

December 18, 2002

Arthur Garwin
Counsel on Publications and Professionalism
American Bar Association
Task Force on the Model Definition of the Practice of Law
750 North Lake Shore Drive
Chicago, Illinois 60611

Re: Draft Definition of the Practice of Law

Dear Mr. Garwin:

The National Federal of Paralegal Associations (NFPA) appreciates the opportunity to submit this testimony in response to the Task Force's draft definition. NFPA questions the need to adopt a definition that may not allow for the vast array of practice areas, task and delivery plans currently in place throughout the United States. NFPA looks forward to meeting the Task Force on February 7, 2003.

Background

NFPA is dedicated to the delivery of high quality, cost-efficient legal services. NFPA is a non-profit professional organization comprising state and local paralegal associations throughout the United States and Canada. Founded in 1974, NFPA is a federation of 60 member associations representing over 15,000 individual members who reflect a broad diversity of experience, education and job responsibilities. NFPA has been the national voice for the paralegal profession for over 25 years. Designed as a grass-roots organization, NFPA is an issues-oriented, policy driven association directed by its membership.

NFPA shares your goals in recognizing an attorney's ethical obligations with respect to the Utilization of paralegal services. NFPA also recognizes those obligations as they apply to paralegals individually. NFPA members supported that premise when they created and adopted the NFPA Model Code of Ethics and Professional Responsibilities¹ (Model Code) in May 1993, delineating the principles for ethics and conduct to which every paralegal should aspire. NFPA believes it is important to emphasize that its members do not endorse or support the unauthorized practice of law.

NFPA members affirm the paralegal profession as a self-directed profession that supports increased quality, efficiency, and accessibility in delivering legal services. NFPA promotes growth, development, and recognition of the profession as an integral partner in delivering legal services. Further, NFPA encourages study of means to improve access to legal services and supports any activity intended to increase the use of paralegal services for delivering legal services.²

Our stated mission is to expand the practice of paralegals. By working with other

members of the legal team, educators, the judiciary, and legislators we have and are continuing to expand our profession in a responsible and ethical manner.

Since its formation, NFPA has:

- monitored legislation, case law, and researched reports on various issues that could affect the paralegal profession;
- worked with and testified before many organizations such as legislatures, bar association task forces, and court committees on issues related to paralegal participation in delivering legal services and the paralegal profession generally;
- filed *amicus* briefs with courts throughout the United States on several issues that could affect the paralegal profession;
- drafted a Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement in 1993;
- participated in the ABA's Commission on Non-Lawyer Practice;
- participated in the New Roles and the Law Conference in 1996;
- assisted member organization Washington State Paralegal Association in its successful efforts to pass Washington's General Rule 25 which adopts criteria and a mechanism to address limited licensure to practice law to address access needs; and,
- adopted an advanced competency examination, PACE.³

NFPA defines a paralegal as one who is:

A person qualified through education, training or work experience to perform substantive legal work that requires knowledge of legal concepts and is customarily, but not exclusively, performed by a lawyer. This person may be retained or employed by a lawyer, law office, governmental agency, or other entity or may be authorized by administrative, statutory or court authority to perform this work.

NFPA's definition embraces our diversity working with attorneys and in positions that assist the public directly under administrative, statutory or court authority.⁴ NFPA opposes the unauthorized practice of law and provides its members with timely information regarding decisions and interpretations of current law.

NFPA is concerned as to the ABA's perceived need to adopt a definition that would not necessarily take into account the vagaries of practice across all 50 states. The vast array of practice areas and delivery schemes has been recently debated and discussed in the Multi-Disciplinary Practice (MDP) arena that the ABA and other bar associations have addressed comprehensively, but without uniformity.

NFPA acknowledges that the ever increasing need for high quality legal services has made it necessary for attorneys to find new ways to meet those needs while maintaining both profitable practices and the integrity of the legal profession and addressing public perceptions of any real harm to consumers. The line between what constitutes the practice of law and what is permissible business and professional activity by non-lawyers is less distinct. As our society becomes more complex, our laws become more enmeshed

in everyday life. Interpreting laws, legal concepts, and providing legal and law related services have become more and more necessary for our social and business survival.

Attorneys have not and cannot possibly meet the needs of the market. Thus, the NPFA strongly believes it is necessary for non-lawyers such as victim advocates, lobbyists, title agents, real estate brokers, accountants, mediators, arbitrators, estate or trust officers, and paralegals to perform these legal and law related services, once exclusively performed by attorneys, in a competent and less expensive manner. A great deal of empirical research has been done addressing practice by non-lawyers and those conclusions are telling as well.⁵ To effectively respond to the issue of UPL, the legal profession must accurately assess the nature and extent of UPL. Vague statements of public harm are no longer appropriate or adequate. Specific circumstances and proof of harm must be documented in order to clearly reflect the nature and seriousness of the problem before deciding on an appropriate remedy. NFPA is concerned that a “cure” to perceived problems and anecdotal instances of unethical conduct by non-lawyers will impede avenues to responsibly create, expand and regulate alternative delivery means that assist in the access to justice crisis.

