Avoiding the Unauthorized Practice of Law: Proposed Regulations for Paralegals in South Carolina

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AVOIDING THE UNAUTHORIZED PRACTICE OF LAW: PROPOSED REGULATIONS FOR PARALEGALS IN SOUTH CAROLINA

I. INTRODUCTION

Paralegals have come to play a vital role in the modern American legal system as they are increasingly relied upon to support those in the legal profession. Their growth and involvement in the legal field have evolved slowly because of courts’ attempts to limit their permitted activities. The regulation of paralegal practice stems from a general concern about paralegals engaging in the unauthorized practice of law. Courts, attorneys, and state bar associations have defined the unauthorized practice of law by paralegals, but questions remain regarding a paralegal’s proper role and duties.

The unauthorized practice of law by paralegals poses a serious problem in South Carolina. While the South Carolina Supreme Court has consistently outlined the unauthorized practice of law, paralegals are often unaware of these decisions. Because paralegals in South Carolina are not required to complete formal training or education, they may not realize or understand the limitations placed on their work. As a result, they may engage in activities that are unauthorized or illegal.

This Note focuses on the paralegal’s role in South Carolina and proposes a remedy for the lack of communication between the court system and paralegals. Part II creates a framework for discussion by describing who paralegals are, the general types of work they perform, the training they receive, and the ethical and statutory guidelines that have been implemented in an attempt to regulate their profession. Part III discusses South Carolina’s regulatory guidelines regarding paralegal activity and South Carolina’s definition of the unauthorized practice of law. Part III also examines Doe v. Condon,¹ South Carolina’s most recent ruling on the unauthorized practice of law by paralegals. Part IV advocates the adoption of legislation in South Carolina to address the problem of the unauthorized practice of law by paralegals. Using California’s Business and Professions Code §§ 6450 - 6456 as a model,² the proposed South Carolina legislation would define the occupation of paralegals, outline licensing requirements, describe the duties paralegals are legally authorized to perform, and delineate the ethical and legal standards by which they are bound. Most importantly, the legislation would focus on educating paralegals about their proper role in the legal profession. The proposed legislation would aim to structure the provision of legal services.

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in South Carolina and to curtail the unauthorized practice of law committed by paralegals in the state.

II. PARALEGALS DEFINED

A. Who Paralegals Are and What They Do

Although each state’s definition of “paralegal” varies, the National Federation of Paralegal Associations (NFPA) states that a “paralegal/legal assistant 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.” The American Bar Association (ABA) defines a legal assistant or paralegal as a person “qualified by education, training or work experience, who is employed or retained by a lawyer, law office, governmental agency, or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible.”

In Missouri v. Jenkins, the United States Supreme Court recognized the growing importance and utilization of paralegals and summarized the common threads in the various definitions of paralegals. The Court stated that:

It has frequently been recognized in the lower courts that paralegals are capable of carrying out many tasks, under the supervision of an attorney, that might otherwise be performed by a lawyer and billed at a higher rate. Such work might include, for example, factual investigation, including locating and interviewing witnesses; assistance with depositions, interrogatories, and document production; compilation of statistical and financial data; checking legal citations; and drafting correspondence. Much such work lies in a gray area of tasks that might appropriately be performed either by an attorney or a paralegal.

Jenkins is “frequently cited as the Supreme Court’s ‘legitimization’ of the paralegal profession.”

5. 491 U.S. 274 (1989). This case dealt with whether “reasonable attorney’s fees” should include compensation for the work of paralegals. Id. at 285.
6. Id. at 288 n.10.
7. Id.
Most often, paralegals are employed in law firms to assist attorneys, but they increasingly perform work for governmental agencies, banks, corporations, insurance companies, and other businesses and service providers.\(^9\) As the number of paralegals has risen, employers have capitalized on paralegals’ potential to improve the efficiency and quality of legal work. The ABA’s Commission on Nonlawyer Practice has stated that “[n]onlawyers have important roles to perform in reaching the legal profession’s urgent goal of expanding access to the American justice system . . . .”\(^10\) Today, paralegals perform a variety of functions within the legal setting, including interviewing witnesses; analyzing legal documents; drafting pleadings, memoranda, and briefs; preparing documents for trial and real estate closings; researching titles and trademarks; and drafting employee policy manuals.\(^11\) However, this utilization of paralegals is a recent phenomenon.\(^12\)

The “formal establishment of the paralegal profession can be traced to the 1960s when individuals were trained to assist attorneys in making legal services available to the poor during the ‘War on Poverty.’”\(^13\) Shortly thereafter, “private law firms and corporations recognized the benefits of employing paralegals to supply efficient support, reduce the expense of legal services, and increase the availability of services to the public.”\(^14\)

As law firms have become increasingly more specialized, so too have the jobs performed by their paralegals. Paralegals now often have high levels of expertise in a particular legal field,\(^15\) and they have become an indispensable resource for assisting lawyers in their daily tasks.

