**Chapter 3: The Regulation of Paralegals**

**Review Questions**

**3.1.** Name six ways that paralegals could be regulated.

**3.2.** What is accreditation?

**3.3.** Define regulation.

**3.4.** Paralegals can be accredited to perform functions that attorneys once performed. True or False? Explain.

**3.5.** List three criteria commonly imposed as a condition of certification.

**3.6.** When certification comes from a school, some prefer to say that the person has been \_\_\_\_\_\_\_\_\_\_.

**3.7.** Define code.

**3.8.** Define licensure.

**3.9.** Define limited or specialty licensure.

**3.10.** Define registration or enrollment.

**3.11.** It is a(n) \_\_\_\_\_\_\_\_\_\_ in many states to violate the law on the unauthorized practice of law.

**3.12.** Name seven tests that different courts have used to define the practice of law.

**3.13.** In defining the practice of law, what is theprofessional judgment test?

**3.14.** In defining the practice of law, what is the general public/personal relationship test?

**3.15.** In defining the practice of law, what is the complex/difficult question test?

**3.16.** In defining the practice of law, what is the important rights/public protection test?

**3.17.** In defining the practice of law, what is the traditional areas test?

**3.18.** In defining the practice of law, what is the commonly understood test?

**3.19.** In defining the practice of law, what is the incidental test?

**3.20.** What is the essence of professional judgment?

**3.21.**  Distinguish between attorney in fact and power of attorney.

**3.22.** Name the three major kinds of activities in the practice of law.

**3.23.** A person who represents himself or herself in court is obviously practicing law. True or False? Explain.

**3.24.**  What is the difference between giving legal information and giving legal advice?

**3.25.** Is a paralegal practicing law when he or she goes to a land records office, traces the title to a parcel of land, and draws conclusions on the legal validity of the title? Explain.

**3.26.** Self-employed and unsupervised paralegals are not engaged in the illegal practice of law when they sell legal forms and type them for someone. True or False? Explain.

**3.27.** Jones is a nonlawyer. He sells videotapes on how citizens can represent themselves in court. The tapes describe what the law is and how to use the law in court. The tapes are sent to buyers through the mail. Jones is practicing law illegally. True or False? Explain.

**3.28.** Why was Rosemary Furman prosecuted?

**3.29.** There are bar associations that have negotiated a treaty or \_\_\_\_\_\_\_\_\_\_ of \_\_\_\_\_\_\_\_\_\_ with groups such as claims adjusters and real estate agents to work out boundary lines concerning the practice of law.

**3.30.** What U.S. Supreme Court opinion held that the antitrust laws apply to attorneys and that minimum fee schedules violate these laws?

**3.31.** What definition of the practice of law did the American Bar Association propose and ultimately withdraw because of opposition by the Justice Department and Federal Trade Commission?

**3.32.** Paralegals cannot represent clients in any court. True or False? Explain.

**3.33.** In a few states, it

**3.34.** What is an adversary system?

**3.35.** What did Chief Justice Rehnquist mean when he said that the role of the lawyer is *not* to make sure that the truth is ascertained?

**3.36.** Under *Johnson v. Avery*, (a) when must a prison allow one inmate to give legal assistance to another inmate, and (b) can this assistance include representing another inmate in court?

**3.37.** In what way can the concurring opinion of Justice Douglas in *Johnson* be used to support the view that nonattorneys should be allowed to represent citizens outside of prison who are not being represented by attorneys?

**3.38.** Some administrative agencies authorize paralegals to represent clients before the agencies. True or False? Explain.

**3.39.** The federal \_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_ provides that a person who must appear before a federal agency is entitled to be represented and advised by an attorney, or by other qualified representative, if permitted by the agency.

**3.40.** Give the title of the nonattorneys authorized to practice before the U.S. Patent and Trademark Office and the Internal Revenue Service.

**3.41.** Attorneys and paralegals can represent their own clients before the Social Security Administration and both can charge client fees. In what respect are attorneys and paralegals treated differently?