Should the ABA adopt the definition, NFPA and its member associations strongly encourage the Task Force to include a mechanism and suggested criteria that allows for regulated practice by non-lawyers that increases access to justice for low to middle income consumers, and the expansion of the role of trained, qualified paralegals and others, such as occurred in Washington State with the adoption of GR 25.⁶

Over 75% of low to middle income persons’ legal needs go unmet.⁷ Paralegals can play a role in rectifying this unacceptable number.

NFPA participated on the American Bar Association Commission on *Nonlawyer Practice*, which produced the June 1995 report entitled, *Nonlawyer Activity in Law-Related Situations--A Report with Recommendations*. At that time NFPA urged the Commission to develop methods to:

- identify traditional and non-traditional areas where the paralegal's role may be expanded;
- revise the ABA Model Rules of Professional Responsibility to allow paralegal roles and responsibilities to be expanded by revising the references to ultimate responsibility and accountability of a lawyer for a paralegal's work rather than *under direct supervision* and the reference concerning nonlawyer partnerships with lawyers, fee sharing arrangement with nonlawyers, and so forth;
- provide a model for revisions to court rules. This model would permit expanded paralegal roles and responsibilities;
- provide a model for expanded rules of practice that allow paralegals and other qualified nonlawyers to represent persons in state administrative agencies.

The report noted that more extensive utilization of paralegals and allowing paralegals to perform more substantive duties would provide the public with lower cost alternatives to certain widely used legal services.

Though the Commission's Report and Recommendations were not adopted by the ABA Board of Governors, NFPA strongly believes that the Commission's report and recommendations are even more pertinent today, than when issued seven years ago. The current economic realities and the greater needs for access to the legal system demands that alternative creative ways to meet those needs are found. NFPA respectfully suggests that the Task Force give more thought to those recommendations, perhaps take testimony from affected persons, and seek more input prior to finalizing its suggested definition of the practice of law.

NFPA is concerned that the draft definition does not reflect current reality. The draft definition states a person is "presumed to be practicing law when a non-lawyer represents someone before an adjudicative body," but does not provide exceptions for those instances where non-lawyers are authorized to do so.⁸

Conclusion

The inclusion of criteria to evaluate limited licensure to practice law to expand the role of paralegals and non-lawyers may better serve our communities, and be a part of the resolution of our national access to justice crisis, is essential to any definition of the practice of law. Qualified non-lawyers should continue to provide representation or assistance within the parameters already identified and responsible expansion of such parameters would allow greater access to justice.

NFPA believes that nonlawyer activity is best addressed at the state level, and in accordance with its grass roots structure and position on regulation, deem states, rights issues to be dominant in the forum of nonlawyer practice issues. However, the legal profession must recognize its responsibility to provide the public with the opportunity to choose different levels of expertise and cost, depending upon the type of services needed.

The continued existence of unmet legal needs should be of paramount concern to lawyers, paralegals, and nonlawyers alike. The legal community must strive to provide a greater variety of legal services to allow more freedom of choice, easier access to professional services for the public, and reduced costs.

Should the ABA adopt a definition, NFPA strongly advocates specific exceptions be provided in the ABA definition and suggests that the following language be added to (d) (4) "or as otherwise authorized by statute, court rule, tribal law, or governmental authority."

If you have any questions please contact Karen Belcher by e-mail at President@paralegals.org or Stephen Imondi by e-mail at VPPI@paralegals.org.
Respectfully,

Karen Belcher, RP
Stephen P. Imondi, RP
President Vice President for Positions

and Issues
Attachments:

1. [Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement](#)
2. [Paralegal Responsibilities](#)
3. [Paralegal Advanced Competency Exam](#)
4. [Agencies that Allow Nonlawyer Practice](#)
5. [Washington Court Rules: General Rule 25](#)
6. [Washington Court Rules: APR 12](#)

¹ See attachment 1

² See attachment 2, NFPA's Paralegal Responsibilities

³ PACE is the Paralegal Advanced Competency Exam that was developed and marketed to Paralegals whether members of NFPA or not. Attachment #3.

⁴ There are many instances of appropriate direct service allowed, see Attachment #4.

⁵ Rhode, Deborah L. "The Delivery of Legal Services by Non-Lawyers," 4 Georgetown Journal of Legal Ethics 209 (1990); "The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis," 86 Yale Law Journal 104-184 (1976); "Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice," 22 New York Review of Law and Social Change, 701 (1996)

⁶ Attachment #5. Also, for your information, please see Attachment #6, Washington State Court Rules "Admission to Practice Rules" (APR) Rule 12.

