

Coralie C. Matayoshi, Esq.
Hawaii State Bar Association
1132 Bishop St., Ste. 906
Honolulu, HI 96813

Re: Task Force Proposal Amending Rule 5.3 of
the Hawai'i Rules of Professional Conduct

Dear Ms. Matayoshi:

Thank you for soliciting comments on the proposal to amend Rule 5.3 of the Hawai'i Rules of Professional Conduct. Our local member association, the Hawai'i Paralegal Association has also asked that we provide information we feel might help you in creating a well-rounded regulatory policy that will achieve its goals of protecting the public and assisting the legal profession. The National Federation of Paralegals Association (NFPA) on behalf of its 57 member associations representing over 17,000 paralegals nationwide is proud to participate in this endeavor.

NFPA has been the leader in the paralegal profession for the last 26 years. A grass roots organization, the policies espoused in our response are those created by our delegates at annual policy meetings.

Regulation of the paralegal profession is definitely necessary for the legal profession to grow and prosper in the new century. Your recognizing that another level of legal service provider is needed to compete in the profession shows foresight and affirmance of the importance of the legal profession in today's society.

The need for this additional level of provider has already been addressed in the medical profession by its use of physician's assistants as additional service providers. Created to answer the crisis brought on by insurance companies reduction in reimbursement on medical costs, the role of the physician's assistant was expanded. While responsibility for the substantive medical work performed by these assistants rests with the doctors, they are allowed to see patients and write prescriptions. It must be noted that the training required to become a Physician's Assistant is not as extensive of that required by M.D.s, but is a rigorous course of training that includes a curriculum of medical based courses, continuing medical education and an ethics component. Persons successfully completing this course are required to obtain and maintain a license. The increased access to medical services has proven that the medical profession made the correct choice in recognizing the expanded role of the Physician's Assistant. The legal profession can enjoy that same success.

The needs of the public seeking high quality, cost effective legal services must be answered. This ever increasing need has made it necessary for attorneys to seek new and innovative ways to meet these needs and continue to maintain the integrity of the profession AND maintain a profitable law practice. Paralegals working in an expanded role performing substantive legal work can help meet these needs.

With respect to your proposal, we offer the following comments:

Although your proposal uses the terms "paralegal", "legal assistant" or "lawyer's assistant", it is respectfully submitted that these terms no longer enjoy the interchangeable quality they had in years past. In today's market, the term "paralegal" has emerged as the title for those persons performing the highest level of substantive legal work. The term legal assistant is being employed as a term for legal secretaries who are seeking to use a title other than that of secretary. In short, the more clerical job assignments are being relegated to legal assistants. To add to the confusion, in the states of Mississippi and Massachusetts, the term "legal assistant" is used to describe assistant county attorneys.

Based on the foregoing and to avoid misleading either the Courts or the public, NFPA would suggest that the term paralegal be the preferred title used in your certification process.

In the creation of your regulatory plan you mandate that the assignment of substantive legal work to paralegals shall not adversely impact or hamper the exercise of the attorney's professional independent judgment (Section 5(1)(vii)). Later in comment "4" on pages "8-9" of the proposal, you state that the purpose of this plan is to ensure that "paralegals have the minimum competency necessary to perform the delegated paralegal tasks."

Through its years of leading the profession, NFPA delegates have repeatedly confirmed that any proposal to regulate our profession should always aspire to more than "minimum" competencies. Therefore, we suggest that only paralegals who demonstrate advanced competency could adequately accommodate these duties your proposal would allow paralegals to perform. Paralegals certified by your proposal who possess such advanced competency would allow attorneys in your state to increase their profits by working on more cases. The attorneys (partners and associates)⁽¹⁾ would have the ability to concentrate on the more complex components of legal matters while secure in the knowledge that the other substantive legal tasks inherent in the process of any case are being performed by paralegals that have the knowledge and capability to perform same in a thorough and professional manner. Imagine the positive effect on the way the public views the legal profession when they realize that your state has looked at their needs and added the highly skilled paralegals to help them address those needs.

Under your current proposal, it would be recommended that you define to some degree that substantive legal work is those tasks that only paralegals can perform for an attorney. Tasks that, absent the creation of this proposal, only attorneys would be doing. Across the United States paralegals perform substantive legal tasks for their employers and we enclose for your reference our publication "Paralegal Responsibilities" which details the various tasks regularly assigned to paralegals in various practice areas. We would also suggest that paralegals certified under this proposal also be granted the ability to perform those tasks permitted to non-lawyers via court rule, statute or governmental authority.

It is imperative that paralegals be separated from other non-lawyer staff in an office in a tangible manner to insure that those persons not meeting the criteria cannot be assigned paralegal tasks. To accomplish this, the word paralegal should be used consistently throughout the proposal, replacing phrases such as "the person", "the non-lawyer", etc.

