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◎21世纪法学系列双语教材

法律英语：法学概论（第3版）

INTRODUCTION TO LAW (THIRD EDITION)

乔安妮·班克·黑姆斯 (Joanne Banker Hames) 伊冯娜·伊肯 (Yvonne Ekern) 著
姜栋 改编 (英文部分) 姜栋 编著 (中文部分)



 中国人民大学出版社

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· 北京 ·

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出版说明

根据教育部《关于加强高等学校本科教学工作提高教学质量的若干意见》的精神要求，为适应我国加入WTO后的发展需要，我国高等学校法学等专业的课程安排中双语教学要逐步达到一定的比例。

为了引进对国内双语教学有帮助的优秀的国外原版教材，同时对其加以适当改造，使之真正符合我国目前双语教学的发展状况和广大师生的教学需求，我们对其中的诸多问题进行了探索。比如，在哪些课程上引进原版教材对我国的法学教学更有借鉴和学习意义，引进何种难度和多大体量的教材；又比如，如何降低纯粹的英文原版教材的学习难度，如何为广大师生提供辅助学习材料；等等。

奉献于读者面前的这套21世纪法学系列双语教材，就是基于以上考虑和探索而做的一种有益尝试。

首先，我们选择了在国际法学科、重要的民商事法学科和法学基础理论学科率先引进国外的原版教材，选择其中难度适中的国外原版教材。

其次，我们对教材的体例进行了精心的编排和设计，对较厚的原版教材进行了精心的改编。

最后，整套教材采取了英文原版书配中文辅导用书的形式：每本教材前一部分是英文原版教材(为适宜教学，作了相应删改)，后一部分是我们约请国内从事双语教学的优秀教师编写的与英文原版教材相配套的中文辅导内容，设置了重点词汇解析、内容导读、案例解析等栏目。这些配套的中文辅导内容将会为学习英文原版教材的读者提供较大的帮助。

本套丛书从原版样书的审核挑选，到艰难的版权谈判过程，再到体例内容的各项设计以及作者的精心编写，每一项努力都是为了给大

家奉献对我国法学双语教学真正有所裨益的好教材，希望在广大师生的关心和支持下，我们能将这套教材做得更好！

编者

2009年9月

序言

法律英语和英美法的双语教学在当今的法学教育中受到了越来越多的重视，因此编写一本适合现阶段学生学习要求的法律英语和英美法概论教材有着重要的现实意义。2008年中国人民大学出版社的郭虹编辑和作者曾就如何编写法律英语和英美法双语教材进行过一次深入的讨论，达成了共识：随着我国学生英语能力的提高和授课教师法律视野的开阔，使用原版教材进行法律英语的系统教学已是迫在眉睫。恰逢此时中国人民大学出版社引进了美国培生出版集团的美国法学院教材，我们商定，以法律英语系列教材的方式将美国原版教材引入中国的法学双语教学中。而之所以要编写系列教材，是因为法律英语的学习绝不仅仅是英文加法律单词，不懂英美法来学习法律英语只能是无源之水、无本之木。而英美法博大精深，单靠一两本教材如何能将其精华囊括殆尽？因此，结合各个部门法全面、系统地出版适合我国教学现状的双语教材将是一个大胆的尝试。但选取哪一本教材作为系列教材的开篇之作则成了头等大事。

在众多的原版教材中，由乔安妮·班克·黑姆斯和伊冯娜·伊肯所著的Introduction to Law一书，引起了作者的注意。万事开头难，法律英语和英美法的学习也不例外，总要有一个“入门”的教材将学生引入英美法学习的殿堂中来，这就要求教材要难易适中，此外，还要有基础性和全面性，要较为全面地把英美法的基础知识介绍清楚，从而为以后的法律英语和英美法学习打下坚实的基础。以此观之，该书即是一本符合我国现阶段法律英语和英美法双语教学需求的恰当之选。该书在内容上系统介绍了英美法的基本知识，其最大特点是以其简单精练的语言——即Plain English来撰写法学教材，因此对该书的使用能起到事半功倍之效：通过“简单”的语言掌握“复杂”的英美法知识，在英文中学习法律，在法律中提高英文。因此，将其译为《法律英语：法学概论》，既是希望通过该书将法律英语和英美法概论的双语教学有机结合，为法学双语教学提供一个全新的视角，也希望将此书作为法律英语系列教材的开篇之作，从概论开始，逐步深入各个部门法，建

立一个法律英语和英美法的教材体系。

本教材在原著的基础上，结合我国法学双语教学的现实需求，分为中英文两个部分，其英文部分选取了原版教材中的十章进行适当改编，其覆盖范围包括了英美普通法的核心基本理论和主要的部门法基础知识。中文部分在编写过程中考虑到学习法律英语和英美法双语教学的特殊性——既有学习法律术语和基本的法律知识的专业性要求，还要掌握法律英语中的语言技能，在体例上做了如下安排：

首先，将原书中标出的基本的法律词汇进行翻译，以便于理解和掌握，此为“基础词汇释义”。

其次，选取原书中值得深入分析的重点法律词汇进行详细分析，英汉并重，即“重点词汇详解”。

序言法律英语：法学概论(第3版)再次，原书虽然是法律教材，但是语言简单精确，结合法律语境学习英语语言技巧并学以致用，则是法律英语学习的事半功倍之坦途，因此本书中文部分还特别列举了值得好好体会的语言知识点，即“英语技能提高要点提示”。

