollars, and Loyola University's Institute of Paralegal Studies in Chicago, Illinois, offers a paralegal certificate for approximately eight thousand dollars.²³ Part-time classes at virtually all paralegal programs allow students to earn an income during their time of study instead of incurring debt.

¹⁸ *In re* Opinion No. 24 of the Committee on Unauthorized Practice of Law, No. A-91, 1992 NJ LEXIS 1049 (N.J. May 14, 1992).

¹⁹ See Wade, *supra* note 9.

²⁰ See Hon. Geraldine Mund, *Paralegals: The Good, the Bad, and the Ugly*, 2 AM. BANKR. INST. L. REV. 337, 343-44 (1994).

²¹ See Ronald Lipman, *Ex is Gone, and Now She'd Like to Lose his Name*, HOUSTON CHRONICLE, Mar. 25, 2002, at 3.

²² See Robert E. Hirshon, *Graduating Under Pressure*, 87 A.B.A. J. 6 (2001).

²³ University of San Diego, Paralegal Program, Tuition and Fees, at <<http://www.acusd.edu/paralegal/online/admissions.shtml>> (last visited July 3, 2002); Loyola University Chicago, Student Business Office, Division of Student Financial Services, at <<http://www.luc.edu/sbo/tuition.html>> (last visited July 3, 2002) (approximately \$8,000 based on \$385 tuition per credit hour and twenty-one credit hour requirement).

Today there are more than eight hundred educational programs for paralegals, over two hundred of which are approved by the ABA.²⁴ A current list of ABA-approved paralegal programs is published online.²⁵ There are many different options available within these paralegal educational programs. Students can obtain a paralegal certificate or concentrate in paralegal studies during their course of study at a bachelors or associates degree program. The Paralegal Studies Program at Suffolk University has contemplated offering a graduate degree in advanced paralegal studies that would be tailored to mid-career professionals with experience in politics or business.²⁶ There is a possibility that other schools will develop such advanced degree programs in the future.

Independent Paralegals and attorneys acquire skills and training in similar ways. Paralegals are educated on the job under the supervision of experienced practitioners. They gain practical knowledge by assisting clients under the supervision of experienced colleagues, as well as observing how legal documents are completed and filed in practice. If unauthorized practice laws are eliminated, the supply of available providers of legal services may increase. In many cases, clients of Independent Paralegals are not individuals who have access to a lawyer. In those areas where Independent Paralegals and lawyers do compete, the market will likely drive attorney prices down.²⁷ Thus, availability of Independent Paralegal services has the potential to make an impact on increasing access to justice - not only by providing high-quality, low-cost legal services, but also by introducing competition to the legal services market as a whole.

B. Expanding the Range of Services that Satisfy the Legal Needs of Low- and Moderate-Income Americans

²⁴ SCHNEEMAN, PARALEGAL CAREERS 10 (2000).

²⁵ A.B.A. Standing Committee on Legal Assistants, Approved Programs, <<http://www.abanet.org/legalservices/legalassistants/directory/al.html>> (last modified Mar. 27, 2002).

²⁶ See Dahlborg, *supra* note 12.

²⁷ See Lock, *supra* note 3, at 468.

In addition to reducing the cost of high-quality legal assistance, Independent Paralegals can increase access to justice in the United States by tailoring their services to the particular legal needs of low- and middle-income individuals. The most common legal problems of low- and middle-income households involve personal finance, housing matters, community disputes, personal health/injury, and family problems.²⁸ In our current system, few lawyers provide these legal services for average Americans. A vast majority of legal resources are concentrated in more lucrative fields such as corporate law, intellectual property, and major business litigation.²⁹ As the ABA Commission on Nonlawyer Practice reported:

[T]here appear to be few, if any, lawyers experienced or willing to handle certain types of cases - for example, those of handicapped children seeking alternative school placements . . . claimants challenging denial of disability and unemployment claims and cases . . . which often carry very low statutory fee limitations. . . .³⁰

Despite the professional commitment of the bar to public service, the sheer number of Americans in need of legal assistance far exceeds the pro bono capacity of the bar. Nationally, it has been estimated that less than seventeen percent of attorneys participate in pro bono programs.³¹ Moreover, associates in law firms are now expected to bill more hours in return for higher salaries, leaving little time for pro bono work.³² Not only are there fewer attorneys willing and available to perform pro bono services, but also those participating generally have no prior work or educational experience in the areas that they volunteer to practice. In contrast to some inexperienced volunteer attorneys, Independent Paralegals can offer knowledge, expertise, and skill acquired over time in serving low- and middle-income communities. For example, the

²⁸ See CLNS STUDY, *supra* note 2.

²⁹ See SCHNEEMAN, *supra* note 24, at 62.

³⁰ COMMISSION ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS, A REPORT WITH RECOMMENDATIONS (1995) [hereinafter NONLAWYER ACTIVITY].

Tenant Advocacy Project of the Public Justice Center in Baltimore, Maryland trains nonlawyer advocates specifically to assist litigants in landlord-tenant proceedings. According to the director, the Tenant Advocacy Project was instituted to address the gap between the number of people needing attorneys and the number of attorneys actually stepping up to meet that need.³³ Similarly, California established the Superior California Legal Clinic in Sacramento to fill a gap in legal needs. Co-founded by an Independent Paralegal, the Clinic specializes in family law. It utilizes paralegals to perform services such as uncontested divorces, separations, annulments, child support modifications, and name changes. The quality of the Clinic's work for low-income families can be attested to by the fact that local courts, the district attorney, social services agencies, and law schools have all referred cases to the organization.³⁴

Paralegals are generally skilled at preparing routine legal documents and dealing with administrative agencies, both of which are necessary for the types of legal concerns that arise frequently among these clients. Professor Deborah Rhode of Stanford University explains:

Schools do not generally teach, and bar exams do not test, ability to complete routine forms for divorces, landlord-tenant disputes, bankruptcy, immigration, welfare claims, tax preparation, and real estate transactions. For many of these needs, retaining lawyers is like hiring "a surgeon to pierce an ear."³⁵

Independent Paralegals can meet the unique needs of low- and moderate-income consumers because they may be willing to take low paying and time intensive cases that are less desirable to lawyers. Richard Moorhead's study of nonlawyers and solicitors in England and Wales found that the most significant difference between clients of nonlawyers and solicitors pertained to disabled clients. Moorhead reported: "Nonlawyer organisations were nearly twice as likely to

³¹ See Lock, *supra* note 3, at 465.

