Changing the Paradigm: Reimagining the Practice of Law in a Post-Pandemic World

Submitted by Andrea Schillaci, Esq. Andrea Schillaci is a Shareholder of Hurwitz & Fine, P.C., a law firm headquartered in Buffalo, New York, and a member of the International Association of Defense Counsel. Thanks to Alison Smith for her assistance.

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Introduction

The last two years have raised questions about many established institutions and practices and has shone a light on some fundamental inequalities. For instance, while an individual's right to access the judicial system is one of the foundational pillars of a thriving democracy, that access is not universally available. Unfortunately, because of the complicated and costly nature of the U.S. legal system, many Americans are unable to obtain comprehensive and/or meaningful access to the courts. One way the U.S. legal system has attempted to provide more cost-efficient legal services to the public is through the use of paralegals. Paralegals are not attorneys but assist attorneys in the preparation of legal documents and other tasks as directed. There is an ongoing debate about whether paralegals should be licensed and permitted to provide certain legal services to clients without the supervision of an attorney. This article will discuss the positive and negative implications of the autonomous practice of law by paralegals, including access to justice, impact on the legal system, as well as liability and ethical considerations. Finally, this article will briefly discuss the current American Bar Association Rule that prohibits nonlawyers from acquiring any interest in a law firm.

Concerns with Access to Law – An Expensive and Convoluted System

The U.S. judicial system can be confusing to the average person. According to the Heritage Foundation, the federal statutory books alone contain more than 4,500 criminal laws, which does not account for the myriad of local and state laws, along with the hundreds of thousands of criminal penalties imposed by federal agencies.[1] In 1982, the Justice Department attempted to determine the total number of federal criminal laws, but after two years gave up due to the magnitude of the project. Ronald Gainer, who headed the project, was famously quoted by the *Wall Street Journal* as saying: "you will have died and [been] resurrected three times" and still not have an answer to the question.[2] These staggering numbers only paint part of the picture of the complexity of a portion of the American judiciary.

Civil practice is no less regulated and complex and brings its own nuances and difficulties. The Federal Rules of Civil Procedure with their official commentary are more than seventy single-spaced pages with 9-point font.[3] Again, this only scratches the surface of the magnitude of U.S. civil law, not taking into account the numerous state and local laws that govern civil matters. One must also consider the fact that laws and regulations are constantly changing and staying up-to-date on the changes is an ongoing challenge.

The civil discovery process is often long, arduous, and expensive under the best of circumstances. Discovery can be contentious and expensive, often requiring the production of vast amounts of electronically stored data, negotiation, and frequently, motion practice. Document production can involve the exchange of voluminous materials consisting of years of emails, records, and/or medical records, which must be attentively reviewed, analyzed for

[1] Gorsuch, Neil. *Republic, If You Can Keep It.* S.1: Crown, 2020.
[2] https://blogs.loc.gov/law/2013/03/frequent-reference-question-how-many-federal-laws-are-there/.
[3] Gorsuch, page 241.

privilege and appropriately redacted. The complexity and length of the process has resulted in uncomfortable realities. 70% of the American College of Trial Lawyers say that attorneys use discovery costs as a threat to force settlements that are not based on the merits of the case.[4] Less than one percent of civil cases are decided by jury trial.[5]

The cost of retaining a lawyer for representation in a civil matter is often more than the average person can afford. Profession Luz Herrera has estimated that the average person requiring the services of a lawyer makes around $25 an hour, while the average hourly rate of a lawyer is about $200 to $250 an hour.[6] The difference is staggering. Supreme Court Justice Neil Gorsuch indicated that "legal services are so expensive today that the United States ranks near the bottom of developed nations when it comes to access to counsel in civil cases."[7]

Paralegals – Defining the Job Description

The use of paralegals presents one method for containing legal costs.

As a general rule, paralegals practice under the supervision of an attorney. With that supervision, paralegals' responsibilities can range from doing glorified secretarial work to performing some work traditionally done by attorneys. The common denominator for all paralegals is that they do not have the requisite qualifications to practice law, i.e. they are not licensed to practice law.

As of February 2020, the American Bar Association has defined the term "paralegal" as

> a person, qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible.[8]

A paralegal's responsibilities can include preparing legal documentation, such as pleadings, contracts, motions, leases, as well as pleadings or motions. Many paralegals conduct legal research. Furthermore, paralegals can interview witnesses and obtain information through a variety of sources in order to assist with the fact investigation of a case and can communicate with clients as long as they are directed by the attorney as to what to convey to the client.

