

Regulating Legal Assistant Practice: A Proposal That Offers Something for Everyone

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The premise of this Article is straightforward: let's regulate legal assistants, let them handle more lawyer stuff, and everyone will benefit. "Lawyer stuff" means activities that constitute the practice of law. My purpose here is not to add to the extensive scholarship that explains and debates the "practice of law" or its ugly stepchild, the "unauthorized practice of law." Nor is it my purpose to consider all of the many policy issues surrounding those topics that make for lively bar dinner debate. Others have covered these subjects extensively and thoughtfully.¹

In an effort to build upon existing scholarship, I offer a regulatory model intended to accommodate the interests of all concerned. More precisely, this proposal balances the public's interest in being able to choose among legal service providers against other public interests,²

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1. The American Bar Association (ABA) Commission on Nonlawyer Practice (the Commission) conducted a comprehensive study of the practice of law, unauthorized practice, and the policy issues involved over a two-year period. The Commission amassed what was, and probably still is, "the nation's broadest, most comprehensive database on the subject." ABA COMM'N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS, at xv (Aug. 1995) [hereinafter ABA REPORT]. Professor Deborah Rhode of Stanford University Law School is a leading scholar and has written extensively about our legal services delivery system, the legal cartel, and non-lawyer practice. See, e.g., Deborah L. Rhode, *Too Much Law, Too Little Justice; Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989 (1998) [hereinafter Rhode, *Too Much Law*]; Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1996) [hereinafter Rhode, *Alternative Approaches*]; Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981) [hereinafter Rhode, *Policing the Monopoly*].

2. Many public interests are at stake, including public safety, consumer protection, affordability of legal services, judicial economy, and state sovereignty. See ABA REPORT, *supra* note 1, at 8. This Article will focus on three public interests that are most directly involved in the non-lawyer services debate: access to legal services, the integrity of the legal

lawyer interests,³ and legal assistant interests.⁴ The proposal strikes this balance by combining a competency-based legal assistant registration system with the lawyer regulation and legal assistant supervision infrastructure already in place in every state. The proposal will be easy and inexpensive to implement and administer, and it is flexible enough to allow for state-to-state variations.

I. THE PROPOSAL

The beauty of this proposal lies in its simplicity. An attorney may register his or her legal assistant with the attorney's state supreme court, if the legal assistant meets certain competency criteria. A registered legal assistant who acts within the scope of his or her authority is exempt from the state's unauthorized practice of law (UPL) restrictions. When the legal assistant's employment ends, the attorney notifies the state supreme court, revoking the registration. Registration is voluntary for both the attorney and the legal assistant. An unregistered legal assistant is not prohibited from working as a legal assistant; instead, he or she simply remains bound by state UPL law.

Competency criteria should include, at a minimum:

1. An education requirement, such as the completion of an American Bar Association-approved legal assistant studies program,⁵

services delivery system, and protection from incompetent legal service providers.

3. Lawyers are interested in protecting their "monopoly" over the delivery of legal services. While this term is factually and legally inaccurate, the implication is on point. Lawyers are also interested in staying in business and protecting their profits. This proposal preserves the monopoly and it lets lawyers protect their bottom lines.

4. Legal assistants are interested in self-determination and in enhancing the growth of their profession. This proposal accommodates both interests.

5. Regulation implies proof of competency, and there must be standards by which competency is judged. American Bar Association approval is becoming as important to legal assistant education as it is to law school education. ABA Guidelines tend to promote consistency in faculty, facilities, and curricula among approved legal assistant studies programs. *See generally* ABA STANDING COMM. ON LEGAL ASSTS., GUIDELINES FOR THE APPROVAL OF LEGAL ASSISTANT EDUCATION PROGRAMS (1997), *available at* <http://www.abanet.org/legalservices/downloads/legalassistants/approvalguidelines.pdf> (last visited July 7, 2002). While ABA approval does not, in itself, guarantee a quality legal assistant education, the ABA's guidelines and its approval process are by far the most comprehensive measurement tools available.

2. An experience requirement of at least one year working under the day-to-day supervision of the registering attorney; and

3. A character and fitness requirement that could be satisfied by a criminal background and reference check.

The remainder of this Article discusses the details of the proposal and explains why it is workable. There are potential problems that will need to be addressed, but the problems are not very different from those that are faced today. In the end, this proposal offers enough benefit for everyone concerned, including those who hate it, that it should be tried. The market will then decide whether it succeeds or fails.