**B. Training**

In addition to possessing a high level of expertise, many paralegals are also well-educated. According to the NFPA, “nationwide 21% of all paralegals have an associate degree, 53% have a bachelor degree, and 8% have a masters or J.D. degree. Eighty-three percent received paralegal training as a part of or in addition to college education.”\(^16\) Increasingly, lawyers and law firms “prefer graduates of 4-year paralegal programs or college graduates who have

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9. See NFPA DEFINITION, supra note 3.
12. See NFPA DEFINITION, supra note 3.
13. Id.
14. Id.
15. Id.
16. Id.
completed paralegal certificate programs. [However,] [s]ome employers prefer
to train paralegals on the job, hiring college graduates with no legal experience
or promoting experienced legal secretaries. 17 Paralegal training programs
typically consist of a course of study including legal research and legal writing
and classes in specialized areas of law such as real estate, litigation, and
contracts. 18 Some of these programs are approved by the ABA, while others are
not. 19

The NFPA recommends that paralegals also complete the Paralegal
Advanced Competency Exam (PACE), which measures the proficiency level
of practicing paralegals. 20 The exam consists of questions from five main areas:
“administration of client legal matters, development of client legal matters,
factual and legal research, factual and legal writing, and office administration.” 21 It also includes ethics questions in each area. 22 To take the
exam, paralegals must have a minimum of four years of experience or have a
minimum of two years of experience, hold a bachelor’s degree, and have
completed an accredited paralegal program. 23 The paralegal cannot have a
felony conviction or a previously revoked paralegal license, registration, or
certification. 24 If a paralegal passes the exam and “maintain[s] the continuing
education requirement,” he becomes a PACE-Registered Paralegal (RP). 25
PACE has an overall passage rate of 84.2% and has accredited more than 300
Registered Paralegals. 26

Similarly, the National Association of Legal Assistants (NALA)
recommends completion of the Certified Legal Assistant (CLA) exam, which
tests standards of performance and professional responsibility of paralegals. 27
To qualify for the exam, a paralegal must either have: (1) graduated from an
ABA-approved legal assistant program, (2) have received a bachelor’s degree
and completed one year of paralegal work, or (3) have a high school diploma

17. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, supra note 11; see also
Flynn, supra note 8, at 55 (stating that “most firms now require their legal assistants to have
some form of college degree”).
18. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, supra note 11.
19. See Flynn, supra note 8, at 55. Approximately seventy-four percent of paralegal
training programs have been ABA approved. Id.
20. NAT’L FED’N OF PARALEGAL ASS’NS, PACE-REGISTERED PARALEGAL, at
http://www.paralegals.org/PACE/ (last visited Jan. 14, 2002) [hereinafter NFPA PACE-
REGISTERED PARALEGAL].
21. Id.
22. Id.
23. Id.
24. Id.
25. Id.
26. Flynn, supra note 8, at 57.
27. NAT’L ASS’N OF LEGAL ASSISTANTS, NALA MODEL STANDARDS AND GUIDELINES
FOR UTILIZATION OF LEGAL ASSISTANTS, at http://www.nala.org/stand.htm (last updated Feb. 23,
2001) [hereinafter NALA MODEL STANDARDS].
and seven years of paralegal experience. The CLA exam has an overall passage rate of forty-eight percent, and there are currently over 10,000 Certified Legal Assistants nationwide. Although completion of PACE or the CLA exam is not a prerequisite to working as a paralegal in any state, the tests provide a useful method of evaluating a paralegal’s skills and knowledge. Therefore, these certification exams should be considered by any state seeking to create court rules or legislation to govern paralegal practice.

C. Guidelines for Paralegal Activity

The paralegal profession is one of the fastest growing occupations in the United States today with approximately 188,000 working paralegals in 2000. Given the number of paralegals and their level of expertise, it is surprising that no national guidelines currently exist to standardize their ethical and professional conduct. In 1993, the NFPA adopted the Model Code of Ethics and Professional Responsibility (Model Code), which attempts “to delineate the principles [of] ethics and conduct to which every paralegal should aspire.” In general, the Model Code provides that a paralegal shall maintain a high level of personal and professional integrity, behave professionally, serve the public interest, preserve confidential information, avoid conflicts of interest, and achieve and maintain a high level of competence. In addition, the Model Code states that a paralegal “shall comply with the applicable legal authority governing the unauthorized practice of law in the jurisdiction in which the paralegal practices.” NALA has also adopted its own code, the NALA Code of Ethics and Professional Responsibility (NALA Code). The NALA Code mirrors many of the standards described in the Model Code and establishes similar guidelines for paralegals. While these codes serve as a positive step

28. Flynn, supra note 8, at 57.
29. Id.
30. See NFPA PACE-REGISTERED PARALEGAL, supra note 20; NALA MODEL STANDARDS, supra note 27. Although states do not require paralegals to take these exams, completion of PACE is mandatory for members of the NFPA. See NFPA PACE-REGISTERED PARALEGAL, supra note 20. Additionally, members of NALA must complete the CLA exam. See NALA MODEL STANDARDS, supra note 27.
31. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, supra note 11.
33. Id. § 1.2-1.6.
34. Id. § 1.8.
36. Id.
toward regulating the activities of paralegals, neither has been formally adopted by any state.37

III. PARALEGALS UNAWARENESS OF UNAUTHORIZED PRACTICE OF LAW STANDARDS IN SOUTH CAROLINA

A. The Practice of Law in South Carolina

In all states, statutes prohibit practicing law without a license.38 The generally understood definition of the practice of law in South Carolina

embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition, converyancing, the preparation of legal instruments of all kinds, and, in general, all advice to clients, and all action taken for them in matters connected with the law.39

In general, a paralegal “may not give legal advice, consult, offer legal explanations, or make legal recommendations.”40 Additionally, a paralegal may not represent a client in court, set legal fees, or accept a case, as these duties are considered the practice of law.41 While paralegals may generally understand what constitutes the unauthorized practice of law, most are unaware of the specific activities that the court has deemed unacceptable paralegal activity.42

B. South Carolina’s Regulation of Paralegal Activity

The South Carolina Supreme Court exercises original and exclusive jurisdiction over the practice of law, specifically the admission to practice.43 Since South Carolina has not established any formal regulations explicitly governing paralegal practice, the court and legislature attempt to control

37. See NFPA Model Code, supra note 32; NALA Code, supra note 35.
41. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, supra note 11.
42. See, e.g., Condon, 341 S.C. at 27, 532 S.E.2d at 882 (detailing a paralegal’s unknowing engagement in an activity that constituted the practice of law).
43. S.C. CONST. art. V, § 4; see also S.C. CODE ANN. § 40-5-10 (Law. Co-op. 2001) (declaring the “inherent power of the Supreme Court with respect to regulating the practice of law, determining the qualifications for admission to the bar and disciplining, suspending and disbarring attorneys at law”).
paralegals indirectly by regulating the activities of attorneys. For example, only attorneys may practice law in South Carolina. Section 40-5-310 of the South Carolina Code provides that "[n]o person may practice or solicit the cause of another person in a court of this State unless he has been admitted and sworn as an attorney."