The American Bar Association does not specifically define the "practice of law." Rather, individual states are tasked with the job of defining the practice of law within that jurisdiction. A consistent requirement is that one must be duly admitted to practice before the courts of the state.[9]

There are general restrictions imposed on paralegals that define the scope of their permissible conduct. Paralegals are prohibited from representing clients in court and giving legal

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[4] Gorsuch, page 246.
[5] https://constitutioncenter.org/interactive-constitution/interpretation/amendment-vii/interps/125#:~:text=The%20reality%20is%20different.,United%20States%3A%20federal%20and%20state.
[6] Gorsuch, page 241.
[7] Gorsuch, page 254.
[8] https://www.americanbar.org/groups/paralegals/profession-information/current_aba_definition_of_legal_assistant_paralegal/.
[9] See: e.g. New York Judiciary Law §478.

advice. The prohibition of giving legal advice encompasses providing a client with information, which the client will use to make a legal determination. Paralegals are not permitted to set legal fees for clients or accept/reject cases. Finally, paralegals are barred from signing legal documents. This list is not all-inclusive and there are many nuances, and thus many challenges, that present themselves regarding the legal boundaries of practice for paralegals.

The unauthorized practice of law is a criminal offense in many states. For instance, in San Bernardino County, a superior court judge charged 40 independent paralegals with the unauthorized practice of law in 1997. The Florida Bar Association prosecuted and jailed a former legal secretary for the unauthorized practice of law.[10]

Other serious consequences may result from unauthorized practice. In *Sussman v. Gardo*, the court granted a judgment creditor damages under N.Y. Gen. Bus. Law § 349(h) against a paralegal for her failure to work under the supervision of an attorney.[11] Similarly, lawyers face serious consequences for failure to adequately supervise paralegals. Failure to properly supervise paralegals may result in a spectrum of discipline from censure[12] to disbarment[13]

A paralegal's responsibilities can vary greatly. Likewise, employment arrangements for paralegals can also differ. While there is no legal difference between an independent paralegal and a freelance paralegal, these two terms described very different employment arrangements.[14] As a basis for comparison, it is important to note that a traditional paralegal is one who works within a law firm or legal department and provides case assistance to attorney(s) within that organization. These paralegals are supervised by the attorneys within the firm and generally do not provide services outside of their primary employment.

On the other side of the spectrum are independent paralegals, "non-attorn[ies] who provide[s] legal document preparation services to the public."[15] They are also sometimes referred to as legal document preparers or forms practitioners. The most important difference between an independent paralegal and a traditional paralegal is that independent paralegals, unlike traditional paralegals, work without the supervision of any attorney. Independent paralegals can assist clients in locating forms and following the correct procedure for filing those forms. Without the supervision of an attorney, independent paralegals are considerably limited in the types of services they provide, including the types of documents they prepare. Furthermore, independent paralegals may be at a greater risk of inadvertently "practicing law" due to the legal limitations imposed on their work.[16]

Freelance paralegals, sometimes called contract paralegals, provide services on a contract basis and are not solely employed by one attorney and/or firm. Since contract paralegals perform their duties under the supervision of an attorney, they have more latitude in the types of

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[10] *Id.*
[11] *Sussman v. Grado*, 192 Misc. 2d 628 (N.Y. Dist. Ct. 2002).
[12] *In re Bonnano* [617 N.Y.S.2d 584 (3d Dept. 1994)],
[13] *In re Stenstrom*, 605 N.Y.S.2d 603 (4th Dept. 1993).
[14] https://www.paralegalalliance.com/independent-or-a-freelance-paralegal-is-there-a-difference/#:~:text=An%20independent%20paralegal%20is%20a,document%20preparer%20or%20forms%20practitioner.
[15] *Id.*
[16] *Id*.

documents they prepare. Contract paralegals can prepare any type of legal document, including memoranda of law and motions, because they are under the direction of an attorney. They generally focus on one or two areas of law. When using the services of a contract paralegal it is important that the attorney supervise the paralegal's work in order to maintain ethical obligations and professional responsibilities.[17]

