IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE RULES REGULATING THE FLORIDA BAR TO ADD CHAPTER 20 – FLORIDA REGISTERED PARALEGAL PROGRAM

Case No.: SC06-1622

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RESPONSE OF THE SOUTH FLORIDA PARALEGAL ASSOCIATION IN OPPOSITION TO THE FLORIDA BAR'S PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR TO ADD CHAPTER 20 – FLORIDA REGISTERED PARALEGAL PROGRAM

On August 15, 2006, The Florida Bar filed a petition with this Court seeking to amend the rules regulating it by adding a new Chapter 20 establishing the Florida Registered Paralegal Program (hereinafter the "Proposal.") This Response is being submitted by the South Florida Paralegal Association ("SFPA") on behalf of its members since, although we support a regulatory program for all paralegals in the State of Florida, SFPA must raise specific objections in opposition to The Florida Bar's petition.

Introduction

The South Florida Paralegal Association is a not-for-profit entity based in Miami, Florida. It has approximately 200 members, the majority of whom are practicing paralegals who live and work in Miami-Dade, Broward, and Palm Beach

counties. The SFPA was founded in 1979 for the primary purpose of promoting the professional interests of practicing paralegals throughout south Florida.

During the past decade, the paralegal profession has been among the fastest growing professions in the United States. This rapid growth has given rise to numerous professional paralegal associations, both in Florida and nationwide, and to a movement by these associations to seek accreditation and regulation for their profession. In 1996, several paralegal associations throughout Florida forged an alliance to study various issues relating to professional certification and regulation. As a result, the Florida Alliance of Paralegal Association ("FAPA"), of which SFPA is an active parent member, was created. This alliance provided the profession with a united voice to advocate our interests and with a vehicle to develop strategies for the advancement of our chosen profession on a statewide level. In studying the issues, it has become increasingly apparent that there are two primary needs that would both advance the professionalism of Florida paralegals and promote the protection of the public: ***a mandatory certification system*** to set minimum standards for those seeking to work as professional paralegals in Florida, and a meaningful ***regulatory system*** to supervise the paralegal profession. The problem with the pending proposal by The Florida Bar is that it would impede rather than satisfy these needs.

The Legislative Backdrop

Over the past several years, FAPA and its parent paralegal associations have worked with The Florida Bar in an attempt to achieve these goals. Although dialog between The Florida Bar and the paralegals began in the early 1990s, no substantive headway was achieved until House Bill 1519 and Senate Bill 2054, which came to be known as the Paralegal Profession Act (hereinafter the "Initial Bills"), were filed early in 2005. This proposed legislation required mandatory educational and ethical guidelines for ALL paralegals in Florida. The Initial Bills also proposed the creation of an independent "Paralegal Regulation Board."

After the Initial Bills were filed, representatives from The Florida Bar met with the Initial Bills' sponsor in the House of Representatives, Representative Juan Zapata, advising that The Florida Bar needed time to study the issues addressed in the Initial Bills and requesting that the Initial Bills be held in abeyance to give The Florida Bar an opportunity to undertake such a study. Representative Zapata acceded to this request, and The Florida Bar created the Special Committee to Study Paralegal Regulation ("the Committee"). Membership in the Committee was made up primarily of attorneys with only a handful of paralegals.

Over the next several months, the Committee held a number of meetings. It also conducted a public hearing in Tampa on October 21, 2005, which was attended by representatives of both FAPA and SFPA. Both paralegal associations,

as well as the other FAPA parent associations, supported the goals set forth in the pending Initial Bills regarding the certification and regulation of the paralegal profession. At the Tampa hearing, thirty-one of the attendees addressed the Committee. (*See* Petition, Appendix D – Part 2.) Of those speakers, the majority supported the regulation of the paralegal profession in the state; most also supported the creation of a mandatory certification system.

Ultimately, the Committee failed to adopt or support the recommendations of FAPA, and its parent associations including SFPA, regarding mandatory certification and independent regulation. In November 2005, Representative Zapata resubmitted House Bill 395, titled "The Paralegal Profession Act," with the support of both FAPA and SFPA. A companion Senate Bill, SB 2054, was filed concurrently by Senator Argenziano (hereinafter the "Refiled Bills"). The Refiled Bills had substantial support from both the public sector and various legislators. Various publications throughout Florida began reporting on the pending legislation and on differing views held by the Refiled Bills' sponsors, The Florida Bar, and the paralegal associations regarding regulation of paralegals in Florida. The Committee then renewed its efforts to create an alternative to the Refiled Bills, within the time constraints mandated by The Florida Bar's leadership, without compromising their well-documented objection to the mandatory regulation set forth in the pending legislation.