**3.42.** What opinion of the U.S. Supreme Court held that a state bar association cannot prevent a nonattorney from practicing law before a federal agency when such activity is authorized by the federal agency?

**3.43.** What clause of the U. S. Constitution was used by the Court to support the conclusion stated above in question 3.42?

**3.44.** What are the two main reasons an occupation may want to be licensed?

**3.45.** Distinguish between:

(a) Licensure

(b) Certification

**3.46.** What is the main reason many oppose broad-based licensing for traditional paralegals?

**3.47.** Why did New Jersey reject broad-based licensing in 1999?

**3.48.** What are the requirements for using the paralegal or legal assistant title in California?

**3.49.** Why did the California Independent Paralegal Association change its name to the California Association of Legal Document Assistants?

**3.50.** The ABA once supported limited licensing for paralegals. True or False? Explain.

**3.51.** How did the ABA Commission on Nonlawyer Practice define:

(a) self-represented person

(b) document preparer

(c) paralegal

(d) legal technician

**3.52.** A person acts pro se or in properia persona (pro per) when that person \_\_\_\_\_\_\_\_\_\_

\_\_\_\_\_\_\_\_\_\_ or \_\_\_\_\_\_\_\_\_\_\_.

**3.53.** What is the function of the Practice of Law Board in Washington state?

**3.54.** State the duties of the Limited Practice Officer (LPO) in Washington state.

**3.55.** Why has NALA opposed proposals for limited licensing?

**3.56.** What does NFPA call the license at each level of its two-tiered licensing scheme?

**3.57.** Name two categories of independent contractors in California and one category of independent contractor in every other state who are not allowed to call themselves paralegals but who can provide assistance to the public without attorney supervision.

**3.58.** List nine reforms in the practice of law.

**3.59.** An attorney or paralegal who donates free time and services is engaged in \_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_ work.

**3.60.** What is a prepaid legal services program?

**3.61.** When paralegals can join a bar association, what membership categories have different associations used?

**3.62.** List four national certification programs for paralegals.

**3.63.** Which of the national certifications are entry level?

**3.64.** All four national certification programs require passage of an examination. True or False? Explain.

**3.65.** In what states are the following state-specific certification exams given?

(a) CFLA

(b) LCP

(c) CAS

(d) Board Certified Legal Assistant

(e) NCCP

(f) DCP

(g) OSBA Certified Paralegal

(h) Pa.C.P.

**3.66.** Of the certification programs mentioned in questions 3.62 and 3.65, which one or ones are required for employment?

**3.67.** The ABA favors entry-level certification of paralegals. True or False? Explain.

**3.68.** Which unit of the U.S. Department of Labor administers the Fair Labor Standards Act?

**3.69.** The U.S. Department of Labor says that paralegals are exempt under the Fair Labor Standards Act and hence are not entitled to overtime compensation. True or False? Explain.

**3.70.** Which of the following factors do not determine whether a paralegal is exempt and hence not entitled to overtime.

(a) the paralegal’s title

(b) whether the office calls its paralegals “professionals”

(c) whether the paralegal obtains advance approval to work overtime

**3.71.** What are the three white collar exemptions under the FSLA?

**3.72.** Define tort.

**3.73.** A paralegal is \_\_\_\_\_\_\_\_\_\_ liable for the torts he or she commits. Under the doctrine of \_\_\_\_\_\_\_\_\_\_ superior, employers can be \_\_\_\_\_\_\_\_\_\_ liable for paralegal torts committed within the \_\_\_\_\_\_\_\_\_\_ of the paralegal’s employment.

**3.74.** If a paralegal is negligent on the job, the client injured by this negligence can sue only the paralegal’s boss. True or False? Explain.

**3.75.** Give an example of an intentional tort by a paralegal that would be within the scope of employment so as to make the paralegal and the employing law firm liable for the intentional tort.