Paralegals are also indirectly regulated by the South Carolina Appellate Court Rules (SCACR). In SCACR 407, the South Carolina Supreme Court set forth the Rules of Professional Conduct which represent a "framework for the ethical practice of law." Rule 5.5(b) of the South Carolina Rules of Professional Conduct provides that a lawyer shall not "[a]ssist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." In addition, when a lawyer employs a nonlawyer assistant, the lawyer must give "reasonable assurance that the [nonlawyer's] conduct is compatible with the professional obligations of the lawyer" and must exercise "direct supervisory authority over the nonlawyer." Rather than explicitly regulating paralegal activity, the court has delegated this job to the supervising attorney. To comply with his ethical obligations, the attorney must oversee paralegal work and ensure that it complies with the law. South Carolina case law consistently reflects this requirement.

C. South Carolina Case Law Regarding Paralegals and the Unauthorized Practice of Law

In general, the South Carolina Supreme Court has held that paralegals cannot perform tasks requiring legal judgment unless a supervising attorney specifically reviews those judgments before they can have any effect on a client or on his case. The most recent South Carolina case to address the unauthorized practice of law is Doe v. Condon, decided in June 2000. The petitioner, a paralegal, invoked the original jurisdiction of the supreme court to

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44. See State v. Robinson, 321 S.C. 286, 289, 468 S.E.2d 290, 291 (1996) ("[R]equireing a paralegal to work under the supervision of a licensed attorney ensures control over his or her activities by making the supervising attorney responsible.").
46. Id.
48. Id. at Rule 5.5(b).
49. Id. at Rule 5.3(a)-(b).
50. See infra Part III.C.
52. 341 S.C. 22, 532 S.E.2d 879 (2000). The case was a declaratory judgment action, brought under the authority granted in In re Unauthorized Practice of Law Rules Proposed by the S.C. Bar, wherein the court "urge[d] any interested individual who [became] aware of such conduct [which could constitute the unauthorized practice of law] to bring a declaratory judgment action in the Court's original jurisdiction to determine the validity of the conduct." In re Unauthorized Practice of Law Rules Proposed by the S.C. Bar, 309 S.C. 304, 307, 422 S.E.2d 123, 125 (1992).
determine whether certain tasks he performed in his employment constituted the unauthorized practice of law. Specifically, the petitioner asked the following:

(1) Is it the unauthorized practice of law for a paralegal employed by an attorney to conduct educational seminars for the general public, to disseminate general information about wills and trusts . . . including answering general questions, without the attorney being present at the seminar as long as the seminar is sponsored by the attorney’s law firm and the attorney has reviewed and approved the format, materials and presentation to be made for content, truthfulness and fairness?

(2) Is it the unauthorized practice of law for a paralegal employed by an attorney to meet with clients privately in the law office for the purpose of answering general questions about wills [and] trusts . . . and to gather basic information from said clients . . . as long as it is done under the attorney’s direction, and the clients have a follow-up interview and meeting with the attorney who would have primary responsibility for legal decisions?

The court appointed a referee to make findings of fact and conclusions of law. In a per curiam opinion, the court adopted the referee’s findings and held that the previously described activities, when performed by a paralegal, constituted the unauthorized practice of law.

The Doe court relied on dicta from the 1980 case In re Easler, which explained that

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

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53. Doe, 341 S.C. at 24, 532 S.E.2d at 880.
54. Id. at 25, 532 S.E.2d at 881. The petitioner also requested a determination of "whether a paralegal [could] receive compensation from [his] law firm/employer through a profit-sharing arrangement based upon the volume and type of cases [he] handle[d]." Id. at 23, 532 S.E.2d at 880. The court held that such profit-sharing arrangements violated the ethical rules prohibiting lawyers from splitting fees with non-lawyer employees. Id. at 29, 532 S.E.2d at 883.
55. Id. at 23, 532 S.E.2d at 880.
56. See supra note 54 and accompanying text.
57. Doe, 341 S.C. at 29, 532 S.E.2d at 883.
conclusion through his own examination, approval or additional effort. The general question featured in the seminar, and reaffirmed by the Doe court, therefore may not give legal advice, consult, offer legal explanations, or make legal recommendations.

Because the paralegal in Doe would actually be advising clients about legal instruments such as trusts and wills, he, rather than the attorney, would be practicing law. As the court stated, "advising a potential client on his or her need for a living trust (or other particular estate planning instrument or device) fits squarely within the practice of law. These matters cry out for the exercise of professional judgment by a licensed attorney." In particular, the Doe court found it difficult to conceive how a seminar featuring the discussion of specific estate-planning devices would elicit "general" questions that would not necessitate the exercise of legal judgment. The seminar specifically provided advice to clients regarding legal instruments, and therefore a paralegal could not appropriately present it to the public. "In promoting the law firm and representing to the public the 'legal' nature of the seminar, neither the paralegal nor his attorney-employer [could] escape the prohibition against the unauthorized practice of law."