II. WHY IT WORKS

A. It's Simple and Flexible

Registration is the simplest, fastest, and cheapest form of state-sponsored regulation.⁶ The attorney and the legal assistant fill out an application. The application requires references and proof of completion of the education requirement in the form of an official transcript. The attorney must vouch for the legal assistant's character and must confirm that the legal assistant has satisfied the experience requirement. Both the attorney and the legal assistant are required to sign the application under oath.

A small application fee can be charged to cover administrative costs associated with processing the application and performing the criminal background and reference checks. A simple example demonstrates that registration cost should not impact the cost of legal services. Assume that the application fee is \$200. Assume further that the attorney bills his or her legal assistant's time at \$75 per hour and that, after payment of the legal assistant's wages and benefits and

6. The other type of state-sponsored regulation is licensing. As a practical matter, the idea behind licensing and registration is the same: the state seeks to protect various public interests. Licensing is usually more cumbersome from the state's viewpoint because it often involves a state-administered examination. A license is also plenary within the scope of the license. Some might argue that what this proposal really gives to legal assistants is a license, but this argument ignores the fact that registered legal assistants must work under attorney supervision. Registered legal assistants are not licensed to practice law; they are granted a limited exemption from UPL rules.

associated overhead costs, the attorney clears \$20 per hour. The attorney will recover the cost of the application fee in ten billable hours of legal assistant time. One may quibble over the numbers,⁷ but the point is clear: the cost of registration is not prohibitive, nor will registration cost drive up the overall costs of legal services.

Registration also offers all involved the greatest flexibility. Participation by attorneys and legal assistants is voluntary. The legal assistant who chooses not to register can still be a legal assistant and a valuable employee. Registration simply allows the attorney and the legal assistant to offer, and the client to choose from, a wider range of legal assistant services unburdened by the constraints of UPL rules.

The nature and extent of the services that a legal assistant may perform are left to the attorney, the legal assistant, and the client after consultation and disclosure.⁸ Will a legal assistant be entrusted with primary responsibility for handling a multi-million dollar product liability case, a complex estate plan, or a messy divorce with thorny custody or financial issues? The chance of such a scenario is no greater than the chance that such matters would be entrusted to a first-year associate. The law will not be kind to an attorney who brings such foolishness upon his or her client.

Some will find a potential for abuse in the fact that, under this proposal, the UPL exemption is linked to agency law. Yet agency law is what makes the existing attorney supervision scheme attractive to so many.⁹ Suppose that a client sues a registered legal assistant for

7. The Legal Assistant Management Association (“LAMA”) 2000 National Compensation Survey found that average billable rates for legal assistants were as follows: legal assistant—\$98; senior legal assistant—\$116; legal assistant specialist—\$127. *See* Inst. of Management & Admin., *New LAMA Data Can Help You Retain Your Paralegals* (Apr. 2001), at http://www.lamanet.org/Resources/IOMA_article.pdf (last visited July 7, 2002). This survey probably reflects accurate average billable rates for legal assistants in metropolitan areas; the figures may be lower in rural communities. *See, e.g.*, Jacqueline Meile Rasmussen & Paul M. Sedlacek, *Paralegals: Changing the Practice of Law*, 44 S.D. L. REV. 319, 330 (1999) (the average 1996 billable rate for South Dakota paralegals was \$48).

8. States might decide to be more proactive by defining the scope of permissible activities, or by excluding registered legal assistants from performing certain tasks. For example, registered legal assistants might be permitted to appear before state courts of limited jurisdiction, or they could be prohibited from appearing in divorce cases with contested custody issues. While not needed to make this proposal work, such “bright lines,” where they can be clearly drawn, will give additional comfort to those who seek more public (or lawyer) protection.

9. “The cornerstone of the lawyer’s obligation [to be accountable for paralegal work] has

malpractice. The attorney who registered the legal assistant defends the charge by claiming that the legal assistant acted outside the scope of his or her authority. The attorney's malpractice carrier then denies coverage on the basis of a policy provision excluding fraud, intentional acts, or criminal activity. This situation is foreseeable, of course, because the same scenario can arise under the present system. Fortunately, agency law protects third parties, such as clients, who may be injured when they reasonably rely on an appearance of authority.¹⁰

For their part, states are free to impose any competency criteria that they see fit. Some states might feel that a basic competency examination, like the National Federation of Paralegal Associations' (NFPA) Paralegal Advanced Competency Examination¹¹ or the National Association of Legal Assistants' (NALA) Certified Legal Assistant Examination,¹² should be an additional prerequisite to registration. This proposal is flexible enough to include such an examination. States could also require continuing education for annual or other periodic registration renewal.