Contract paralegals are not to be confused with a registered Legal Document Assistant ("LDA"). The California Association of Legal Document Assistants explains that legal document assistants are a low-cost alternative to attorneys for preparing legal paperwork and "can help with many different types of document preparation, including divorce, wills, deeds, guardianships, and much more."[18] Under California law, an LDA may assist customers in self representation or by providing "self-help service." For instance, LDAs can provide legal materials that have been published or approved by a lawyer to their customers, may complete the customers' legal documents in a ministerial manner under the direction of their customers, and may file the customers' legal documents in the appropriate courts.[19] California law requires LDAs to be registered in the County in which they work, to post $25,000 cash or bond security,[20] and to establish that he or she has a minimum level of experience and/or education. Specifically, an LDA must hold:

- A high school diploma or general equivalency diploma, and either a minimum of two years of law-related experience under the supervision of a licensed attorney, or a minimum of two years experience, prior to January 1, 1999, providing self-help service;
- A baccalaureate degree in any field and either a minimum of one year of law-related experience under the supervision of a licensed attorney, or a minimum of one year of experience, prior to January 1, 1999, providing self-help service;
- A certificate of completion from a paralegal program that is institutionally accredited but not approved by the American Bar Association, that requires successful completion of a minimum of 24 semester units, or the equivalent, in legal specialization courses; or
- A certificate of completion from a paralegal program approved by the American Bar Association.[21]

In addition, LDAs must complete 15 units of continuing education every two years and must make specific disclaimers in advertising and to their customers.

The Colorado Supreme Court has agreed to some statutory exceptions to the requirement that only licensed attorneys be engaged in the practice of law. Specifically, the Colorado Supreme Court permits nonlawyers to represent an employer or an employee before the Department of Labor and Employment for proceedings.[22]

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[17] *Id*.
[18] https://calda.org/
[19] California Business and Professions Code 6400(d)
[20] California Business and Professions Code 6404(a)(1)
[21] California Business and Professions Code 6402(1)
[22] https://coloradosupremecourt.com/PDF/UPL/Understanding%20Practice%20of%20Law%20Issues.pdf.

The Washington Supreme Court has allowed limited licensed legal technicians (LLLTs) to advise and assist people in domestic relation cases as long as they meet certain requirements, such as obtaining an associate's degree, passing an exam, completing three thousand hours of supervised paralegal work, and taking certain legal courses.[23] The Washington Supreme Court decided on June 4, 2020 to sunset the LLLT program, which will require LLLT candidates to complete all requirements by the July 31, 2022 deadline.[24] It appears that states are cautiously considering relaxing the strict bans on the practice of law by nonlawyers. As with all legal issues, there are arguments in favor of and against lifting the ban.

The Pros and Cons of Loosening the Regulations on Independent and Freelance Paralegals

Cost

One of the main arguments in favor of permitting paralegals to engage in expanded independent practice is that it helps eliminate a barrier to legal services for many consumers: cost. Increasing the supply of paraprofessional legal services providers will potentially lower the price of legal services. Furthermore, there will be more legal experts that consumers of legal services can afford. Paralegals generally charge less than attorneys and thus are more economically accessible to the average person. Because civil cases involve an immense amount of document review due to the complex and labor-intensive discovery process, having someone charge less than half of what would normally be charged is a great cost benefit for the client. As explained above, the cost of legal services performed by attorneys is one of the most significant factors in barring access to the legal system. Increasing the number of legal professionals who charge less will help break this barrier, giving people affordable options for legal services.

Quality of Legal Services

A major concern that is often raised by opponents of licensing paralegals and having them provide more independent services, is that they are not lawyers and there is a greater risk for poor quality legal services. Specifically, these concerns center around the fact that restrictions that prohibit the unauthorized practice of law are in place to protect the public from unqualified and fraudulent practitioners. Without these restrictions, the public may be subject to services of uneven quality with little or no recourse.

While these are valid concerns, some studies suggest that these concerns may be exaggerated. In bankruptcy and administrative proceedings, it appears that individuals who are unlicensed, but specializing in the subject matter, often perform as well as or better than attorneys. Another study found that in unemployment compensation appeals before the Wisconsin Labor and Industry Review Commission, "the overall pattern does not show any clear differences between the success of lawyers and agents."[25] The American Law Institute's Restatement (Third) of Law Governing Lawyers commented with the following:

[23] Gorsuch, page 257.
[24] https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/become-a-legal-technician.
[25] Herbert M. Kritzer, *Legal Advocacy: Lawyers and Nonlawyers at Work*. University of Michigan Press. Pages 50-51 (1998).