³² Starting salaries in top law firms range from \$125,000 to \$140,000.

³³ See Brennan, *supra* note 17.

see clients who had a disability, medical, health or psychological problems: 1 in 5 of nonlawyers' clients was disabled compared with 1 in 9 of the clients of the solicitor."³⁶

In the United States, the Federal Administrative Procedure Act authorizes qualified nonlawyers to appear before federal agencies in a representative capacity.³⁷ In the context of disability benefits appeals, paralegals can develop a case, obtain favorable medical reports, and ultimately present an appeal to an administrative law judge. Diana Wade is an Independent Paralegal who specializes in social security benefits cases in the rural community of Lake Isabella, California. Before Wade opened her business, there were only three attorneys practicing in the county. According to Wade, none of these attorneys accepted Social Security benefits cases because the maximum statutory fee of four thousand dollars was not attractive to them.³⁸ Wade has since established a reputation in the community and a strong practice in this field of law. Wade's practice in a rural area of the country also illustrates how Independent Paralegals can expand the range of available legal services to low- and middle-income clients simply through geographic accessibility. Independent Paralegals often offer convenient neighborhood locations and are more willing to take on smaller cases than lawyers.³⁹

C. Facilitation of Pro Se Representation

Another critical role Independent paralegals can play in increasing access to justice in the United States is in guiding pro se litigants through the judicial system. The significant

³⁴ See Interview by Ralph Warner with Robert Mission, Coordinator, Superior California Legal Clinic (September 1994).

³⁵ Rhode, *supra* note 10, at 206.

³⁶ Richard Moorhead, *The Rise of Non-Lawyers – Experience from England and Wales: Lawyers, Nonlawyers and Professional Service in a Contested Domain*, International Legal Aid Group Conference Paper, Melbourne, Australia, 2001, at 532 (Mar. 6, 2001), at <<http://www.dmt.canberra.edu.au/ilag/>>.

³⁷ See Administrative Procedure Act, 5 U.S.C. § 555(b) (2001).

³⁸ Wade, *supra* note 9. Fee agreements approved on or after February 1, 2002 under §206(a)(2)(A) and 1631(d)(2)(A) of the Social Security Act now have an increased fee cap of \$5,300.

percentage of litigants who currently choose to represent themselves suggests that American consumers are seeking an alternative to high-cost attorneys. Data indicates that in many states at least one party represents themselves pro se in sixty to ninety percent of domestic relations cases. Courts have also experienced a large increase in the number of pro se litigants in landlord-tenant, bankruptcy, and small claims matters.⁴⁰

Pro se litigants have been aided by the proliferation of publications and websites aimed at making the law accessible to laymen. Nolo Press is the leading publisher of self-help law guides. They publish more than one hundred twenty titles, including books, software, legal forms, audio and videotapes. Additionally, the comprehensive website of Nolo Press provides information on a wide range of legal subjects.⁴¹ Divorcelawinfo.com, another consumer-oriented website, provides legal information regarding pro se divorce, as well as information about child custody, child support, and visitation rights within most U.S. states.⁴²

States such as California, Washington, Florida, and Arizona have made legal forms available over the internet. California has even introduced public kiosks with computers that can generate ready-to-file legal documents. Consumers, however, can easily be overwhelmed with information. “The kiosks don’t answer questions!” explains Diana Wade, President of the California Association of Legal Document Assistants.⁴³

Consumers can rely upon Independent Paralegals for guidance in attaining the goal of representing themselves pro se. Despite increased access to legal information and legal

³⁹ Rosalind Resnick, *Looking at Alternative Services; The Lawyer/Nonlawyer Wall Continues to Erode*, NATIONAL LAW JOURNAL, June 10, 1991, at 1.

⁴⁰ Hines, *supra* note 11. *See also Consumer Bankruptcy: A Round Table Discussion*, 2 AM. BANKR. INST. L. REV. 5 (1994) [hereinafter *Bankruptcy Roundtable*]. In the Los Angeles division of bankruptcy court, approximately 50% of our Chapter 7 and 13 cases are filed without an attorney.

⁴¹ *See generally* Nolo.com website, at <<http://www.nolo.com>> (visited last Mar. 4, 2002).

⁴² *See generally* divorcelawinfo.com website, at <<http://www.divorcelawinfo.com>> (last modified Mar. 26, 2002).

⁴³ Wade, *supra* note 9.

documents, consumers still require assistance in understanding how to fill out legal forms, and utilize legal information to serve their needs. As one judge explained in the context of domestic violence: "Somebody who knows something is better than a litigant who basically knows nothing."⁴⁴ Likewise, a bankruptcy trustee pointed out that often debtors file pro se and do not seek advice on the proper type of relief to seek.⁴⁵

The state of Arizona stopped enforcing its unauthorized practice laws in 1985, and both California and Washington recently enacted legislation authorizing nonlawyers to engage in limited areas of practice customarily performed by attorneys.⁴⁶ California's SB 1418, enacted in 1999, authorizes "legal document assistants" to provide or assist in providing, for compensation, "any self-help service to a member of the public who is representing himself or herself in a legal matter."⁴⁷ Self-help service includes completing legal documents selected by a person who is representing himself, providing general published factual information that has been written or approved by an attorney, making published legal documents available, and filing and serving legal forms and documents at the specific direction of a person who is representing himself in a legal matter.⁴⁸ Legal document assistants must register every two years with each county in which they practice.⁴⁹ Washington State Court Admission to Practice Rule 12 permits certified laymen to "select, prepare and complete documents . . . for use in closing a loan, extension of credit, sale or other transfer of real or personal property." Examples of such documents are deeds, promissory notes, guaranties, deeds of trust, reconveyances, mortgages, satisfactions,

⁴⁴ BRENNAN, *supra* note 17, at 15.

⁴⁵ See *Bankruptcy Roundtable*, *supra* note 40.

⁴⁶ See ARIZONA CONSUMER PROTECTION COMMITTEE, RECOMMENDATIONS TO THE STATE BAR BOARD OF GOVERNORS, at <<http://www.azbar.org/PublicResources/consumer.pdf>> (last visited Mar. 4, 2000).