B. It Protects the Public Interests

This proposal protects the public interests in three ways. First, the state's interest in the integrity of its legal services delivery system is protected through baseline education, experience, and character and fitness requirements. Second, as under the present system, the attorney remains ultimately responsible to the client, the court, and the public for negligence or professional misbehavior by his or her legal assistant. This component of the *status quo*, together with the

traditionally been the law of agency." ABA REPORT, *supra* note 1, at 55.

10. See, e.g., RESTATEMENT (THIRD) AGENCY § 2.03 cmt. a (Tentative Draft No. 2) (2001). "A principal may not choose to act through agents whom it has clothed with the trappings of authority and then determine at a later time whether the consequences of their acts suits its advantage." *Id.* at cmt. c.

11. For information about the Paralegal Advanced Competency Examination and NFPA's Registered Paralegal credential, see <http://www.paralegals.org/PACE/home.html> (last visited June 23, 2002).

12. For information about the Certified Legal Assistant Examination and NALA's Certified Legal Assistant credential, see <http://www.nala.org/cert.htm> (last visited June 23, 2002).

competency requirements described above, should give clients more protection from incompetent and unethical providers than they presently enjoy. Finally, this proposal strikes a balance between public protection and an equally important public interest: freedom of choice. With this freedom will come greater access to quality legal services.

1. Integrity of the Legal Services Delivery System

Just as a license to practice law does not guarantee a competent or ethical lawyer,¹³ registration will not guarantee a competent or ethical legal assistant. In other words, no regulatory system is perfect. The real issue, of course, is whether the regulatory system is properly tailored to the level of public risk involved. A plenary license requires a greater assurance of competence, typically in the form of more education and examinations.

Legal assistant registration as proposed here, however, is markedly different from a license to practice law. Legal assistants may not register themselves; instead, a supervising attorney who knows the legal assistant and his or her work must initiate the process. After registration, the attorney continues to supervise the legal assistant, perhaps even more rigorously. Those who employ legal assistants know that in countless law offices around the country today, legal assistants are effectively practicing law.¹⁴ An attorney who delegates more sophisticated tasks to a legal assistant has a greater stake in making sure that the legal assistant is capable, and that he or she performs assigned tasks competently. Regardless of the duties assigned or the level of supervision that is required, the attorney is responsible for his or her legal assistant's work product. These checks and balances reduce the risks to the public, and thus lower the competency criteria.

13. See Margaret Martin Barry, *Access to Justice: On Dialogues With the Judiciary*, 29 FORDHAM URB. L.J. 1089, 1103-04 (2002).

14. "[W]itnesses reported that many paralegals operate without meaningful supervision." ABA REPORT, *supra* note 1, at 3. See also *id.* at 55 (a "significant number of lawyers" do not provide training or supervision to the legal assistants they employ).

2. Protection From Incompetent Providers

Existing rules of professional conduct prescribe attorneys' ethical standards and indirectly impose the same ethical standards on legal assistants. If a state desires more direct ethical control, the state can modify its rules of professional conduct to include registered legal assistants, or it can adopt the ethical rules for legal assistants created by NFPA¹⁵ or NALA.¹⁶ Likewise, every state has a system in place to deal with attorney discipline matters. These systems can assume the authority to handle disciplinary complaints against registered legal assistants.

A client who suffers damage as a result of legal assistant negligence has the same remedy available to clients today: the client may sue the attorney,¹⁷ and the attorney's professional liability policy will indemnify the attorney for damages caused by the legal assistant's negligence. Of course, this scenario presumes that the attorney carries malpractice insurance and that the attorney lists the legal assistant as a member of his or her professional staff. Legal assistants may choose to purchase their own liability coverage where it is available.

Once states begin to register legal assistants, they will have to decide upon an appropriate standard of care. Should registered legal assistants be held to the standard of care of attorneys? Should a legal assistant standard of care apply? Or should the law develop a distinct standard of care for registered legal assistants? States may choose to address this issue via legislation, or they can leave it to the courts.

