

THE LEGAL ASSISTANT: A STRUGGLE FOR ACCEPTANCE

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The development of the legal assistant is an attempt to utilize a new class of workers to reduce the costs of delivering legal services to the public. The theory of the legal assistant is simple: costs are reduced by using a lower-paid person (the legal assistant) to perform tasks traditionally performed by a higher-paid person (the attorney). The end result is ideally set forth to be an increased availability of legal services, with the savings achieved to be shared between the attorney, the attorney's non-lawyer staff, and the client. With but a few exceptions, a review of the literature regarding the legal assistant leaves the reader with the distinct impression that with the legal assistant everyone wins, and that it is but a short time until the legal assistant revolutionizes the legal profession.

It was with this overall impression of the legal assistant that eighteen months ago I began work as the Project Director of the Legal Assistant Program at Kapiolani Community College.¹ While I am still convinced of the strengths of the legal assistant concept, the widespread use of the legal assistant is not going to occur easily—the legal assistant must struggle to be totally accepted by the legal community. The legal assistant will eventually “revolutionize” the delivery of legal services, but it will be more of an “evolution” than “revolution.” Substantial resistance to the use of the legal assistant still exists on the part of most attorneys. While the number of legal assistants has dramatically increased in recent years, by no means has the legal assistant been employed by the majority of attorneys.

This article attempts to accomplish three major purposes: 1) to familiarize the reader with the current extent of use of the legal assistant, including a description of what the legal assistant does and a discussion of why the legal assistant has developed; 2) to analyze the major sources of attorney resistance to the more extensive use of the legal assistant; and 3) to make predictions of the extent to which legal assistants will be utilized within the next ten years.

Data on a national level concerning legal assistants is extremely sparse and of dubious accuracy,² although there is data available in some individual states. The conclusions and descriptions of attorney attitudes contained in this article are primarily drawn from developments in Hawaii, although it is my strong opinion, based upon extensive conversations with many other Legal Assistant Program Directors throughout the nation, that the trends and issues in Hawaii are typical of those facing the other states.

The Current Extent of Use of the Legal Assistant

This section attempts to familiarize the reader with the current extent of use of the legal assistant, including a description of what the legal assistant does and a discussion of why the legal assistant concept has developed.

A. *What does a legal assistant do?*

The initial question asked by both the general public and attorneys usually requests information on what a legal assistant does. To some extent, the question is unanswerable, since the role of the legal assistant is to “assist the lawyer,” and lawyers have been unable to provide a comprehensive definition of what a lawyer does.³ Most definitions of the legal assistant usually refer to the legal assistant as someone who performs tasks which historically have been performed by lawyers:

[A] non-lawyer who performs or assists the lawyer in performing many of the tasks which historically have been performed by lawyers, but which do not necessarily need to be performed by lawyers.⁴

The legal assistant is also often called the “legal paraprofessional” or the “paralegal.” The terms are usually used interchangeably.⁵

A more meaningful understanding of what a legal assistant does can be realized through an enumeration of what general tasks the legal assistant completes. General skills and tasks which the

trained legal assistant performs include:

- handling routine client contact
- interviewing
- gathering information
- preparing documents
- signing documents
- filing papers
- monitoring case status
- investigating
- legal research
- maintaining the monitor system*

A review of the above list of skills and tasks makes it apparent that the legal assistant is in effect "sandwiched" between the legal secretary and the attorney, since the legal assistant does many functions previously performed by the experienced legal secretary⁷ and also does many functions traditionally performed by attorneys.

B. *What has caused the development of the legal assistant?*

The legal profession is hardly unique in its increased use of paraprofessionals. Paraprofessionals are extensively used in the medical and dental fields and are being used in increasing numbers in areas of architecture, social work, teaching, and law enforcement.⁸

Historically, non-lawyers have always been significantly involved in the law office, and the law clerk and the legal secretary have been of much assistance to the attorney. Thus, the concept of using non-lawyers in the law office is hardly new. What makes the legal assistant a significant "new" development is the type of work performed by the legal assistant, since the legal assistant is handling major areas previously within the work tasks of the attorney. The role of the attorney is now becoming more one of review and supervision of work that is performed by the non-lawyer.