The criteria for paralegals in Hawai'i Section 1.14(1) does not address which currently existing examinations are acceptable and would leave this to a commission to be formed. Since there are only two national paralegal associations in existence, it is felt that the examinations should be referred to by name ("The Paralegal Advanced Competency Exam" or "PACE" and the "Certified Legal Assistant Exam") or by the designation awarded for the successful completion of those tests ("RP" or "CLA"). The inclusion of these tests would give the Commission guidance in the criteria to be met before accepting other, less strict examinations as part of this regulatory process.

While unable to comment on the criteria for the Certified Legal Assistant exam offered by the National Association of Legal Assistants, we can tell you that PACE was created by NFPA to answer our need for a psychometrically valid test to identify those paralegals possessing advanced competency in our profession. The successful completion of PACE bestows the designation of "RP" or "PACE Registered Paralegal."

In addition, this proposal should encourage (we would go so far as to suggest that it mandate) that applicants who obtain certification under this section maintain their credential. To do otherwise would undermine the achievement and status gained by passing the test. An "RP" must complete 12 hours of CLE every two years. We can proudly state that Hawai'i has nine (9) RPs.

Any policy defining or regulating paralegals faces the critical balancing test of (a) including all those people who are working in the profession at the current time (we never want to put people out of work); (b) allow sufficient time for those currently training for the profession under the present criteria to complete their training; and (c) to then end those methods of entry into the profession that do not meet the advanced competency sought by this regulation. The use of a grand parenting window in Section 1.14(2)(i) which begins on page "10" through the end of that section on page "12" and a definite sunset provision would serve to identify the windows of opportunity available to those paralegals currently working in the profession as well as to educators and students in Hawai'i's paralegal programs.

Envisioning the time when regulation of our profession would be a nationwide concern, our delegates created policy which has two tiered licensing as our preferred form of regulation. We can, however, support other forms of regulation (registration or certification) if said processes include testing, a core curriculum of legal based courses (we recommend 24 hours of such legal specialty training), ethics and continuing legal education. To further this policy, NFPA has created not only a Model Code of Licensure but a Model Code of Ethics and Guidelines for Enforcement. Copies of each are enclosed.

Your certification proposal does speak to the components that would allow NFPA to support it and we hope that you find sections of the Model Codes created by NFPA something that you could easily incorporate into your current proposal.

NFPA recognizes that continuing legal education is not yet mandatory for attorneys in Hawai'i and for that reason it is not included in this regulatory process for paralegals. We would ask that you rethink this reasoning and include mandatory CLE for paralegals. CLE can be obtained online from both national paralegal associations and from other professional sources. Including mandatory CLE in the certification process would demonstrate to attorneys and the public alike that the paralegals performing substantive legal work remain up to date on the changes in the law or the practice areas in which they work.

Your proposal leaves the issue of excluding disbarred and suspended attorneys from certification to the Bar's Disciplinary Committee. We also know that the Disciplinary Committee takes a dim view of attorney's who violate the trust and honor of the profession. It would be our preference that this proposal contain a recommendation that disbarred and suspended attorneys not be allowed to become paralegals under this proposal.

One area of great concern not addressed in your proposal is the area of pro bono services. We acknowledge the fact that you leave legal services organizations as exempt from your regulation. However, the needs of those who regardless of our best efforts cannot afford legal services cannot be fully met without pro bono services. NFPA strongly supports paralegals assisting in the delivery of pro bono services. Our policy calls for each NFPA member to aspire to performing 24 hours of pro bono service each year. At the present time we have a working relationship with AARP and the American Bar Association's Conference on Equal Justice. We continue to seek new avenues to encourage paralegal participation in the pro bono venue. We recognize the outstanding achievements in the pro bono arena by our annual awards to individuals and member associations.

Additional information regarding NFPA can be obtained by visiting our web site at <http://www.paralegals.org/> and we invite you to visit that site to learn more about us.

NFPA would like to take this opportunity to thank you for recognizing the value of paralegals as an integral part of the legal services team and hope that our comments will prove of assistance in the creation of your regulation policy. Should you require any additional information or wish to speak to someone about these matters, please contact either me or Mary Kay Rivera, RP, our present Vice President and Director of Positions and Issues. Ms. Rivera can be reached at the offices of Richard A. Glickel, Esq., Two Crosfield Avenue, Suite 103, West Nyack, NY 10994; her telephone number at work is (845) 353-4300 and you may email her at VPPI@paralegals.org. Hawai'i is part of NFPA's Region I and our Region I Director, Lee Davis, may be reached at LeeDav@aol.com

Again, thank you for allowing NFPA to provide this information to you.

Very truly yours,

Sally Andress, RP
President, NFPA

enclosures

cc: Hawai'i Association of Paralegals
Board of Directors, NFPA

1. Paralegals should always be considered a member of the legal services team to be used IN ADDITION to and not instead of associate attorneys.