

Issues Related to Licensure and Governmental Regulation of Paralegals

Introduction

In July, 1998, the New Jersey Supreme Court Committee on Paralegal Education and Regulation issued a report which sets forth several recommendations concerning the attorneys' use of paralegals in the delivery of legal services. The report sets forth a system of licensure for paralegals. It is apparent from the report that the purpose of the licensing procedure is to identify individuals who meet a set of educational requirements and who pass a written examination on the subject of ethics and to qualify them to work as paralegals under the supervision of licensed attorneys. The duties and responsibilities of licensed paralegals would be no different than they are today; and, absent a licensed paralegal, any employee may perform these duties although they may not use the title "paralegal." Further, the licensure requirements establish rules and regulations concerning the employer/employee relationship of attorneys with assistants.

NALA has prepared a statement to be submitted to the court which states that the association cannot support the proposed system of licensure for several reasons. Among these reasons:

1. There is no demonstrated public need to regulate paralegals.
2. This procedure would increase the cost of paralegals to employers.
3. This procedure would increase the cost of legal services to the public.
4. This procedure does not allow for the growth of the paralegal profession nor does it encourage the utilization of paralegals in the delivery of legal services.

The issues of licensure of a profession are very complicated and rest on two factors: 1) a person's fundamental right to engage in his or her chosen profession; and 2) protection of the health, welfare and safety of the public. Often, in today's discussions concerning paralegal licensure, the needs of members of the profession are confused with the needs of the public. Some view licensure as the same as establishment of professional standards - this is a misstatement. This article will present the issue of licensure from a legislature's point of view and will address the questions of what licensure is, why it is created, and the criteria for licensure used by legislatures to evaluate licensing proposals.

There are at least 12 states which include information in the statutes about what is required in order to establish a licensing procedure. The states and statutes reviewed for this article are as follows:

California	Title 2, Div. 2, Part 1, Chapter 1.5, Article 8. Legislative oversight of state board formation and licensed professional practice. Secs. 9148.4, 9148.10.	New Mexico	Ch. 12, Article 9A. Sunrise Act. Secs.12-9A-1-12-9A-6.
Colorado	24-34-104.1 General assembly sunrise review of new regulation of occupations and professions	South Dakota	Ch. 36-1A
Florida	Title III. 11.62 Legislative review of proposed regulation of unregulated functions.	Vermont	Title 26. Ch. 57 Review of licensing statutes, boards and commissions. Sec. 3105.
Georgia	Title 43. Ch. 1A. Occupational regulation legislation review	Virginia	Title 54.1, Subtitle 1, Chapter 1. Sec. 54.1-100-54.1-311.
Hawaii	Division 1, Title 4, Ch. 26H Hawaii Regulatory licensing reform act	Washington	Title 18. Ch. 18.118 Regulation of business professions

Maine	Title 32, Ch. 1-A, Subchapter II. Sunrise review procedures. Sec. 60-J-60L	Wisconsin	Criteria for evaluating need to draft a regulatory legislative proposal of the State of Wisconsin Dept. of Regulation & Licensing
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See also Revised Statutes of Nebraska Annotated, Chapter 71. Public Health and Welfare; Article 62. Nebraska Regulation of Health Professions Act. Although this statute deals specifically with the regulation of health professionals, its review is instructive.

Licensure Defined

Several of the above listed statutes included definitions of licensure, as follows:

Georgia: 43-1A-3. (6) "License," "licensing," or "licensure" means authorization to engage in a business or profession which would otherwise be unlawful in the state in the absence of authorization. A license is granted to those individuals who meet prerequisite qualifications to perform prescribed business or professional tasks, who use a particular title, or who perform those tasks and use a particular title.

South Dakota: Chapter 36-1A-4 For the purposes of this chapter, licensure is a process by which a board grants to an individual, who has met certain prerequisite qualifications, the right to perform prescribed professional and occupational tasks and to use the title of the profession or occupation.