⁷ ABA Nonlawyer Activity Report, August, 1995, page 75. "Although nearly half of all U.S. households find themselves in situations that could be addressed by the civil justice system, a major 1994 survey by the ABA's Consortium on Legal Services and the Public found that 71% of the situations facing low-income households and 61% of those facing moderate income households are not being brought to any part of the justice system. Another 8% and 11%, respectively, are being brought to courts, mediators or administrative tribunals without a lawyer having been retained. Only 21% and 28% of the situations, respectively, are lawyers retained. (fn.238). Other studies have produced similar conclusions. (fn. 239)" fn. 238: ABA, Report on the Legal Needs of the Law-and Moderate-Income Public: Findings of the Comprehensive Legal Needs Study, Table 4-1 at 20 and Table 4-7 at 27. The legal needs study was conducted by the Institute for Survey Research at Temple University for the ABA Consortium on Legal Services and the Public. The study also found that both low- and moderate-income households are more likely to be satisfied with the ultimate resolution of a matter if it is brought to the legal/judicial system for a solution than if it is not. Id. at 32 (Figure 4-2). The conferees attending the ABA 1994 Just Solutions Conference, most of whom were nonlawyers, pointed out that just solutions to problems do not always entail adversarial proceedings in a court of law and that mediation, negotiation, court facilitated self-help and other justice system mechanisms can also bring about just solutions. They recognized, however, that in many instances, traditional adjudication is the optimal approach. See ABA Just Solutions Report, supra note 121, at 24, 29. fn. 239: Barbara Curran conducted the seminal study of legal needs in 1977 and found that the legal profession addressed only 24 to 28 percent of the significant legal problems of all adults. Curran, AMERICAN BAR FOUNDATION, THE LEGAL NEEDS OF THE PUBLIC, supra note 104, at 161 [hereinafter Curran Legal Needs Study]. See also AMERICAN BAR ASSOCIATION, TWO NATIONWIDE SURVEYS: 1989 PILOT ASSESSMENTS OF THE UNMET LEGAL NEEDS OF THE POOR AND OF THE PUBLIC GENERALLY 389 (1989); See also supra note 232 and accompanying text for a 1994 study commissioned by the State Bar of Nevada which yielded similar results.

⁸ Attachment #4.

Agencies That Allow NonLawyer Practice

NFPA's Roles and Responsibilities Committee has been researching which federal agencies allow nonlawyer representation. What follows is a compilation of the Committee's research to date. In future the committee will develop a list of specific

paralegal tasks under each of these areas. If you or someone you know works in any of these areas, you can assist in this endeavor.

Federal Agencies That Permit Nonlawyer Representation

The statutory authority for each is shown after the name of the agency.

Board of Immigration Appeals

Immigration and Naturalization Service [8 CFR 292.1-3]

Bureau of Indian Affairs

Financial Assistance and Services Program [25 CFR 20]

Civil Aeronautics Board [14 CFR 300.1-6, 302.11]

Comptroller of the Currency [12 CFR 19.3]

Consumer Product Safety Commission [16 CFR 1025.61, et seq.]

Department of Agriculture

Food Stamps [7 CFR 273]

Marketing Service [7 CFR 50.27]

Department of Commerce

Patent & Trademark Office* [35 U.S.C. § 31-33]

*Only registered practitioners are permitted to practice. Nonlawyers become registered by passing a character and fitness review and an examination. Nonlawyers who have served four years in the examining corps of the Patent and Trademark Office may waive the exam. See 57 CFR 1.341

Office of Secretary [5 CFR Part 1201]

Department of Health and Human Services

Food and Drug Administration [32 CFR 12.40, 12.45]

Public Health (Medicare, Part B) [42 CFR 405]

Welfare (Medicare, Aid to Families w/Dependent Children [45 CFR 205]

Department of Justice

Drug Enforcement Administration [21 CFR 1316.50]

Department of Labor

Benefits Review Board [20 CFR 802.201(b), 802.202]

Employees Compensation Appeals Board [20 CFR 501.11]

National Railroad Adjustment Board* [45 U.S.C. 3153]

*Only entities identified in 45 U.S.C. § 151 are allowed to practice. Almost 100% of nonlawyer representation is by industry employees.

Wage and Appeals Board [20 CFR 725.362(a), 725.365, 725.366(b)]

Department of Transportation

Maritime Administration* [46 CFR 201.21]

*Only registered nonlawyers are permitted to practice.