Because registered legal assistants will be a distinct category of legal professionals, and because they will hold themselves out to the public as having the competence to perform more sophisticated legal tasks, a registered legal assistant standard of care is the correct one. This standard of care is higher than that applicable to unregulated legal assistants, but lower than that of attorneys. Some may argue that the attorney standard of care is more appropriate, but the level of

15. NFPA's Model Code of Ethics and Professional Responsibility can be found at <http://www.paralegals.org/Development/modelcode.html> (last visited June 24, 2002).

16. NALA's Code of Ethics and Professional Responsibility can be found at <http://www.nala.org/stand.htm> (last visited June 24, 2002).

17. See ABA REPORT, *supra* note 1, at 58.

public risk is different. Because this proposal incorporates attorney supervision and accountability, holding registered legal assistants to an attorney standard of care is duplicitous. As a practical matter, the client who sues a registered legal assistant for malpractice will also sue the supervising attorney. An injured client will have the benefit of both standards of care.

Some opponents of legal assistant regulation argue that regulation is unnecessary because legal assistants work for lawyers and lawyers themselves are regulated.¹⁸ This argument relies on the premise that legal assistants cannot do things that constitute the practice of law because legal assistants are not regulated. It either presumes the *status quo*, or it is circular because it fails to recognize the *quid pro quo* for legal assistant regulation: legal assistants get to do more “lawyer stuff.”

3. Access to Legal Services

Virtually all commentators agree that increasing access to legal services is a worthwhile goal, one that the bar should pursue. Unfortunately, the agreement seems to end there. The bar has long advocated *pro bono* services and other activities that do not threaten its monopoly. These efforts, while commendable, have failed to bridge the unmet legal needs gap. When it comes to limited non-lawyer practice models as a way to increase access, the bar tends to be long on rhetoric and short on action. This proposal goes a long way toward achieving that goal without sacrificing either public protection or quality of service.

Certain segments of the legal market are chronically underserved: immigration law, elder law, landlord-tenant law, and entitlement law are just a few examples.¹⁹ To make matters worse, people who need

18. See, e.g., Thomas P. Flynn, *Should More Be Done to Credential Paralegals?*, MICH. BAR J., Mar. 2001, 52, 59-60.

19. See, e.g., Rhode, *Too Much Law*, *supra* note 1, at 997-98. The ABA has abstracted the findings of a variety of legal needs surveys. ABA REPORT, *supra* note 1, at E-1. See generally ABA CONSORTIUM ON LEGAL SERVICES & THE PUBLIC, LEGAL NEEDS & CIVIL JUSTICE, A SURVEY OF AMERICANS: MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994), available at <http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf> (last visited July 15, 2002). *But cf.* Wayne Moore, *Improving the Delivery of Legal Services for the Elderly: A Comprehensive Approach*, 41 EMORY L.J. 805, 805-16 (1992) (finding that the

these services are often the victims of unscrupulous practitioners who promise much, provide little, and charge exorbitant sums. The legal needs of many middle class consumers also go unmet, at least in part because of the actual or perceived costs of hiring a lawyer.²⁰ Yet these are viable markets for attorneys to serve, if they can do so cost-effectively. Registered legal assistants, working under attorney supervision, can meet these needs with quality and lower cost services.

Critics respond in several ways. First, they say that there are plenty of lawyers out there who are struggling, and who would gladly take on this work at \$50 or \$60 per hour.²¹ If so, where are they? If so many lawyers are ready and willing to meet the needs of these underserved populations, then why do they remain underserved? The truth is that lawyers are not willing to take on this type of work. Lawyers have naturally gravitated to practice areas that offer a greater chance for higher-paying clients.²² There is no reason to think that this tendency will change in the future.

Other critics charge that leaving these clients to be served by non-lawyers relegates them to “second class” status.²³ The fact that they are elderly, or poor, or unsophisticated, or do not understand our language or culture should not mean that they must accept non-lawyer representation. Few would argue that socioeconomic status should be a barrier to quality legal representation. Again, though, the question remains: Where are all the lawyers? They are doing personal injury work, or defending insurance companies, or writing estate plans for clients who are fortunate enough to have to worry about their estates.

elderly have many unmet legal needs but questioning the accuracy of other studies considering the legal needs of the elderly).

20. “[I]ncreasingly our civil justice system is also inaccessible to those of modest or moderate means.” ABA, AN AGENDA FOR JUSTICE: ABA PERSPECTIVES ON CRIMINAL AND CIVIL JUSTICE ISSUES 80 (1996).