Washington: RCW 18.118.020 (7) "License," "licensing," and "licensure" mean permission to engage in a business profession which would otherwise be unlawful in the state in the absence of the permission. A license is granted to those individuals who meet prerequisite qualifications to perform prescribed professional tasks and for the use of a particular title.

In summary, licensure grants a practitioner the legal right to work in his or her chosen occupation, by law, and restricts this right to only those persons who hold a license. Licensure is a mandatory legal condition for employment, generally enacted by legislation and administered by state agencies.

Why License an Occupation - Legislative Intent

The driving force behind a legislature to take action to license a profession is the health, welfare, and safety of the public. Consider the following statements of intent from the statutes:

Colorado 24-34-104.1(1) the general assembly finds that regulation should be imposed only on an occupation or profession only when necessary for the protection of the public interest.

Florida. 11.62. (2) It is the intent of the legislature:

(a) That no profession or occupation be subject to regulation by the state unless the regulation is necessary to protect the public health, safety, or welfare from significant and discernible harm or damage and that the police power of the state be exercised only to the extent necessary for that purpose; and

(b) That no profession or occupation be regulated by the state in a manner that unnecessarily restricts entry into the practice of the profession or occupation or inversely affects the availability of the professional or occupational services to the public.

Hawaii Code Annotated 26H-2, 26H-5 and 26H-6

26H-2 Policy: The legislature hereby adopts the following policies regarding the regulation of certain professions and vocations:

(1) The regulation and licensing of profession and vocations shall be undertaken only when reasonably necessary to protect the health, safety, or welfare of consumers of the services; the purpose of regulation shall be the protection of the public welfare and not that of the regulated profession or vocation;

Vermont Sec.3105 Criteria and standards. (a) A profession or occupation shall be regulated by the state only when:

1. It can be determined that the unregulated practice of the profession or occupation can clearly harm or endanger the health, safety, or welfare of the public, and the potential for the harm is recognizable and not remote or speculative;
2. The public can reasonably be expected to benefit from an assurance of initial and continuing professional abilities; and
3. The public cannot be effectively protected by other means.

Virginia. 54.1.100 Regulations of professions and occupations.

The right of every person to engage in any lawful profession, trade or occupation of his choice is clearly protected by both the Commonwealth of the Va. Code Ann.@54.1-100 (1998) United States and the Constitution of the Commonwealth of Virginia. The Commonwealth cannot abridge such rights except as a reasonable exercise of its police powers when it clearly found that such abridgment is necessary for the preservation of the health, safety and welfare of the public. No regulation shall be imposed upon any profession or occupation except for the exclusive purpose of protecting the public interest when:

1. The unregulated practice of the profession or occupation can harm or endanger the health, safety or welfare of the public, and the potential for harm is recognizable and not remote or dependent upon tenuous argument;
2. The practice of the profession or occupation has inherent qualities peculiar to it that distinguish it from ordinary work and labor;
3. The practice of the profession or occupation requires specialized skill or training and the public needs, and will benefit by, assurances of initial and continuing professional and occupational ability; and
4. The public is not effectively protected by other means.

These statements demonstrate the legislatures' views toward protection of the public as well as the use of licensing as a last resort. For example, the Florida and Virginia statutes both refer to the police powers of the state - strong language demonstrating how reluctant a state may be to license an occupation.

Criteria to Determine Whether an Occupation Should be Licensed

Each of the statutes defined some criteria against which applications for licensure are measured. The criteria are quite similar from statute to statute. The following from the State of Wisconsin is typical of this criteria and the information needed to substantiate each:

Criterion 1. Regulation should address the single purpose of promoting the general welfare of the consumer of services.