又次，法律英语的学习绝不是简简单单的几个单词、几个句子，不懂法律知识，也难以学好法律英语，至少是掌握不了其中之精髓，本书中的“重点法律知识分析”部分即选取了法律知识要点进行详细分析，力图使读者体会其中的内涵。

最后，英美普通法的特点在于其案例法体系，案例的学习是学习法律英语不可或缺的部分，本书中的“案例解析”部分即对教材中的案例结合涉及的法律问题进行了全面的分析，既有层层递进的详细论述，也有结合案例情况以问题形式进行的启发式分析，并且还点出了案例中的语言要点。目的只有一个，即使读者深入理解案例的精髓和熟悉案例的语言韵味，不再对案例感到陌生和排斥，期待读者在阅读完本书中二十个左右的案例后能对英美法案例有一个切身的认识。

为了提高学生的阅读和学习兴趣，在本书的编写中，还穿插了“词义辨析”和“Small quiz”两个小栏目，前者是对需要掌握的同义词或近义词进行了比较分析，促使读者更为全面地掌握词汇的含义并能熟练使用，而后者则是结合具体的知识点，通过提小问题的方式，帮助读者主动思考，加深理解。

作者在双语教学中有一个切身体会——启发式和互动式的教学方式最能调动学生的学习热情和提高学习效果，因此，在运用教材进行

教学的过程中，有两个方面值得关注：

第一，运用英语教学中的paraphrase的教学方式，鼓励（甚或在适当的时候采用“强迫”）学生使用自己的语言来解释词汇，重述案件的概况，将教材中已有的词汇、短语、句型有机地融入自己的表述中，特别是将在教材中出现的一些看似简单和日常化的词语运用到法律语言中，可以有效地提高学生的语言能力和对法律知识的理解，并能排除学生对法律英语的畏难情绪。

第二，与其他法律英语和英美法教材相比，本教材的一大特点在于其较为充实的案例。众所周知，案例教学是英美法学教育的特色之一。通过案例的学习读者可以掌握英美法的语言特点和思维方式。因此，对于本教材中的案例，授课教师可以采取灵活多样的方式调动学生的主动学习：结合案情分为原、被告双方进行课堂辩论，利用教材中教授的案例分析方法进行案例分析的课堂提问和发言，利用教材中教授的诉讼文件的书写格式模拟案件的起诉书等法律文件，全面利用网络资源对相关案例的背景资料进行查询并在此基础上结合案例涉及的法律理论写小论文，等等，从而使学生能够活学活用法律语言，掌握英美法的思维技巧。

总之，作者希望通过本书为我国法学教育的双语教学贡献一份力量，其中疏漏之处，诚挚希望各位同仁批评指正！

姜栋

2009年7月

英文原版书部分

PREFACE

The study of law attracts students for a variety of reasons. Many see the study of law as a career choice—as the opportunity to become a lawyer, a paralegal, or some other related professional. Some are interested because of personal dealings with the legal system, while others are interested simply because it is a fascinating subject. Whatever reasons motivate the student, an introductory class in law must accomplish certain basic objectives. Students must develop an understanding of the organization of the legal system. They must comprehend basic legal concepts related to procedural and substantive law. Students should also be introduced to cases, statutes, and the Constitution, the sources of all of our laws. While students in an introductory law class should not be forced to learn about the law entirely through reading cases, some experience in reading cases is essential to learning about the law.

Our years of teaching paralegal students have convinced us that any introductory law course must begin with and emphasize the development of a strong legal vocabulary. Also important is the opportunity to use and develop the analytical skills so important to any legal professional. Our goal, therefore, in writing this text is to help instructors by providing beginning students with a book that keeps their interest while providing an overview of the organization and operation of the legal system, as well as an introduction to some of the basic concepts of substantive and procedural law. More importantly, however, we have included several features that give students the opportunity to develop a strong legal vocabulary and to build their analytical skills.

THE THIRD EDITION OF INTRODUCTION TO LAW

Feedback from instructors and students who use this text convinces us that the basic organization and features of this textbook are successful. Students have especially appreciated the extensive key term definitions in the margin, the interesting cases, and the wide use of common hypothetical cases to explain the application of legal principles. These features remain in the text. However, the law has never been, nor will it ever be, a static entity. Any useful textbook dealing with the law must reflect these changes. As a result, where applicable, the law has been updated in this text. Other changes reflect the changing face of the legal system, as well as our desire to provide students with the following.

- ▼ More practice in building analytical skills
- ▼ An awareness of the global view of law
- ▼ An introduction to the ever-growing important areas of constitutional, employment, and environmental law
- ▼ Extended coverage of the unauthorized practice of law
- ▼ Updated information on the current impact of technology in law practice to accomplish these goals, the third edition of Introduction to Law contains the following new features
 - ▼ A new chapter, “Constitutional Law, ” introducing and discussing some of the major concepts of constitutional law
 - ▼ New coverage of legal research strategies
 - ▼ Introduction to the areas of employment and environmental law
 - ▼ Inclusion of new U.S. Supreme Court cases
 - ▼ Expanded discussion of the unauthorized practice of law
 - ▼ A new chapter feature, “Around the World, ” providing information and Web sites related to international aspects of law
 - ▼ A new chapter feature, “Skills Assessment, ” containing assignments for students to test the skills needed in a law office

- ▼ Expanded use of tables and charts to clarify legal concepts

INSTRUCTIONAL AND LEARNING FEATURES OF INTRODUCTION TO LAW

The many features of Introduction to Law make it an excellent choice for both the student and the instructor. Students will find an easy-to-read text with a built-in dictionary, realistic factual situations, and high-interest cases. Instructors will find an organized text containing questions to help students review text material, hypothetical situations for class analysis and discussion, and assignments in each chapter. In addition, an Instructor's Manual provides the instructor with chapter outlines, answers to review questions, a test bank, and transparency masters. The supplemental material is especially helpful to adjunct faculty. More specifically, Introduction to Law contains the following features.

