

To: ABA Task Force on the Model Definition of the Practice of Law

From: Ernest Calderón, President, Board of Governors of the State Bar of Arizona

Date: January 3, 2003

Re: Draft Definition of the Practice of Law

The State Bar of Arizona commends the ABA for taking on the difficult task of defining the practice of law and supports the need for a definition of the practice of law as an important component for protecting consumers of legal services. I am providing the following Arizona background with the hope that this information will assist the Task Force in its deliberations.

Arizona Background:

- As early as the 1950's Arizona's highest court held exclusive jurisdiction over the practice of law, both in and out of the courtroom. The Arizona Supreme Court confirmed its jurisdiction over the practice of law, including non-lawyers engaging the practice of law outside of the courtroom, when it decided and defined the practice of law in *State Bar of Ariz. v. Ariz. Land, Title & Trust Co.*, 90 Ariz. 76, 95, 366 P.2d 1 (1961). In 1980 and 1994, the Arizona Supreme Court affirmed it has the exclusive authority to regulate who may "practice law." *Hunt v. Maricopa Cty. Employees Merit System Comm'n*, 127 Ariz. 259, 261-262, 619 P.2d 1036, 1038-1039 (1980); cited in, *In re Shannon*, 179 Ariz. 52, 75, 879 P.2d 548, 571 (1994).
- When the Arizona Supreme Court made it clear that it had jurisdiction over the practice of law, the legislature permitted the statutes regulating the practice of law to sunset in 1985. With the exception of a statute that made engaging in UPL a criminal misdemeanor, the regulations regarding the practice of law, including rules regarding attorneys, were transferred to Rules of the Supreme Court.
- As a result, there has not been any regulation of those who engage in UPL, nor is there any recourse for consumers harmed by those engaging in UPL in Arizona since 1985.
- The State Bar of Arizona attempted, twice, to get legislation to protect the public in the mid-1990's.
- Today in Arizona there is a proliferation of non-lawyers engaging in UPL: They are offering their services by mail, by the media, and by personal contact. The non-lawyers are negotiating personal injury claims, preparing documents for clients, attempting (and sometimes successfully) to appear on behalf of others in courts, preparing pleadings and briefs, and providing legal advice to "clients." If they cause harm to their clients in performing these services, there is no

recourse for those clients and no sanctions available for their conduct. Although the State Bar is not an official repository for UPL complaints, it has received well over 300 UPL complaints during each of the past several years.

- The harm caused by those who engage in UPL is immeasurable. Custody cases have been lost by unregulated legal service providers who file defective documents or fail to file documents timely, young families experiencing financial difficulties needlessly have moved to homeless shelters because they have relied upon a dishonest and unregulated “pretend attorney,” thousands of dollars have been paid to non-lawyers for services that were never rendered, personal injury cases may have been compromised by ineffective non-lawyers, and personal injury victims have never received the settlements awarded to them and their non-lawyer representative. These are just a few examples of the harms that occur daily in an unregulated environment.
- Many of the problems related to UPL issues are caused by misperceptions and an unclear understanding about what it means to engage in the practice of law.
- In the seminal *Arizona Land Title & Trust* case, the Court defined practicing law:
Those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries constitute the practice of law. Such acts include, but are not limited to, one person assisting or advising another in the preparation of documents or writings which affect, alter or define legal rights; the direct or indirect giving of advice relative to legal rights or liabilities; the preparation for another of matters for courts, administrative agencies and other judicial or quasi-judicial bodies and officials as well as the acts of representation of another before a body or officer. They also include rendering to another any other advice or services which are and have been customarily given and performed from day to day in the ordinary practice of members of the legal profession, either with or without compensation.
State Bar of Ariz. v. Ariz. Land, Title & Trust Co., 90 Ariz. 76, 95, 366 P.2d 1 (1961).
- Specifying what services constitute the “practice of law” is crucial because the Supreme Court Rules do not regulate lawyers – they regulate everyone who engages in the “practice of law” or “hold[s] himself out as one who may practice law[.]”
- The Arizona Supreme Court noted in *In re Creasy*, 198 Ariz. 539, 542, 12 P.3d 214 (2000), that its “cases make clear that a person need not appear in a judicial proceeding to engage in the practice of law.” The Court then indicated that it is “quite aware of the social, technological, and economic changes that have taken place since . . . *Arizona Land Title*,” and invited the need for a newer and clearer definition of law when it asserted, “In some situations these changes may require us to reexamine our broad definition of the practice of law.”
- Furthermore, it is unclear to lawyers, non-lawyers, and consumers what conduct is considered to be the practice of law. To protect consumers and provide

uniformity and clarity, it is imperative that there be a definition for the practice of law and also a definition of unauthorized practice of law.

- The State Bar's Consumer Protection Committee proposed a definition for both the practice of law and the unauthorized practice of law after careful review of definitions from all of the states. The final proposed definition does not make any substantive changes to the definition set out in Arizona case law.
- Through the years, the Supreme Court has made exceptions for certain non-lawyers to engage in conduct that is normally considered to be the practice of law. These exceptions have always taken into account access to justice and consumer protection issues, which include assuring that anyone authorized to provide legal services be competent and accountable. The exceptions historically have been created when the Supreme Court has been alerted to the apparent need for limited legal services for consumers by non-lawyers and the concomitant assurance of consumer protection when those services are delivered. CPA's, tax accountants, enrolled tax agents, mediators, and government employees offered suggestions for exceptions, noting the need for the services, the history of such services, and the assurance of consumer protection. The State Bar proposed definitions also included several new exceptions, based upon input received from community groups, non-lawyer organizations and courts. One of the new exceptions, for "certified document preparers" resulted from meetings with Supreme Court staff, document preparers, and staff from the State Bar of Arizona. This exception recognizes the reality of our legal market: document preparation may be performed by qualified professionals who are not lawyers. However, those preparers are subject to Supreme Court regulation and must adhere to a code of ethics.
- The revised Supreme Court Rules in Arizona will:
 - Clarify what it means to engage in the "practice of law";
 - Make it clear what conduct constitutes "unauthorized practice of law";
 - Create an effective means to regulate non-lawyers who provide legal services; and
 - Assure that Arizona consumers of legal services, whether provided by lawyers or non-lawyers, have access to competent and accountable legal service providers.

The State Bar of Arizona commends the ABA for taking on the difficult task of defining the practice of law. Arizona has experienced the confusion and consumer harms and deceptions that occur when there is ambiguity about what constitutes "practicing law." For lawyers crossing state lines for non-lawyer legal service providers seeking credibility, and for consumers of legal services, thank you for attempting to clarify what is the practice of law.