21. See, e.g., Sherri Kimmel, *Stemming the Tide of Unauthorized Practice*, 13 ME. B.J. 164, 165 (1998).

22. See Rhode, *Too Much Law*, *supra* note 1, at 991-92 (arguing that the problem is not too many lawyers, but too many lawyers seeking the same prosperous clients).

23. See Richard Abel, *Big Lies and Small Steps: A Critique of Deborah Rhode’s Too Much Law, Too Little Justice; Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 1019, 1025-26 (1998).

This argument also assumes that non-lawyer representation must, *de facto*, be of a lower quality than lawyer representation. Such an assumption is more arrogant than accurate. A registered legal assistant who is trained and experienced in landlord-tenant matters, for example, is most likely every bit as competent to handle routine landlord-tenant disputes as her attorney counterpart.²⁴

Critics of non-lawyer representation also argue that adding non-lawyers to the mix will not lower the cost of legal services. Indeed, they say, allowing legal assistants to do more “lawyer stuff” means that those legal assistants will command a higher wage, which will increase the cost of legal services. Common sense dictates that registered legal assistants will expect to be paid more than unregistered legal assistants. But it does not follow that the cost of legal services will increase as a result. Registered legal assistants will take on some of the tasks now performed by higher-priced lawyers. Unless one assumes that billing rates for registered legal assistants will be higher than those of lawyers, then the result will be lower costs. Recent history, with the entry of legal assistants into the legal marketplace, suggests that consumers will prefer the lower cost alternative, especially if quality of service is not sacrificed.

C. It Protects the Lawyers

Lawyers should not feel threatened by this proposal. It preserves their monopoly over the delivery of legal services. What’s more, business-savvy lawyers will recognize that this proposal can add to the bottom line by making both them and their legal assistants more productive. Just as it does with legal consumers, this proposal gives lawyers the freedom to choose. Those who prefer to do all the heavy lifting themselves can employ unregistered legal assistants and continue with business as usual. Others can register their legal assistants, let them do more, and see where the new business model takes them.

24. See Carl M. Selinger, *The Retention of Limitations on the Out-of-Court Practice of Law by Independent Paralegals*, 9 GEO. J. LEGAL ETHICS 879, 883 (1996) (noting that many attorneys take on tasks for which they have little training or experience); Barry, *supra* note 13, at 1103.

1. Preserving the Monopoly

No self-respecting lawyer will admit that he wants or needs “protection.” But the actions of the bar speak louder than its words. Non-lawyer practice has been studied, debated, and written about *ad nauseam*, and many have concluded that implementing some form of it would be a good thing.²⁵ In almost every instance though, the bench or the bar, or both, have defeated efforts to create a limited practice model.²⁶ Justifications for keeping the *status quo* include the familiar “no need to regulate” and “protecting the public” arguments. The former argument is flawed because, as demonstrated above, it either presumes the *status quo* or it is circular. As to the latter argument, protecting the public is a legitimate state interest. It is also the duty of any profession entrusted with a monopoly.

But the bar has overplayed this card. It turns out that the public is not as convinced of its own need for protection as are the lawyers responsible for doing the protecting.²⁷ Legal consumers have repeatedly demonstrated that they want the freedom to make choices. When alternatives to lawyers are available, many consumers have chosen non-lawyer or self-help.²⁸ Perhaps understandably, lawyers find this unsettling because they have their own interests to protect.

If the public wants to be able to choose, why not adopt a system that gives the public a choice? As a practical matter, any drastic change is unlikely. To borrow an admittedly imperfect analogy, the fox is guarding the chicken coop, and this fox has the power to effectively prevent anyone else from taking his job. Any regulatory

25. Indeed, the ABA’s Commission on Nonlawyer Practice has said as much: “The Commission recommend[ed] that the range of activities of traditional paralegals be expanded, with lawyers remaining accountable for their activities.” ABA REPORT, *supra* note 1, at 5. See also ABA, REPORT OF THE AMERICAN BAR ASSOCIATION NATIONAL CONFERENCE ON ACCESS TO JUSTICE IN THE 1990S 37 (1989) (“The conference strongly supported the relaxation of current barriers to the involvement of non-attorneys in the provision of legal assistance . . .”).