1. Has the public been harmed because this profession/service entity has not been regulated?
2. What constitutes harm? Please list examples.
- 3.To what extent has the public's economic well-being been harmed? Is the harm wide-spread or isolated? Please explain.
4. Is potential harm recognizable or remote?
5. To what can the harm be attributed?

a) Lack of knowledge

b) Lack of skills

c) Lack of ethics

d) Other

6. Can potential users of the service be expected to possess the knowledge needed to properly evaluate the quality of the service? If no, why not?

Criterion 2. The functions and responsibilities of individuals working in the occupation shall require independent judgment and action based on a substantive body of skill and knowledge.

The questions to be raised in regard to this criterion have to do with autonomy and accountability.

1. What is the extent of autonomy of work?

2. Is there a high degree of independent judgment required?

3. How much skill and experience is required in making these judgments?

4. Do practitioners customarily work on their own or under supervision?

5. If supervised, by whom, how frequently, where, and for what purpose?

6. If the person is infrequently, or unsupervised, to whom is he/she accountable? To whom is the supervisor accountable?

Criterion 3. The public cannot be effectively protected by means other than regulation.

1. Can existing problems be handled through strategies on the part of the applicant group?

a. Has the occupational group established a code of ethics? To what extent has it been accepted and enforced?

b. Has the group established complaint handling procedures for resolving disputes between practitioners and the consumer? How effective has this been?

c. Has a non-governmental certification program been established to assist the public in identifying qualified practitioners?

2. Could the use of existing laws or existing standards solve problems?

a. Use of unfair and deceptive trade practice laws.

b. Use of civil laws such as injunctions, cease and desist orders, etc.

c. Use of criminal laws such as prohibition against cheating, false pretense, deceptive advertising, etc.

Criterion 4. Benefits of regulation should outweigh potentially adverse effects.

1. What are the potential benefits?

- a. How will regulation help the public identify qualified services?
 - b. How will regulation assure that practitioners are competent?
 - c. What assurance will the public have that the individuals credentialed by the state have maintained their competence?
 - d. How will complaints of the public against the practitioners be handled?
 - e. Will licensure increase the availability of services and decrease costs?
 - f. What is the impact of this action on consumer choice? Are choices increased, or maintained, or limited?
2. What are the potential adverse effects?
- a. Will the occupational group control the supply of practitioners?
 - b. Will regulation act as an entry barrier?
 - c. Will regulation prevent the optimal utilization of personnel?
 - d. Will regulation increase the cost of services to the consumer? Consider: license fees, bonding costs, record keeping.
 - e. Will stringent and/or additional educational requirements increase the cost of entry into the occupation and subsequently increase the cost of the services?
 - f. Will regulation decrease availability of practitioners?

Do the benefits more than compensate for potentially adverse effects?

How do legislatures look at this information.

Attached to this article is a chart furnished by the California Department of Consumer Affairs which is used to rank the need for regulation, from low to high, based on the information provided to substantiate each criterion. The chart lists each criterion and gives examples of findings that would lead to a conclusion of a low need, or a high need. This chart is quite informative of the views and concern of the legislature concerning governmental regulation of a profession. Note that in the first criterion the legislature is not persuaded at all by a request which only demonstrates that licensure procedure is sought only by the profession, not the public. This leads us to a more general discussion of licensure and the needs of the paralegal profession.

Licensure and the Regulated Profession - What does this mean?

Licensure allows one to demonstrate proficiency for entry into a profession, with such minimal competency defined legislatively. Because the license is the same thing as a permission to gain employment in a certain occupation, there is tremendous pressure to develop the licensing program to address or define the lowest level of professional competence. In addition, among the statutes reviewed for this article, many differentiate the forms of regulation, from registration to certification to licensure. The statutes further state that the form of regulation chosen must be the least restrictive, consistent with the public interest. Not only, then, are legislatures pressured to define the lowest level of competence, they are encouraged to use the least restrictive form of regulation, if regulation is determined to be needed.