⁴⁷ CAL. BUS. & PROF. CODE § 6400 (West 1998).

⁴⁸ *Id.*

⁴⁹ *Id.* at § 6402

security agreements, releases, U.C.C. documents, assignments, contracts, excise tax affidavits, and bills of sale.⁵⁰

In addition to the reforms in Arizona, Washington, and California, the state of Florida carved out an exception within their unauthorized practice law in the context of family law. Florida permits nonlawyers to “assist in the completion of blanks on a legal form approved by the Supreme Court of Florida.”⁵¹ The Florida Supreme Court approved a set of simplified family law forms that can be completed without a lawyer. These forms include, among others, the petition for simplified dissolution of marriage, petition for name change, petition for grandparent visitation, and affidavit of indigency.

Relaxing unauthorized practice restrictions in California and other states has produced some promising results. For example, We the People Forms and Service Centers USA, Inc. competes in Santa Barbara’s legal market of approximately seven hundred lawyers. In 1998, We the People won the “Best Legal Services” designation from a readership poll sponsored by the Santa Barbara News-Press.⁵² The company reports that their franchises receive approximately five thousand new customers each month.⁵³

III. THE ROLE OF INDEPENDENT PARALEGALS IN INCREASING THE QUALITY OF LEGAL SERVICES

Along with the crisis in the delivery of legal services to low- and middle-income Americans, there has been an increasing loss of faith in the justice system. Consumers express dissatisfaction with the quality of their representation by attorneys and are consequently unhappy with the resolution of their legal matters. Theorists have commented on the potential cost and

⁵⁰ WASH. R. CT. 12 (2001).

⁵¹ FLA. SUP. CT. R. 10-2.1(a).

⁵² See Laurie Collister, *Legal Ease*, AMERICAN VENTURE MAGAZINE, April 1999.

⁵³ See Hines, *supra* note 11.

access implications of introducing nonlawyer competition in the legal marketplace, however there is little data available on how nonlawyer practitioners can impact and improve the quality of legal services in the United States. Although critics of Independent Paralegals argue that eliminating unauthorized practice laws will result in the development of a lower class of legal advisors for the poor, evidence to the contrary suggests that paralegals provide high-quality services. Furthermore, in certain contexts Independent Paralegals may even achieve greater client satisfaction than lawyers.

A. Consumer Dissatisfaction with Quality of Attorneys' Representation

A chronic complaint against lawyers is that they demonstrate a lack of sensitivity and lack of concern for the individual needs of clients. Testimony before the ABA Commission on Nonlawyer Practice in the United States highlighted several specific concerns about the treatment of clients by attorneys, including failure to respond promptly to requests for information, unwillingness to clarify or document billing arrangements, and failure to prepare adequately for meetings or adjudicative proceedings.⁵⁴ Likewise, an interview with Anne Kaufman of the Massachusetts Board of Bar Counsel revealed that the most common complaints received against Massachusetts lawyers are allegations of lack of diligence (approximately seventeen percent of complaints), high attorney fees (nine percent of complaints), and failure to return client calls (approximately five percent of complaints).⁵⁵

⁵⁴ See NONLAWYER ACTIVITY, *supra* note 30, at 34. See also A.B.A., NONLAWYER PRACTICE IN THE UNITED STATES: SUMMARY OF THE FACTUAL RECORD BEFORE THE COMMISSION 6-7 (1994). For further discussion of such complaints, see sources cited in DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 858-63 (1995); CITY OF NEW YORK DEPARTMENT OF CONSUMER AFFAIRS, WOMEN IN DIVORCE: LAWYERS, ETHICS, FEES, AND FAIRNESS 1-3 (1992) (detailing billing abuses in divorce cases). See also AMERICAN BAR ASSOCIATION, REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT 9-11 (1992) (discussing fee disputes).

⁵⁵ See Interview with Anne Kaufman, Director, Massachusetts Board of Bar Counsel, Attorney and Consumer Assistance Division (Feb. 21, 2002).

Another frequent complaint against attorneys is that they employ an adversarial approach to legal problems in contexts where it may be inappropriate. One consumer, explaining why he chose to handle his own divorce with the help of an Independent Paralegal, stated: “Lawyers profit from creating a whole lot of hate and discontent in divorce to prolong court proceedings.” He believed that relying upon an Independent Paralegal would allow he and his wife to remain friends and also prevent them from going into bankruptcy.⁵⁶ Independent Paralegals have found that because their clients have more control over their decisions, they are generally more satisfied with the outcome. They report that when they refer clients to lawyers, clients “feel very insecure.” Clients “fear that once they get involved with a lawyer they will lose all control of their case.”⁵⁷

The wide gap in social status between the legal profession and the general population could partly explain why low- and middle-income consumers perceive a lack of sensitivity from attorneys. By meeting rigorous requirements to pass the bar, attorneys can command high salaries and have obtained an elevated social status. The mean annual wage for lawyers in the United States is \$91,320, compared with a mean annual wage for all U.S. workers of \$33,419.⁵⁸ While there is no available data on average wages of Independent Paralegals, the mean annual wage of paralegals and legal assistants who work under the supervision of attorneys is \$38,790 - just slightly above that for the average worker. Independent Paralegals may be able to relate and

⁵⁶ Myrna Oliver, *Paralegal to the Rescue; Oregon Woman Finds Big Market for Inexpensive Assistance*, L.A. TIMES, March 26, 1986, Part 1, at 3.

⁵⁷ Interview by Ralph Warner with Jolene Jacobs, Independent Paralegal (September 1994).

⁵⁸ BUREAU OF LABOR STATISTICS, UNITED STATES DEPARTMENT OF LABOR, 2000 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGES ESTIMATES; BUREAU OF LABOR STATISTICS AND BUREAU OF THE CENSUS, UNITED STATES DEPARTMENT OF LABOR, ANNUAL DEMOGRAPHIC SURVEY (Supp. Mar. 2001). The estimated median annual income for U.S. workers is \$25,434; the estimated median annual income for U.S. lawyers is \$88,280; the estimated median annual income for U.S. paralegals and legal assistants is \$35,360.

be sensitive to the particular needs of moderate-income clients because it is more likely that they would share the same social class or social status as their clients.