- ▼ Numerous charts and tables illustrate and clarify legal concepts.

- ▼ Legal vocabulary is identified in boldface type. The key terms are defined in the margins of the text where the terms appear, and are also listed at the end of each chapter for review.

- ▼ A case file containing a hypothetical factual situation opens each chapter. This case file serves as an introduction to the subject matter, encouraging students to think about the subject matter in a law office or everyday setting, rather than simply as more textual reading.

- ▼ Carefully selected and edited case law appears in each chapter. The case law introduces students to reading the law and assists with the development of critical thinking skills. The cases are interesting and even familiar. Most cases have been edited in an effort to shorten them and to give beginning students the opportunity to ascertain the important concepts of the case without being confused. (In editing the cases, we have taken some liberties with normal rules of editing.) To assist the student, we have also provided a brief introduction to most cases, as well as questions for case analysis following the case.

- ▼ A “Technology Corner” box in each chapter provides a list of Internet sites that are relevant to the material in the chapter. A “Featured Web Site” box in each chapter provides an overview of one important Web site, along with student assignments using the site.

▼ Internet references to international organizations, laws, and legal resources appear in each chapter in a feature titled “Around the World.” This feature allows students to explore global influences on the legal system as well as to compare the U.S. legal system with that of other nations.

▼ “Ethical Concerns” boxes in each chapter contain hypothetical situations presenting ethical questions suitable for class discussion. Students are given the opportunity to apply the various ethical rules to real-life situations.

▼ A “Chapter Summary” is included in every chapter. The summaries are short overviews of the major concepts covered in the chapter.

▼ Basic “Questions for Review” follow each chapter summary. These questions are designed to assist the student in focusing on the most important concepts in the chapter.

▼ “Questions for Analysis” at the end of each chapter require the student to apply the concepts covered in the chapter.

▼ An “Assignments and Projects” section, which follows the “Questions for Analysis,” contains hands-on activities to help the student build necessary skills.

▼ “Skills Assessment” provides students with an opportunity to test a variety of skills needed to survive in a law office.

▼ Most chapters include a feature called “A Point to Remember.” This practical information helps students focus on the skills and concepts that will help them in their legal studies.

▼ A complete Glossary at the end of the text contains definitions for all highlighted key terms used in the text.

▼ A mock trial can be found in Appendix III, and a Basic Citation Reference Guide is included as Appendix IV. The mock trial could be used at the end of Chapter 17 (“The Trial”). We have found that a mock trial is fun and memorable for students. We have provided the basic fact pattern and the legal issues. The trial is a good opportunity for students to apply the materials presented in the preceding chapters.

▼ Appendix VII, “Recent United States Supreme Court Decisions,” contains summaries of important recent cases. In the various chapters, students are asked to do factual analysis based on the cases.

▼ A complete Instructor's Manual is available. The Instructor's Manual contains suggested course syllabi, chapter outlines, answers to “Questions for Review,” and suggestions for additional teaching materials. It also includes a test bank with answers and transparency masters.

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No textbook can be produced through the sole effort of its authors. The third edition of Introduction to Law is no exception.

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CHAPTER 1 THE LEGAL COMMUNITY AND PROFESSIONAL RESPONSIBILITY

- 1-1 Introduction
- 1-2 The Legal Profession
- 1-3 The Paralegal Profession
- 1-4 Legal Support Staff
- 1-5 Court Personnel
- 1-6 Agency Personnel
- 1-7 Professional Organizations
- 1-8 Ethical Responsibilities

 Technology Corner	
The Technology Corner boxes provide starting points to finding legal information using the Internet. Examine each site. Bookmark the addresses you find most helpful.	
Web Address	Name of Site
www.abanet.org/	American Bar Association
www.nala.org/	National Association of Legal Assistants
www.paralegals.org/	National Federation of Paralegal Associations
www.abanet.org/cpr/home.html	ABA Center for Professional Responsibility
guide.lp.findlaw.com/01topics/14ethics/cases.html	Selected U. S. Supreme Court Ethics Decisions
<i>Caution:</i> Web addresses may change and some may disappear. If you experience difficulty loading a Web page, try deleting the information to the right of the last slash mark (/). You may need to work all the way back to the “.com” or “.edu” or “.gov” or “.org” and so forth.	

CHAPTER OBJECTIVES

When you complete this chapter you should be able to

1. Describe the requirements for becoming a lawyer.
2. Explain some of the different types of law practice.
3. Explain the role of the paralegal in the legal environment.
4. Identify the skills required of a paralegal.
5. List and describe the responsibilities of the various personnel working in law offices and in the courts.
6. Identify the organizations for legal professionals.
7. Describe some of the major ethical rules that govern legal professionals.
8. Explain how to avoid the unauthorized practice of law.