**3.76.** What is the test used for determining whether an attorney is negligent?

**3.77.** What kind of wrongdoing have paralegals most often been accused of committing?

**3.78.** What are the elements of malicious prosecution and abuse of process?

**3.79.** What is meant by going bare?

**3.80.** Name the two kinds of malpractice insurance policies.

**3.81.** Which of the two malpractice insurance policies do insurance companies favor, and why?

**3.82.** Paralegals can always assume that they are covered under the malpractice policy of their employing attorneys. True or False? Explain.

**ANSWERS**

**Chapter 3: The Regulation of Paralegals**

**3.1.** Six ways paralegals could be regulated:

1. laws on unauthorized practice
2. state licensing
3. self-regulation through certification
4. Fair Labor Standards Act
5. tort law
6. ethical rules

**3.2.** Accreditation is the process by which an authoritative organization (usually nongovernmental) evaluates and recognizes an institution or a program of study as meeting specified qualifications or standards.

**3.3.** Regulation is any governmental or nongovernmental method of controlling conduct.

**3.4.** False. Accreditation is a process of approving *schools* or *programs* of study. Persons are not accredited. Persons can be licensed or otherwise given special authorization to do something.

**3.5.** Conditions often imposed as a condition of certification:

1. graduating from a school or training program, and/or
2. passing a standard examination, and/or
3. completing a designated period of work experience.

**3.6.** When certification comes from a school, some prefer to say that the person has been certificated.

**3.7.** A code is any set of rules that regulates conduct.

**3.8.** Licensure is the process by which an agency of government grants permission to persons meeting specified qualifications to engage in an occupation and often to use a particular title. The permission is the license.

**3.9.** Limited or specialty licensure is the process by which an agency of government grants permission to persons meeting specified qualifications to engage in designated activities that are customarily (but not always exclusively) performed by another category of license holder.

**3.10.** Registration or enrollment is the process by which individuals or institutions are listed on a roster kept by an agency of the government or by a nongovernmental organization.

**3.11.** It is a crime in many states to violate the law on the unauthorized practice of law.

**3.12.** Tests different courts have used to define the practice of law:

1. professional judgment test
2. general public/personal relationship test
3. complex/difficult question test
4. important rights/public protection test
5. traditional areas test
6. commonly understood test
7. incidentals test

**3.13.** Professional Judgment Test: Does the service require an attorney’s professional judgment, meaning the special training and skills of an attorney? If the answer is yes, the service is the practice of law. For example, questioning a witness at a deposition. The professional judgment test is the most widely used test in the country.

**3.14.** General Public/Personal Relationship Test: Is the service offered to the general public rather than to a specific person? If the answer is yes, the service is not the practice of law. For example, an author writes a book on how to draft a will but does not provide personal attention to any individual buyer of the book. If, however, the service connects (applies) the law to the facts of a specific person, the service is the practice of law.

**3.15.** Complex/Difficult Question Test: Does the service seek to resolve a complex or difficult question of law that is beyond the capability of the average layperson? If the answer is yes, the service is the practice of law. For example, giving legal advice on an involved commercial transaction.

**3.16**.Important Rights/Public Protection Test: Does the service pertain to important legal rights that can be protected only by someone with special legal skills? If the answer is yes, the service is the practice of law. For example, telling someone how to divorce his or her spouse.

**3.17.** Traditional Areas Test: Is the service one that attorneys have traditionally performed? If the answer is yes, the service is the practice of law. For example, drafting a separation agreement in a divorce.

**3.18.** Commonly Understood Test: Is the service commonly understood to be the practice of law? If the answer is yes, the service is the practice of law. For example, making a motion in court. Preparing tax returns, on the other hand, is *not* commonly understood to be the practice of law.

**3.19.** Incidental Test: Is the service an adjunct to (incidental to) what another business routinely provides? If the answer is yes, the service is not the practice of law. For example, the preparation of a form sales contract by a real estate agent for which a separate fee is not charged.

