Defining the Practice of Law

The American Bar Association through its task force on the Model Definition of the Practice of Law, has submitted a draft definition (dated September 18, 2002) which will be submitted for consideration at the annual ABA meeting in Seattle in February 2003. Developing such a definition has challenged all who have tried. It is ironic that the one profession which claims to be the foremost experts on drafting legislation, regulations or legal agreements is unable to prepare a clear definition of what it is that they do.

Before writing a definition, we suggest it is first necessary to ask why we need a definition. Is the purpose to define what it is that lawyers do? If that is the purpose, then it provides a guideline for describing what activities of the lawyer are subject to regulation. However, a different purpose for the definition is to describe what it is that nonlawyers cannot do. For example, if a lawyer drafts an agreement for the purchase of a personal residence, most would conclude that it is an activity that a lawyer does and therefore subject to the rules of ethics and competence applicable in the lawyer's jurisdiction. However, a licensed real estate agent can draft the same agreement without engaging in the "practice of law". Thus, the same definition of the practice of law does not apply at the same time to what a lawyer can do and what a nonlawyer cannot do. There appears to be a need for the definition of two terms.

Next, we must ask what public interest is being served in defining the practice of law or the unauthorized practice of law. Related to the purpose issue one should also ask which branch of government should properly regulate the activity. We suggest that there are at least four possible reasons:

1. To assure that practitioners representing clients in the judicial system maintain minimum standards of competence and ethics: Under this rationale, any appearance before a judicial body, including preparation of documents to be filed in court, deposition of witnesses and other actions considered ancillary to court appearances should be included in the definition. This purpose is clearly consistent with the objectives of the judicial branch of government (to preserve the integrity of the judicial process) and therefore is properly regulated by the courts.
2. To protect the general public from the persons purporting to represent or advise them on interpretations of the law: This purpose serves the general public interest and may govern matters which will never be scrutinized by the judicial branch of government. The judicial branch of government is not suited nor intended to be a consumer protection agency. This purpose is more appropriately served by legislative action with enforcement by the administrative branch of government.
3. Regulation of commerce: Since lawyers are integral to many major business transactions, they can have a serious positive or negative impact on the economy. The need to regulate this type of activity is certainly a legislative prerogative; however, the assignment of this duty to state legislatures raises additional questions as to whether only the federal government can regulate interstate commerce or if states can properly do so.

4. To protect the turf that has been developed and claimed by the legal profession as their exclusive franchise: This is more of a selfish interest than a public interest. The legal profession would need to make an argument to the appropriate governing body that their significant capital investment in developing their profession and individual law practices is entitled to government protection from infringement by those who have not made the same investment.

The real questions that need to be addressed are:

1. What activities of lawyers need to be regulated and what public interests are served by that regulation?

2. What activities of nonlawyers need to be restricted and what public interests are being served by imposing those restrictions?

Recent attempts to define the "practice of law" have been part and parcel to the ongoing debate on Multidisciplinary Practices ("MDP"). These attempts have, as might be expected, developed broad definitions in an effort to place lawyers in the controlling position of a Multidisciplinary Practice. Under the broader definition, the MDP would be subject to the regulatory requirements applicable to lawyers generally and assure that nonlawyers won't tread upon the turf historically claimed by lawyers. We suggest that a definition (more acceptable to lawyers and nonlawyers alike) can be reached only if we can step away from the MDP debate and focus on the rationale for a definition and identification of the public interests being served in each case.

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Bernie H. Beaver
6225 Fox Meadow Lane
Minneapolis, MN 55436