26. See Abel, *supra* note 23, at 1027; see also Marilu Peterson, *New Jersey Rejects Legal Assistant Licensing Recommendations*, 12-DEC UTAH B.J. 22 (1999); Rhode, *Alternative Approaches*, *supra* note 1, at 705.

27. See, e.g., Rhode, *Policing the Monopoly*, *supra* note 1, at 3-4.

28. *Id.* See generally Julee C. Fischer, Note, *Policing the Self-Help Legal Market: Consumer Protection or Protection of the Legal Cartel?*, 34 IND. L. REV. 121 (2000); Bruce D. Sales, et al., *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553 (1993).

proposal that grants legal assistants even limited plenary practice rights asks the fox to let someone else do the guarding. This proposal is workable because it avoids that: it simply asks the fox to let someone else *help* him guard, and it gives the fox the power to decide who that someone else will be, how much guarding they will do, and to a large extent, who gets to eat the chickens. Stated a bit differently, this proposal concedes that lawyers will not voluntarily relinquish their monopoly, nor is it likely to be taken away from them anytime soon.²⁹

2. Staying in Business and Protecting Profits

What about the argument that this proposal will put lawyers out of business? Experiences in the United States and abroad suggest the unlikelihood of such a result. In 1985, the British Parliament created a new type of legal professional, the licensed conveyancer. Until that time, residential real estate transfer work had been the exclusive domain of solicitors. Solicitors were certain that licensed conveyancers would spell the end for many of them, but instead, market forces took over. High rents and other business expenses made it difficult for licensed conveyancers to compete, and solicitors added still more pressure by lowering their prices. A 1992 study showed that even though licensed conveyancers charged much less than solicitors, the licensed conveyancers' market share was one percent or less.³⁰

Here at home, cut-rate interstate legal service clinics like Hyatt Legal Services enjoyed success in the late-1970s and the 1980s. So-called "Main Street lawyers" responded to these threats by lowering their fees and increasing their efficiency. By the early- to mid-1990s, the interstate clinics found that they simply could not compete.³¹

Critics who find these comparisons less than convincing should remember that this proposal does not create a legal assistant who can compete on an equal footing with lawyers. Registered legal assistants will not be the functional equivalent of licensed conveyancers, nor

29. See Abel, *supra* note 23, at 1027.

30. Selinger, *supra* note 24, at 888-89.

31. *Id.* at 891-92.

will they be able to set up low-cost legal service clinics on their own to directly compete with lawyers. Legal assistants will be dependent upon lawyers for registration in the first instance, and on an ongoing basis they will be subject to lawyer supervision and control.

The demand for legal services is finite. If a registered legal assistant is able to function competently at the level of, for example, a third-year associate, then one can assume that market forces would prefer the lower cost legal assistant to the higher cost lawyer, with all other factors being equal. Thus, this proposal might impact the demand for newly-minted lawyers. But the long-term impact on established practitioners is more likely to be positive than negative. In the end, if the market does select lower cost providers over their more expensive counterparts, as long as quality of service is not compromised, isn't that a good thing?

Many attorneys will be quick to capitalize on the opportunities that this proposal will offer. With a registered legal assistant on staff, the attorney will be free to devote more time to more complex, and presumably more lucrative, legal work. The registered legal assistant who performs more sophisticated work will also increase profits. In addition, registered legal assistants will enable attorneys to serve markets where they have found it difficult to compete, and to do so more cost-effectively. Smart lawyers will use registered legal assistants to enhance profitability.

3. It Benefits Legal Assistants

Legal assistants have struggled for recognition as a distinct category of legal professionals since the profession's beginnings three decades ago. Many within the legal profession, and even more outside of it, know little about what legal assistants are or what they are capable of doing. Both NALA and NFPA have done much to help legal assistants organize, and to differentiate legal assistants from both legal secretaries and lawyers. A third association, the Legal Assistant Management Association (LAMA), is interested in the legal assisting profession generally, but it is more specifically concerned with issues facing legal assistant managers. These national

policymaking associations have formulated educational standards, created proficiency examinations,³² established codes of ethics for legal assistant practice,³³ and advocated on behalf of the profession.³⁴

Each association has adopted a policy on state-based legal assistant regulation. Unfortunately, the three organizations are not unanimous: NFPA and LAMA each favor some form of regulation,³⁵ while NALA opposes it.³⁶ Given this divergence, it is probably no coincidence that legal assistant regulation has largely failed to materialize.