Regarding the initial client interview, the court held the petitioner was permitted to compile client information but not to answer any questions which would involve dispensing legal advice. The court noted the paralegal could

59. Id. at 401, 272 S.E.2d at 32-33 (footnote omitted).
60. Doe, 341 S.C. at 26, 532 S.E.2d at 881-82 (citation omitted).
61. Id. at 27, 532 S.E.2d at 882.
62. Id.
63. Id.
64. Id. at 26-27, 532 S.E.2d at 882.
65. Id. at 28, 532 S.E.2d at 882-883.
perform preparatory tasks while under attorney supervision, but it felt that the “proposed after the fact attorney review [came] too late.”

Other activities that the South Carolina Supreme Court has held constitute the unauthorized practice of law include handling real estate closings and advising clients about the preparation of legal documents. For example, in State v. Buyers Service Co., a commercial title company assisted homeowners in purchasing residential real estate. The court held the company’s provision of reports, opinions, and certificates regarding the status of titles to real estate and mortgage liens; its preparation of documents affecting title to real property; and its handling of real estate closings constituted the unauthorized practice of law.

The court explained its holding by noting there was “no direct contact between the attorney and the [client]” and also that the title company “conduct[ed] closings without any attorney present.” Although an attorney did review the title company’s closing documents before they were given to potential purchasers, the court held that this minimal supervision was inadequate. The court also noted the legislature restricted the practice of law not for the economic protection of the legal profession but “[r]ather . . . [to] protect[] . . . the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law.” The court restricted the title company’s activities to conducting title examinations and to preparing abstracts for attorneys’ benefit because the “examination of titles [for the public] require[s] expert legal knowledge and skill. For the protection of the public such activities, if conducted by lay persons, must be under the supervision of a licensed attorney.”

The court further defined the unauthorized practice of law in State v. Despain when it prohibited a nonlawyer from giving legal advice to the public. The defendant, who was not authorized to practice law in any state,

67. Id.
70. Id. at 429-34, 357 S.E.2d at 17-19.
71. Id. at 429, 357 S.E.2d at 17.
72. Id. at 431-33, 357 S.E.2d at 18-19.
73. Id. at 431, 357 S.E.2d at 18.
operated a business in which she allowed customers, for a fee, to access a computer program that prepared “documents to be used in legal proceedings.” In the course of her business, the defendant also gave her customers legal advice and, in some instances, prepared the legal documents. The court held that preparing legal documents for others to use in court “constitute[d] the practice of law when such preparation involve[d] the giving of advice, consultation, explanation, or recommendations on matters of law. Further, instructing other individuals in the manner in which to prepare and execute such documents . . . also [constituted] the practice of law.”

_**Doe v. Condon**_ is thus consistent with prior case law in that it focused on the importance of attorney supervision and prohibited a paralegal from exercising his own legal judgment. The _Doe_ court also reinforced the paralegal’s role as one of support, rather than one of independence.

Notably, the South Carolina Supreme Court has declined to create a formal definition of the practice of law, stating “that the better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy.” This approach may create confusion for attorneys and paralegals who do not know if their activities are “unauthorized” until their case comes before the court. The supreme court should recognize paralegals’ difficulties in understanding their jobs’ boundaries and implement consistent and clear guidelines and regulations for all paralegals.

**D. The Debate About Paralegal Regulation**

Currently, South Carolina paralegals face a precarious situation. Many paralegals in South Carolina have received adequate training from accredited universities to obtain a paralegal degree. These paralegals likely learned what types of activities constitute the unauthorized practice of law. However, many paralegals have received no such formal education, and enter the profession largely ignorant of what the law permits them to do. A paralegal’s unauthorized practice of law may result in harm both to the client and to the paralegal’s attorney-employer. To avoid this result, South Carolina should institute a program to educate _all paralegals_ regarding permissible activities and should establish a licensing program to ensure compliance with educational and other ethical and legal guidelines on paralegal practice.

76. *Id.* at 318, 460 S.E.2d at 577.
77. *Id.* at 319, 460 S.E.2d at 577.
78. *Id.* at 320, 460 S.E.2d at 578.
80. *Id.* at 26, 532 S.E.2d at 881.
82. *See supra* Part II.B.
83. *See supra* Part II.B.
However, disagreement exists regarding whether the regulation of paralegal activity is necessary or even desirable. Opponents of regulation argue that because attorneys must supervise paralegals there exists no need for mandatory certification, registration, or licensure.\(^8\) For example, the Legal Assistant Management Association (LAMA) argues that regulations such as licensure “would create an unwieldy bureaucracy that would have the potential to limit the flexibility and discretion employers need in hiring those individuals whom they believe most closely match the standards and expectations of their businesses and their clients.”\(^9\) Additionally, LAMA notes that

\[^{m}\]andatory regulation, which would require licensing fees and mandatory continuing education requirements, would add cost to the consumption of legal assistant services. Since the utilization of legal assistants has been embraced by clients as a cost-effective alternative to excessive attorney fees, adding the costs of a regulatory scheme is self-defeating for the legal assistant profession. Further, ... licensing may hinder legal assistant professional growth by placing limits on legal assistant responsibilities.\(^6\)

LAMA asserts regulation and supervision should remain with lawyers who are licensed and who can adequately protect their clients.\(^7\)