The development of the legal assistant is an outgrowth of a personnel restructuring of the legal profession. This restructuring is caused by two major factors. The first major factor is increased costs. Cost of supplies, personnel, equipment, and office space have substantially increased for attorneys. These cost increases have resulted in the raising of fees, which of course has a negative effect upon the ability of the client to pay these fees. Attorneys have been losing business as a result of the failure to keep costs down:

[T]he Bar's loss of legal business is attributable primarily to the element of expense rather than comparability in the caliber of services...lawyer's charges...discourage prospective cli-

ents who remain unimpressed by an explanation of the high expense involved in operating a law office.⁹

The delegation by attorneys of tasks to legal assistants is one available means of reducing costs of personnel, stemming from the management principle of delegating the work as far down as possible to produce the maximum amount of efficiency.¹⁰

The second major factor forcing restructuring of the legal profession is the failure to serve the legal needs of a major segment of the population. Much reference has been made to the "gap group," which refers to the middle-income family earning between \$7,000 and \$17,000 annually.¹¹ This group is generally unable to afford attorney's fees but is ineligible for free legal services. The need to serve this group of people has been the major influence behind the creation of pre-paid plans, many of which extensively utilize legal assistants to reduce personnel costs.¹²

C. *To what extent are legal assistants presently being utilized?*

Accurate statistics concerning the number of legal assistants are difficult to obtain. Since there is no clear-cut definition of what constitutes a "legal assistant," it is difficult to determine whether many employees are "legal secretaries" or "legal assistants," since both employees perform many overlapping functions. Despite these categorizing difficulties, it has been estimated that the number of legal assistants total nationally 70,000, of whom 20,000 are in government and 50,000 are in the private market.¹³ The American Bar Association in 1971 published survey results indicating that lawyers were making considerable use of legal assistants.¹⁴ Since the legal assistant was virtually unknown ten years ago,¹⁵ the number of legal assistants has increased at a rather impressive rate.

Yet before one concludes that the legal assistant has been adopted universally by the legal profession, one must be aware of two considerations. First, even if one accepts the number of 70,000 legal assistants, this number must be compared to the 355,000+ attorneys in the nation.¹⁶ This indicates that the growth of paraprofessionalism in the legal field is still in its infancy when compared with the medical field, since in the medical field, there are eleven paramedical personnel for each doctor.¹⁷

Second, statistics on the increase of raw numbers of legal assistants can be misleading concerning the degree to which the profession is really changing in its operational structure, since there is the conviction among the legal assistants that

they are not being utilized to their full potential.¹⁸ The dual factors of: 1) the relatively low total number of legal assistants in comparison with the total number of attorneys, especially when compared with parallel developments in the medical field; and 2) the failure by attorneys to utilize the full capacity of the legal assistants presently working indicate that while the growth in numbers of legal assistants has been impressive, acceptance of the legal assistant can by no means yet be considered universal.

Sources of Attorney Reluctance to Utilize Legal Assistants More Extensively

This section discusses four primary sources¹⁹ of the reluctance of many attorneys to utilize legal assistants more extensively: 1) lack of systematized procedures in the law office; 2) attorneys' fear of possible violations of the Canons of Ethics; 3) lack of quality legal assistant training programs; and 4) attorneys' general reluctance to delegate responsibility to non-lawyer staff.

To measure the attitudes of attorneys towards legal assistants, two major surveys have been conducted in Hawaii concerning the use of the legal assistant.²⁰ Attorneys were the responding group in a survey taken in the Spring of 1974 by the Hawaii State Bar Association Special Committee on Legal Paraprofessionals. The second survey used legal assistants as the responding group, and this survey was taken by the Legal Assistant Program of Kapiolani Community College in the Spring of 1975. Both surveys were conducted under the direction of Professor Terrence Weldon of the University of Hawaii Department of Communication. Relevant portions of these surveys are discussed *infra*.