> "Several jurisdictions recognize that many [law-related] services can be provided by nonlawyers without significant risk of incompetent service, that actual experience in several states with extensive nonlawyers provision of traditional legal services indicates no significant risk of harm to consumers of such services, that persons in need of legal services may be significantly aided in obtaining assistance at a much lower price than would be entitled by segregating out a portion of a transaction to be handled by a lawyer for a fee, and that many persons can ill afford, and most persons are at least inconvenienced by, the typically higher cost of lawyer services. In addition, traditional common-law and statutory consumer-protection measures offer significant protection to consumers of such nonlawyer services."[26]

In fact, the Federal Trade Commission has concluded: "We are not aware of evidence of consumer harm arising from non-attorneys providing services...that would justify foreclosing competition."[27] Thus, it seems that the risk of poor quality of legal services may not be as troubling as it appears at first glance.

Ability to Provide Range of Services

While paralegals can successfully handle a variety of tasks under an attorney's supervision, the prohibition on paralegals rendering legal advice places constraints of the ability to independently provide value to customers. As every attorney knows, there are certain cases that are complicated and involve various areas of law. Similarly, cases that may at first blush appear to be routine may be more complex and require counselling on alternative strategies, requiring extensive legal expertise and experience, which can only be provided by a lawyer.

While there are situations which may only require form filling, representation often requires the ability to do more than draft standard documentation and arguments. In these cases, nonlawyers would not be able to take the place of a lawyer, who can provide counsel and advice. Without the guidance of an attorney, nonlawyers may have difficulty determining the difference between services they are and are not empowered to provide. This raises serious ethical concerns about giving non-attorneys more leeway in the legal services they provide without the supervision of an attorney.

Recourse for Malpractice

Generally, a paralegal's only responsibility to a potential client exists because of the attorney-client relationship established by the attorney who supervises the work of the paralegal. This means that the attorney may be sued for legal malpractice or may be subject to disciplinary

[26] American Law Institute Restatement (Third) of Law Governing Lawyers § 4 cmt. C (2000).
[27] https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-mr.carl-e.testo-counsel-rules-committee-superior-court-concerning-proposed-rules-definition-practice-law/v070006.pdf.

action based on the actions taken by his paralegal. [28] But what happens when there is no supervising attorney to bring a lawsuit against for malpractice?

While some jurisdictions permit private rights of action against paralegals for the unauthorized practice of law, and clients can attempt to obtain damages as a result of the paralegal's actions, this is not universally true. Some jurisdictions, including Ohio, Illinois, and California, have ruled that non-lawyers cannot be held liable for legal malpractice. Many other states have not addressed the issue at all.[29] In addition, professional liability insurance policies are not generally available for paralegals. This may leave customers with no remedy against independent paralegals and nonlawyers for negligence. The California model addresses this issue as the bond or cash security required to be posted by a registered Legal Document Assistant provides financial security against which a claim made be made for negligent practice.[30]

Because paralegals are not required to belong to a paraprofessional organization, there is no governing body regulating and/or guiding the actions of non-lawyers and paralegals. The lack of guidelines and industry regulation causes serious ethical concerns about unauthorized individuals working as independent paralegals.[31] Access to justice for clients not only means giving clients more resources and options in terms of legal representatives, but it also means providing clients with feasible options to bring malpractice claims, when necessary. Currently, there are not enough safeguards in place to ensure that clients have resources to hold non-attorney representatives accountable for malpractice.

Attorney-Client Privilege

Besides malpractice claims, another ethical concern surrounds attorney-client privilege.

While obligations of preserving client confidences should apply to independent paralegals, the attorney client and attorney work product privileges are reserved for communications between attorneys and their clients. The attorney-client privilege is held by the client and broadly stated, shields from discovery communications between a lawyer and a client where the communication relates to legal advice where the lawyer is acting in a professional capacity and the communication is intended by the client to remain confidential.

The American Bar Association's Model Rule for Professional Conduct 5.3, which applies to non-lawyer assistants, explains that anyone working under an attorney must make assurances that their "conduct is compatible with the professional obligations of the lawyer."[32] However, if a breach of client privilege does occur, the attorney is ultimately responsible, even if a paralegal or other law firm employee caused the breach. If the attorney-client privileged is breached, the attorney is the one who will be penalized.[33]

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[28] https://txpd.org/ethics-articles/paralegals-and-legal-malpractice/.
[29] *Id.*
[30] California Business and Professions Code 6405(g)
[31] 122 Am. Jur. Proof of Facts 3d § 279.
[32] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_3_responsibilities_regarding_nonlawyer_assistant/.
[33] *Id.*

By definition, as a paralegal is barred from rendering legal advice, the attorney-client privilege does not apply and communications between a paralegal and a client are not protected from disclosure. Similarly, attorney work product protections are not available to independent paralegals who are not practicing under an attorney's supervision.