B. Moorhead Findings on Quality of Nonlawyer Legal Services

In 1994, England and Wales lifted restrictions against nonlawyers and permitted them to provide legal services within the government-funded legal aid scheme.⁵⁹ A comprehensive study by Richard Moorhead of the International Legal Aid Group indicates that nonlawyers in England and Wales are providing high-quality legal services.

Moorhead's conclusions contradict the theoretical claim, present in what he terms the "professional" paradigm, that the higher cost of lawyers' services are justified by their higher quality. One striking finding was that solicitors had more cases that fell below an adequate level of professional services.⁶⁰ In contrast, nonlawyers produced more results that fell in the "excellent" range - the highest level of professional services.⁶¹ Another unanticipated finding of the study was that nonlawyer legal aid providers in England and Wales cost the government more per case than solicitors. Moorhead states:

Even when controlling for cost per case type, to take account of the possibility that nonlawyer agencies did more weighty cases than solicitors, nonlawyer agencies took considerably longer (usually upwards of 2.5 hours per matter) on comparable cases than solicitors. This led to a cost per case in nonlawyer agencies which was, on average, approximately double that of solicitors.⁶²

Moorhead's study employed a wide-range of quantitative and qualitative methods for understanding the behavior of the participants and evaluating the quality of service. Anonymous model client visits were used to assess the quality of nonlawyer and solicitor contacts with clients. Researchers also conducted a postal survey of over three thousand clients to measure

⁵⁹ See Moorhead, *supra* note 36, at 521.

⁶⁰ See *id.* at 530-31.

⁶¹ *Id.* at 531.

quality and assess client satisfaction.⁶³ Clients of nonlawyers rated their advisers more highly than clients of solicitors both overall and on specific criteria. For example, clients were more satisfied with the way in which nonlawyers “listened to what the client had to say,” “told them what was happening” during the case, “told them what would happen at the end of the case,” “knew the right people to speak to,” “stood up for their rights,” “did what they wanted,” and “treated them like they mattered.”⁶⁴

Not only did nonlawyers perform better than solicitors in the judgment of clients, but nonlawyers also achieved significantly better quality based on the assessments by peer reviewers.⁶⁵ Solicitors with experience in both private practice and public sector practice were hired to evaluate quality through a review of the participants’ casework files.⁶⁶ Peer review of solicitor and nonlawyer casefiles found “marked differences” in the quality of work between the two groups. These findings challenge the presumption that eliminating unauthorized practice restrictions will result in a lower quality of legal services for clients of paralegals.

The only comparative research to date on U.S. non-lawyer practitioners focused on pro se divorce and agency proceedings. This study concluded that nonlawyer specialists perform as effectively as lawyers.⁶⁷ Moreover, in a U.S. survey of consumer satisfaction with legal service providers, lay practitioners rated higher than attorneys.⁶⁸ While data on the quality of lay practitioner services in the United States is scarce, the experience in England and Wales provides

⁶² *Id.* at 527-31.

⁶³ *Id.* at 527.

⁶⁴ *Id.* at 529.

⁶⁵ *See id.*

⁶⁶ *See id.* at 526.

⁶⁷ *See* Recommendation 86-1, Nonlawyer Assistance and Representation, 1 C.F.R. § 305.86-1 (1986), *reprinted in* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS 3 (1986).

⁶⁸ *See* STATE BAR OF CALIFORNIA, COMMISSION ON LEGAL TECHNICIANS REPORT 5 (1990). The survey found that 67% of individuals receiving assistance from a lawyer were happy overall with services. In comparison, 76% were happy overall with services provided by Independent Paralegals.

helpful insight into ways in which Independent Paralegals can improve the quality and delivery of legal services in the United States.

C. Utilizing a Holistic Approach

One similarity between the practice areas that are typically disfavored by attorneys is that they involve more than just legal assistance. These practice areas can be broadly described as requiring advocacy and preventative education for people who are disadvantaged. For example in the context of consumer bankruptcy or foreclosure, clients often need debt counseling as well as assistance with long-term planning. Independent Paralegals practicing in these areas can meet consumer needs by combining the service of preparing routine bankruptcy forms with credit counseling.⁶⁹

Richard Moorhead's study of legal aid providers in England and Wales found that solicitors, on average, spent considerably less time working on each case. In contrast, Moorhead concluded that nonlawyers utilized a more holistic, time-intensive and long-term approach, particularly with welfare benefits and debt matters.⁷⁰ This difference between the approach of solicitors and nonlawyers to their cases may partly explain why the cost to the government per case was lower for solicitors than nonlawyers in Moorhead's study.

There are several examples in the United States of legal service programs that employ a holistic approach to serving client needs. The Neighborhood Defender Service of Harlem pursues the multi-faceted goal of helping clients prevent future contact with the criminal justice system. A team of specialists, rather than just an attorney, represents clients. The typical legal

⁶⁹ See RALPH WARNER, THE INDEPENDENT PARALEGAL'S HANDBOOK: HOW TO PROVIDE LEGAL SERVICES WITHOUT BECOMING A LAWYER 4-9 (3d ed. 1994).

⁷⁰ See Moorhead, *supra* note 36, at 533-34.

team includes paralegals, social service providers, attorneys, and investigators.⁷¹ Paralegals tend to be the experts on procedure and on methods of accomplishing legal tasks.⁷²

Domestic violence advocacy is another area where nonlawyers in the United States employ a holistic approach in providing legal services. As battered women are often financially dependent upon their spouses, few can afford to hire a lawyer when they seek help.⁷³ Even if an attorney is willing to take a domestic violence case on a pro bono basis, the needs of an attorney's paying clients are likely to receive priority.⁷⁴ The Court Advocacy Program in Weibern, New York provides “personal support” for women dealing with child custody, child support, divorce, paternity, and physical abuse issues. Some of its activities include distributing pamphlets about women’s legal rights, conducting legal education sessions about New York family law, accompanying pro se litigants to the courtroom, and providing counseling designed to empower women to make their own decisions. According to the director, a fundamental difference between the approach of the Court Advocacy Program and the traditional approach of lawyers is that, unlike lawyers, they recognize that physically and emotionally abused women need to make their own decisions about how to change their lives. Employees of the Court Advocacy Program never “tell people what to do.”⁷⁵

A 1990 study of domestic violence and the judicial system sponsored by the National Institute of Justice found that nonlawyer victim advocates could assist petitioners in ways that most attorneys cannot. According to the study, victim advocates who specialize in obtaining

⁷¹ See Neighborhood Defender Service of Harlem, *Mission & Organization* 2000, at <<http://www.ndsny.org/mission.htm>> (last visited July 3, 2002).