Why are some legal assistants opposed to regulation? In general, they feel that regulation will be harmful to the profession. More specifically, NALA offers the following reasons for its opposition to regulation:³⁷

- There is no demonstrated public need for regulation;
- Regulation will increase the costs of legal assistants for employers;

32. See *supra* notes 11-12 and accompanying text.

33. See *supra* notes 15-16 and accompanying text.

34. For more information about these associations, see NALA's Web site at <http://www.nala.org>, NFPA's Web site at <http://www.paralegals.org>, and LAMA's Web site at <http://www.lamanet.org>.

35. NFPA endorses a mandatory licensing scheme, so long as licensed legal assistants are "able to do more under the regulatory plan than they were previously doing." NAT'L FEDERATION OF PARALEGAL ASS'NS, STATEMENT ON ISSUES AFFECTING THE PARALEGAL PROFESSION—PARALEGAL REGULATION (2000), at <http://www.paralegals.org/Development/statement/parapro8.html> (last visited June 10, 2002) (urging that regulation will promote freedom of choice, greater public access to legal services, and reduced costs). LAMA supports "voluntary registration when it results in expansion of legal assistant responsibilities It is up to employers to determine the value of legal assistant registration to their businesses and their clients." LEGAL ASSISTANT MGMT. ASS'N, LEGAL ASSISTANT MANAGEMENT ASSOCIATION'S POSITION PAPER ON LEGAL ASSISTANT REGULATION (1998), at <http://www.paralegals.org/Report/On-line97/lama.html> (last visited June 11, 2002).

36. "NALA believes it is the responsibility and duty of a profession to regulate itself rather being subject to state wide governmentally imposed regulations." Nat'l Ass'n Legal Assistants, *Questions & Answers About NALA* (Aug. 5, 1998, Rev. Sept. 1999), at http://www.nala.org/NALA_QA.htm (last visited July 7, 2002). NALA appears to have determined that the best approach to professional regulation is one that embraces the status quo. "NALA's focus on this issue is the expansion of the legal assistant career field within its present setting. NALA members believe this to be the future growth for our profession." *Id.*

37. NAT'L ASS'N LEGAL ASSISTANTS, ISSUES RELATED TO LICENSURE AND GOVERNMENTAL REGULATION OF PARALEGALS (DEC. 14, 1998), at <http://www.nala.org/LicIssues.htm> (last visited July 7, 2002) [hereinafter NALA, LICENSING ISSUES].

- Regulation will increase the costs of legal services to the public; and
- Regulation will inhibit both the growth of the legal assistant profession and the utilization of legal assistant services.

NALA's objection that there is no public need for regulation seems to rely on the fact that legal assistants work for lawyers, or under lawyer supervision. As such, they do not provide services "directly" to the public.³⁸ In other words, like the "no need for regulation" argument advanced by lawyers, it assumes the *status quo*. Based on this assumption, NALA prefers voluntary certification via its Certified Legal Assistant Examination as a means of professional self-regulation.³⁹ It is not clear whether NALA would endorse registration, as proposed here, in exchange for freedom from UPL restrictions. Given the benefits registration would confer upon legal assistants, though, support for this proposal would make sense.

NALA contends that legal assistant regulation will result in increased costs to employers. It is true that registered legal assistants would probably come with a higher price tag to employers. This proposal, however, gives both the lawyer and the legal assistant a choice. Lawyers who do not perceive the benefits of registration are free to employ unregistered legal assistants. Other lawyers will see the potential that the registered legal assistant brings to increase revenues, and they should be willing to pay a wage premium. It is hard to see how this choice could be bad for legal assistants, or for the legal assisting profession as a whole.

With regard to NALA's contention that regulation will increase the costs of legal services, this proposal carries with it only a minimal cost. Any cost involved would certainly not be enough to exert upward pressure on the present cost of legal services. Because it should encourage the performance of legal services by lower cost legal assistants instead of higher cost attorneys, this proposal will most likely lower the cost of legal services.

NALA also argues that legal assistant regulation will hinder the growth of the profession and utilization of legal assistants. This

38. *Id.*

39. *Id.*

criticism seems to be based particularly on the perceived impact of New Jersey's recent licensing initiative. That licensing proposal would have placed legal assistants with less formal education and more on-the-job training at a competitive disadvantage, and it would have distinguished between legal assistants employed by attorneys and those working independently.⁴⁰ In that context, NALA's criticism was legitimate. This proposal, on the other hand, is much different. No one is prohibited from being a legal assistant because of his or her education or training, or lack thereof. Growth of the profession should not, therefore, be an objection. In addition, this proposal should encourage the utilization of legal assistants generally, and registered legal assistants particularly.