Presently, as the attorney-client privilege does not apply to independent paralegals, clients do not have a remedy against an independent paralegal who violates the client privilege.

Law Firm Ownership by Nonlawyers

While the concept of multi-disciplinary professional practices is not new, the reality is that state laws generally prohibit them in practice. When examining the role of nonlawyers in the practice of law, the rule prohibiting nonlawyers from owning law firms has come under recent reconsideration. Currently, most states accept the American Bar Association's Rule 5.4 that prohibits nonlawyers from acquiring "any interest" in a law firm.[34] Economics tells us that participants in the market with increased access to capital can increase supply and lower prices, if all other variables are held equal. Because the capital base is restricted to equity and debt of the individual partners, "the output of legal services is restricted, and the price raised above competitive levels."[35]

ABA committees have regularly revisited the idea of changing Rule 5.4. Some of the proposed changes would allow nonlawyers to own a certain percentage of a firm or require nonlawyers to pass a test before the can own a practice. However, the ABA House of Delegates refuses to pass any such changes to Rule 5.4.[36] At the end of 2020, Arizona became the first state to dislodge ABA Rule 5.4 prohibitions on non-lawyers from having an economic share in a law firm and bans on fee sharing between lawyers and nonlawyers. Other states have not done away with Rule 5.4 but some are considering loosening it.[37]

Opponents of lifting the ban argue that nonlawyers may negatively influence their attorney counterparts' decision-making. Specifically, nonlawyers could influence attorneys to act in a manner that is professionally unethical. ABA Formal Op. 01-423, at 3-4 & n. 7 explains that "the prohibitions in Rule 5.4 are directed mainly against entrepreneurial relationships with nonlawyers and primarily are for the purpose of protecting a lawyer's independence in exercising professional judgment on the client's behalf free from control by nonlawyers."[38]

There are several arguments highlighting the advantages of changing Rule 5.4. First, by allowing non-attorneys an opportunity to hold an economic stake in a law firm, attorneys have the opportunity to collaborate with high-powered professionals. Additionally, non-attorney shareholders in a law firm will enable law firms to decrease attorney salaries and bonuses, making access to legal services more affordable to more clients.[39] In 2007, the United Kingdom permitted multidisciplinary firms and nonlawyer investment, creating what was called

[34] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_4_professional_independence_of_a_lawyer.
[35] Gorsuch, page 258.
[36] *ID.*
[37] https://www.glscap.com/how-will-changes-to-law-firm-ownership-rules-affect-us-law-firms/
[38] ABA Formal Op. 01-423, at 3-4 & n. 7
[39] https://www.glscap.com/how-will-changes-to-law-firm-ownership-rules-affect-us-law-firms/

"alternative business structures" (ABSs). The Solicitors Regulation Authority studied these entities and found that ABSs reached far more consumers and served low and middle income clients than traditional law firms.[40] Advocates for eliminating the ban point to these successes as justification that it would provide more services to more people, especially those who traditionally would not be able to afford legal services.

It is uncertain if other states will follow Arizona and reconsider allowing nonlawyers to be stakeholders in law firms. If states do decide to lift the ban on nonlawyers being stakeholders in a law firm, this may increase accessibility to legal services. While there are risks that must be addressed, this is an issue that has been given substantial consideration due to its potential to bring more legal services to communities, i.e. increased access to the judicial system.

Conclusion

The complexity of U.S. legal system and the cost of hiring a lawyer are cited as two major hindrances to Americans' access to courts. As legal costs continue to rise, rethinking these barriers may be crucial for a thriving rule of law and democracy. One way to lower the cost of legal services may be by using paralegals and nonlawyers to do some work that has been traditionally done by lawyers. This could significantly decrease the cost of certain legal services and increase access to the legal system for many. As with any changes there are concerns. These concerns include ethical considerations, the quality of legal services, the ability to provide a wide range of services to clients, and the ability to seek redress for negligence.

Submitted by Andrea Schillaci, Esq. Andrea Schillaci is a Shareholder of Hurwitz & Fine, P.C., a law firm headquartered in Buffalo, New York, and a member of the International Association of Defense Counsel. Thanks to Alison Smith for her assistance.

[40] Gorsuch, page 259.