⁷² See SCHNEEMAN, *supra* note 24, at 7.

⁷³ See Elizabeth Topliffe, Note, *Why Civil Protection Orders are Effective Remedies for Domestic Violence Victims but Mutual Protective Orders are Not*, 67 IND. L.J. 1039, 1044-45 (1992).

⁷⁴ See Brown, *supra* note 8, at 279.

⁷⁵ Interview by Ralph Warner with Judy Lamb, Director, Court Advocacy Program, Weibern, New York, (Sept. 1994).

orders of protection against abuse by intimate partners “have more familiarity with the practical impact of common provisions in protection orders than attorneys who handle only one or two cases a year.”⁷⁶ The National Institute of Justice study also concluded that, due to their expertise, nonlawyer victim advocates, “may have a better understanding of the emotional and social impact of domestic violence and a greater ability to communicate with victims than most attorneys.”⁷⁷

Independent Paralegals who specialize in domestic violence advocacy could play a valuable role in both educating victims about their legal rights and helping them navigate the court system. Responsibilities could include explaining the court's procedures for obtaining a protective order, discussing available legal remedies, preparing pleadings, assisting with safety planning, preparing divorce petitions, and providing referrals for shelters and other emergency services.⁷⁸

D. How Independent Paralegals Provide High Quality Services - An Analogy to Advanced Practice Nursing

Since restrictions against advanced practice nursing were lifted, nursing professionals have made significant contributions to the medical profession. Likewise, if restrictions against nonlawyer legal service providers are eliminated in the United States, the legal profession can explore, in greater depth, the ways in which Independent Paralegals enhance the quality and delivery of legal services.

Among advanced nurses, Independent Midwives are most analogous to Independent Paralegals. They commonly provide health services to women without the direct supervision of

⁷⁶ PETER FINN & SARAH COLSON, NATIONAL INST. OF JUSTICE, UNITED STATES DEP'T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 26 (1990).

⁷⁷ *Id.*

⁷⁸ See Brown, *supra* note 8, at 281-82.

a doctor. Surveys of medical patients indicate that advanced practice nurses generally have better communication, counseling, and interviewing skills than physicians.⁷⁹ Studies have also shown that the participation of advanced practice nurses in the provision of medical care has resulted in lower health care costs and increased accessibility for many low- and moderate-income health care consumers, particularly those in underserved urban and rural communities that have difficulty attracting and retaining physicians.⁸⁰ Likewise, Independent Paralegals can expand the range of available legal services to the poor by working in practice areas and geographic areas that do not attract attorneys.

Studies suggest that advanced practice nurses may have greater success working with patients who are women and people of color because advanced practice nurses are, as a group, far more diverse than physicians.⁸¹ A lack of racial diversity is also a problem within the legal profession. Racial and ethnic minorities constitute approximately eleven percent of the U.S. bar. While enrollment in law schools is currently less than twenty percent students of color, the general U.S. population is projected to be about fifty percent people of color within the next fifty years. The lack of representation of people of color within the legal profession perpetuates a system that many find unfair and indifferent to their needs.⁸² There are few reliable statistics on the percentage of paralegals that are minorities.⁸³ As the industry develops, if a significantly more diverse group of workers enter the Independent Paralegal profession, it is possible that they may play an important role in serving the needs of communities of color.

⁷⁹ See Kristin Sostowski, *Access to Justice: Reforming Unauthorized Practice Law, Learning From Advanced Practice Nursing Regulation* 497 (May 2001) (unpublished manuscript in course reader).

⁸⁰ See *id.* at 495-98.

⁸¹ See *id.* at 497.

⁸² See Talbot D'Alemberte, *Racial Injustice and American Justice*, 78 A.B.A. J 58 (1992).

⁸³ See Hangle, *supra* note 7. After conducting a survey of members in 1999, the National Federation of Paralegal Associations (NFPA) estimated its members are 88% Caucasian. Because of low survey response, however, no conclusions can be made on the percentage of members belong to a minority racial group.

IV. ASSESMENT OF CONSUMER PROTECTION ARGUMENTS AGAINST ELIMINATING UNAUTHORIZED PRACTICE LAWS

Given the significant role that Independent Paralegals could play in lowering the cost of legal services, addressing unmet legal needs of low- and middle-income consumers, and facilitating pro se representation, policymakers should seek to expand Independent Paralegal practice. Instead, however, legal assistance by skilled lay practitioners has been criminalized. An important critique of unauthorized practice statutes is that they overregulate. Rather than sanction fraudulent legal service, the unauthorized practice doctrine prohibits lay practitioners from performing *any* traditional legal task. In fact, the most commonly used judicial test of unauthorized practice of law requires courts to determine whether the challenged legal service of a nonlawyer is traditionally performed by lawyers.⁸⁴

The strongest argument against eliminating unauthorized practice laws is that most consumers are not in the position, ex-ante, to evaluate whether they are receiving correct legal advice or whether their legal service provider is qualified. Clients of Independent Paralegals are more likely to be poor or to be immigrants. These are vulnerable consumers who are too often the target of fraudulent business practices. For example, “bankruptcy mills” take advantage of poor debtors on the verge of eviction.⁸⁵ Consumers also need protection from disbarred lawyers and nonlawyers who misrepresent themselves to the public as licensed attorneys, and from paralegals who charge exorbitant fees or provide shoddy services.⁸⁶

While there may be legitimate consumer protection concerns regarding paralegal services, categorical prohibitions against Independent Paralegal practice are not the best

⁸⁴ See Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors -- or Even Good Sense?* 1980 AM. B. FOUND. RES. J. 159, 192 (1980).