A. Lack of systematized procedures in the law office.

Effective utilization of a legal assistant requires a work situation in which areas of responsibility are clearly divided between the attorney, the legal assistant, and the legal secretary. Many attorneys believe that they do not have enough time to establish these areas of responsibility. For those attorneys who do not establish careful procedures, the result is the chaotic practice of law, where some essential steps are not adequately handled by anyone in the office and other steps are inefficiently handled with duplication of effort. As the American Bar Association Special Committee on Legal Assistants has stated: "The crucial point is that a legal assistant program for a firm is no better than the ability of members of the firm to utilize the talents and skills of the legal assistants."²¹

The notion that an attorney does not have "enough time" to establish careful division of responsibility is a costly myth, since the attorney experiences a net loss of time by the lack of organization. Simple economics indicates that attorneys are losing, even by conservative estimates, half a million dollars of lifetime income by the failure to use the legal assistant efficiently.²²

The development of a functioning system that delineates responsibility between the office employees can be a time-consuming task. Fortunately, the task is now much easier, due to the existence of commercially available "legal systems" in various substantive areas of the law. The Utah Law Research Institute, under the able leadership of Kline Strong, has developed a series of systems for the eight major substantive law areas of corporations, divorce, estate planning, intestate probate, testate probate, real estate, collections, and bankruptcy. The Hawaii State Bar Association has recently completed a 350+ page "systems approach" to divorce.²³ Attorneys may purchase these legal systems at a cost of between \$50-\$75 for each substantive law area. The attorney may then, with only a minimal time investment, organize a very efficient law office.

Systems manuals attempt to list the various steps that must be completed in a typical divorce, incorporation, probate, or other proceeding. The systems do not attempt to handle completely the extremely complicated cases, but the systems do cover the more "typical" case, which includes approximately eighty percent of the caseload of the attorney. The systems provide for delegation of all "routine" steps to the legal assistant or experienced legal secretary, with the attorney reviewing the documents after preparation. This enables the attorney to concentrate his time upon the more complicated issues requiring attorney expertise or judgment, while the less complicated portions are prepared by the non-lawyer staff for attorney review. Standardized "forms" are contained in the system to provide the basic format for document preparation. The system also includes comprehensive checklists that allow the attorney to verify whether the necessary steps are being completed by the legal assistant and legal secretary.

Use of the "systems approach" allows the attorney to delegate work with confidence, since the system contains instructions to the legal assistant and the checklists enable the attorney to be certain that the work delegated is completed in a satisfactory and timely fashion. Attorney reaction in Hawaii to *The Hawaii Divorce Manual* has been very enthusiastic. As attorneys become more

familiar with the utilization of legal systems, they should begin to delegate more work to the legal assistant. With the increase in efficiency will come cost savings, which can be shared between the attorney, the staff, and the client.

B. *Attorneys' fear of possible violations of the Code of Professional Responsibility.*

The responsible attorney is concerned whether delegation of particular responsibilities to non-lawyer personnel constitutes a violation of the Code of Professional Responsibility, which controls the conduct of attorneys. Since the use of legal assistants is a new and developing area, there are still unanswered questions regarding the degree to which delegation to non-lawyer personnel is permissible. Clarification of these issues will occur through case-by-case determination. However, the Code of Professional Responsibility allows tremendous latitude in the delegation of responsibility.

Ethical Consideration EC 3-6 is the portion of the Code that deals most directly with the issue of delegation:

EC 3-6. A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal services more economically and efficiently.

Formal Opinion 316 of the American Bar Association Standing Committee on Legal Ethics gives additional latitude to the attorney:

A lawyer can employ lay secretaries, lay investigators, lay detectives, lay researchers, accountants, lay scribes, non-lawyer draftsmen or non-lawyer researchers. In fact, he may employ non-lawyers to do any task for him except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal proceedings as a part of the judicial process, so long as it is he who takes the work and vouches for it to the client and becomes responsible for it to the client. In other words, we do not limit the kind of assistants the lawyer can acquire in any way to persons who are admitted to the Bar, so long as the non-lawyers do

not do things that lawyers only may do. ABA Standing Committee on Legal Ethics, "Formal Opinion 316: The Practice of Law Across State Lines," (January 18, 1967).

