

**IN THE SUPREME COURT OF FLORIDA**

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**CASE NO.: SC06-1622**

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

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**THE SOUTH FLORIDA PARALEGAL ASSOCIATION'S  
AMENDED BRIEF ADDRESSING JURISDICTION TO REGULATE  
A NON-ATTORNEY NOT ENGAGED IN THE  
UNLICENSED PRACTICE OF LAW**

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## **STATEMENT OF CASE AND FACTS**

On August 15, 2006, The Florida Bar (alternatively “The 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”). The Bar’s Proposal seeks to create a two-tiered, bifurcated regulatory system for paralegals working in this state; it would authorize The Florida Bar to be the sole arbiter of the Proposal by promulgating eligibility requirements for admission into that program, by setting ethical rules for members of the program, and by regulating and overseeing the discipline of the paralegal profession. Numerous public comments have been filed both in support of and against the Proposal. This Court has directed the parties that filed timely comments on the Proposal to submit briefs addressing the jurisdictional authority of this Court and of The Florida Bar to regulate non-lawyers who are not engaged in the unlicensed practice of law.

## **SUMMARY OF ARGUMENT**

The South Florida Paralegal Association (“SFPA”) addresses the following three areas for review by this Court when considering the issue of jurisdiction to regulate a non-attorney not engaged in the unlicensed practice of law.

### ***Separation of Powers***

The regulation of the employment of private citizens within this state is generally a function for the Florida Legislature. The separation of powers among the executive, legislative, and judicial branches is a well-established doctrine which this Court has strictly applied to preclude each branch of government from encroaching upon the powers of another. Strict application of the separation of powers doctrine precludes this Court or The Florida Bar from imposing the regulatory system contained in the Proposal upon professional paralegals, since no authority to do so has been delegated to the Court either under the Florida Constitution or through enactment of an enabling statute by the Florida Legislature.

### ***Court's Jurisdiction over the Enforcement of UPL***

This Court's jurisdiction over the admission to the practice of law, and over the discipline of persons admitted to legal practice, implicitly empowers this Court to enforce the laws and rules regarding the unlicensed practice of law ("UPL"). However, proof of a violation is a prerequisite to the exercise of jurisdiction over an enforcement proceeding, and the class of non-attorney legal professionals which the Proposal seeks to regulate have neither engaged in UPL nor violated any related rule or regulation, but are probably the least likely to violate these rules.

### ***Court's Jurisdiction over the Prevention of UPL***

Jurisdiction to enact the Proposal cannot be supported as a means of UPL prevention, pursuant to this Court's delegation of authority to The Bar over UPL investigations, since the Proposal is not limited to UPL, but seeks to impose an entire regulatory scheme over a separate and distinct profession. Moreover, even assuming the inherent authority to prohibit UPL confers jurisdiction to regulate the paralegal profession on *this Court*, there exists no basis for the Court to delegate that authority to The Florida Bar in the absence of a plan analogous to the "integration rule" governing The Bar. The Court should, instead, retain that jurisdiction itself and adopt a regulatory system that would serve as an effective deterrent to UPL – a system including self-regulation and mandatory membership as set out in the modifications to the Proposal previously suggested by SFPA.

### **ARGUMENT**

#### ***Separation of Powers***

As this Court stated in *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004):

The cornerstone of American democracy known as separation of powers recognizes three separate branches of government – the executive, the legislative, and the judicial – each with its own powers and responsibilities. In Florida, the Constitutional doctrine has been expressly codified in article II, section 3 of the Florida Constitution, which not only divides state government into three branches but also expressly prohibits one branch from exercising the powers of the other two branches[.]

This Court has traditionally applied the separation of powers doctrine strictly. *See State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000). That strict separation of powers doctrine “encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power.” *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260 (Fla 1991); *See also Florida Department of State, Division of Elections v. Martin*, 916 So. 2d 763 (Fla. 2005). As this Court has observed, “[t]he power to legislate belongs not to the judicial branch of government, but to the legislative branch.” *See Penelas v. Arms Technology, Inc.*, 778 So. 2d 1042 (Fla. 2001).

The Proposal before this Court seeks authorization for the Florida Bar to implement and impose regulatory guidelines and disciplinary mechanisms upon a profession of non-attorney personnel who are not engaged in the unlicensed practice of law. The imposition of any sort of regulation upon a person, entity, or profession is a legislative function of government. The strict separation of powers doctrine as delineated in *Cotton* would clearly classify the pending Proposal as a “regulatory act,” for which jurisdiction lies with the legislative branch.