Conversely, proponents of regulation argue “that since paralegals are trained to assist in the delivery of complex legal services, there should be a mandatory competence credential in order to protect the public.”\(^8\) Some paralegals want legislation passed to define their jobs so “they can render legal services without fear of prosecution.”\(^9\) Other paralegals want to establish legislative licensing schemes to attempt to broaden the work they are permitted to perform.\(^9\) They advocate legislation which would allow them to handle bankruptcies, divorces, and simple wills.\(^9\) The NFPA desires an expansion of permitted paralegal services and states that “[i]ncreasing access to affordable

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84. Flynn, supra note 8, at 54.
86. Id.
87. Id.
88. See Flynn, supra note 8, at 54; see also State v. Buyers Serv. Co., 292 S.C. 426, 431, 357 S.E.2d 15, 18 (1987) (stating that the reason for prohibiting lay persons from preparing legal instruments is “the protection of the public from the potentially severe economic and emotional consequences which may flow from erroneous advice given by persons untrained in the law”).
90. Id.
91. Id.
assistance and protecting the public from harm have been the foundation upon which NFPA's positions on paralegal education, ethics and regulation are based.\textsuperscript{92} Similarly, the national group Help Abolish Legal Tyranny (HALT) supports legislation that would allow paralegals to render legal services in routine legal matters so as "to make legal services available to middle-class America at a reasonable price."\textsuperscript{93}

Independent representatives who do not work directly with attorneys but are authorized by legislation or administrative regulation to perform law-related tasks pose a regulatory problem.\textsuperscript{94} Because these representatives are not supervised by attorneys, questions arise as to how to prevent them from engaging in the unauthorized practice of law. If mandatory regulations requiring education about the unauthorized practice of law were enacted, these representatives would better understand the limits of their work.

IV. A REMEDY: PROPOSED REGULATIONS FOR PARALEGAL PRACTICE

\textit{A. South Carolina's Recent Attempt at Legislation}

The difficulty of finding and articulating the line between permissible and impermissible activity by paralegals is not new to lawmakers or members of the South Carolina Bar. In 1991, the South Carolina Bar proposed to the South Carolina Supreme Court a set of rules (Proposed Rules) to address the unauthorized practice of law.\textsuperscript{95} The Proposed Rules "attempt[ed] to define and delineate the practice of law, and to establish clear guidelines so that professionals other than attorneys [could] ensure [that] they [did] not inadvertently engage in the practice of law."\textsuperscript{96} After careful review the supreme court decided not to adopt the Proposed Rules, despite its recognition of the Bar's "Herculean efforts to define the practice of law."\textsuperscript{97} The court reasoned that it was "neither practicable nor wise to attempt [to formulate] a comprehensive definition by way of a set of rules."\textsuperscript{98} The court stated that it


\textsuperscript{93} Dimitriou, supra note 89, at 975.

\textsuperscript{94} For example, the Administrative Procedures Act, 5 U.S.C. § 555(b) (1996), allows a person compelled to appear before an administrative agency to be represented by an attorney or, if permitted by the agency, by some other qualified representative. Id. Examples include certified public accountants appearing before the Internal Revenue Service, authorized by 31 C.F.R. § 10.3(b) (2001), and "registered agents" appearing before the United States Patent Office, authorized by 37 C.F.R. § 1.31 (2001).


\textsuperscript{96} Id.

\textsuperscript{97} Id.

\textsuperscript{98} Id.
preferred “to decide what is and is not the unauthorized practice of law in the context of an actual case or controversy.”

Despite its refusal to adopt the Proposed Rules, the court did clarify what does not constitute the unauthorized practice of law. First, the court noted that pursuant to statute, a nonlawyer may represent another individual before any tribunal as long as the tribunal approves the representation and as long as the nonlawyer is not compensated. Additionally, the court stated that (1) a business may be represented in civil magistrate’s court by a nonlawyer, agent, or employee; (2) state agencies may, by regulation, authorize nonlawyers to appear and represent clients before the agency; (3) Certified Public Accountants (CPAs) “do not engage in the unauthorized practice of law when they render professional assistance . . . within their professional expertise and qualifications”; and (4) “police officers may prosecute traffic offenses in magistrate’s court and in municipal court.”

Interestingly, the court “held that CPAs do not engage in the unauthorized practice of law when they render professional assistance” because of their high level of “professional training, certification and licensing procedures, continuing education requirements, and ethical code.” Following this reasoning, it seems plausible that if all paralegals had high levels of professional training, certification, continuing education, and a strict ethical code, perhaps the court would define fewer of their activities as the unauthorized practice of law. Consequently, the proposed legislation discussed below includes requirements similar to those imposed on CPAs.

B. Recommendations for South Carolina

1. Methods of Regulation

Paralegals can be regulated through such means as licensure, certification, and registration. Licensure is the most strict method of regulation, allowing only those paralegals who have earned a license to practice and hold the title

99. Id.

100. Id. (citing S.C. CODE ANN. § 40-5-80 (Law. Co-op. 2001)).

101. In re Unauthorized Practice of Law Rules, 309 S.C. at 305-06, 422 S.E.2d at 124. This holding modified the holding of State ex rel. Daniel v. Wells, in which the Court refused to allow an individual to represent a business entity. State ex rel. Daniel v. Wells, 191 S.C. 468, 480-81, 5 S.E.2d 181, 186 (1939).

102. Id. at 306-07, 422 S.E.2d at 124-25; see also 1 S.C.JUR. Attorney and Client § 4 (1991) (summarizing the unauthorized practice of law in South Carolina and the holding in In re Unauthorized Practice of Law Rules).