**3.20.** The essence of professional judgment is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client.

**3.21.** Definitions:

* Attorney in fact: One authorized to act in place of or for another, often in a business transaction.
* Power of attorney: (1) A document that authorizes another to act as one’s agent or attorney in fact. (2) The authority itself.

**3.22.** Three major kinds of activities in the practice of law:

1. representing someone in court or in an administrative agency proceeding
2. drafting legal documents for someone
3. giving someone legal advice

**3.23.** False. Practicing law usually means to provide legal services *for another.* When a person tells himself or herself what the law is (e.g., how to claim a certain deduction on his or her tax return), we do not say that this person is practicing law.

**3.24.** The difference between giving legal information and legal advice:

* Legal information is general and not based on the facts of a specific person’s legal problem. Legal information is basic data about legal rights and remedies.
* Legal advice is a statement or explanation of how the law applies to the specific legal problem of a specific person.

**3.25.** The question of whether a paralegal is practicing law when he or she goes to a land records office, traces the title to a parcel of land, and draws conclusions on the legal validity of the title, depends on what the paralegal does with the conclusions.

* If they are communicated directly to a client, the paralegal *is* practicing law.
* If they are communicated to a supervising attorney, the paralegal *is not* practicing law. (Or, the paralegal is engaged in the *authorized* practice of law because the paralegal is stating legal conclusions about the facts of a specific client. However, this practice of law is authorized because paralegals have authority to provide legal conclusions to their attorney supervisors.)
* If the paralegal uses the conclusions solely for his or her own personal case (rather than for someone else), he or she *is not* practicing law.

**3.26.** True, but only if there is no personal assistance on what should go in the forms. Note, however, that if the forms deal with a legal matter where nonattorneys can practice (e.g., Social Security), they *can* give such personal assistance.

**3.27.** False. Such sales would be illegal only if there is *personal* help given to particular people using the videotape. This does not appear to be the case here since everything is done through the mail and there does not appear to be any communication on the specific legal problems of specific persons.

**3.28.** The official reason Rosemary Furman was prosecuted is that she was practicing law illegally by selling forms and by giving assistance and advice on how to fill out the forms. Some, however, say that the real reason she was prosecuted is that she was an economic threat to the bar.

**3.29.** There are bar associations that have negotiated a treaty or statement of principles with groups such as claims adjusters and real estate agents to work out boundary lines concerning the practice of law.

**3.30.** The U.S. Supreme Court opinion that held that the antitrust laws apply to attorneys and that minimum fee schedules violate these laws is *Goldfarb v. Virginia State Bar*.

**3.31.** The following definition of the *practice of law* was proposed by the American Bar Association but was ultimately withdrawn because of opposition by the Justice Department and Federal Trade Commission: The application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law.

**3.32.** False. The statement is true for the vast number of courts in the country, but there are a few lower courts in some states that allow nonattorneys to provide full or limited representation of clients in their courts. This, however, is rare.

**3.33.** True, but in these states the paralegal’s role is very limited.

**3.34.** The adversary system is a method of resolving a legal dispute whereby the parties (alone or through their advocates) argue their conflicting claims before a neutral decision maker.

**3.35.** Lawyers must be advocates for their clients. The role of the judge and jury is to ascertain the truth.

**3.36.** Under *Johnson v. Avery* (a) a prison must allow one inmate to give legal assistance to another inmate when there are no alternatives to this assistance, and (b) the assistance of the inmate does not include court representation.

**3.37.** The concurring opinion of Justice Douglas can be used to make the following points: Citizens have a constitutional right of access to the courts. If attorneys do not provide this access (because there are not enough attorneys or because the fees are not high enough to attract attorneys), alternatives to attorneys arguably must be made available.

**3.38.** True. Some administrative agencies can establish their own requirements on who can practice before them. Under this authority, they can allow nonattorney representation.

**3.39.** The federal Administrative Procedure Act (APA) provides that a person who must appear before a federal agency is entitled to be represented and advised by an attorney or by other qualified representative, if permitted by the agency.