Although this Court does regulate some professions – including, most saliently, lawyers – it does so only pursuant to an express grant of authority, either constitutional or legislative. Indeed, this Court’s authority to regulate lawyers is

founded both on the Florida Constitution, Art. V, §15, and on a grant of authority from the Florida Legislature, Florida Statute §454.021. Absent this grant of constitutional authority and enabling legislation, the regulation of the legal profession would be a matter within the authority of the legislative branch. *See In re Clifton*, 155 So. 324 (Fla. 1934).

The Florida Legislature has also delegated to this Court the authority to establish rules, disciplinary procedures, and certification criteria over court reporters and foreign-language court interpreters through enabling legislation. *See Fla. Stat.* §§ 25.283, 25.386. However, without the legislative branch first providing sufficient and adequate guidelines in the form of enabling legislation, the judiciary branch would have no jurisdiction over these or any other professions. The non-delegation doctrine “requires that fundamental and primary policy decision ... be made by members of the legislature who are elected to perform those tasks, and [that the] administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.” *Florida Department of State, Division of Elections v. Martin*, 916 So. 2d at 763 (internal quotations omitted). Without clear, concise legislation – similar to Florida Statutes §§ 25.283 and 25.386 – expressly authorizing either an agency or another branch of government to perform a specific

function, that agency or branch of government is without jurisdictional authority to exercise regulatory authority.

Paralegals, by definition, are not engaged in “the practice law” as that term is used in Article V, §15 of the Florida Constitution and §454.021 of the Florida Statutes. Consequently, in the absence of enabling legislation, this Court has no greater jurisdiction to regulate the paralegal profession than it would to regulate court reporters or foreign-language interpreters without the grant of authority in Florida Statutes §§ 25.283 and 25.386. The exercise of such jurisdiction would, thus, encroach upon the legislative branch’s authority in contravention of the strict separation of powers doctrine.

In its Petition, The Florida Bar states that the authority to submit and implement the Proposal is found in Rule 1-12.1 of the Rules Regulating the Florida Bar. Nowhere in that rule, or in any other of the Rules Regulating the Florida Bar, is authority granted to The Bar to regulate anyone who is not a member of The Bar, an attorney from another state practicing in Florida, or a person engaged in the unlicensed practice of law. The Florida Bar is not an agency created by the legislative branch; nor has the Florida Legislature statutorily assigned it the authority to regulate any entity, person, or profession outside of those specified above. Minus such all-important legislatively-delegated authority, The Florida Bar lacks the jurisdiction necessary to implement and administer the Proposal.

Based on the strict separation of powers doctrine and in the absence of the constitutional authority or appropriate enabling legislation, both the Supreme Court of Florida and the Florida Bar lack authority to promulgate, implement, discipline, or impose guidelines of any sort upon the paralegal profession as requested in the pending Proposal.

***Court's Jurisdiction over the Enforcement of UPL***

This Court has Constitutional jurisdiction over the admission to practice law, and over the discipline of persons admitted to legal practice, pursuant to the Florida Constitution Article V, §15 (1968 Rev.). See *The Florida Bar v. Sperry*, 140 So. 2d 587 (1962). Also, since “the authority to regulate the practice of law by those not admitted to the Bar is vested in this Court under the cited section of the constitution, it follows that the power to issue writs necessary to enforce its rules and orders applies to matters affecting the practice of law as much as to any other rule or order within its jurisdiction to enter.” *The Florida Bar v. Sperry*, 140 So. 2d at 589. This includes the inherent authority to enjoin persons engaged in the unlicensed practice of law. *Id.*; accord *The Florida Bar v. Smania*, 701 So. 2d 835 (Fla. 1997).

For this Court to obtain any jurisdiction over an enforcement proceeding, however, there must first be some offer of proof that a violation of the UPL rules has occurred. Such evidence is a prerequisite to the invocation of jurisdiction by

the Court. In *Sperry*, the Respondent was an attorney licensed in another jurisdiction who was not a member of The Florida Bar; a complaint was filed and the due process provisions invoked.

In addressing The Bar's Proposal, the question before this Court is the regulation of a class of non-attorney legal professionals who has neither engaged in the unauthorized practice of law nor violated any rule or regulation pertaining thereto – the necessary prerequisite to invocation of this Court's UPL jurisdiction. Without an offer of proof that UPL has occurred, neither the Court nor The Bar obtains jurisdiction to implement the standards set forth in pending Proposal. Again, creating a preventative regulation is a legislative function properly within the sole purview of the legislative branch of government.