104. See infra Part IV.B.
of “paralegal.”\textsuperscript{105} Usually, licensure is performed by a state agency.\textsuperscript{106} A second, more lenient method, certification, is usually instituted on a voluntary basis.\textsuperscript{107} Under this category, a paralegal may seek professional accreditation but is not required to do so in order to practice as a paralegal.\textsuperscript{108} Certified paralegals include Certified Legal Assistants, who have taken and passed the Certified Legal Assistant Examination offered by the NALA, and Registered Paralegals, who have passed PACE, the Paralegal Advanced Competency Exam offered by the NFPA.\textsuperscript{109} The least stringent method, registration,\textsuperscript{110} merely requires a paralegal to register with the appropriate agency in order to lawfully hold the title of paralegal.\textsuperscript{111}

2. Proposed Adoption of a Paralegal Code and Paralegal Ethical Rules in South Carolina

South Carolina should adopt a paralegal code requiring the licensing of paralegals and regulating their activities. This code should clearly define the categories of paralegals in the state, outline their permitted duties, and provide guidelines with which they must comply.\textsuperscript{112} Great weight should be placed on maintaining educational requirements to ensure that every paralegal remains knowledgeable about the unauthorized practice of law. Since the South

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\item \textit{NFPA Statement on Issues}, supra note 92. Licensure is “the process by which an agency or branch of government (a) grants permission to persons meeting predetermined qualifications to engage in a given occupation and/or use a particular title, or (b) grants permission to institutions to perform specified functions.” \textit{Id.}
\item Flynn, supra note 8, at 54-55.
\item NFPA \textit{Statement on Issues}, supra note 92. Certification is a voluntary process by which a nongovernmental agency or association grants recognition to an individual who has met certain predetermined qualifications specified by that agency or association. Such qualifications may include (a) graduation from an accredited program, (b) acceptable performance on a qualifying examination or series of examinations, and/or (e) completion of a given amount of work experience. \textit{Id.}
\item Flynn, supra note 8, at 55.
\item Flynn, supra note 8, at 55.
\item See supra notes 20-30 and accompanying text.
\item Registration is “the process by which individuals or institutions list their names with an association or agency. Registration may be voluntary or mandatory. There usually is no education’ or training requirement, although references and/or bonding requirements are sometimes necessary.” NFPA \textit{Statement on Issues}, supra note 92.
\item Flynn, supra note 8, at 55.
\item Similar rules or legislation have been adopted in other states. \textit{See, e.g., KY. SUP. CT. R. 3.700 (same); N.D. CT. R. 5.3 (same); OHIO LOCAL CT. R. 75.8 (outlining the state’s regulatory scheme for paralegals).}
\end{enumerate}
Carolina Supreme Court regulates the practice of law in the state, the program would have to be adopted by the court. 113

a. California Legislation as a Model

In 2001, California adopted legislation very similar to the program proposed in this Note. 114 This legislation can serve as a useful model in formulating a South Carolina Paralegal Code. The relevant portion of the California Code begins with a definition of “paralegal” 115 and proceeds to list prohibited paralegal activities. 116 These prohibited duties include advising clients; representing a client in court; selecting, explaining, drafting, or recommending the use of any legal document; or engaging in conduct that constitutes the unauthorized practice of law. 117

In addition to limiting paralegal activity, the California Paralegal Code requires that paralegals possess a certain level of training. Paralegals can fulfill this requirement by (1) completing an ABA-approved paralegal program, (2) obtaining a baccalaureate degree and working for at least one year for an attorney who has been an active member of the California Bar for the preceding three years, or (3) by obtaining a high school diploma and working for at least three years for an attorney who has been an active member of the California Bar for the preceding three years. 118 Importantly, paralegals must also complete mandatory continuing legal education in legal ethics. 119 Only after a person has complied with all of these requirements may he hold himself out as a paralegal in California. 120

All paralegals in California are required to comply with the laws regarding confidentiality and attorney-client privilege applicable to attorneys as established in other portions of the California Business and Professional Code. 121 If a paralegal performs services for a consumer, he must do so under the direction and supervision of an attorney. 122 An attorney using a paralegal’s services will remain liable for any harm caused by the paralegal’s negligence or misconduct. 123 Any violation of California’s paralegal code by a paralegal may result in the imposition of sanctions, including a fine, imprisonment,

113. See supra note 42 and accompanying text.
115. Id. § 6450(a). In addition, Section 6454 states that “[t]he terms ‘paralegal,’ ‘legal assistant,’ ‘attorney assistant,’ ‘freelance paralegal,’ ‘independent paralegal,’ and ‘contract paralegal’ are synonymous for purposes of this chapter.” Id. § 6454.
116. Id. § 6450(b).
117. Id.
118. Id. § 6450(c).
119. Id. § 6450(d).
121. Id. § 6453. For example, an attorney owes his client a duty of confidentiality. Id. § 6068(e). Section 6453 imposes this duty on paralegals.
122. Id. § 6451.
123. Id. § 6452(b).
The passage discusses the unauthorized practice of law, focusing on the role of paralegals and the legislation governing their activities. It mentions the South Carolina Supreme Court's stance on formal and comprehensive definition of paralegal activities, highlighting concerns about a less general definition. The text also explores the California legislation's approach to defining acceptable and prohibited activities, emphasizing the need for comprehensive guidance.

**b. A Paralegal Code for South Carolina**

The text recommends South Carolina adopt a paralegal code and ethical rules to govern paralegal activity, considering the pros and cons of licensing fees and mandatory continuing education. It notes that such measures can increase costs but may be justified by avoiding the unauthorized practice of law.