Ethical Consideration EC 3-6 and Formal Opinion 316 provide significant guidelines for the attorney who wishes to delegate work. As attorneys become more familiar with these requirements and gain additional experience with delegation, the ethical issues should eventually be resolved in favor of allowing delegation within the guidelines set forth above.²⁴

C. *The lack of quality legal assistant training programs.*

The lack of training of the legal assistant is a major reason why many attorneys have not used the legal assistant more extensively. In the survey conducted in Spring of 1975 by the Legal Assistant Program of Kapiolani Community College, the legal assistants surveyed were asked the question: "Why aren't you allowed to utilize your full potential in your job?" Nearly fifty percent of those responding indicated that their lack of training was one reason for their less than full utilization. This percentage of response was the second highest affirmative response to the above question.²⁵

Most attorneys do not conduct regular in-house training programs for non-lawyer staff. The survey taken in Spring of 1974 by the Hawaii State Bar Association Special Committee on Legal Paraprofessionals revealed that virtually the only training conducted in most firms for non-lawyer personnel is conducted by the salespeople from the various corporations that sell office machines, and this training concerns only the proper operation of particular machines. The lack of training programs within the law office means that if non-lawyer personnel are to receive thorough training, they must receive their training from outside sources.

There are nearly 100 schools offering training for legal assistants.²⁶ These programs have nearly all been instituted in the 1970's, which means that these programs are in the formative stages in comparison to law school training. As additional experience is gained by these programs, the quality of training should increase. Feedback from program graduates who have gone to work will be of much assistance in structuring a training program that fits the needs of the firms.

D. *Attorneys' reluctance to delegate responsibility to non-lawyer staff.*

Attorney reluctance to delegate responsibility to non-lawyer staff is partially caused by the three factors discussed in the immediately preceding

Sections A., B., and C. An additional source of attorney reluctance stems from the lack of attorney training in how to use a legal assistant. In the survey conducted in Spring, 1975 by the Legal Assistant Program of Kapiolani Community College, more than fifty percent of the responding legal assistants indicated that one reason for their lack of full utilization is the "lack of attorneys' training regarding paralegals."²⁷

There are also psychological motivations behind the reluctance of attorneys to delegate responsibility to non-lawyer staff. There is a fear of "replacement," which is the fear by the attorney that if substantial amounts of work are delegated, there may be less for the attorney to do. Although the legal assistant is "trained to assist lawyers, not replace them,"²⁸ many attorneys are nervous about changing their role in the office. If legal assistants are utilized to their full capacity, the role of the attorney becomes more one of supervising of personnel, reviewing documents prepared by non-lawyers, and concentrating upon the truly difficult legal problems requiring the expertise of an attorney.

Another basis for attorney reluctance to delegate responsibility is the simple ego consideration arising from a fear of lack of importance. If an attorney, with his advanced degree, has been performing tasks which could more efficiently (at least in terms of total cost) be performed by a legal assistant (who may be either a high school or junior college graduate), there are at least two immediate implications to that attorney: 1) that what the attorney has been doing is not quite as complicated and difficult as the degree of training involved for the attorney would indicate; and 2) that if the attorney has been performing these activities for the last few years, the attorney has been operating at less than full efficiency. Both of these implications are potential ego threats to the attorney.

Predictions Regarding the Use of Legal Assistants in the Next Ten Years

This article began with the statement that the purpose of the legal assistant is to make the delivery of legal services more efficient and thus less costly. This section attempts to predict whether in fact the legal assistant will be used to meet this goal and if so, in what numbers.

The legal assistant is definitely increasing rapidly in numbers, although precise calculations are difficult to make, due to lack of accurate statistics and difficulties in separating the legal assistant from the experienced legal secretary.²⁹ Whether this trend continues depends upon whether the

legal assistant is coordinated with various developments occurring in the restructuring of the legal profession. My thesis is that the legal assistant should not be viewed as an isolated event and that the emergence of the legal assistant must be considered in connection with the growth of pre-paid plans, legal insurance, clinics, the development of legal "systems," and technological advances in computers and word processing.