A license merely controls entry into a profession, it does not establish professional standards, nor is that its purpose. This is an important distinction to keep in mind. It requires careful consideration of the purpose of a licensure program before deciding if it is in the best interest of the profession. In fact, because licensure programs are created to serve the public, the rules and regulations which drive the licensure process are developed with the needs of the public in mind, not the needs of the profession. In instances where these needs may compete, the public will be served. Closely related to this point is the fact that

licensure programs are the responsibility of government or the agency overseeing the process, not the profession. A licensure program may or may not include the involvement or even the interests of members of the profession.

The requirements and procedures for obtaining a license vary from state to state. Therefore, unless some sort of reciprocity agreement has been created between states, it may not be easy for a professional licensed in one state to obtain a license in another. This fact is among the reasons this issue has nationwide implications for the paralegal profession.

A licensing procedure - a statute - does not ensure competence or ethical performance. For example, NALA's files are full of newspaper articles describing cases in which individuals are charged with the unauthorized practice of law and where states are considering legislation to toughen UPL penalties. There is no reason to believe the licensure of legal assistants would have any effect on the practices of these individuals.

Options - Protecting the Title: Legal Assistant or Paralegal

Some view licensing as the only means available to a profession to protect the title. However, a licensing procedure is not always necessary to accomplish this. Many states have taken some sort of action to define the terms "paralegal" and "legal assistant" through case law, supreme court rule, model guidelines for utilization of legal assistants adopted by the states, or ethical opinions. These documents form the basis for challenging one's use of the term incorrectly.

In 1996, the Supreme Court in the State of South Carolina heard a case in which one of the issues was whether the defendant had a first amendment right to advertise himself as a paralegal (State v. Robinson, Opinion Number 24391; filed March 18, 1996). The defendant was operating a business which consisted of the delivery of legal services without attorney supervision. The defendant contended that advertising himself as a paralegal is not false since there are no regulations requiring any qualifications to be a paralegal in the state. The Supreme Court found the following:

This court has addressed the function of a paralegal in re: Easler, 275 S.C. 400, 272 S.E.2d 32 (1980):

Paralegals are routinely employed by licensed attorneys to assist in the preparation of legal documents such as deeds and mortgages. The activities of a paralegal do not constitute the practice law as long as they are limited to work of a preparatory nature, such as legal research, investigation, or the composition of legal documents, which enable the licensed attorney-employer to carry a given matter to a conclusion through his own examination, approval or additional effort.

Id. at 400, 272 S.E.2d at 32-33. While there are no regulations dealing specifically with paralegals, requiring a paralegal to work under the supervision of a licensed attorney ensures control over his or her activities by making the supervising attorney responsible. See Rule 5.3 of the Rules of Professional Conduct, Rule 407 SACR (supervising attorney is responsible for work of nonlawyer employees). Accordingly, to legitimately provide services as a paralegal, one must work in conjunction with a licensed attorney. Robinson's advertisement as a paralegal is false since his work product is admittedly not subject to the supervision of a licensed attorney.

Further, the ad's statement, "If your civil rights have been violated - call me," is an unlawful solicitation. It is unlawful for one who is not a licensed attorney to solicit the cause of another person. S.C. Code Ann. Sec. 40-5-310 (Supp. 1994). We find Robinson should be enjoined from advertising himself as a paralegal or soliciting the representation of others.

Is the New Jersey Situation Unique?

New Jersey is not the only state to have considered this matter. The Minnesota legislature, in 1991, asked the Supreme Court to appoint a committee to study the feasibility of the delivery of legal services by those who would be called specialized legal assistants. The study was to include consideration of a licensure procedure. In March, 1994, the committee issued its report and discussed the following concerning the licensure of the specialized legal assistants as summarized below:

The Minnesota statutes provided that no regulation shall be imposed upon any occupation unless retained for the safety and well-being of the citizens of the state. This statute indicates that the purpose of a professional license requirement is to protect the citizens of the state by limiting entry into a profession to those people who demonstrated that they possess at least a minimum level of skill and knowledge related to the practice of the profession. License requirements are intended to protect the service consuming public from harm that can be caused by unqualified practitioners.