**3.40.** The titles of nonattorneys authorized to practice before certain federal agencies are:

1. *registered agents* are nonattorneys who are authorized to practice before the U.S. Patent and Trademark Office.
2. *enrolled agents* and *certified public accountants* are nonattorneys who are authorized to practice before the Internal Revenue Service.

**3.41.** The Social Security Administration will deduct the attorney fee from the client’s Social Security award and give the fee directly to the attorney. Nonattorney representatives, however, must collect their fee from the client; the agency will not deduct it from the award. In 2005, however, the agency began a demonstration project to allow specified nonattorneys to receive fees directly from the agency.

**3.42.** *Sperry v. State of Florida ex rel the Florida Bar* held that a state bar association cannot prevent a nonattorney from practicing law before a federal agency when such activity is authorized by the federal agency.

**3.43.** The Supremacy Clause of the U.S. Constitution is the basis of the decision that a state bar association cannot prevent a nonattorney from practicing law before a federal agency when such activity is authorized by the federal agency.

**3.44.** An occupation may want to be licensed to:

* protect the public
* enhance the occupation’s own image

**3.45.** Definitions:

* Licensure is the process by which an agency of government grants permission to persons meeting specified qualifications to engage in an occupation and often to use a particular title.
* Certification is the process by which a nongovernmental organization grants recognition to a person who has met the qualifications set by that organization.

**3.46.** The main reason many oppose broad-based licensing for traditional paralegals is that the public does not need the protection of such a license. It is already protected by the supervision of an attorney.

**3.47.** New Jersey rejected broad-based licensing in 1999 because paralegals are already subject to oversight by their attorney supervisors. There was no need, therefore, for a court-directed licensing system.

**3.48.** To be called a paralegal or legal assistant in California, you must:

* work under the supervision of an attorney,
* meet stringent education qualifications (e.g., complete an approved paralegal program with a designated number of law-related courses or have a baccalaureate degree and one year of law-related experience under the supervision of a California attorney), and
* attend mandatory continuing legal education (CLE) (four hours of ethics training and four hours of training in general law or the law of a specialty every two years).

**3.49.** Since most members of the California Independent Paralegal Association do not work under attorney supervision, its members can no longer call themselves paralegals. Most are now called legal document assistants.

**3.50.** False. A report of an ABA Commission (on page 52) once *recommended* limited licensing. But the ABA itself never adopted this recommendation.

**3.51.** The ABA Commission on Nonlawyer Practicedefines the following as:

* A *self-represented person* is a person who represents himself or herself, with or without assistance from someone else.
* A *document preparer* is a person who assists someone in the preparation of forms and documents using information provided by a self-represented person.
* A *paralegal* is a person who performs substantive work or provides advice to a client under the supervision of an attorney or for which an attorney is accountable.
* A *legal technician* is a person who provides advice or other substantive legal work to the public without attorney supervision and for which no attorney is accountable.

**3.52.** A person acts pro se or in properia persona (pro per) when that person represents himself or herself.

**3.53.** The Practice of Law Board in Washington state will determine where the role of the paralegal and other nonattorneys might be expanded through limited licensing. It will make its recommendations to the Washington State Supreme Court.

**3.54.** Duties of the Limited Practice Officer (LPO) in Washington include selecting and preparing approved legal documents for designated property transactions such as closing a loan, extending credit, or transferring land.

**3.55.** NALA feels that the proposals for limited licensing do not give enough guidelines to identify which cases nonattorneys are competent to handle. Also, limited licensing may lead to open warfare with attorneys and to public disillusionment with the legal system.

**3.56.** The two-tier license proposal of NFPA consists of an entry-level paralegal license and a specialty paralegal license.