The fundamental problem facing the legal profession is that of providing services for lesser cost so that more people may be served. Historically, whenever the legal profession has been unable to provide a service for a reasonable price, the legal profession has lost exclusive control of that service. Numerous illustrations exist: title searches are now usually performed by title search companies; trusts are now usually drafted and handled by trust departments of banks; automobile accident claims are usually handled without attorneys in "no-fault" states. The field of medical malpractice litigation is probably the next area in which attorney involvement will be severely curtailed. Thus, if the legal profession does not come up with the means to serve the middle-income consumer, the legal profession will lose its exclusive right to provide the legal services needed by the middle class.

The legal assistant is the personnel resource that makes it possible for the legal profession to serve the additional markets at a lower cost. Yet the use of the legal assistant alone is not sufficient. To meet the massive need that presently exists, attorneys must radically restructure their present methods of practice. This means that the attorneys must implement comprehensive systems, in which checklists and delegation among personnel is carefully planned. Attorneys must press for pre-paid plans and legal insurance to encourage the middle-income client who is presently afraid of high fees.

In summary, what is required is both a restructuring in personnel (using more legal assistants) and the method of practice (use of legal systems, increased specialization, and legal insurance). If the legal profession is able to provide the required fundamental changes, the number of legal assistants that will be needed will be in the hundreds of thousands, and the legal profession will begin to approach the eleven-to-one ratio of paramedical personnel to doctors that presently exists in the medical field. If the legal profession is unable to make the required changes, the result will be further loss of individual areas of law practice to whatever non-lawyer groups are able to provide the services for the price that the consumer can afford.

Footnotes

¹The program offers an Associate in Science degree. The Program is one of six national demonstration projects designated by the American Association of Community and Junior Colleges.

²The lack of a universally-accepted definition of "legal assistant" makes suspect any estimate of the number of legal assistants presently working nationally.

³While it is possible to define a lawyer as someone who has: 1) completed law school; 2) passed the Bar examination in a particular state; and 3) been admitted to practice in a particular state, this hardly defines what the lawyer does. To define a lawyer as someone who "practices law" takes us not very far, since the practice of law has not been easy to define.

⁴Endacott, R. "Systemization and the Legal Assistant in the New Law Office," 54 Neb.L.Rev. 46, 47 (1975).

⁵The term "paralegal" has been considered by some people, especially by those engaged in providing legal services to the poor, to imply someone who engages in oral advocacy on behalf of clients before administrative agencies, as opposed to the "legal assistant," who is confined to office practice.

⁶*The Hawaii Divorce Manual*, at IV-A-2 through 5 (The Hawaii State Bar Association, R. LeClair, ed. 1975).

⁷This article discusses the major sources of attorney resistance to the performance by the legal assistant of functions traditionally performed by the attorney. Note that an additional source of resistance to the legal assistant is the legal secretary, since the legal assistant also performs many of the tasks of the experienced legal secretary. This creates a potentially heavy source of conflict within the law office if the "new" legal assistant begins to perform many of the most "important" tasks of the "old" legal secretary. This article also briefly discusses predictions of the end resolution of conflict between the legal secretary and the legal assistant. For survey results concerning the relationships between legal assistants and the legal secretary, see American Bar Association Special Committee on Legal Assistants, "The Training and Use of Legal Assistants: A Status Report," 11 (1974). The Legal Assistant Program at Kapiolani Community College conducted a survey of practicing legal assistants that measured the amount of friction between legal assistants and legal secretaries. The survey results indicated that friction between legal assistants and legal secretaries was as great as friction between legal assistants and the attorneys. Survey results may be obtained from the Legal Assistant Program, Kapiolani Community College, 620 Pensacola Street, Honolulu, Hawaii 96814; telephone (808) 531-4654.