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124. Id. § 6455.
125. Id. § 6456.
126. See supra notes 97-98 and accompanying text.
127. CAL BUS. & PROF. CODE § 6450(a)-(b) (West Supp. 2001).
128. The court outlined the few activities that it considers to be acceptable nonlawyer practices in In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 309 S.C. 304, 305-07, 422 S.E.2d 123, 124-25 (1992); see supra Part IV.A.
129. See supra notes 118-20 and accompanying text.
130. See supra note 112 and accompanying text.
131. See supra note 86 and accompanying text.
The proposed paralegal code should formally define the categories of paralegals. The code could adopt either the definition established by the NFPA or the ABA presented above. Alternatively, the court could create its own definition, tailored to paralegal practice in South Carolina. The definition must clearly identify whom the statute will govern.

Next, the code should provide a general outline of tasks that a paralegal routinely performs as well as a brief listing of the duties the court has determined do not constitute the unauthorized practice of law. Paralegals’ permitted general tasks should include interviewing witnesses, analyzing legal documents, drafting pleadings and other legal memoranda, preparing documents for trial and real estate closings, and conducting legal research. The statute should also codify South Carolina decisions regarding particular acts that constitute the unauthorized practice of law.

Additionally, the paralegal code should impose licensing requirements mandating that paralegals possess: (1) a certificate of completion or a diploma from a paralegal program approved by the ABA; (2) a baccalaureate degree or advanced degree in any subject and a minimum of one year of law-related experience under the supervision of an attorney authorized to practice law in South Carolina; or (3) a high-school diploma or general equivalency diploma and a minimum of seven years of law-related experience under the supervision of an attorney authorized to practice law in South Carolina. A grandfather clause should also be included for those paralegals who fail to meet any of the above requirements but who have at least eight years of law-related experience.

Moreover, all paralegal candidates should be required to pass the Certified Legal Assistant Exam. This exam is important in testing paralegals’ knowledge of legal principles, their judgment and analytical abilities, their communication skills, and their ability to administer clients’ legal matters. As part of this exam or under an independent exam, the paralegal candidate should be tested on what constitutes the unauthorized practice of law in South Carolina.

Upon successful completion of the exam and fulfillment of the educational requirements discussed above, the candidate would be licensed to work in South Carolina as a paralegal and would be legally entitled to hold himself out

132. See supra Part II.A.
133. See supra note 11 and accompanying text.
134. See supra Parts III.A-C and Part IV.A.
135. These requirements are similar to those established by NALA and the NFPA in order to take the CLA Exam or the Paralegal Advanced Competency Exam. See supra notes 20-28 and accompanying text. Law-related experience may include such jobs as a legal secretary or a project assistant with a law firm. However, the experience must be the product of working alongside an attorney.
136. Fulfillment of one of the outlined education requirements would also qualify a paralegal to take the CLA Exam.
137. See supra note 135 and accompanying text.
as a paralegal. A one-time fee might be charged for this licensing to defray its potential costs.

To maintain their licensed status, paralegals should be required to complete five hours of continuing legal education every other year. This legal education should consist of two hours of legal ethics and three hours in either general law or in a specialized area of the law in which the paralegal works or has an interest. The continuing education should also address any new developments in case law regarding the unauthorized practice of law. The paralegal’s supervising attorney should certify these continuing education requirements, but the paralegal should also be required to maintain his own records of compliance. By requiring such high standards, South Carolina would recognize the high value it places on paralegals and their work. The proposed requirements recognize the level of commitment and expertise that paralegals should possess and maintain.

c. Proposed Paralegal Ethical Rules for South Carolina

In addition to the proposed paralegal code, the South Carolina Supreme Court should issue ethical rules governing all paralegals in the state. As previously discussed, both NFPA and NALA have adopted formal guidelines for ethics and professional responsibility which serve as a valuable model for implementing paralegal ethical rules in South Carolina. The South Carolina ethical rules should begin with the statement that a paralegal “shall achieve and maintain a high level of competence,” including compliance with the licensing and continuing education requirements discussed above. Next, the rules should prescribe the level of personal and professional integrity that the paralegal must maintain. In so doing, they should warn paralegals against fraudulent timekeeping and billing practices and should set forth certain general duties such as maintaining honest and open communication with attorney-employers, clients, and outside attorneys; avoiding conflicts of interest; preserving the attorney-client privilege and duty of confidentiality; and maintaining a high level of decorum which reflects well on the legal profession.

Moreover, paralegals should be bound to truthfully represent their status as a paralegal to clients and to explain that they are not authorized to

138. Since the South Carolina Supreme Court has the sole authority to grant licenses to attorneys, it would be the most logical entity to oversee paralegal licensing. S.C. CODE ANN. § 40-5-220 (Law. Co-op. 2001).
139. This requirement parallels that found in California’s Code, discussed above. See supra note 119 and accompanying text.
140. See supra Part II.C.
141. The NFPA’s Model Code also begins with such a provision. NFPA MODEL CODE, supra note 32, §1.1.
142. These duties are derived, in part, from NFPA’s Model Code. NFPA MODEL CODE, supra note 32, § 1.2-1.6.
practice law.143 Naturally, the rules must clearly state that a paralegal shall not engage in the unauthorized practice of law and that if he does, he will be subject to appropriate legal penalties, including suspension or loss of his license.144

These ethical rules should be included in the curriculum of any ABA-approved paralegal program in the state of South Carolina and should be tested on any licensing exam that the state may ultimately adopt. In sum, the rules should instill in every paralegal a commitment to maintain a high level of training, integrity, and conduct consistent with their integral role in the legal profession.

d. Appropriate Sanctions for Violators of the Proposed Paralegal Code and Ethical Rules