CASE FILE: PEOPLE V. TERRY JACOBS

Terry Jacobs has always been fascinated by the law. Terry's spare time is spent watching television shows about lawyers and police or reading legal thrillers written by authors such as Grisham and Turow. At one time Terry even considered becoming a lawyer, but the thought of seven years of college and the corresponding cost made Terry put aside. Instead, Terry surfed the net and found several articles and books on the law written for paralegals. After reading the books, Terry started a paralegal business called Jacobs Paralegal Services. As part of this business, Terry often helped people obtain divorces. Now, the local bar association claims that Terry is engaged in the unauthorized practice of law. After investigating the matter, the local prosecutor filed criminal charges against Terry.

SEC. 1-1 INTRODUCTION

Whether based on fact or fiction, legal stories capture the interest of the American public. Daily news reports in all media generally include some stories involving our legal system. Sometimes the events involve serious issues such as the rights of those accused of terrorist activities. Sometimes the stories involve less serious but more incredible issues such as the right to sue a fast food restaurant for causing obesity. Often, the stories involve legal difficulties of celebrities who get involved in everything from murder to child abuse to domestic disputes. The entertainment media also focus heavily on legal stories. Popular fiction, television series, and movies are often based on law-related events.

Clearly, the law is a fascinating topic. More than that, however, the law affects all aspects of our lives, from the selection of our president to the way we drive our automobiles. At times the law is simple and straightforward. At other times it can be complex and involved, requiring experts to explain and interpret it.

Whether your goal is to work in the law or whether you are just interested in law, you should know certain basic concepts about the U.S. legal system. This text is intended to introduce you to some of the basics of the U.S. legal system. You will not learn everything there is to learn about the law; that is an impossible task. However, as you go through the various chapters, you will see how the legal system is organized and how it functions. You will read about some important areas of law and see how legal disputes are handled both in and out of court.

The starting point in learning about the law is to become familiar with the participants who make up the legal community. This first chapter introduces you to the various members of the legal community. It also introduces some of the important ethical rules that guide these professions.

SEC. 1-2 THE LEGAL PROFESSION

LAWYERS

A lawyer^[1], who is also called an attorney^[2], is an individual licensed by a state to practice law. States generally require that individuals take and pass a special examination, a bar examination^[3], before they can be licensed to practice law. The license is valid only within the state that issues it. If an individual wishes to practice law in a state on a regular basis, that individual must be licensed within that state. Prior to taking a bar examination, most individuals have completed a four year bachelor's degree program followed by a three-year law school program. On completion of law school, most graduates receive a Juris Doctor (doctor of law) degree. Because of the ever-changing nature of the law, some states now require licensed attorneys to regularly complete a certain number of hours of continuing education in order to maintain their license to practice law.

THE PRACTICE OF LAW

Lawyers practice their profession in different ways. Many lawyers work in privately owned law firms. The lawyers may be the employees or owners of the law firm, either individually, in partnership with other lawyers, or in an association with other lawyers. The law firm may even be incorporated. A law partnership operates under the same partnership laws as any business. The partners share profits and each is responsible for all of the liabilities of the business. However, because of certain ethical rules, only licensed attorneys can be partners. Many states recognize a new type of partnership, a limited liability partnership (LLP). In this business form, the partners in the law firm have limited liability for the acts of their partners. An association is a type of business organization where lawyers may share office and support-staff expenses, but do not share in the profits of the law practice itself. In some cases the law practice is incorporated. In such an event, the state laws regulating corporations apply to the organization. Shareholders, or owners of the corporation, are generally limited to attorneys.

Not all lawyers work in private law firms. Many work for local, state, or federal government organizations such as prosecutors' offices (sometimes

known as district attorneys), public defenders' offices, state attorneys' offices, or the U.S. Attorney's office. Other attorneys work in legal departments of corporations or insurance companies. In these instances, the attorneys are usually salaried employees, although the heads of some of these organizations may be elected or appointed officials.

The nature of the day-to-day work done by attorneys depends on where the attorney works or the area of expertise or specialty of that attorney. However, what constitutes the practice of law is somewhat consistent among all legal practitioners. Although there is no exact definition of the practice of law, generally the practice of law includes such activities as appearing in court, giving legal advice, and preparing legal documents to meet specific client needs.

注释

[1] lawyer: An individual who is authorized by a state to practice law.

[2] attorney: Another term for lawyer.

[3] bar examination: An examination administered by a state that tests an individual's knowledge of the law and is a prerequisite to being allowed to practice law.

SEC. 1-3 THE PARALEGAL PROFESSION

Because of the complexities of the law, most people rely on the work and efforts of professionally trained individuals whenever they have a legal problem. Traditionally, these trained individuals have been attorneys. In recent years, with the emergence of the paralegal profession, this has changed. Paralegals^[1], also known as legal assistants^[2], are individuals whose training and education enable them to assist lawyers by performing various legal tasks. Although they cannot give legal advice or appear in court, paralegals, under the supervision of a lawyer, do much of the legal work traditionally done by lawyers. If a paralegal is properly trained and supervised, clients receive the same level of legal work as they would from attorneys working alone, and they receive it at an affordable cost.

Today, legal services are commonly provided by a “team” consisting of lawyers, paralegals, and other support staff. By properly utilizing a support staff, especially paralegals, today's attorneys find that their time is most efficiently and economically spent performing tasks that require the expertise they gained in law school. Conversely, clients find that when paralegals, rather than attorneys, perform certain legal tasks, the cost of legal services is greatly reduced. The value of paralegals to the legal community is so great that labor experts predict the paralegal profession will continue to be one of the fastest-growing professions in the United States.