### ***Court's Jurisdiction over the Prevention of UPL***

By placing the Proposal on the UPL section of its website, The Bar implicitly suggests that the pending regulatory Proposal is a means of preventing the unlicensed practice of law – and that the Florida Bar, pursuant to the authority delegated to it by this Court to investigate UPL, should be empowered to promulgate regulations contained in the Proposal. Although one aspect of the Proposal would prohibit UPL by paralegals, that provision alone is insufficient to justify The Bar's jurisdiction, since the Proposal is ***not limited*** to UPL, but seeks ***complete regulatory authority*** over a separate and distinct profession.

The Bar certainly cannot raise an inference that the regulation of non-attorney professionals through the proposed voluntary certification program will somehow eliminate or prevent UPL. To the contrary, the paralegals who would qualify under the certification system contained in the Proposal are already the least likely to engage in UPL, since they have attained the highest degree of professional training, have attained a long record of work experience and, thus, have the most to lose. Any such “back-door” regulatory tactic should fail, since it would in no way serve the public or assist in the enforcement or prevention of UPL, and thus provides no basis to contravene the well-established doctrine of strict separation of powers as outlined above.

The Florida Bar was given exclusive authority by this Court to license and regulate lawyers engaged in the practice of law in this State through the so-called “integration rule.” *See Petition of Florida State Bar Association*, 40 So. 2d 902, (1949). That “integration rule” does not extend to anyone but lawyers practicing in this State, and no similar petition seeking the integration of paralegals – supported by a similar majority vote supported by the persons affected by the petition (*i.e.*, paralegals who would qualify for certification) – has ever been filed with this Court.

Moreover, in July 2001, The Bar proposed changes to Rules 4-5.3, 10-2.1(a)(2), and 10-2.1(b) of The Rules Regulating The Florida Bar in Case No.

SC01-1509. In its Petition supporting those rule changes, (attached hereto as Appendix “A”<sup>1</sup>) The Bar submitted that the addition of the titles “paralegal” and “legal assistant” to those rules would “protect the public by declaring that it is the unlicensed practice of law for a nonlawyer to use the term ‘paralegal’ or ‘legal assistant[.]’” It also submitted that the “[a]doption of these amendments should deter a nonlawyer from misleading anyone into believing the nonlawyer may provide legal services that the non-lawyer is not authorized to provide.” In that petition, The Bar cited four cases as examples of (then) recent UPL rulings that would have been impacted by the proposed rules change.

Interestingly, only one of the cases cited by The Bar specifically involved a person self-identifying as a “paralegal,” *The Florida Bar v. Catarcio*, 709 So. 2d 96 (Fla. 1998) (paralegal found to be engaging in the unlicensed practice of law by providing legal services directly to the public).<sup>2</sup> Nevertheless, relying on that one

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<sup>1</sup> Petition obtained from:  
[http://www.floridasupremecourt.org/clerk/briefs/2001/1401-1600/01-1509\\_Pet.pdf](http://www.floridasupremecourt.org/clerk/briefs/2001/1401-1600/01-1509_Pet.pdf)

<sup>2</sup> The other cases cited in the petition were *The Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980) (joint petition filed by The Florida Bar and Respondent non-attorney requesting this Court to determine whether respondent’s appearance in a representative capacity before a hearing officer in unfair labor practice proceedings, pursuant to a rule adopted by the Public Employees Relations Commissions (PERC) constituted the unlicensed practice of law.); *The Florida Bar v. Davide*, 702 So. 2d 184 (Fla. 1997) (finding respondents, Salvador Davide and Florida Law Center, Inc. to be engaged in the unlicensed practice of law); and *The Florida Bar v. Miravalle*, 761 So. 2d 1048 (Fla. 2000) (enjoining respondents,

case, The Bar argued in open court that the proposed rule would deter paralegals from engaging in UPL.

During oral arguments before this Court in 2002, Karen McLead, a paralegal speaking on behalf of The Florida Alliance of Paralegal Associations, argued that simply referring to the titles of these two professions would “leave a gaping hole in the interpretation and enforcement” of the proposed rule amendment. *See Florida State University’s audio recording of proceedings of SC01-1509 dated January 7, 2002*, <http://www.wfsu.org/rafiles/archives/01-1509v.ram>.<sup>3</sup> Additionally, it was predicted at that time that neither paralegals nor any other member of the legal profession would look to either one of these rules for guidance in how to regulate the paralegal profession – a prediction which, the SFPA submits, has been borne out as true.