On or about April 1, 2006, the Committee proposed the addition of Chapter 20 to the Rules Regulating the Florida Bar – The Florida Registered Paralegal Program, the rule amendment now pending before this Court. Over the objection of SFPA, and without consulting any of its parent associations, FAPA leadership (which had been appointed to the Committee by the Florida Bar) agreed to the Proposal, even though the Proposal did ***not*** meet the goals previously sought by FAPA and its parent associations, on the assumption that no better system is currently possible. SFPA respectfully dissents from this capitulation, since the proposed Chapter 20 meets neither of the goals previously sought jointly by FAPA, and its parent associations, including SFPA. Accordingly, SFPA submits this response in opposition to The Bar's petition and requests either that this Court amend the proposed Rules change to incorporate the suggestions as set forth below or that the Court exercise its authority to appoint a committee to draft a mandatory regulatory program for paralegals to be overseen by the Florida Supreme Court.

Analysis

There Should Be a Mandatory System of Certification, With Minimum Standards Of Education and Experience, For Anyone Wishing To Use the Title "Paralegal" in the State of Florida

The Florida Bar's Proposal would create a two-tiered system for paralegals practicing in this state: "Florida Registered Paralegals," who must meet strict standards regarding education, experience, background, while submitting

themselves to disciplinary actions (tier-two paralegals); and "paralegals," who need not meet any objective standard other than a widely varied definition decided by their employer-attorney under Rule 4-5.3(b) (tier-one paralegals). The Florida Bar's Proposal defines a tier-one paralegal in relevant part as "a person with education, training, or work experience" – without setting any minimum requirements for what that "education, training, or work experience" must entail. Thus, under this standardless definition, ***anyone*** asserting themselves to qualify could hold themselves out as a tier-one paralegal; any attorney agreeing could, regardless whether that person met any sort of credentialing requirement, employ such a person as a "paralegal."

The Florida Bar's Proposal excludes from eligibility for participation in the Florida Registered Paralegal program (tier-two paralegals) various individuals – including disbarred or suspended attorneys, convicted felons, persons who have been found to have engaged in the unlicensed practice of law, paralegals who have lost their registration for disciplinary reasons, and paralegals who have failed to meet their continuing education requirements. (*See* Proposed Rule 20-5.1). Under The Florida Bar's Proposal, however, such persons – including convicted felons, disbarred attorneys, and persons who have undertaken no continuing education whatsoever – could nevertheless still be employed as "paralegals" under the first tier of the program.

This dual use of the term "paralegal" is bound to be confusing to the public. Consumers of legal services will likely be confused by the distinction between "registered paralegal" and "paralegal," bringing the legal profession into disrepute, including by raising avoidable issues regarding billing.[1]

The Bar's two-tiered system for the use of the title "paralegal" would also impede the desire of ***qualified*** paralegals to bring additional professionalism to their field. Under The Bar's Proposal, persons working under the direction and supervision of an attorney would have little incentive to meet the demanding standards to enter the "Registered Paralegal Program," since the ***only*** benefit would be the authorization to use the "Florida Registered Paralegal" title, as the large majority of those who would currently qualify under that program have already voluntarily submitted themselves to national certification or belong to local paralegal associations, with long-standing educational, work experience, ethical and continuing education standards similar to those The Florida Bar is proposing[2].

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[1] Although SFPA has no interest in limiting, or in any way affecting, the way that lawyers can bill clients for the services of any staff members, it still bears noting that a unified system under which only those persons who qualify as Florida Registered Paralegals were entitled to use the title "paralegal," would avoid such problems. Such a system should also simplify billing issues in cases involving an award of fees, whether by a court, an arbitrator, or through negotiation by the parties.

[2] Like many other voluntary professional paralegal associations, SFPA imposes strict guidelines on its paralegal members, including adherence to prerequisite educational and/or work experience and ethical guidelines. SFPA's Code of Ethics and membership requirements can be viewed on our website at www.SFPA.info.

The SFPA is unaware of any other group of professionals who operate under such a "two-tiered" system, where one of the "tiers" imposes no obligation whatsoever on the supposed professional. Certainly, it is difficult to believe that either the medical profession or the public would tolerate a system in which doctors could employ an individual – including physicians who had lost their medical licenses, convicted felons, persons who had engaged in the unlicensed practice of medicine, and nurses who had lost their registration for disciplinary reasons or for failure to meet their continuing educational requirements – and hold such persons out to the public as "nurses," simply because a doctor somewhere believed that person had the necessary "education, training, or work experience" to merit the title. Nothing in The Florida Bar's Petition in support of its proposed rule change sets out ***any*** legitimate policy interest that would be served by creating the standardless status of "tier one" paralegal.