PARALEGALS IN THE LEGAL ENVIRONMENT

Most paralegals work under the supervision of attorneys either in private law offices, government law offices (such as prosecutors' offices), or in the legal departments of corporations or other businesses. A paralegal who works in a firm that handles automobile accident cases might interview clients and witnesses, draft documents to be filed in court, or summarize medical records. On the other hand, a paralegal who works for a probate attorney might be involved in gathering and organizing financial data or preparing inheritance tax returns.

The day-to-day tasks that paralegals perform are as varied as the types of law that are practiced. However, certain knowledge and skills are

commonly required of all paralegals. Paralegals need to have a basic knowledge of the legal system, substantive laws, and legal procedures. Subsequent chapters in this book will cover these areas. Legal assistants should also have some knowledge of the substantive and procedural laws of the state in which they work. This is the focus of most formal paralegal education. In addition, every paralegal should know and understand the ethical obligations that bind legal professionals. These obligations are discussed later in this chapter.

A POINT TO REMEMBER

Paralegals cannot engage in the unauthorized practice of law. They cannot appear in court or give legal advice. However, under the supervision of an attorney, they can perform many tasks often done by lawyers, such as interviewing clients, drafting legal documents, and doing legal research.

Paralegals must also possess certain basic skills. These include the following.

Oral and Written Communication Skills

Paralegals frequently communicate orally and in writing with the courts, attorneys, other paralegals, and clients. Paralegals commonly interview clients and witnesses, and then summarize in writing the content of such interviews. Additionally, paralegals draft all types of legal documents.

Research Skills

Some paralegals do extensive legal research and writing for attorneys, while others do very little. However, all paralegals must have basic legal research skills. Furthermore, all paralegals should have general research skills. For example, as a paralegal you might be asked to locate the address of a distant court; in a medical malpractice case, you might be asked to research certain medical conditions.

Critical Thinking/Analytical Skills

Critical thinking skills are essential for anyone working as a legal assistant and are required for most if not all of the legal work done by paralegals. For example, the ability to analyze and synthesize facts is

required for legal research and preparing legal documents. It is also needed for reviewing legal documents and reviewing and evaluating evidence.

Organizational Skills

Case files in a legal office often contain numerous documents. In major lawsuits the number of documents may be in the thousands. Paralegals may be responsible for indexing and organizing all of them. If a case is in litigation, many time deadlines are also critical. Papers may have to be filed in court or served on other parties to the lawsuit, or court appearances by the attorney might be set. Someone must keep track of everything; often that someone is a paralegal.

General Office/Computer Skills

A paralegal in a law office is expected to possess general office skills. Today that means computer literacy. Word processing skills are a must. Most law firms use the word processing software Microsoft Word, although some may use WordPerfect. Ability to use the Internet effectively and efficiently is also essential. Legal and factual research uses the Internet. Most courts are now online. And, of course, no office operates without e-mail. In addition, knowledge about general filing and billing procedures, proper telephone etiquette, and general business communication skills is essential.

INDEPENDENT PARALEGALS

Not all paralegals work in law offices. Some, like Terry Jacobs, prefer the benefits of self-employment. In some instances they work as independent contractors, offering their services to different attorneys for specific legal projects. For example, they might do a legal research project, handle a probate, or summarize documents in a specific case. Paralegals who work like this are sometimes referred to as independent or freelance paralegals; they do much the same type of work as traditional paralegals.

Contrasted with paralegals who work independently for attorneys are those who offer their services directly to the public. This type of work presents serious ethical and legal questions because, absent specific legislation to the contrary, only attorneys can give legal advice, appear in court, or otherwise engage in the practice of law. In recent years many state legislatures have considered the issue of trained nonattorneys providing

limited legal services to the public. The term legal technician^[3] rather than paralegal is sometimes used to designate these individuals. Advocates of legal technicians stress the need for affordable legal services, while opponents stress the dangers of allowing nonattorneys to practice law, even to a limited extent.

REGULATION OF PARALEGALS

Unlike attorneys, paralegals are not generally licensed by any government agency. In fact, in most states anyone can be called a paralegal. However, a number of states have enacted or are considering some type of regulation of paralegals. See Figure 1-1, Regulation of Paralegals, for an example of recent legislation passed in California related to paralegals. Aside from governmental regulation, the paralegal profession itself has adopted forms of self-regulation. Two major professional organizations established professional standards and voluntary certification for paralegals: the National Association of Legal Assistants (NALA) and the National Federation of Paralegal Associations (NFPA). NALA administers a national examination that tests paralegal competency. Paralegals who pass the examinations are referred to as Certified Legal Assistants (CLAs)^[4]. CLAs are required to take several hours of continuing education regularly to maintain their status. NALA further administers certain specialty examinations to paralegals who have passed the basic CLA examination. NFPA also administers a competency examination known as PACE (Paralegal Advanced Competency Exam).

Both NALA and NFPA have sought to enhance the paralegal profession by adopting codes of ethical standards for paralegals. Neither organization, however, has authority to punish or discipline anyone who violates these standards.

Regulation of Paralegals

California Business and Professions Code § 6450.