Further into the proceedings, the (then) President of The Florida Bar, Terrance Russell, addressed the Court and acknowledged that The Bar had been aware of public confusion over the definition of the term “paralegal” since 1997. Indeed, The Bar had conducted studies showing a significant misperception by the public – as high as 97 percent in some areas – that “paralegals” and “legal

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Candice L. Miravalle and Express Legal Services, Inc. from engaging the in the unlicensed practice of law).

<sup>3</sup> SFPA is having a certified transcript of that hearing prepared and will submit that transcript as a supplemental appendix upon its completion.

assistants” are “formally trained, perhaps licensed, and operating under the supervision of a lawyer.” Yet it was not until four years later, in 2001, that The Bar took the initiative to make the wholly-inadequate proposal in SC01-1509, of requiring persons using the titles “paralegal” and “legal assistant” to be under the supervision of an attorney. Even then, there was no proposed requirement for specialized training, formal education, continuing education, or formalized ethics instruction.

After discussion of the definitional confusion, Justice Anstead stated that:

My observation that the unlicensed practice of law, of course, has been a major problem and continues to be a major problem, and a major part of that problem is definitional. That is that ... at least in sort of an oversimplistic way of superficial response ... it does seem like a scheme or regulation in some way would be a far better way to deal with the definitional side of that. That is that if you actually had a group that, as here in Florida that we are proud of that there is an association that makes this attempt to do this very thing but that, by the regulation of paralegals and legal assistants, it would seem like would go a long way towards solving this continuing, very difficult problem of unlicensed practice of law.

Even more importantly for present purposes, Mr. Russell stated regarding paralegals who belong to professional associations and who had gone to the effort to obtain national certification: “[t]hose are not the people that we are getting the complaints about. The ones who do not belong to that organization, do not comply with any of their requirements, don’t take any of their training and simply are out

there to make a quick dollar and are there to harm the public, those are the ones that this rule is directed at.”

The Proposal now before this Court would merely amplify the public’s confusion by bifurcating (and thereby weakening) the meaning of the title “paralegal.” Further, as noted by Mr. Russell in 2002, the paralegals who would qualify under this Proposal do not violate the UPL regulations. The current Proposal as now written not only further dilutes the title of “paralegal” and “legal assistant” but also fails to address the true concern of UPL prevention, which can be accomplished by mandating that all who perform paralegal related services meet the necessary certification guidelines.

To the contrary, the current Proposal, by giving sole control to The Bar and without any judicial oversight, and affording no meaningful self-governance to qualified paralegals, will simply continue to perpetuate the illusion at the heart of the problem: that all paralegals under an attorney’s supervision are formally trained and adhere to a (non-existent) set of standards. The Bar’s efforts, both past and current, fall well short of any substantive effort to prevent UPL by means of the regulation of the paralegal profession.

In any event, even if the inherent authority to prohibit UPL under its current constitutional and legislative grant of jurisdiction is sufficient to bestow on *this Court* the jurisdiction to regulate the paralegal profession, there is no basis in law

or policy why the Court should delegate the jurisdiction to act as the sole certifying and regulatory body over the paralegal profession to The Florida Bar. Instead, the SFPA submits that this Court should retain that jurisdiction itself and enact the following reforms to the proposed paralegal program (which will better serve as an effective deterrent to the unlicensed practice of law by those holding themselves out as professional paralegals):

1. A separate standing committee or governing board comprised of a majority of paralegals who qualify for certification under the proposed standards, as well as attorneys, paralegal educators, and members of the public to oversee the administration and implementation of the regulatory program; and
2. A certification and regulatory program that is *mandatory* for all those wishing to use the title “paralegal” in Florida.

Such a system will both promote the professionalism of paralegals in this State and better safeguard the interest of those members of the public using legal services.

### **CONCLUSION**

This Court and The Bar lack jurisdiction to regulate the paralegal professional in the absence of a specific grant of authority through enabling legislation, under the strict separation of powers doctrine recognized in this State. The authority to prevent UPL is alone insufficient to grant such jurisdiction to

create a regulatory system for non-attorneys not engaged in the unlicensed practice of law. Furthermore, the pending Proposal would not qualify as a means of UPL enforcement or preventative measures. Finally, even if this Court were to determine that such jurisdiction is afforded it through its inherent authority to prevent UPL, the Court should not delegate that jurisdiction to The Florida Bar, but should administer the program itself pursuant to recommendations made in the SFPA's prior filings.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was served via United States Mail this 11<sup>th</sup> day of January, 2007, 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 Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 AND all persons on the attached service list.

**CERTIFICATE OF COMPLIANCE**

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

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