

NALA SPECIAL REPORT. EXECUTIVE SUMMARY

NALA Statement Re Report of the New Jersey Supreme Court Committee on Paralegal Education and Regulation

Background

By way of background information, the New Jersey Supreme Court established the above referenced committee in 1992. Prior to that, the New Jersey Supreme Court Committee on the Unauthorized Practice of Law considered a question as to whether an attorney who hires a “independent” paralegal is supporting someone in the unauthorized practice of law. The Committee issued an opinion in the affirmative in 1991 (Opinion 24.) This opinion was reviewed by the New Jersey Supreme Court which decided on May 14, 1992, that there is no rational basis for the disparate way in which Opinion No. 24 treated employed and independent paralegals.

In its opinion, the Court stated that although independent paralegals may have a greater potential for conflicts, the risk is not essentially different from that experienced by paralegals who change jobs. Further, as paraprofessionals who work solely under the supervision of attorneys, independent paralegals were not found to be engaged in the practice of law. As part of the Court’s opinion, it stated that a committee on paralegal education and regulation “is necessary and will be established to study the practice of paralegals and make recommendations.” “The committee may consider guidelines from other states, bar associations and paralegal associations

in formulating the regulations for New Jersey paralegals. Any such guidelines or regulations should encourage the use of paralegals while providing both attorneys and paralegals with standards that together with the Rules of Professional Conduct can guide their practices.”

NALA’s statement focused on several key aspects of the report in light of the corporate mission and responsibility of the National Association of Legal Assistants to support the development of the paralegal profession. This includes supporting and enhancing the professional growth of those within the field; as well as promoting the paralegal occupation as an excellent career option for those just entering the workforce. NALA statement reinforces the New Jersey Supreme Court’s Opinion in Re Opinion 24 by emphasizing that 1) paralegals are valuable and necessary members of the attorneys’ work force in the effective and efficient practice of law, and 2) any system of regulation should encourage the use of paralegals.

Report Summary

The report of the Committee on Paralegal Education and Regulation, published on July 27, 1998, sets forth several recommendations concerning the attorneys’ use of paralegals in the delivery of legal services, sets forth a

system of licensure and prerequisites, promulgates a code of professional conduct for paralegals, suggests modifications to the Rules of Professional Conduct concerning attorneys' use of paralegals, and discusses the administrative body and organization required to effect the recommendations. The report emphasizes that paralegals in New Jersey always work under the supervision of licensed attorneys and their work is merged with and becomes the attorney's product.

The National Association of Legal Assistants believes the report and recommendations of the New Jersey Committee on Paralegal Education and Regulation involves matters of vital interest to paralegals in New Jersey as well as those throughout the United States.

NALA Statement-Points

In its analysis of the report, NALA focused on the following points:

1. The paralegal's role is accepted and necessary in the efficient practice of law.
2. The Supreme Court permits the use of nonlawyers by New Jersey attorneys.
3. "No rational basis exists for the disparate way in which Advisory Opinion No. 24 treats employed and independent paralegals. The testimony overwhelmingly indicates that independent paralegals were subject to direct supervision by attorneys and were sensitive to potential conflicts of interest."-New Jersey Supreme Court Opinion In Re Opinion No. 24 of the

Committee on the Unauthorized Practice of Law.

4. A licensure mechanism must be developed in response to a demonstrated need; based on objective, quantifiable research; and must serve the public interest.

5. The report and recommendations could cause public harm unnecessarily increasing the cost of legal services to consumers and eliminating the benefits of the utilization of nonlawyers in the delivery of legal services.