⁸For a discussion of the growth of paraprofessionalism in various fields, see American Bar Association Special Committee on Legal Assistants, "The Paraprofessional in Medicine, Dentistry, and Architecture," (Preliminary Draft, October 1971).

⁹Voorhees, T. "Paralegals: Should the Bar Employ Them?" 24 Vand.L.Rev. 1151, 1152 (1971).

¹⁰Strong, K. *Law Office Management*, 407-409 (1971).

¹¹Cornish, L. Jr., and C. Cornish. "Group Legal Services Today," 14 Washburn L.J. 31, 32 (1975).

¹²There are presently more than 5,000 pre-paid plans in existence. "Prepaid Legal Services, Ethical Codes, and the Snares of Antitrust," 26 Syracuse L.Rev. 754 (1975).

¹³Revzin. "More Services Are Performed by Paralegals; Attorneys Have Mixed Feelings About Trend," *The Wall Street Journal*, November 14, 1975, at 34, col. 1.

¹⁴American Bar Association Special Committee on Legal Assistants. "Liberating the Lawyer: The Utilization of Legal Assistants by Law Firms in the United States," 1-49 (1971). The survey does not contain national estimates on the total number of legal assistants but does indicate that many of the

firms surveyed were using legal assistants for a variety of tasks.

¹⁵While non-lawyer personnel have been providing these services for a substantial period of time, the emergence of the "legal assistant" is a recent development.

¹⁶U.S. Department of Commerce. *Statistical Abstract of the United States*, 158 (93rd Edition, 1972).

¹⁷Statsky, W. *Introduction to Paralegalism*, 19 (1975).

¹⁸Berg, C. "Annual Survey," 12-25 (San Francisco Association of Legal Assistants, December 19, 1973). Similar results were obtained from a survey conducted by the Kapiolani Community College Legal Assistant Program in the Spring of 1975 of all the legal assistants in Honolulu. More than half of the respondents indicated that they were not being utilized to their full potential. Survey results are available from the Legal Assistant Program, Kapiolani Community College.

¹⁹There are a number of other sources of attorney reluctance that are not discussed here. Other reasons include lack of familiarity with the use of the legal assistant, uncertainty as to how to locate a suitable legal assistant, lack of available physical office space to house another employee, financial constraints, etc. The four sources discussed were the ones most frequently raised during my discussions with various attorneys over the last two years.

²⁰Copies of both surveys and results are available from the Legal Assistant Program, Kapiolani Community College.

²¹American Bar Association Special Committee on Legal Assistants. "Liberating the Lawyer: The Utilization of Legal Assistants by Law Firms in the United States," 2 (1971).

²²Stevenson. "Paralegals in the Practice of Law," 62 Ill. B.J. 432, 433 (1974).

²³*The Hawaii Divorce Manual*, (Hawaii State Bar Association, R. LeClair, ed. 1975).

²⁴For a discussion of legal ethics and the legal assistant, see W. Statsky, *Introduction to Paralegalism*, 96-167 (1974).

²⁵The highest response to the utilization question was "because of lack of attorneys' training regarding paralegals."

²⁶The American Bar Association has completed a list of institutions offering legal assistant programs.

²⁷One can conclude from the survey that probably the single most important reason for less than full use of the legal assistant is the lack of attorney training, since no other response to the utilization question drew such a high percentage of agreement among the legal assistants questioned.

²⁸Cassedy. "The Legal Paraprofessional," 48 Fla.B.J. 510, 511 (1974).

²⁹An increasing number of firms are switching to "Word Processing," which is essentially a sophisticated typing pool using magnetic-card typewriters with speciality typing operators. These operators are providing the basic secretarial functions of typing and transcribing from dictating machines. My prediction is that gradually there will be a separation of roles of the secretarial functions and the legal assistant functions. Legal assistants will not necessarily have secretarial skills, and secretaries will usually not deal with preparation of documents and other complicated processes. Thus, there will be a clearer division of responsibility among the non-lawyer staff, making it easier to differentiate between the "legal secretary" and the "legal assistant."

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