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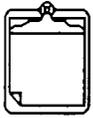
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THE CAVEAT

VOLUME XVII

ISSUE 2



EDITOR'S PREAMBLE

"While competition cannot be created by statutory enactment, it can in large measure be revived by changing the laws and forbidding the practices that killed it." Woodrow Wilson –

A tidal wave of public outrage is swelling up and threatening to crash over our legal system. As one committee member of the San Francisco State Bar Association announced: We can either jump on the boat now and attempt to steer a course - or be swept off of the dock.

The problem: an overburdened, overpriced, under-accessed legal system. The solution demanded by many is the licensing of legal technicians (paralegals) to practice in limited areas of law.

Proponents of licensing paralegals state that millions of people are shut out of the legal process, routine legal tasks are already being performed by in-house paralegals but charged at attorney rates and simply requiring sporadic pro bono work of attorneys is an inefficient solution.

Opponents of licensing claim the severe limitations placed upon the tasks which paralegals could perform would eventually lead consumers to seek legal advice should the matter become more than rudimentary. Additionally, the boundaries between advice which can or cannot be given is too easy to cross over, ultimately causing more harm than good for low-income users of the licensed paralegal.

Currently a number of states (excluding California) license paralegals to prepare specific documents within a particular area of the law. In California, the State Bar Board of Governors has proposed that the Supreme Court adopt a Rule of Court authorizing non-lawyers to practice in areas of landlord/tenant, bankruptcy and family law under the direct supervision of the Department of Consumer Affairs. Rather than limiting paralegals to document preparation however, the proposed legislation would

encompass the breadth of each suggested substantive area of law generally. This proposal is in response to the legal community's concern that presently there are many non-attorneys practicing law who are perpetrating fraud on consumers. Additionally, the Bar Association has acknowledged that both poor and middle income consumers have difficulty obtaining legal services.

The California Young Lawyers Association (CYLA) has stated that this issue most directly effects new lawyers as there is significant overlap between functions performed by paralegals and new associates. The concern of the CYLA is that by licensing paralegals, the public will no longer go to law firms for legal counsel in those areas of law practiced by licensed paralegals. This in turn will reduce a law firm's need to hire new attorneys.

In this issue, **In Focus: Licensing Legal Technicians** explores both sides of the debate. In opposing licensing are lawyers protecting the public's interests or are they in the uncomfortable position of protecting their own interests against a consumer revolution? The decision yours. ■

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Starting a Law Firm



CAVEAT FOCUS

Should You Start Your Own Practice?

By Jay Foonberg

Lawyers who start their own law practices usually fall into one or both of two categories:

- A. They have to.
- B. They want to.

Lawyers Who Have to Start Their Own Practices:

Frankly, I expect that many, if not most, of the new lawyers who start their own practices today have no choice. They would prefer to get jobs, but can't for various reasons including:

- 1. They are in the 95% of a law school class who are not in the top 5% of the class.
- 2. They didn't attend the "right" colleges or law schools.
- 4. They lead a lifestyle that doesn't fit in with the firm.
- 5. Their wives or husbands just aren't the "type" to be social with partners' spouses.

All of the above may or may not be valid reasons for being denied employment. **None** of the above reasons has the slightest correlation to success or failure as a practicing lawyer. (I expect those persons who satisfy all or part of the list of requirements to disagree).

Lawyers Who Want to Start Their Own Practice

I opened my own doors right out of law school. To satisfy your curiosity I will tell you that I turned down several unsolicited job offers and walked away from a successful CPA practice to open my doors. Let me list the pros and cons:

- 1. *Personality:* I couldn't take three months to two years in law libraries doing the scut work of other lawyers, while I was being looked at with a magnifying glass for fear I might say or do something to embarrass the firm. I didn't want candid criticism of a legal position to cost me my job.
- 2. *Client Contact:* Three years of law school was enough. I wanted contact with clients and the responsibility of making decisions immediately. Another year of apprenticeship held no appeal for me. I had been an "apprentice" in two different unions and an "apprentice" with a CPA firm. To me an apprenticeship seemed more a matter of getting cheap, profitable labor than of improving the quality of the work done by the apprentice.
- 3. *Practical Training:* Law firms hire associates because there is work to be done, not because the firm is interested in teaching new lawyers. In some firms there is no formal training program and in some others the training program is not functioning because the partners have little or no time to teach you anything. If they had that time they wouldn't need the associates. Therefore, in many, if not most, instances you'll get just as much training in the law on your own as with a firm.
- 4. *Money:* It took me five years until my cumulative earnings as a self-employed lawyer equaled what my cumulative earnings as an employee would have been.