The report concluded that licensing legal assistants does not fit into the analytical framework created by this statute because the practice of law is already a regulated profession. Further, the license requirement would increase the cost of licensed people's services by limiting the number of people who can perform a task. The committee also identified the fact that a licensure mechanism for legal assistants would require the creation of a regulatory system similar to that for lawyers, with the same expense and complexity. Creating this would only be justified if it would result in significantly cheaper costs to the consumers of legal services without unacceptable risk. It is not apparent to the committee how independent licensure would achieve these goals. The cost of doing business alone would be no different than those costs of lawyers and the fees charged by nonlawyers to remain in business would be unaffordable for many people.

Even in a situation in which nonlawyers would deliver legal services directly to the public, the report did not find any benefit in creating a licensure or regulatory scheme for these individuals.

Options

As demonstrated in this short summary, licensing procedures are complicated, designed with the public in mind, and with regard to professions, allow a licensed person to do something - perform some function that cannot be performed by an unlicensed person. There are many ways in which an occupation can establish standards for itself.

Those professions that do not offer services or products directly to the public often embrace a certification procedure. Certification programs are generally conducted by professional associations and are widely recognized by courts and state and federal agencies as valid programs which identify competent professionals. The fact that certification programs are voluntary, not mandatory, does not lessen the impact of these programs. Certification programs must operate under specific rules and requirements designed to insure the fairness and objectivity of the programs as well as the reliability and validity of the examination itself. It is generally agreed throughout the literature that certification programs are more flexible, more responsive to the career field, and establish standards for a profession that licensing programs are unable to do. Like licensing programs, certification programs generally include an element of discipline of certified individuals who do not adhere to professional standards. In short, certification programs have all the perceived benefits in terms of professional standards - and none of the governmental red tape.

NALA is supportive of the recommendation that the New Jersey Supreme Court establish guidelines that attorneys may use in the utilization of legal assistants. In addition to providing this guidance, the Court rule may also be helpful in governing the use of the phrases "paralegal" and "legal assistant" as found in the South Carolina case. Bar associations in several states have taken the lead in developing these guidelines and many have worked with state legal assistant organizations. Guidelines for the utilization of legal assistants have been established in the following states. Those states whose guidelines are adopted as a Supreme Court Rule or by a Supreme Court case are indicated with an (*). Those states whose guidelines are those of state legal assistant organizations are indicated with an (**):

California**	Maine	Oklahoma*
Colorado	Michigan	Oregon
Connecticut	Minnesota	Pennsylvania
Florida	Mississippi	Rhode Island*
Georgia	Missouri	South Carolina
Hawaii	Montana	South Dakota*

Idaho	Nevada	Texas
Illinois	New Hampshire*	Utah
Indiana*	New Jersey**	Virginia
Iowa*	New Mexico*	Washington
Kansas	New York	West Virginia
Kentucky*	North Carolina	
Louisiana**	North Dakota*	

Model guidelines have also been developed by the American Bar Association and the National Association Legal Assistants. As with the discussion concerning professional certification and licensure, guidelines and Supreme Court rules are an attractive way to deal with the issues of professional regulation because they may be drafted and amended by those involved in the legal profession - not by the government or a legislature. Further, guidelines and Supreme Court rules are more directly related to a Supreme Court's jurisdiction over those licensed to practice law than attempting to govern those who are not licensed and are, essentially, members of another profession.

Summary

The issues of professional regulation through creation of a statute, through self-regulatory mechanisms or through Supreme Court rule are complex matters. The decision to embrace one scheme over another rests on what is best for the profession from a global perspective based on research and knowledge, and not on individual experience. Critical in the decision process is the perception of the future growth and development of the career field. Throughout the United States, the utilization of legal assistants has become accepted, acceptable, important and, indeed, necessary to the efficient practice of law. Any system of regulation should be based on this recognition and acceptance of the legal assistant profession and provide for its continued growth.