This "growth and utilization" objection highlights a particular vulnerability of the legal assisting profession as it relates to regulation. The profession is, at present, almost entirely unregulated. Anyone, regardless of his or her education, training, or experience, can "hang out a shingle" in most states and call himself or herself a legal assistant. While both NALA and NFPA have created educational and other standards for membership, professional realities necessitate that these standards cast a wide net. Differing levels of education, from a high school diploma to a four-year college degree with post-degree certification, combined with differing levels of on-the-job experience, qualify legal assistants to join these associations. Fairly loose standards are to be expected of a fledgling profession that seeks to grow and establish an identity.

Permissive entry standards can only survive for so long, however, if a profession expects to transition from youth to adulthood. In order to be widely recognized as a distinct group of professionals entitled to a special place of their own within the legal services delivery system, legal assistants must make that admittedly painful transition. This means that the profession must speak with one voice on uniform standards for professional qualifications and professional practice.⁴¹

40. See generally NAT'L ASS'N LEGAL ASSISTANTS, RESPONSE TO THE REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON PARALEGAL EDUCATION AND REGULATION (1999), at <http://www.nala.org/NJStmt.htm> (last visited July 7, 2002).

41. The legal assisting profession seems to be aware that its internal disagreements have become self-defeating. "The profession continues to debate the issue of licensure, often to the detriment of the growth of our career field." NALA, LICENSING ISSUES, *supra* note 37.

Eventually, some within the profession may be left behind because they cannot meet these standards. The adoption of professional standards will be a difficult but essential step along the path to professional distinction.

Ideally, this step should be designed in a way that allows as many legal assistants as possible to continue within the profession. Legal assistant registration as proposed here does so. No legal assistant will be forced to make a career change if this proposal is adopted. Unregistered legal assistants, however, may aspire to registration, and state competency criteria will set the baseline for professional qualifications. If, over time, the legal market finds a place for registered legal assistants, then unregistered legal assistants may find themselves in the minority. The legal assisting profession will then gravitate toward those uniform standards. In a very real way, then, this proposal is not a wholesale leap into regulation, but a way to bridge the gap between today's model and a model for the future.

Legal assistants may be concerned that this proposal will limit their employment mobility. Specifically, some legal assistants might view the competency requirement of one year of experience as a deterrent to changing jobs. This concern can be addressed by a provision allowing a registered legal assistant with a specified amount of experience to be re-registered by a new employing attorney after a shorter period. For example, a state could allow a legal assistant who has been continuously registered for at least three years without any ethical complaints or disciplinary actions to be immediately re-registered by a subsequent employing attorney, or to be re-registered after 60 days of employment. Considering that the employing attorney is responsible for the registered legal assistant's work, the attorney could decide to either register the legal assistant immediately, or to delay registration until the attorney gained firsthand experience with the legal assistant's capabilities.

CONCLUSION

This proposal is attractive because it has the potential to offer something for everyone: legal assistants, lawyers, and the public. It can be implemented and administered with minimal cost. Unlike proposals that suggest plenary licensure, registration does not remove

attorneys from the equation, nor does it diminish their role in the delivery of legal services. Registered legal assistants are able to avoid UPL restrictions, but attorney supervision and accountability remain intact as added consumer safety nets. Attorneys and legal assistants can choose registration or not, as they see fit. And attorneys, legal assistants, and clients can decide on the level of legal assistant services to be performed on a case-by-case, and perhaps even a task-by-task, basis.

If this proposal is adopted, the market will decide whether unregistered legal assistants disappear from the scene completely. Legal assistants will have to decide whether to invest in the education needed to register. This decision will involve a cost-benefit analysis that weighs the investment against increased earning potential and other, more intangible, benefits. Attorneys will have to decide whether a wage premium for registered legal assistants can be recovered in additional fees. Legal consumers will decide whether they want to use the services of registered legal assistants, and if so, for what kinds of tasks.

This much seems certain: this proposal incorporates freedom of choice with the safety of the present system. It offers something for everyone, including those who want no part of it. It's worth a try.