In my fourth year of private practice I was earning more than my classmates, but I had yet to make up for the difference of the first three years. After the fifth year I was ahead of my friends, my employed classmates, etc. I've never fallen behind on a year-by-year basis or on a cumulative basis. After ten years some of my classmates have weathered the selection process and are junior partners in the large prestige law firms. They still earn less than I do. I suppose at some point I will fall behind my classmates with the large firms when they attain senior partnership. On the other hand, I believe that those of my classmates who initially or ultimately started their own practices are earning about as much as I am.

5. *Type of Legal Work:* As a CPA I had to work on matters where I frankly didn't care for the client or type of work or what the firm was doing for the client. As a lawyer I didn't want the problem of doing work on matters or for clients for whom I had no respect, simply because they had money to hire lawyers and I was a lawyer. As my own boss I have greater freedom (not absolute freedom) to turn down cases and clients when I disagree morally with the legal principle espoused by the client.

6. *Security:* Except for some civil service situations, there is no such thing as job security in legal practice. If anything, I feel more secure standing on my own two feet than being dependent on the success or failure of an organization which I cannot control. I've seen banks fire their entire legal division to "experiment on cost savings using outside counsel." If the experiment is a failure, some vice president will shrug it off and the careers of some good lawyers who thought they had security will have been destroyed. I've seen private law firms fire associates on a mass basis when a large client leaves. I've seen law firms and corporations where there are two lawyers in line for every promotion. The better lawyer (better-liked lawyer may be more accurate) gets promoted and the other gets fired and the competition starts again.

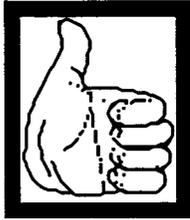
Risks of Failure: Nothing in life is guaranteed. There is a substantial risk of failure in opening your own law practice. There is also an element of luck involved. I would not be candid if I didn't make clear the possibility of failure.

Should You Start Your Own Practice? Are the risks justified by the rewards? In my opinion YES. Whether you make it or not you'll never regret having tried. The lessons of failure are more bitter than the lessons of victory, but they are valuable lessons nonetheless. Even if you don't make it you'll be a better lawyer and a better person for having tried.

How Soon Should You Open Your Doors? As soon as possible. You will quickly develop a liking for the "finer things in life" Its easier to bite the bullet before developing a taste for these things than after you have all these personal expenses. (Reprinted from ABA Career Series: How to Start & Build a Law Practice) ■

FOCUS ON:

LICENSING LEGAL TECHNICIANS:



Lawyers jealously guard their monopoly over providing legal services by enforcing state laws and court rules making it illegal for anyone but licensed lawyers to practice law. To this day, non-lawyers can be, and occasionally are sent to jail for violating these

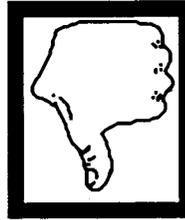
laws and rules. Most often, however, judges simply order the non-lawyer out of business. Asserting their constitutional authority to regulate who appears before them as advocates, courts ban all but lawyers, even though many agree with Warren Burger, former Chief Justice of the U.S. Supreme Court, that lots of lawyers are incompetent. The real victims however are the millions of Americans who are priced out of the legal system. Even the ABA laments that as many as one hundred million Americans cannot afford fundamental legal help. Laws and court rules that prohibit practicing law without a license should be repealed, making non-lawyers free to provide basic legal services, including form preparation for divorces, bankruptcies, probates and most other routine uncontested actions. Consumers, not lawyers, should be allowed to decide who to turn to for legal help.

This new deregulated system would benefit lawyers as well as consumers. Lawyers would shift from low-skill legal tasks, such as handling uncontested probates, guardianships or divorces to areas involving more technical knowledge, much as doctors have turned the task of taking peoples' temperatures over to others.

Some critics of non-lawyer legal service providers argue that it's important to at least provide supervision by a highly-trained lawyer. This completely ignores the fact that few lawyers have such necessary skills. Lawyers do not learn to provide good quality basic legal services in law school, nor are they tested for this skill in bar exams. In fact, new lawyers learn how to deal with basic law issues from the secretaries and paralegals who have done it for years, not the other way around.

Many still maintain that even if paralegals can handle some simple tasks, allowing them to provide services to low-income people institutionalizes a dual standard: The middle class can choose lawyers, while the poor must scrape by with paralegals. Yet, even the ABA has conceded that the middle class, increasingly unable to buy legal help from lawyers, is turning to independent paralegals to provide cost-effective help with routine legal services. So if the middle class can gain access to law by replacing lawyers with paralegals why can't the poor?

Our country is founded on the principle of "justice for all" under the law, but it requires people to buy their way into the legal system by hiring lawyers. Many people who cannot afford to pay the price are shut out of the system. (Reprinted with permission from *Legal Breakdown* by the editors of NOLO Press, 950 Parker St., Berkeley, CA. (415) 549-1976.)