**3.57.** Independent contractors in various states:

* independent contractors in California who are not allowed to call themselves paralegals but who can provide assistance to the public without attorney supervision are called legal document assistants (LDA) and unlawful detainer assistants (UDA)
* independent contractors in every other state who are not allowed to call themselves paralegals but who can provide assistance to the public without attorney supervision are called bankruptcy petition preparer (BPP)

**3.58.** Reforms in the practice of law:

* 1. pro bono work
  2. simplified forms
  3. Internet self-help centers
  4. court facilitators
  5. prepaid legal services
  6. attorney advertising
  7. publicly funded legal services
  8. modest means panels
  9. traditional paralegals
  10. limited licensing (a possibility in the future)

**3.59.** An attorney or paralegal who donates free time and services engaged in pro bono work.

**3.60.** A prepaid legal services program is one in which participants pay a set amount each month for designated legal services that may become needed.

**3.61.** When paralegals can join a bar association, they might be called:

**▪** associate members of the association, committee, or section;

**▪** affiliate members of the association, committee, or section; or

**▪** a full member of a legal assistant division.

**3.62.** National certification programs for paralegals:

1. CLA/CP: National Association of Legal Assistants
2. RP/Pace Registered Paralegal: National Federation of Paralegal Associations
3. PP: NALS, or the Association for Legal Professionals
4. AACP: American Alliance of Paralegals, Inc.

**3.63.** The CLA/CP certification of the National Association of Legal Assistants is entry level.

**3.64.** False. Three of the four certifications require passage of an examination (CLA/CP, RP, and PP), but AACP certification does not.

**3.65.** Certification examination in various states:

(a) CFLA: Florida

(b) LCP: Louisiana

(c) CAS: California

(d) Board Certified Legal Assistant: Texas

(e) NCCP: North Carolina

(f) DCP: Delaware

(g) OSBA Certified Paralegal: Ohio

(h) Pa.C.P.: Pennsylvania

**3.66.** None of the certification programs (national or state) is required for employment; they are all voluntary.

**3.67.** False. The ABA favors certification of *advanced* competence only.

**3.68.** The Wage and Hour Division of the U.S. Department of Labor administers the Fair Labor Standards Act.

**3.69.** False. The U.S. Department of Labor believes paralegals are *not* exempt except for managerial paralegals who supervise other employees.

**3.70.** None of these three factors determine whether a paralegal is exempt.

**3.71.** White collar exemptions under the FSLA:

1. executive exemption
2. professional exemption
3. administrative exemption

**3.72.** A tort is a civil wrong (other than a breach of contract) that causes injury or other damage for which our legal system deems it just to provide a remedy such as compensation.

**3.73.** A paralegal is personally liable for the torts he or she commits. Under the doctrine of respondeat superior, employers can be vicariously liable for paralegal torts committed within the scope of the paralegal’s employment.

**3.74.** False. The client can sue the paralegal and the latter’s employer. A paralegal is individually liable for his or her torts.

**3.75.** Paralegal assaults a client concerning a dispute over the payment of the fee owed to the firm where the paralegal works.

**3.76.** Has the client been injured because of a failure to use the knowledge and skill commonly possessed by a member of the profession in good standing? This constitutes reasonable care by an attorney in good standing.

**3.77.** Paralegals have often been accused of improperly notarizing signatures under pressure from a supervising attorney.

**3.78.** The elements of malicious prosecution and abuse of process are:

(a) malicious prosecution:

* to initiate or procure the initiation of civil or criminal legal proceedings,
* without probable cause,
* with malice or an improper purpose,
* the proceedings terminate in favor of the person against whom the proceedings were brought.

(b) abuse of process:

* the use of a civil or criminal process
* for a purpose for which the process is not designed
* resulting in actual damage.

**3.79.** Going bare means practicing without having malpractice insurance.

**3.80.** Two kinds of malpractice insurance policies:

* occurrence policy
* claims-made policy

**3.81.** Insurance companies favor claims-made policies since these policies cover only claims filed (made) during the period the policy is in effect. Under an occurrence policy, an insurance company would have to pay a claim if it arose (i.e., if the covered negligence or other wrongdoing took place) while the policy was in effect even if the claim was not filed (made) until long after the policy ended.

**3.82.** False. The paralegal must check the employer’s policy to find out if he or she is covered.