6. Professional associations offer viable alternatives to governmental regulation.

The first two points provided information from throughout the nation describing the general acceptance of the role of the paralegal in the delivery of legal services. This includes the statement from the United States Supreme Court in the 1989 case of *Missouri v. Jenkins*, 491 US 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989), in which the Supreme Court of the United States held that an award of attorneys' fees may include the market value of services rendered by paralegals, stating the following:

"It has frequently been recognized in the lower courts that paralegals are capable of carrying out many tasks, under the supervision of an attorney, that might otherwise be performed by a lawyer and billed at a higher rate. Such work might include, for example, factual investigation, including locating and interviewing witnesses; assistance with depositions, interrogatories, and document production; compilation of

statistical and financial data; checking legal citations; and drafting correspondence. Much such work lies in a gray area of tasks that might appropriately be performed by either by an attorney or a paralegal. [Id., 109 S.Ct., at 2471-2472].”

The United States Supreme Court added that paralegal services may encourage cost-effective legal services by reducing the spiraling cost of litigation. [Id., 109 S.Ct. at 2471].

In the presentation of the third point, the statement focused on the findings of the New Jersey Supreme Court in its review of opinion No. 24. The committee’s report and recommendations specifically address freelance paralegals who work for attorneys on a contract basis as a separate class of paralegals. The recommendations would essentially eliminate freelance practice in the state by requiring many years [sic] experience in order to qualify for a license. Thus, should the licensing proposal be adopted, it would be impossible for someone to obtain experience as freelance legal assistant. In connection with this, NALA’s statement presented information supporting the fact that freelance paralegals who work under the supervision of attorneys should not be treated differently than employed paralegals.

The fourth point of the statement discusses the elements of a licensure mechanism and the purpose of licensing mechanisms. It is interesting that the committee focused on licensing as the means of credentialing paralegals in the state of New Jersey. There are three

forms of individual credentialing - licensure, certification, and registration. These terms are frequently interchanged in conversation; however, their differences are quite distinct.

Licensure is a mandatory governmental requirement necessary to practice in a particular profession or occupation. Licensure implies both practice protection and title protection in that only individuals who hold a license are permitted to practice and to use a particular title. In order to meet the definition of a licensing program, the mechanism must be related to specific job functions or duties and responsibilities. Also, by their very nature, licensure mechanisms are created by government and designed to protect the health, safety, and well-being of citizens. A licensure mechanism is appropriate in instances where the public may be harmed by incompetent products or services.

The Committee’s report has not demonstrated a public need for the licensure of paralegals. Rather, the report focuses solely on the relationship between the legal assistant and the attorney/employer and the regulation of those who are admitted to the practice of law. Further, the licensure mechanism recommended does not relate to any specific duties and responsibilities that may be performed only by licensed persons, rendering the process a completely ineffective and costly bureaucratic exercise. Without a foundation in duties and responsibilities, any person may perform paralegal duties regardless of his or her licensed status. The report emphasizes that paralegals and (sic) New Jersey always work under

the supervision of licensed attorneys and their work is merged with and becomes the attorney's product.

The discussion within this point further identifies the following:

1. The Committee's licensure recommendation sets forth a complicated system of plenary licenses and restricted licenses, divides the paralegal profession into two groups based on conditions of employment, although there is no rational basis for this segmentation, and classifies paralegals according to their education and experience. The Committee's approach to defining the career field into separate segments has no basis, particularly when these segmented groups have identical duties and responsibilities.

2. The Committee's report and recommendations with regard to a licensing mechanism dismisses the present day realities of the practice of law and the paralegal occupation.

3. No occupational research is offered to substantiate the Committee's fragmentation of the career field or creation of the admission requirements.

4. The licensure requirements provide that the sole acceptable means of obtaining paralegal education is by completing a program approved by the American Bar Association, which, in addition to being unrelated to present day realities, raises serious anti-competitive issues.

5. The licensure mechanism contemplated prohibits qualification for employment as a paralegal on the basis

of years of experience alone, and further segments those who are employed as paralegals and have a bachelor's degree in any field and only in-house paralegal training.