⁸⁵ See, e.g., Mund, *supra* note 20. See also Paul Rubin, *Scammer to Slammer; Bankruptcy Advisor Who Bilked Clients Sentenced to Federal Prison*, PHOENIX NEW TIMES, Apr. 22, 1999.

approach to address these concerns. Despite the few individuals who have harmed rather than helped consumers, evidence indicates that the majority of nonlawyer practitioners provide quality services that greatly help consumers. In fact, case law reveals that unauthorized practice statutes have been most relied upon, not by consumers, but by members of the bar. One study of unauthorized practice cases in five states over a period of sixty years found that only eight percent of unauthorized practice cases alleged that an individual caused actual harm.⁸⁷ Independent Paralegals report that unauthorized practice statutes are utilized by state bar organizations as well as disgruntled defendants for harassment. For example, domestic batterers have taken legal action against domestic violence advocates for engaging in the unauthorized practice of law.⁸⁸

The most well-known unauthorized practice case is that of Florida Bar v. Furman.⁸⁹ Furman specialized in divorce but had no formal legal education or training. Furman did not hold herself out to be an attorney and was not alleged to have harmed consumers. Most of Furman's clients had low incomes and many were either illiterate or unfamiliar with legal terminology.⁹⁰ For a fee of fifty dollars, Furman prepared the Petition for Dissolution of Marriage, provided clients with instructions on how to file the petition, and advised clients on the court process.⁹¹ The court held that Furman could "sell printed material purporting to explain legal practice and procedure to the public in general" and "sell sample legal forms."⁹² The

⁸⁶ See, e.g., Ross Harig, *Paralegal Pleads Guilty to Scam*, THE RECORDER, October, 9, 2000 (involving a paralegal who targeted tenants facing eviction and filed answers for defective evictions).

⁸⁷ See Lock, *supra* note 3, at 469.

⁸⁸ See, e.g., Selland v. Selland, 519 N.W.2d 21 (N.D. 1994). See also Natalie P. McNeal, *Suit: Woman Acted as Lawyer*, THE NEWS AND OBSERVER (Raleigh, N.C.), Aug. 7, 1999, at B1; Sarah M. Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay*, 28 COLO. LAW. 19, 19 n.7 (1999).

⁸⁹ Florida Bar v. Furman, 376 So. 2d 378 (Fla. 1979).

⁹⁰ *Id.* at 380.

⁹¹ *Id.*

⁹² *Id.* at 381.

Florida Supreme Court, however, enjoined her from engaging in personal legal assistance, including the correction of errors and omissions on the forms of her clients.⁹³

More recently, an Independent Paralegal was enjoined from practice in the case of Oregon State Bar v. Robin Smith and People’s Paralegal Services, Inc.⁹⁴ Defining “practice of law” as “the exercise of professional judgment in applying legal principles to address another person’s individualized needs through analysis, advice, or other assistance,” the court found that Smith and People’s Paralegal Services, Inc. violated Oregon’s unauthorized practice laws.⁹⁵ Smith was recognized as one of the country’s most successful Independent Paralegals; she served over 100,000 people before being prosecuted by the bar. Smith offered services that included “providing consumers with various legal forms available to the public,” and “advising [consumers] with respect to their individual legal concerns.”⁹⁶

In another recent case, In the Matter of Marilyn Arons, Ruth Watson, and the Parent Information Center of New Jersey, Inc., the Delaware Supreme Court held that a nonlawyer specialists’ assistance of parents at an administrative hearing constituted unauthorized practice of law.⁹⁷ Arons, founder of the Parent Information Center, provided free advice, counseling, and advocacy services to parents of children with special needs and disabilities. On several occasions, Arons represented parents at due process hearings under a provision of the Individuals with Disabilities Education Act (“IDEA”) that gives parents “the right to be accompanied and advised by counsel” or “by individuals with special knowledge or training with respect to children with disabilities.”⁹⁸

⁹³ *Id.* at 379.

⁹⁴ *Oregon State Bar v. Smith*, 149 Ore. App 17, 942 P.2d 793 (1997).

⁹⁵ *Id.* at 183.

⁹⁶ *Id.* at 174.

⁹⁷ *In re Arons*, 756 A.2d 867 (Del. 2000).

⁹⁸ *Id.* at 868-69.

The court acknowledged that Arons, though not an attorney, possessed “specialized knowledge and training with respect to the problems of children with disabilities.”⁹⁹ Nevertheless, the court rejected interpretations by the U.S. Department of Education and the U.S. Department of Justice of IDEA and held that the statute did not grant the right to lay representation. Although formal rules of evidence and procedure do not apply in IDEA hearings, the court reasoned that nonlawyers “lack the training and skills that lawyers are expected to exhibit in matters of evidence and procedure.”¹⁰⁰ As in Furman, and Smith, the party suing Arons was not a consumer harmed by her services. Instead, the plaintiff was the Delaware Supreme Court’s Board on the Unauthorized Practice of Law. These cases illustrate the way in which unauthorized practice statutes hinder the provision of high-quality legal services to underserved consumers.

A second critique of unauthorized practice statutes is that they unreasonably restrict the First Amendment right to speech concerning “how to approach and use our courts.”¹⁰¹ Ralph Warner, co-founder of Nolo Press, argues that the inherently vague nature of unauthorized practice statutes violate the due process clause of the Fourteenth Amendment to the Constitution. He states that definitions of “practice of law” are “so hopelessly circular, vague and ambiguous” that they fail to fairly inform either the Independent Paralegal or the general public as to what conduct is prohibited.¹⁰²

In assessing whether categorical prohibitions against paralegal practice are an appropriate response to consumer protection concerns, it is important to determine whether Independent Paralegals pose a greater risk of harm than attorneys. Each year state bar authorities receive a

⁹⁹ *Id.* at 869.

¹⁰⁰ *Id.* at 874.

¹⁰¹ See STEPHEN ELIAS, *FED UP WITH THE LEGAL SYSTEM: WHAT’S WRONG AND HOW TO FIX IT* (2d ed. 1994).

surprisingly large numbers of complaints against lawyers.¹⁰³ As an example, the Massachusetts Board of Bar Overseers reports that there are 45,569 attorneys in the state with an active bar registration.¹⁰⁴ Each year the Board of Bar Overseers receives on average over 6500 complaints against attorneys.¹⁰⁵ Thus, there is approximately one complaint for every seven attorneys.