Instead, SFPA respectfully submits that it would be in the interest of the public and the paralegal profession that ***mandatory*** standards be required for those working in the legal field who wish to use the title "paralegal." Those standards should include educational and work experience requirements, such as those set out in The Florida Bar's "Registered Paralegal Program"[3] or in the respective

[3] SFPA is aware that there has been some objection, as reflected in the materials included in the appendix to The Florida Bar's Proposal, to the creation of ***any*** type of certification or registration program raised by educational institutions that

language contained in the Refiled Bills, and should exclude from the paralegal profession convicted felons, disbarred attorneys, and those who had previously engaged in the unlicensed practice of law (except upon adequate proof of reinstatement of civil rights or license to practice law.)

In addition, there are reasonable alternatives to the permanent bifurcation of the paralegal profession. Under our proposal, a paralegal would be permitted to practice with "tier-one" status for a limited period of time (for example, one year) to give those paralegals an opportunity to attain the necessary credentials to reach tier-two status.

We also suggest that the program impose upon certified professional paralegals an ethical code, based on the Rules of Professional Conduct applicable to attorneys (except modified to be applied to paralegals working under the direction and supervision of a member of The Florida Bar), enforceable through

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conduct paralegal training programs that do not confer Associates degrees and whose graduates would, thus, not qualify under The Florida Bar's proposal. SFPA recognizes the value of these programs and believes that persons who have completed them should qualify for certification as professional paralegals, so long as they also meet additional work-experience and other minimum requirements. SFPA also agrees that a certified professional paralegal program should contain a "grandfather" provision for persons who have been working as professional paralegals for many years but cannot otherwise meet the educational requirements. As set forth above, SFPA requests that this Court appoint a committee to draft the standards for such a mandatory paralegal certification program or amend the Rules that would adopt Chapter 20.

disciplinary sanctions promulgated by a Paralegal Regulation Board (as discussed below) acting under the ultimate jurisdiction of this Court.

The Need for Independent Regulation of the Paralegal Profession

The SFPA recognizes, of course, that a paralegal in this state is, by definition, a person *who works under the direction and supervision of a member of The Florida Bar*. It also recognizes that members of The Florida Bar have an important role to play, formally (as members of an independent Paralegal Regulation Board) and less formally (as committee or association members), in creating and maintaining a valid regulatory system for paralegals. For several reasons, however, that is a far cry from saying that The Florida Bar itself has the authority to regulate ***all*** paralegals ***as a profession***.

First, under its own rules, The Florida Bar lacks authority to govern any profession but its own. Rule 1-2 of the Rules Regulating the Florida Bar states that "[T]he purpose of The Florida Bar shall be to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence." No authority is granted the Florida Bar, through either statute or rule, to create a regulatory system, either voluntary or mandatory, for any profession other than that of an attorney. The adoption of The Bar's Proposal, providing that registration of paralegals "...will be handled by The Florida Bar *with no court involvement*[]" (Petition at p. 7)

(emphasis added), would serve neither the interests of the general public nor those of the paralegal profession.

Instead, an independent Paralegal Regulation Board – including members drawn from The Florida Bar and the public, but with a majority of members comprised of qualifying paralegals themselves (such as was proposed in the legislation sponsored by Representative Zapata and Senator Argenziano) – should regulate the paralegal profession in Florida, with ultimate oversight vested in ***this*** Court pursuant to its constitutional authority, similar to the ultimate oversight this Court exercises over mediators and court reporters.

Second, regulation of the paralegal profession by The Florida Bar would create needless conflicts of interest. The Florida Bar's Proposal provides that "loyalty to the lawyer is incumbent upon the Florida Registered Paralegal." This language alone imposes an ethical burden upon the Florida Registered Paralegal, the violation of which would be cause for revocation of the paralegal's participation in the program. While the intention may have been simply to further reinforce the connection between paralegals and attorneys as their employer, it contradicts various state and federal whistle-blower statutes as well as other existing ethical standards that may bind paralegals.

As recognized above, the definition of a paralegal is, in part, "one who works under the direct supervision of an attorney" – a well-established definition,

recognized in practice in this state and others, and employed both in The Florida Bar's Proposal and in the Initial and Refiled Bills sponsored by Representative Zapata and Senator Argenziano.

Although connected, the professions of paralegal and attorney are distinct, with each requiring separate training, qualifications, and duties. By their nature, however, the two professions, attorney and paralegal, grouped by the well-accepted definition of what a paralegal is, creates an employer/employee relationship, with its concomitant legal protections and responsibilities.[4] For the employer to be a member of a professional *organization* that regulates and, thus, has complete authority over the profession practiced by the employee would drastically shift the balance of power – including power over admission to the Florida Registered Paralegal program and over professional discipline – to the employer, giving rise to a constant source of potential conflicts of interest. Again, an apt analogy can be drawn to the medical profession, where the physicians' professional association would certainly never be given regulatory authority over the nursing profession.

