Brief Comments on the ABA Model Definition

Gregory Huffman
Dallas, Texas

I write as one who has also spent many hours on this same road.[1] I sympathize with you, as service on this task force will be some of the least appreciated work you will do. When I was serving on the State Bar of Texas task force, I occasionally would refer to the scene from the movie AIRPLANE where the passengers and crew line up to slap the passenger who becomes concerned about how the airplane is being flown. I thought that excerpt exemplified well the task force experience.

Propounding a definition is much harder than appears on the surface. As the American Law Institute has pointed out concerning current statutes, the "definitions and tests employed by courts to delineate unauthorized practice by nonlawyers have been vague and conclusory . . . ."[2] Because the ABA model definition resembles current statutes, I believe you still have some distance to go in propounding a workable proposal. Otherwise you will likely encounter opposition from all sides of the debate because each will see opportunities for possible mischief in the ambiguities and unresolved questions.

There are at least two significant problems in defining what constitutes the practice of law. The first is the lack of a simple, bright dividing line between professional legal advice and everyday discussion of legal matters. Being a nation of laws, indeed being a nation captivated by the legal process and legal compliance, our society is permeated with political and legal commentary, conversations between friends and colleagues about legal matters, and ongoing efforts by citizens to understand and follow the law. Everyone discusses legal matters – news commentators, politicians, teachers, bosses, personnel managers, accountants, contractors, friends, relatives – and lawyers. This intense volume of legal discussion is a manifestation of America's love of the law. Millions of persons daily are applying "legal principles and judgment with regard to [their] circumstances and objectives," so that criterion does little to identify where professional legal advice leaves off and everyday discussion of the law begins.

You may want to consider clarifying the proposed definition, by adding additional elements to the definition or by adding exceptions to the definition[3] – that the advice

---

[1] *See Recommendation of a New Statutory Definition for the Unauthorized Practice of Law* (April 2001), reprinted in 64 TEX. B. J. 860 (Oct. 2001), *at* http://www.texasbar.com/newsinfo/newsevents/upltf.pdf; Gregory Huffman, *UPL, MDP, MJP: How Irresistible Are These Changes?*, 65 TEX. B. J. 428 (May 2002), *at* http://www.texasbar.com/globals/tbj/may02/huffman.asp; Gregory Huffman, *Unauthorized Practice of Law: A Texas Review,* 47 TEX. B. J. 1220 (Nov. 1984). Copies of the first two writings are attached.

[2] RESTATEMENT OF THE LAW GOVERNING LAWYERS 36 (2000).

[3] This type of statute typically has a general definition of the practice of law and then specific exclusions. Limitations of the scope of the statute could go in either place. A limitation which excludes everyday lay conduct, however, is more logically placed in the general definition,

must be of specific rights or obligations of another person, that the advisor must be acting in a professional capacity,[4] and that the advisor must be acting as a personal advisor to the person receiving the advice.[5]

The presumptions used in the proposal do not suffice to limit the overbreadth of the definition. "Giving advice," "completing legal documents," and "negotiating legal rights" are part of everyday conduct. Lawyers cannot be at the elbows of citizens as they negotiate every contract, discuss every law, and monitor every employee and subordinate. The presumptions need the same limitations as the general definition.

The second significant problem in defining the practice of law is the political dimension in selecting exceptions to the general rule. In some ways a bar task force is like a referee in an athletic event – the opposing sides of the contest do not look beforehand to the referee to say what the outcome should be. There is a political contest, and a vigorous economic contest, about the areas in which nonlawyers should provide services customarily offered by lawyers. The comments of the Department of Justice and Federal Trade Commission exemplify that ongoing debate.[6] You may want to consider including an open item in your list of exceptions which would allow the state legislature or supreme court to include those nonlawyer activities which are allowed in that state. As you know, there are many such activities which vary state-to-state. Having such an open item could defuse much of the debate about your proposal.[7]

Your listing of an exception for *pro se* representation needs to be better explained. In many states, only an individual can appear *pro se* in court; a corporation must appear

---

especially where a provision is included in the statute imposing on those within the general definition the same level of duty as that imposed on a lawyer.

[4] In the Texas proposal, we defined this element to include acting i) with the expectation that compensation for such advice will be provided by or on behalf of the person receiving the advice or that such compensation, although ordinarily expected by the provider, will be waived for charitable or civic reasons, ii) with the express or implied representation that the provider is an attorney or lawyer, or iii) as part of a pattern of recurring conduct in which the provider holds himself or herself out as an advisor having special competence in the interpretation and application of laws, regulations, and other legal standards. *See* 65 TEX. B. J. 860, at App. A, § 81.101.D.

[5] Your Comment 1 refers to some of these considerations but does not implement them in the definition.

[6] Letter from the Federal Trade Commission and United States Department of Justice to the American Bar Association Task Force on the Model Definition of the Practice of Law (December 20, 2002), *at* http://www.ftc.gov/opa/2002/12/lettertoaba.htm. The federal agencies' comments unfortunately provide almost no guidance as to a standard to determine which tasks and under what conditions nonlawyers can provide competent services to the public. Clearly there are areas where society wants lawyers as the sole providers of services and representation. That is the basis for the licensure of attorneys and other professionals, each in their own area of expertise.

[7] I believe it is unrealistic to think that the ABA task force could come up with a full set of model exceptions. There are scores of possible exceptional situations, with various alternatives for each as to scope of allowed conduct, parallel licensing, disclosures, standards of care, ethical duties, and insurance requirements.

through licensed counsel. I could not tell how broad you intended that exception to be. I also could not tell if you intended that exception to apply to legal advice within a corporation or other business entity (which might alleviate to a limited degree the overbreadth of the general definition).

There may be other generic exceptions you may want to consider – *e.g.,* federal preemption based on *Sperry v. Florida.*[8]

The provision imposing the same standard of care on lawyers and nonlawyers for covered activities needs to be more carefully tailored to fit the circumstances of the various types of allowed nonlawyer practice. There are some situations in which the state may want nonlawyers to offer a certain service but not expect them to have the full legal understanding of a lawyer. The last sentence of that provision may also be objectionable to those states which impose full professional liability on members of a partnership.

I seriously question whether all legal self-help books and programs should be allowed to avoid meeting the standard of care applicable to the practice of law. As those materials evolve away from general forms to expert systems which effect personalized advice to the user, a real issue as to the standard of care arises. Consumers should be protected from negligent advice in such circumstances and providers should be made to shoulder the responsibility of providing correct individualized legal advice. In the Texas proposal, we included such books and programs in the general definition, and then created an exception for them, which kept them subject to the same standard of care as a lawyer would have in giving personalized advice.[9]

There is clearly a role for the ABA to play in finding a modern, workable definition of the practice of law. You will need to go into greater depth, however, if you wish to move the debate to a more meaningful level than where it currently is among the 50 states.

Thank you for your generosity in volunteering your time and effort on this project.

January 15, 2003

[8] 373 U.S. 379 (1963) (federal regulations preempt state unauthorized practice of law statute).
[9] *See* 65 TEX. B. J. 860, at App. A, §§ 81.101.A, 81.102.B.8 and 81.102.C.