South Carolina’s paralegal code must address penalties for violations of the code or ethical rules and remedies for those injured by such violations.145 Just as attorneys who violate the prohibition against practicing law in South Carolina without first being admitted and sworn as a member of the State Bar face strict penalties,146 so too should paralegals who violate the standards created by these proposed laws. The California Business and Professions Code provides that anyone injured by a violation of its paralegal code is entitled to file a complaint and seek redress, including injunctive relief, restitution, and other damages.147 In addition, anyone found guilty of violating the paralegal code receives a fine of up to $2,500 for the first violation; for subsequent violations, the violator is guilty of a misdemeanor, punishable by a fine of $2,500 for each violation or by imprisonment for not more than one year or both.148 Similarly, NFPA’s Model Code provides for a variety of sanctions depending on the severity of the offense, including counseling, probation, suspension, revocation of certification, imposition of a fine, or, in the case of criminal activity, referral to the appropriate authority.149

In South Carolina, the supreme court has urged “any interested individual who becomes aware of [conduct which appears to be the unauthorized practice of law] to bring a declaratory judgment action in this Court’s original jurisdiction to determine the validity of the conduct.”150 Aside from this

143. See id. § 1.7.
144. See id. §§ 1.8, 2.7(a).
145. See id. § 2.7(a).
146. See S.C. CODE ANN. § 40-5-310 (Law. Co-op. 2001) (providing that violators will be guilty of a felony and fined no more than $5,000 or imprisoned for no more than five years or both).
147. CAL. BUS. & PROF. CODE § 6455(a) (West Supp. 2001).
148. Id. § 6455(b).
149. NFPA MODEL CODE, supra note 32, § 2.7(a).
provision, no formal penalties exist against paralegals for wrongful conduct in South Carolina.\(^{151}\) South Carolina’s paralegal code should impose specific penalties for violations, and its drafters should look to the disciplinary schemes issued by California and the NFPA for guidance.

For a first violation, a paralegal should be fined a sum adequate to punish him for his misconduct and to deter future misbehavior. For a subsequent violation, the paralegal should face an additional fine and also temporary loss of his license. After serving a period of probation, he may be able to regain his license upon a proper showing of knowledge of the guidelines and upon a certification that he will, in good faith, comply with the guidelines in the future. If, after this reinstatement, there is a subsequent violation, the paralegal should face permanent loss of his license, a fine, and, if the violation is criminal in nature, imprisonment. This “three-strikes” policy will help to ensure compliance with the guidelines and to punish habitual offenders. However, it will also allow those who may have inadvertently or accidently committed a violation (or two violations) to reinstate themselves and to prove their commitment to compliance with the guidelines.

e. The Unauthorized Practice of Law Consumer Protection Act

The South Carolina General Assembly’s recognition of the need to create penalties for those violating the prohibition against the unauthorized practice of law illustrates the timeliness of this issue. In May 2001, a bill, entitled the Unauthorized Practice of Law Consumer Protection Act,\(^{152}\) was introduced in the South Carolina House. The bill provides that licensed South Carolina attorneys may bring to the attention of the Attorney General a person engaging in the unauthorized practice of law.\(^{153}\) The bill defines the practice of law to include negotiating settlements and plea agreements, giving legal advice and explanations, interpreting a contract, or preparing legal instruments.\(^{154}\) If, after a twenty-day time period, the Attorney General decides not to prosecute, the reporting attorney may bring a proceeding in the Court of Common Pleas to determine if the person in question has engaged in the unauthorized practice of law.\(^{155}\) A person found to have engaged in the unauthorized practice of law may be

(1) subject to the penalties of Section 40-5-310 and fined not more than five thousand dollars for each violation pursuant to

\(^{151}\) Of course, if a paralegal is found to have practiced law, he will be subject to the penalties outlined in South Carolina’s unauthorized practice of law statute, which include being found guilty of a felony and receiving a fine of no more than $5,000, imprisonment of no more than five years, or both. S.C. CODE ANN. § 40-5-310 (Law. Co-op. 2001).


\(^{153}\) Id.

\(^{154}\) Id.

\(^{155}\) Id.
this article, unless the law specifically provides another penalty; (2) required to pay restitution to all injured parties; (3) required to disgorge all gains resulting from the illegal actions; (4) required to pay reasonable attorney’s fees and expenses to the reporting attorney; and (5) required to disclose the judgment on any subsequent licensing application. 156

While this bill appears to be directed to out-of-state attorneys guilty of the unauthorized practice of law in South Carolina, it would also apply to paralegals. This bill should be closely watched, and its penalty provision should be considered when determining the appropriate punishments for violations of the proposed paralegal code and ethical rules for South Carolina. 157

V. CONCLUSION

If the “prohibit[ion of] laymen from practicing law is not for the purpose of creating a monopoly in the legal profession, nor for its protection, but to assure the public adequate protection in the pursuit of justice, by preventing the intrusion of incompetent and unlearned persons in the practice of law,” 158 then South Carolina should not be afraid to regulate paralegals in the state, even if such regulation results in giving paralegals more freedom in their employment activities. This Note has attempted to establish a framework for paralegals by defining their duties while also affirming the practices they are authorized to perform under the law. The proposed paralegal code and ethical rules attempt to strike a balance between giving paralegals the freedom to perform their job and clearly defining certain limitations. Although regulation will not prevent every instance of the unauthorized practice of law, it will alert paralegals and others to what constitutes such activity so they can avoid breaking the law.

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156. Id.
157. It should be noted that the paralegal code and ethical rules proposed in this Note, although addressing the unauthorized practice of law, are not exclusive to this issue but also include guidelines for other areas of paralegal activity. Penalties in the proposed bill are levied exclusively for the unauthorized practice of law, while the penalties discussed in the proposed guidelines are for any violation, whether the unauthorized practice of law or otherwise.