“Paralegal”: Requirements

(a) “Paralegal” means a person who holds himself or herself out to be a paralegal, who is qualified by education, training, or work experience, who either contracts with or is employed by an attorney, law firm, corporation, governmental agency, or other entity, and who performs substantial legal work under the direction and supervision of an active member of the State Bar of California, as defined in Section 6060, or an attorney practicing law in the federal courts of this state, that has been specifically delegated by the attorney to him or her. Tasks performed by a paralegal include, but are not limited to, case planning, development, and management; legal research; interviewing clients; fact gathering and retrieving information; drafting and analyzing legal documents; collecting, compiling, and utilizing technical information to make an independent decision and recommendation to the supervising attorney; and representing clients before a state or federal administrative agency if that representation is permitted by statute, court rule, or administrative rule or regulation.

Figure 1-1 Regulation of paralegals

(b) Notwithstanding subdivision (a), a paralegal shall not do any of the following:

(1) Provide legal advice.

(2) Represent a client in court.

(3) Select, explain, draft, or recommend the use of any legal document to or for any person other than the attorney who directs and supervises the paralegal.

(4) Act as a runner or capper, as defined in Sections 6151 and 6152.

(5) Engage in conduct that constitutes the unlawful practice of law.

(6) Contract with, or be employed by, a natural person other than an attorney to perform paralegal services.

(7) In connection with providing paralegal services, induce a person to make an investment, purchase a financial product or service, or enter a transaction from which income or profit, or both, purportedly may be derived.

(8) Establish the fees to charge a client for the services the paralegal performs, which shall be established by the attorney who supervises the paralegal's work. This paragraph does not apply to fees charged by a paralegal in a contract to provide paralegal services to an attorney, law firm, corporation, governmental agency, or other entity as provided in subdivision (a).

(c) A paralegal shall possess at least one of the following:

(1) A certificate of completion of a paralegal program approved by the American Bar Association.

(2) A certificate of completion of a paralegal program at, or a degree from, a postsecondary institution that requires the successful completion of a minimum of 24 semester, or equivalent, units in law-related courses and that has been accredited by a national or regional accrediting organization or approved by the Bureau for Private Postsecondary and Vocational Education.

(3) A baccalaureate degree or an advanced degree in

Figure 1-1 Continued

any subject, a minimum of one year of law-related experience under the supervision of an attorney who has been an active member of the State Bar of California for at least the preceding three years or who has practiced in the federal courts of this state for at least the preceding three years, and a written declaration from this attorney stating that the person is qualified to perform paralegal tasks.

(4) A high school diploma or general equivalency diploma, a minimum of three years of law-related experience under the supervision of an attorney who has been an active member of the State Bar of California for at least the preceding three years or who has practiced in the federal courts of this state for at least the preceding three years, and a written declaration from this attorney stating that the person is qualified to perform paralegal tasks. This experience and training shall be completed no later than December 31, 2003.

(d) All paralegals shall be required to certify completion every three years of four hours of mandatory continuing legal education in legal ethics. All continuing legal education courses shall meet the requirements of Section 6070. Every two years, all paralegals shall be required to certify completion of four hours of mandatory continuing education in either general law or in a specialized area of law. Certification of these continuing education requirements shall be made with the paralegal's supervising attorney. The paralegal shall be responsible for keeping a record of the paralegal's certifications.

(e) A paralegal does not include a nonlawyer who provides legal services directly to members of the public, or a legal document assistant or unlawful detainer assistant as defined in Section 6400, unless the person is a person described in subdivision (a).

(f) This section shall become operative on January 1, 2004.

Figure 1-1 Continued

Although the paralegal profession has been largely unregulated, changes are beginning. For example, California recently enacted legislation limiting the use of the term paralegal to those who work for attorneys and who have paralegal education or experience. Continuing legal education is also required. California also regulates independent paralegals who provide services to the public. These individuals, referred to as licensed document assistants, must meet educational or experience requirements. They must be licensed and bonded. Unlike attorneys, however, they do not need to take an

examination to be licensed.

PARALEGAL EDUCATION

The traditional definition of a paralegal refers to the fact that paralegals have special training and education. In the early days of the paralegal profession, in the 1960s and 1970s, few formal paralegal programs existed. Instead, many law firms hired intelligent, educated individuals and trained them to be paralegals. As the paralegal profession grew and developed, formal paralegal education became a prerequisite for many if not most paralegal jobs. Formal paralegal programs are offered by numerous educational institutions, both public and private, and vary in length and depth of material covered. To provide some standard, in the 1970s the American Bar Association (ABA) established guidelines for paralegal education and undertook to approve programs that met those guidelines and requested approval. The requirements for approval relate to curriculum, faculty, and support services of the educational institution. The ABA works closely with an organization known as the American Association for Paralegal Education (AAfPE). Paralegal programs can join the AAfPE even if they are not approved by the ABA.

PARALEGALS AS PROFESSIONALS

In a 1989 case, *Missouri v. Jenkins*, the U.S. Supreme Court discussed the role of paralegals in the practice of law. *Missouri v. Jenkins* was an aftermath of a major school desegregation case filed in Kansas City, Missouri. After a lengthy court battle, the plaintiffs in the case won. According to Section (abbreviated §) 1988 of the United States Code, the attorneys for the prevailing party were entitled to collect reasonable attorney fees from the losing party. In this case, the attorneys for the prevailing party used paralegals extensively and wanted reimbursement for their time at a rate of \$35 to \$40 per hour, which was the common rate at which paralegal time was billed to clients. The paralegals themselves were actually paid in the range of \$15 per hour. The trial court awarded fees for the paralegal time at the rate of \$35 to \$40 per hour; the other side appealed and requested a hearing in the U.S. Supreme Court. In writing this decision, the Court made frequent reference to the United States Code (abbreviated U.S.C. in the decision).