Data about consumer complaints against Independent Paralegals is limited. In contrast with the number of complaints against attorneys, the Consumer Protection Division of the Massachusetts Attorney General's Office, reports that in the past three years, the office has had only one complaint against nonlawyers engaged in the unauthorized practice of law.¹⁰⁶ Of the fourteen state bar groups that track complaints against paralegals, only four reported receiving an average of more than one complaint a month and only Florida had a heavy caseload.¹⁰⁷ The California Association of Legal Document Assistants (CALDA) received three complaints against Independent Paralegals during 2001, and in years past has received no more than five per year.¹⁰⁸ The state of Washington reports that between 1984 and 1990, the state issued twelve hundred licenses to Limited Practice Officers and received only twelve complaints concerning these individuals.¹⁰⁹

In sum, the (limited) evidence of complaints against nonlawyers coupled with recent findings on the high quality of nonlawyer legal services, suggests that nonlawyers might not pose a significantly greater risk of harm upon the public than lawyers. Unauthorized practice laws

¹⁰² WARNER, *supra* note 69, at 2 & 26.

¹⁰³ See generally A.B.A, REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, (1992).

¹⁰⁴ Telephone Interview with Melanie Manzanilla, Director, Registration Division, Massachusetts Board of Bar Overseers (Feb. 22, 2002).

¹⁰⁵ See Kaufman, *supra* note 55.

¹⁰⁶ Telephone Interview with Janice Diloreto, Director, Massachusetts Attorney General's Office, Consumer Protection Division, Consumer Complaints (Feb. 22, 2002). Diloreto notes however, that this type of complaint may be underreported.

¹⁰⁷ See Resnick, *supra* note 39, at 1.

¹⁰⁸ See Wade, *supra* note 9.

overregulate, are vague, and are unduly restrictive of free speech. They have not been a strong mechanism for consumer protection. In practice they have been utilized for harassment and to protect the monopoly of the bar. Research studies comparing nonlawyer legal services with lawyer legal services have found that nonlawyers generally perform as effectively if not better than lawyers. Narrowly tailored regulation of Independent Paralegals, rather than the broad prohibitions against skilled legal assistance by laymen, is the best way to protect consumers while at the same time increasing access to justice in the United States.

V. DEVISING A REGULATORY FRAMEWORK FOR A STATE SYSTEM OF INDEPENDENT PARALEGAL LICENSING

A state-controlled licensing regime for Independent Paralegals will establish a credential consumers can rely upon to evaluate the qualification and competence of a paralegal. Regulation that is administered by a government body rather than by the paralegal industry itself will have the effect of increasing the credibility of paralegals among members of the bar, within the courts, and to the public. Mandatory licensing will clarify the role of the paralegal professionals and importantly, establish standards for their fitness to practice.

State courts and federal and state administrative agencies should participate in regulatory decision-making. Supporting this argument, the Law Society of Upper Canada (a self-governing body for Canadian lawyers) recommends that administrative tribunals formulate forum-specific regulations for paralegals. One means by which this could be accomplished is through the establishment of a “tribunal accreditation system.” Individual administrative agencies and courts would recommend their own qualifications for paralegals or accredited agents.¹¹⁰

¹⁰⁹ Jeffrey S. Klein, *The Case for Licensing Paralegals*, L. A. TIMES, Aug. 9, 1990, at E11.

¹¹⁰ See Law Society of Upper Canada Press Release; *Law Society Recommends Framework to Govern Paralegals* (Mar. 24, 2000), at <<http://www.newswire.ca/releases/March2000/24/c7136.html>>.

A. Importance of a Two-Stage Regulatory Process

The central goal of a regulatory scheme for Independent Paralegals should be to increase access to skilled legal service providers among low- and moderate-income Americans while protecting consumers from incompetent or unethical practitioners. Given the current lack of data on the provision of legal services by Independent Paralegals, one approach to the regulatory process is to develop an interim system of regulation before establishing final rules. California's SB 1418 follows this approach by providing for the registration of legal document assistants for a three-year period. During a temporary period of regulation, a state can determine the number of individuals who are engaged in Independent Paralegal practice and identify potential problems in administering a licensing scheme. A temporary phase will also allow a state to measure how many and what types of complaints are lodged against paralegals and evaluate the best way to prevent them.

B. Criteria and Minimum Standards for Competency

To ensure the quality of paralegal services, regulators must select criteria to evaluate the competency of paralegals in providing services, and then establish minimum standards that an individual must attain to be fit for practice. Part of the complexity of devising a regulatory scheme for Independent Paralegals is that the criteria commonly used to evaluate the competence of attorneys might not be directly applicable to the competency of Independent Paralegals. The criteria that policymakers select to evaluate paralegals should focus upon their competency as experienced specialists rather than generalists.

Lawyers are trained to be generalists with a capacity for acquiring proficiency in specialized areas. The comment to Rule 1.1 of the ABA Model Rules of Professional Conduct explains that lawyers need not have "special training or prior experience" to provide what is

deemed “competent representation.” Instead, lawyers are required to make use of the opportunity to engage in “necessary study” to handle a legal problem, or to associate with a “lawyer of established competence in the field.”¹¹¹ As generalists, lawyers are expected to develop skill in determining what kind of legal problems a particular situation may involve.¹¹² The requirement of a law school education assists lawyers in developing analytical abilities and the ability to evaluate evidence. Unauthorized practice rules are based upon the presumption that laymen, unlike lawyers, do not have the knowledge or ability to represent others in legal matters. As courts have explained, the purpose of these rules is “to ensure that laymen would not serve others in a representative capacity in areas requiring the skill and judgment of a licensed attorney.”¹¹³

Independent Paralegals develop not only competent, but highly specialized expertise by focusing on a specific area of the law or engaging in a certain type of assistance over time. Law school does not teach some of the specialized legal knowledge that paralegals acquire from experience. As Judge Mund argues:

Even if the attorney studied bankruptcy law in law school which is neither a requirement for graduation nor is covered on the bar exam, chances are that the course did not cover the nuts and bolts of consumer representation and decision making.¹¹⁴

As experienced specialists, Independent Paralegals should be evaluated on their knowledge of a specific area of local law, and how well they know the rules and procedures necessary to complete specific legal tasks.

¹¹¹ MODEL RULES OF PROF'L CONDUCT R 1.1, cmt. (2001).

¹¹² *Id.*

¹¹³ *Porter v. Alabama Funeral Services, Inc.*, 338 So. 2d 812 (Ala. 1976).

¹¹⁴ *Mund*, *supra* note 20, at 340.