One final observation - why does this matter? The profession continues to debate the issue of licensure, often to the detriment of the growth of our career field. Within these debates, the issues of the perceived need for professional recognition are confused with the purposes of governmental regulation. The issue of an individual's responsibility to advance himself within his chosen career field is confused with the perception of licensing as a mechanism which will ensure job opportunities. The issue of protecting the profession is confused with the issue of protecting the public. This confusion of issues has led us into non-productive, time wasting debates. Let us be smart about our direction and the growth of our profession - let us choose a path for the career field that is definable and achievable, controlled by our profession with its growth as the driving force.

Vicki Voisin, CLAS

President, National Association
of Legal Assistants
December 14, 1998

Table 1.

Criteria Rating Form

This is an example of legislative analysis of each criterion for establishing a licensing process from the California Dept. of Consumer Affairs. The chart lists each criterion to be met to establish a licensing procedure, and gives examples of findings that would lead to a conclusion of a low need, or high need.

Criteria	Little need for regulation	High need for regulation
Unregulated practice of this occupation will harm or endanger the public health, safety, and welfare	Regulation sought only by practitioners. Evidence of harm lacking or remote. Most effects secondary or tertiary. Little evidence that regulation would correct inequities.	Significant public demand. Patterns of repeated and severe harm, caused directly by incompetent practice. Suggested regulatory pattern deals effectively with inequity. Elements of protection from fraudulent activity and effective practice are included.
Existing protections available to the consumer are insufficient	Other regulated groups control access to practitioners. Existing remedies are in place and effective. Clients are generally groups or organizations with adequate resources to seek protection.	Individual clients access practitioners directly. Current remedies are ineffective or nonexistent.
No alternatives to regulation will adequately protect the public	No alternatives considered. Practice unregulated in most other states. Current system for handling abuses adequate.	Exhaustive search of alternatives find them lacking. Practice regulated elsewhere. Current system ineffective or nonexistent.
Regulation will mitigate existing problems	Little or no evidence of public benefit from regulation. Case not demonstrated that regulation precludes harm. Net benefit does not indicate need for regulation.	Little or no doubt that regulation will ensure consumer protection. Greatest protection provided to those who are least able to protect themselves. Regulation likely to eliminate current existing problems.
Practitioners operate independently, making decisions of consequence	Practitioners operate under the supervision of another, regulated profession or under the auspices of an organization which may be held responsible for services provided. Decisions made by practitioners are of little consequence.	Practitioners have little or no supervision. Decisions made by practitioners are of consequence, directly affecting important consumer concerns.
Functions and tasks of the occupation are clearly defined	Definition of competent practice unclear or very subjective. Consensus does not exist regarding appropriate functions and measures of competence.	Important occupational functions are clearly defined, with quantifiable measures of successful practice. High degree of agreement regarding appropriate functions and measures of competence.
The occupation is clearly distinguishable from other occupations that are already	High degree of overlap with currently regulated occupations. Little information given regarding the	Important occupational functions clearly different from those of currently regulated occupations.

regulated	relationships among similar occupations.	Similar non-regulated groups do not perform critical functions included in his occupation's practice.
The occupation requires possession of knowledges, skills and abilities that are both teachable and testable	Required knowledge undefined. Preparatory programs limited in scope and availability. Low degree of required knowledge or training. Current standard sufficient to measure competence without regulation. Required skills objectively determined; not teachable and/or not testable.	Required knowledge clearly defined. Measures of competence both objective and testable. Incompetent practice defined by lack of knowledge, skill or ability. No current standard effectively used to protect public interest.
Economic impact of regulation is justified	Economic impact not fully considered. Dollar and staffing cost estimates inaccurate or poorly done.	Full analysis of all costs indicate net benefit of regulation is in the public interest

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