(a) This latter group of paralegals may only seek employment with law offices; they are not eligible for employment as paralegals in corporations, government, or on a contract basis;

(b) The licensing scheme prescribes the number of paralegals a law firm may employ with this qualification and by whom they are supervised;

The licensing mechanism prohibits qualification and employment of paralegals by virtue of years of experience after three years of the rule's inception. A majority of those currently employed as paralegals in New Jersey have achieved their positions by virtue of experience and in-house training.

Rather than support the growth of the paralegal field, and encouraging the use of paralegals, the Committee's report and recommendations could cause paralegals and the public harm by arbitrarily defining those citizens who may or may not qualify for employment as a paralegal and by unnecessarily restricting the delivery of paralegal education.

The purpose of the paralegal profession is to offer a means by which attorneys may deliver legal services in a more cost-effective and efficient way, resulting in lower legal fees for consumers. The licensing of paralegals through this system does not increase the efficiency of delivery of legal services

nor reduce the cost. It does not streamline the practice of law by allowing paralegals to perform functions generally reserved for attorneys. On the contrary, it adds substantially to the cost of legal services through direct costs, such as will not relieve the professional associations of their standard-setting duty to those within the career field.

Summary

In summary, it is the position of NALA that the Committee's recommendation that the Supreme Court establish rules for New Jersey attorneys regarding the utilization of legal assistants will provide the necessary guidance to attorneys and would serve to further clarify the supervisory role of attorney-employers of legal assistants and other lay personnel.

It is also the position of NALA that this proposal for licensure of paralegals in the State of New Jersey is harmful to the growth of the profession and is anti-competitive. This proposal is not based on any occupational or professional research, is subjective, costly, and would result in the loss of jobs. Further, licensing fees, and indirect costs related to the methods by which firms supervise the services of paralegals. Other indirect costs associated with the licensing mechanism would include the cost of separate malpractice insurance for paralegals as licensed individuals. The final cost category associated with this mechanism is the cost to the public not only in terms of increased cost of legal services but also in terms of the public funds required for initial and on-going capitalization of the program. Any cost-saving benefits

related to the utilization of paralegals in the delivery of legal services will be lost and replaced with rising costs.

In its concluding point, NALA's statement provided information describing the role of professional associations in establishing standards for those within a career field. In considering the foundation for this report of the Committee it is safe to surmise that the purpose of the Committee's recommendations are founded on the premise that governmentally imposed licensing mechanisms may be used to establish standards within profession. On the contrary, licensing mechanisms exist solely to define who may and who may not engage in a certain practice and to protect the public.

Professional standards are created by those within the career field through their professional associations. This includes creation of a code of ethics, association membership requirements, and voluntary certification programs. The identification and creation of standards for those within a profession far exceed the purposes and functions of a licensure mechanism. In fact, the mere creation of a licensing mechanism for paralegals in New Jersey the licensing proposal effectively minimizes the accountability of supervising attorneys by rendering the issue of paralegal conduct and accountability away from the law office and thrusting it into an administrative maze of plenary and restricted licenses for paralegals that operates independently of attorney licensing. This specific licensing proposal creates a myriad of other unnecessary and debilitating problems

and does not encourage the use of paralegals by attorneys or the growth of the profession.

To understand the issues involved with this and other proposals, one should first research the general question of occupational regulation. For additional reading, see:

Certification, A NOCA Handbook, National Organization for Competency Assurance, 1200 19th St. NW, #300, Washington, DC 0036-2422, 1997.

Certification and Accreditation Law Handbook, Jacobs, Jerald A., American Society of Association Executives, Washington, DC, 1992.

Current Principles and Practices in Association Self-Regulation, Lad, Lawrence J., DBA, American Society of Association Executives, Washington, DC, 1992.

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A copy of the Report of the New Jersey Supreme Court Committee on Paralegal Education and Regulation can be downloaded from New Jersey State Courts, Notices to the Bar at www.state.nj.us/judiciary/cmtee.htm.