In addition, placing all regulatory control of paralegals under the sole authority of The Florida Bar would take away from the paralegals any ability to shape the future direction of their profession. Paralegals would be denied a

[4] Paralegals are non-exempt employees in accordance with the Fair Labor Standards Act as amended September 21, 2004. One of the primary reasons they are considered non-exempt is because the profession does not have the discretionary authority to act without an attorney.

method to adjust their profession to meet the changing needs for their services by amending the requirements for certification, continuing educational requirements, or other standards governing qualified paralegals. In essence, The Florida Bar had to be dragged to the table to come up with the meager and inadequate voluntary program set out in its Proposal so as to avoid the mandatory system proposed by the Refiled Bills. If the Proposal is enacted, The Florida Bar will have no incentive to amend the rules – and professional paralegals will have no autonomy to seek improvement of their profession on their own.

Finally, should this Proposal be administered by The Bar, there is a high probability that paralegals will not be inclined to participate in the process of steering their future in fear of creating a conflict in their employment relationship. Various members of SFPA have indicated that they are reluctant to submit objections to the Proposal in fear of reprisal from their employer – a valid professional concern, indicative of the type of conflict that would be created (and amplified) if The Florida Bar were to gain ultimate control over the paralegal profession through adoption of its Proposal. According to the National Association of Legal Assistants, Inc. ("NALA"), the administering body of the Certified Legal Assistant/Certified Paralegal designation, there are over 3,400 NALA certified paralegals in Florida. Although there are no precise figures on the number of non-certified paralegals working in Florida, it is likely that that number

is even larger. As such, the written comments submitted to this Proposal represent less than 1% of the paralegals certified by NALA in Florida. SFPA believes that the lack of response is based primarily on those paralegals' reluctance to go on record against a proposal supported by the attorney or firm that employs them. Clearly, where there is any question about whose interest a regulation serves, there is a risk to the entire profession. The key is to ensure that there is no perceived conflict between the role of public protector and those advocating on behalf of the profession. The Florida Bar's Proposal cannot meet this burden.

Instead, the paralegal profession should remain under the ultimate control of the Judicial Branch, pursuant to a mechanism similar to that suggested in the Initial or Refiled Bills. A Paralegal Regulation Board should be created to oversee and regulate a single, unified paralegal profession, funded by fees paid by paralegals who qualify under the program, subject to the approval and ultimate supervision of the Florida Supreme Court, rather than under the direct power of The Florida Bar.[5] Such a structure would eliminate the need for reviving the currently stagnant legislation and obviate any involvement by the Executive Branch.

[5] SFPA does not, of course, wish in any way to interfere with The Bar's ability to regulate, and prevent, the unlicensed practice of law. It bears noting, however, the a system of paralegal certification and regulation such as is proposed by SFPA would *enhance* The Florida Bar's ability in this regard, since it would clarify who could act as a "paralegal" and provide a strong disincentive for those who have been certified as professional paralegals from overstepping the bounds of their profession.

The Paralegal Regulation Board should have jurisdiction over the certification of all legal professionals who seek to participate in the professional paralegal program. The Paralegal Regulation Board would also have jurisdiction over the administration of a continuing education program for professional paralegals. In addition, the Paralegal Regulation Board would have jurisdiction, subject to final appeal to this Court, of all disciplinary matters arising under the professional paralegals' code of ethics. Finally, the Paralegal Regulation Board would have authority to propose and promulgate such changes in the rules regulating these subjects as are deemed necessary for improvement of the program. Such programs have been adopted by the Supreme Court of other states, ***with the cooperation and participation of those state's bar associations***, including Indiana and Wisconsin.[6]

Based on the above, SFPA on behalf of its members, respectfully requests that this Court amend The Florida Bar's Petition and adopt Chapter 20 with the suggestions made herein or that this Court instead appoint a committee to draft a professional paralegal program that includes mandatory participation by all

[6] For this Court's convenience, a copy of the Final Report of the State Bar of Wisconsin's Paralegal Practice Task Force, which contains a detailed discussion of just such a program, accompanies this Response as Appendix "A", and a copy of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys, proposing the "Indiana Registered Paralegal" is attached hereto as Appendix "B".

paralegals and authorizes self-regulation of that program by an independent Paralegal Regulation Board which is overseen by the Florida Supreme Court.

Respectfully submitted,

/s/

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

By: /s/
Kenneth J. Kukec, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via United States Mail this 14th day of September, 2006, to: John F. Harkness, Jr., Esq., Henry M. Coxe, III, Esq., Francisco R. Angones, Esq., Ross Goodman, Esq., Paul F. Hill, Esq., Mary Ellen Bateman, Esq., Lori Holcomb, Esq., in care of the The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300.

By: /s/
Kenneth J. Kukec, Esq.