Missouri v. Jenkins

491 U.S.274 (1989)

ABOUT CASE LAW IN GENERAL

Before you read the excerpt from *Missouri v. Jenkins*, you should know what case decisions are. Published case decisions (or case law) are decisions of cases written by judges. Most often, these are decisions from judges who heard appeals in cases. They all involve real people or organizations who had real disputes. When you read the case itself, you are reading what the judges said about those people and their dispute. The decision is intended primarily to resolve their dispute. Because of the concept of precedent^[5] or stare decisis^[6], this decision can have a far-reaching effect in the legal system. Precedent or stare decisis means that once a specific factual dispute has been resolved in a particular way, if the same factual dispute arises again, it should be resolved in the same way. When judges write an opinion, they usually include a brief history of the factual dispute between the parties. They also discuss the reasons for their decision. In discussing the reasons for their decision, judges frequently refer to other cases or statutory law they considered. When they do this they also give a citation^[7] for that law. A citation is a standard reference that tells readers where they can find the law. The case name for this case, *Missouri v. Jenkins*, is followed by a citation. This is a reference to a book in which this case is published. In this citation, the book is abbreviated as U.S. (United States Reports). The abbreviation is preceded by a volume number and followed by a page number. Case law and citations are explained in more detail in later chapters.

OPINION

Missouri's contention is that the District Court erred in compensating the work of law clerks and paralegals (hereinafter collectively “paralegals”) at the market rates for their services, rather than at their cost to the attorney. While Missouri agrees that compensation for the cost of these personnel should be included in the fee award, it suggests that an hourly rate of \$15—which it argued below corresponded to their salaries, benefits, and overhead—would be appropriate, rather than the market rates of \$35 to \$50. According to Missouri, § 1988 does not authorize billing paralegals' hours at market rates, and doing so produces a “windfall” for the attorney.

We begin with the statutory language, which provides simply for “a

reasonable attorney's fee as part of the costs.” 42 U.S.C. § 1988. Clearly, a “reasonable attorney's fee” cannot have been meant to compensate only work performed personally by members of the bar. Rather, the term must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of secretaries, messengers, librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit. The parties have suggested no reason why the work of paralegals should not be similarly compensated, nor can we think of any. We thus take as our starting point the self-evident proposition that the “reasonable attorney's fee” provided for by statute should compensate the work of paralegals, as well as that of attorneys. The more difficult question is how the work of paralegals is to be valued in calculating the overall attorney's fee.

The statute specifies a “reasonable” fee for the attorney's work product. In determining how other elements of the attorney's fee are to be calculated, we have consistently looked to the marketplace as our guide to what is “reasonable.” A reasonable attorney's fee under § 1988 is one calculated on the basis of rates and practices prevailing in the relevant market, i.e., “in line with those [rates] prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation,” and one that grants the successful civil rights plaintiff a “fully compensatory fee,” comparable to what “is traditional with attorneys compensated by a fee-paying client.”

If an attorney's fee awarded under § 1988 is to yield the same level of compensation that would be available from the market, the “increasingly widespread custom of separately billing for the services of paralegals and law students who serve as clerks” must be taken into account. All else being equal, the hourly fee charged by an attorney whose rates include paralegal work in her hourly fee, or who bills separately for the work of paralegals at cost, will be higher than the hourly fee charged by an attorney competing in the same market who bills separately for the work of paralegals at “market rates.” In other words, the prevailing “market rate” for attorney time is not independent of the manner in which paralegal time is accounted for. Thus, if the prevailing practice in a given community were to bill paralegal time separately at market rates, fees awarded the attorney at market rates for attorney time would not be fully compensatory if the court refused to compensate hours billed by paralegals or did so only at “cost.” Similarly,

the fee awarded would be too high if the court accepted separate billing for paralegal hours in a market where that was not the custom.

We reject the argument that compensation for paralegals at rates above “cost” would yield a “windfall” for the prevailing attorney. Neither petitioners nor anyone else, to our knowledge, has ever suggested that the hourly rate applied to the work of an associate attorney in a law firm creates a windfall for the firm's partners or is otherwise improper under § 1988, merely because it exceeds the cost of the attorney's services. If the fees are consistent with market rates and practices, the “windfall” argument has no more force with regard to paralegals than it does for associates. And it would hardly accord with Congress' intent to provide a “fully compensatory fee” if the prevailing plaintiff's attorney in a civil rights lawsuit were not permitted to bill separately for paralegals, while the defense attorney in the same litigation was able to take advantage of the prevailing practice and obtain market rates for such work. Yet that is precisely the result sought in this case by the State of Missouri, which appears to have paid its own outside counsel for the work of paralegals at the hourly rate of \$35.