Department of Veterans Affairs

Veterans Administration [38 CFR 14]

Federal Deposit Insurance Corporation* [12 CFR 308.04]

*Only qualified nonlawyers are permitted to represent.

Federal Energy Regulatory Commission [18 CFR 385.2101]

Federal Maritime Administration* [46 CFR 502.30]

*Only registered nonlawyers are permitted to appear. Certificates of registration are issued on payment of processing fee and completion of application form indicating sufficient educational qualifications and recommendations. There is no testing or formal licensing.

Federal Mine Safety & Health Review Commission* [29 CFR 2700.3(b)]

*Appearances are made at trial hearings before administrative law judges and at appellate reviews before commissioners. A nonlawyer may practice only if the nonlawyer is a party, a representative of miners as described in 30 CFR § 10.1(b), or the owner, partner, full time [sic] officer or employee of the party-business entity; otherwise a nonlawyer is permitted to appear for limited purpose in special proceedings.

General Accounting Office* [31 U.S.C. 731-732; 4 CFR 11, 28; GAO Orders 2713.2, 2752.1 and 2777.1]

*Permitted in adverse actions, grievance proceedings and discrimination complaints.

Internal Revenue Service* [13 CFR Part 10; 31 U.S.C. 330]

*Nonlawyers must become enrolled agents by passing a character and fitness review and successfully completing a special enrollment examination testing on federal taxation and related matters. A nonlawyer may also qualify based on former employment with the IRS, provided such duties qualify the individual.

Interstate Commerce Commission* [49 CFR 1103]

*Only registered nonlawyers are permitted to practice. To register, applicant must (1) meet educational and experience requirements, (2) undergo character and fitness review, (3) pass exam administered by the agency testing knowledge in the field of transportation, and (4) take an oath. See 49 CFR § 1103.3.

National Credit Union Administration [12 CFR 747]

National Mediation Board [agency governed by 29 CFR 1200]

National Transportation Safety Board* [49 CFR 821, 831, 845]

*Nonlawyer appearances are infrequent except at investigatory levels. Nonlawyer participation is discouraged because technical expertise is required.

Occupational Safety and Health Review Commission [29 CFR 2200.22]

Small Business Administration [13 CFR 121.11, 134.16]

Social Security Administration [42 U.S.C. 406(a); 29 CFR]

Supplemental Security Income (SSI) [20 CFR 416, subpart O]

U.S. Customs Service [no statute or regulation]

U.S. Environmental Protection Agency [40 CFR 124, 164.30, 22.10]

State Agencies That Permit Nonlawyer Representation

In addition to nonlawyer representation at federal agencies, the Committee also studied state and local agencies that allow nonlawyer representation. Below is an initial listing.

Alaska

Human Rights Commission (Alaska Op. Att. Gen. 1979 WL 22915)

Nonlawyer may appear at an administrative hearing.

California

Workers Compensation (California Bar Committee on Professional Responsibility formal opinion 1988-103)

A law firm can allow its paralegals to represent clients at workers compensation hearings if there is supervision and the client consents to nonlawyer representation.

California

Labor (California Labor Code, sections 5501, 5700)

Allows nonlawyer representation.

California

Unemployment (California Unemployment Insurance Code § 1957 (1956))

Nonlawyer may represent any individual claiming benefits in any proceedings before the Appeals Board.

Illinois

Department of Unemployment Security (820 ILCS 405/806)

A nonattorney may represent an individual or entity in any proceeding before the Director, referee or board of review.

Illinois

Workers Compensation (50 Ill. Admin Code Sec. 7020.40(b))

Nonlawyers may appear on routine matters such as agreed continuances or other agreed ministerial acts before the Industrial Commission for workers compensation matters.

Michigan

Unemployment Compensation

Allows nonlawyer representation.

Minnesota

Workers Compensation

Nonlawyers allowed to represent employers before workers compensation administrative law judge.

New York

70% of state agencies and 63% of New York City agencies allow some form of nonlawyer representation. [New York County Association, Committee on Legal Assistants, Committee Report (October 14, 1993)]

Ohio

Workers Compensation

Nonlawyers are allowed to represent parties before the Industrial Commission.

Washington - Seattle (King County)

Courts, King County Bar Association Opinion

Nonlawyers are allowed to present ex parte orders that have been agreed on.

Washington - Tacoma (Pierce County)

Courts, Pierce County Bar Association Opinion

Nonlawyers are allowed to present ex parte orders that have been agreed on.

Wisconsin

Workers Compensation

Allows nonlawyer representation.

You can move the Committee's work along by sharing the information you know. If you can assist the Committee by informing it of duties performed by a nonlawyer representing clients before a federal, state or local agency, and the authority therefor, please send the information to NFPA, Post Office Box 33108, Kansas City, Missouri 64114 or VPPI@paralegals.org.