The legal technician issue is one that must be analyzed in view of three significant questions of policy. First, what is the true effect of unauthorized practice of law upon the public. Second, what is the true measure of the general public's lack of access to the legal process? Third, can legal technicians really offer the public more access to the

judicial system? While the unauthorized practice of law is detrimental to the public, being frozen out of the legal system by prohibitive cost factors is also harmful to our society. The licensing of independent paralegals to provide legal services in limited areas will clearly not cure both harms. The fundamental threshold issue is whether licensing paralegals will exacerbate the type of harm caused by the unauthorized practice of law more significantly than it would help resolve the problem of lack of access to the legal process.

The California Young Lawyer's Association (CYLA) rejects the proposition that paralegals can effectively or competently provide legal assistance in the areas of bankruptcy, family law or landlord/tenant law. Additionally, the recommended "practice area limitations" would so severely limit paralegals that their customers would be prohibited from receiving complete and meaningful services from them. A piece-meal system of legal services would result forcing clients using paralegals to eventually retain a lawyer.

At a substantive level, the complexities associated with "issue spotting" and "cross over" legal problems demands greater educational requirements than those presented in existing legislature. Issue spotting skills require broad knowledge of various, interrelated areas of law and policy; it requires asking the right questions and knowing how to discover what is not obvious. Paralegals practicing only in the areas of bankruptcy, family law and landlord tenant would also need exposure to civil procedure, UCC, civil/criminal statutory fraud, torts, tax--both State and Federal, State and Federal Court Rules, real property and contracts.

Ultimately, the most vulnerable in our society run the greatest risk of fraud or malpractice occasioned by a new paraprofessional class of legal services. California's proposal is more expansive than programs existing in any other state. Washington's program, for example, limits licensed paralegals to preparing various documents relative to the closing of a property transaction. This is dramatically different than allowing advice to span three different practice areas of law. While the access to justice issues are real, the damage to the public and subsequent harm caused to our society from incompetence and fraud vastly outweigh the value of California's current recommendation. (CYLA study Re: Report of the State Bar of California Commission on Legal Technicians.)



PROFILES:

The CAVEAT spoke to law students who had previously been paralegals to get their reaction to the proposed legislation licensing legal technicians. Cindy Cox emphasized a concern for the paralegals lack of issue-spotting skills which are gained through legal education. Paralegals are often given specific tasks regarding discovery or motions but do not see the lawyer's analysis behind the function. Much of the paralegal's work is determined by the lawyer's conversation with clients and negotiations. "The law is a seamless web" as Prof. Kosel always reminded us. Paralegals are often only seeing one dimension. Another concern of Cindy's was that in licensing independent paralegals who are not aware of interwoven procedural issues, a consumer's rights may be violated. The loss of a cause of action resulting from the expiration of a statute of limitations or failure to recognize a related issue are two such examples.

Before entering law school Susan Kalra had worked in a criminal defense law firm for three years. "I learned to be a complete advocate for the defense. Law school has taught me that there are two sides to every issue: that there is no "right" side or "wrong" side."

"I have seen that areas of law are not wholly separate. The most important thing law school has done, however, is that I now understand a) why particular facts are important, and b) the theory behind the cases. When I worked as a paralegal and even through paralegal school, what I learned was "how to" - how to set up trial binders, how to do subpoenas. Now, after a year in law school, when a client comes in to explain his situation, I have begun to see why certain facts are important because they go to particular elements of a crime or defense."

While Susan believes that paralegals can be a link between the legal system and people who cannot afford attorneys, she finds it imperative that paralegals be supervised by an attorney as a minor mistake can spell disaster for the client. Additionally, an executive body, apart from the broadly diverse Consumer Affairs Department, should be established to regulate the paralegal industry. Finally, paralegals should be tested for competency and required to take continuing education courses to keep up with changes in the law.



CAVEAT FOCUS

Caveat viator:

"Let the wayfarer beware. This phrase has been used as a concise expression of the duty of a traveler on the highway to use due care to detect and avoid defects in the way." BLACK'S LAW DICTIONARY 222 (6TH ed. 1991).

The focus of *The Caveat* is to give students travelling through law school the information necessary to "detect and avoid defects" which may plague a legal career. While law school will give you the tools you need to understand substantive law and policy it does not often emphasize the practical skills necessary to be a successful attorney, nor does it delve into the immediate changes which are occurring in our legal system. The aim of *The Caveat* will be to compliment a formal legal education by informing students of issues they will face outside of the classroom.

We hope to provide practical information which will fill in gaps and give students "hands on" tools for use in their legal practice. Each edition will include articles beneficial to the daily practice of law, gathered from working attorneys as well as current "hot" topics in the legal community. We anticipate covering the following areas:

- Alternative Dispute Resolution
- Gender Bias in the Courts
- Intellectual Property Law
- Environmental Law
- Human Rights Issues
- Legal Self-Help

We would appreciate your contribution in any of the above areas which interest you. Just drop off or mail your article or comment to the *The Caveat* located at:
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THE CAVEAT

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