Whereas a law school education is critical in developing competency in general lawyering skills, education through apprenticeship is critical for developing the specialized knowledge and experience required of an Independent Paralegal. An apprenticeship system could be incorporated into a two-tiered licensing process. First, an individual would satisfy minimum educational requirements. As guidance to regulators, the American Association for Paralegal Education (AAfPE) recommends that paralegals be required to obtain an associate or baccalaureate degree and also complete a minimum of eighteen semester credit hours of substantive paralegal classes.¹¹⁵ California's registration statute for legal document assistants offers more flexibility for registrants to meet minimum educational requirements. Registrants can register as a legal document assistant without taking courses from a paralegal program as long, as they have either: 1) a high school diploma or equivalent and two years of legal experience, or 2) a baccalaureate degree and one year of legal experience.¹¹⁶

After satisfying minimum educational and character requirements, an Independent Paralegal could apply for a supervised legal technician license. The apprentice would work for a certain length of time under the supervision of a licensed Independent Paralegal or an attorney. Next, the apprentice could apply to become an Independent Paralegal by satisfying final requirements which would include passing a specialty examination, obtaining a bond or malpractice insurance, and proving fitness of character. Disbarred and suspended attorneys would not be permitted to obtain supervised legal technician or Independent Paralegal licenses during the period of their disbarment or suspension.

¹¹⁵ See A Guide to Quality Paralegal Education, American Association for Paralegal Education, at <<http://www.aafpe.org>> (last visited May 17, 2001).

¹¹⁶ See CAL. BUS. & PROF. CODE § 6402.1 (West 1998).

A qualifying examination for licensing Independent Paralegals should focus on whether an applicant knows the rules and procedures necessary to complete specific legal tasks. National Federal of Paralegal Associations (NFPA) has been offering the Paralegal Advanced Competency Exam (PACE) since 1997.¹¹⁷ PACE is designed for paralegals with at least two years of experience. The first level of PACE involves a general test of critical thinking skills, problem-solving abilities, and general legal and ethical principles. To earn the highest-level credential, a paralegal must pass a separate test of specific legal knowledge and satisfy minimum requirements for years of work experience. Paralegals that pass the PACE exam become “Registered Paralegals.”¹¹⁸ The National Association of Legal Assistants (NALA), offers a similar Certified Legal Assistant examination. Paralegals that pass this examination earn a “CLA” designation.¹¹⁹

C. Determining Appropriate Scope of Authorized Practice

The most difficult challenge in regulating Independent Paralegals is determining the appropriate scope of authorized practice. In practice, a distinction between the provision of legal information and the provision of legal advice can be difficult to maintain and enforce. Providing legal information often entails providing legal advice, particularly if “advice” means telling someone what he or she needs to do in order to reach a desired outcome in that jurisdiction. Moreover, our current system already recognizes the ability of qualified laymen to provide legal advice in certain contexts. (See Appendix B chart on state and federal agencies that permit nonlawyer practice.) Among many examples, qualified nonlawyers represent clients at Department of Labor hearings, licensed tax practitioners can represent clients before the Internal

¹¹⁷ See SCHNEEMAN, *supra* note 24, at 167.

¹¹⁸ See *id.* at 165.

¹¹⁹ See *id.*

Revenue Service, and as mentioned above, nonlawyers also represent clients in Social Security and Medicare appeals.

States should license Independent Paralegals as specialists in local rules and procedure within a narrow field of law and authorize them to advise consumers on how to reach a desired legal outcome in their jurisdiction. What follows is an illustrative list of services licensed

Independent Paralegals could provide:

- Representation of clients before Administrative Agencies,
- Provision of legal advice limited to their area of specialty based on their knowledge of the rules and procedures necessary to complete specific legal tasks,
- Assistance of pro se litigants, including preparation of legal documents and provision of legal information,
- Advocacy for consumers in need of holistic care including legal education, specialized advice, emotional support, psychological counseling, medical help, and referrals.

D. Additional Considerations for Devising Regulatory Framework

Additional issues policymakers must address in devising a regulatory framework for the licensure of Independent Paralegals include: what incentives the regulations aim to create among legal professionals; the administrative feasibility of regulation; what means (penalties, fines, loss of entitlements) should be used to enforce the regulations; and how the costs of regulation could be minimized so that high costs are not ultimately passed on to consumers in a way that would negate potential cost advantages to nonlawyer legal assistance.

Policymakers must also consider how eliminating unauthorized practice laws will impact nonlawyers other than paralegals who provide law-related services. Specifically, abolishing the unauthorized practice laws will enable professionals such as accountants and business consultants to form multidisciplinary practices that standardize common transactional and

litigation services.¹²⁰ A complete discussion of the impact on other nonlawyers is beyond the scope of this paper.

VI. CONCLUSION

Inequities in the delivery of U.S. legal services must be addressed. Diminishing pro bono efforts of the bar and the limited funding of the U.S. legal aid program signal the need to rethink the legal profession. Expanding the practice of Independent Paralegals and eliminating the monopoly of lawyers on the provision of legal services will not only increase access to justice, but also promote a higher quality of legal service.

The goal of expanding the practice of independent paralegals is not to create a lower class of legal service for the poor or to create a profession of “mini-lawyers.” To the contrary, the purpose of eliminating unauthorized practice statutes and facilitating lay practice is to increase the number of skilled professionals dedicated to serving the legal needs of low- and middle-income Americans, and to empower individual consumers who lack legal information.

When functioning properly, the Independent Paralegal acts as a helper to the self-helper . . . approached this way, the consumer doesn’t see the Independent Paralegal as a second-class lawyer . . . Instead, customers see the Independent Paralegal as a positive adjunct to their own learning process.¹²¹

¹²⁰ See George M. Kraw, *Kicking and Screaming*, THE RECORDER, June 16, 1999, at 5.

¹²¹ Interview by Ralph Warner with Catherine Jermany, former Director, Paralegal Training and Career Development, Legal Services Corporation, former President, National Association for Independent Paralegals (Sept. 1994).

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APPENDIX

- A. We the People[®] Representative List of Legal Services Offered from corporate website**
- B. Federal and State Administrative Agencies that Permit Nonlawyer Practice, Chart**
- C. NFPA Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement**
- D. NFPA's PACE Specifications and Sample Questions**