Nothing in § 1988 requires that the work of paralegals invariably be billed separately. If it is the practice in the relevant market not to do so, or to bill the work of paralegals only at cost, that is all that § 1988 requires. Where, however, the prevailing practice is to bill paralegal work at market rates, treating civil rights lawyers' fee requests in the same way is not only permitted by § 1988, but also makes economic sense. By encouraging the use of lower cost paralegals rather than attorneys wherever possible, permitting market-rate billing of paralegal hours “encourages cost-effective delivery of legal services and, by reducing the spiraling cost of civil rights litigation, furthers the policies underlying civil rights statutes.”* Such separate billing appears to be the practice in most communities today. In the present case, Missouri concedes that “the local market typically bills separately for paralegal services,” and the District Court found that the requested hourly rates of \$35 for law clerks, \$40 for paralegals, and \$50 for recent law graduates were the prevailing rates for such services in the Kansas City area. Under these circumstances, the court's decision to award separate compensation at these rates was fully in accord with § 1988.

* It has frequently been recognized in the lower courts that paralegals are capable of carrying out many tasks, under the supervision of an attorney

that might otherwise be performed by a lawyer and billed at a higher rate. Such work might include, for example, factual investigation, including locating and interviewing witnesses; assistance with depositions, interrogatories, and document production; compilation of statistical and financial data; checking legal citations; and drafting correspondence. Much such work lies in a gray area of tasks that might appropriately be performed either by an attorney or a paralegal....

CASE ANALYSIS

1. The parties to a case are the people or organizations who have brought their dispute to court. Who are the parties in this case? Which party petitioned the Supreme Court for review? Can you tell which party won the case at the trial level?

2. Describe the nature of the dispute between the parties in this case. How did the Court resolve the dispute?

3. What does the Court say about the nature of work done by paralegals? Do you think this has any impact on how judges and lawyers view the paralegal profession?

4. Is the Court treating paralegals more like secretaries or more like attorneys? Explain.

注释

[1] paralegal: An individual whose training and education enables him or her to assist lawyers by performing certain legal tasks that traditionally have been done by lawyers.

[2] legal assistant: Another term for paralegal.

[3] legal technician: A term used to describe a nonattorney who is authorized to engage in a limited practice of law.

[4] Certified Legal Assistant (CLA): A paralegal or legal assistant who has passed a special examination given by the National Association of Legal Assistants.

[5] precedent: The example set by the decision of an earlier court for

similar cases, or similar legal questions that arise in later cases.

[6]stare decisis: “It stands decided” ; another term for precedent.

[7]citation:A standard abbreviated way of explaining where law is found.

SEC. 1-4 LEGAL SUPPORT STAFF

LEGAL SECRETARIES

Another important member of the legal team is the legal secretary. As with other legal professionals, the work done by legal secretaries in law offices varies depending on the education and experience of the legal secretaries and the area of specialty of the firm employing them. Their jobs may be primarily secretarial in nature, but in some cases are much more involved. Before the advent of the paralegal profession, many legal secretaries not only did traditional secretarial work, but also performed many of the tasks now assigned to paralegals. In fact, in the early days of the paralegal profession, many new paralegals were former.

Most legal secretarial jobs include such activities as word processing, scheduling appointments, notifying clients of court dates, and calendaring court appearances. Although such tasks are primarily secretarial, a limited knowledge of the law and the legal process is necessary. Legal secretaries frequently deal with the courts; furthermore, they must know the proper format for preparing various types of legal documents as well as be familiar with court rules regarding the filing of any court documents. Sometimes, the work of legal secretaries extends beyond secretarial functions and into the realm of paralegal work. Some legal secretaries draft legal documents, interview clients, and summarize records. Often legal secretaries, like the lawyers for whom they work, become experts in certain areas of the law. They may be known as litigation secretaries, patent secretaries, or corporate secretaries.

In larger law firms, marked distinctions exist between the paralegal job and the legal secretary position. Each has very distinct assigned tasks. In smaller firms, however, the differences between a legal secretary and a paralegal are sometimes hard to determine. Generally, however, paralegals have more formal legal education and are expected to work more independently than legal secretaries. Attorneys who operate small law firms may not need both a legal secretary and a paralegal. They will therefore often seek a “legal secretary/paralegal” for their support staff. That is, they want someone who can perform the job of both the legal secretary and the paralegal.

LAW CLERKS

The term law clerk^[1] is most commonly used to refer to law students interning or working in the law firm while attending school. Their jobs often involve considerable legal research and preparation of legal memoranda^[2], which are written explanations and analyses of factual and legal problems.

OTHER SUPPORT STAFF

Depending on the size of the law firm and the nature of its work, several other legal support positions may exist in a law firm. These include case assistants, case clerks, document coders, and calendar clerks. Although their actual job descriptions may vary from firm to firm, case assistants and case clerks generally assist paralegals. Document coders usually read and extract information from documentary evidence in a case and enter that information into a computerized database. Calendar clerks maintain the office calendar, which may include court appearances, client appointments, and filing dates. Many paralegals begin their careers in one of these support positions.

A POINT TO REMEMBER

If you work in a law firm, you are a member of a team. You must be willing and able to work harmoniously with all other members of that team, including attorneys and support staff.

A Question of Overtime Pay

Under federal labor rules found in the Code of Federal Regulations (C.F.R.), employees who work overtime must be compensated for that time unless they are “exempt.” One category of exemption exists for an employee “who customarily and regularly exercises discretionary powers ...” [29 C.F.R. 541.1(d)]. This section is further interpreted in section 541.107, which defines customarily and regularly as “a frequency which must be greater than occasional but which, of course, may be less than constant.” Furthermore, “[t]he requirement will be met by the employee who normally and recurrently is called upon to exercise and does exercise discretionary powers in the day-to-day performance of his duties. The requirement is not met by the occasional exercise of discretionary powers.” (29 C.F.R. 541.107).