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To: ABA Task Force on the Model Definition of the Practice of Law  
From: Jeremiah Johnson  
Subject: Model definition of "Practice of Law"  
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There are two approaches the American Bar Association (ABA) can pursue in its attempts to provide a model definition of the "practice" of law: the vertical or the horizontal. A vertical approach looks at the definition as a shopping list of criteria, while the horizontal approach is more holistic. The approach taken by this Task Force should reflect the ABA's "more diffuse purposes: to promote the administration of justice, to advance jurisprudence, to uphold professional honor, and to encourage social intercourse among lawyers."<sup>1</sup> In their efforts to define the practice of law, many states have already taken the vertical approach. This attempt to be definitive and complete has created lengthy and technical definitions comprised of multiple elements.

If the Task Force looks at the different state's statutory definitions, I am confident they will find one, or a composite of ones, that adequately define the practice of law. One of the briefest is Wyoming's; the "[p]ractice of law' means advising others and taking action for them in matters connected with law. It includes preparation of legal instruments and acting or proceeding for another before judges, courts, tribunals, commissioners, boards or other governmental agencies."<sup>2</sup> State courts have come up with similar element based definitions:

[the court] recognize[s] that indicia of the practice of law, insofar as court proceedings are concerned, include the following: (1) representation of parties before judicial or administrative bodies, (2) preparation of pleadings and other papers incident to actions and special proceedings, (3) management of such action and proceeding, and non-court related activities such as (4) giving legal advice and counsel, (5) rendering a service that requires the use of legal knowledge or skill, (6) preparing instruments and contracts by which legal rights are secured.<sup>3</sup>

Different court opinions and state statutes contain similar definitions; most of them are as good as the next one. The ABA has given this Task Force the opportunity to add their own model definition to list.

Despite the usefulness of these definitions, they are ironically under inclusive because they attempt to express each and every activity comprising the practice of law. "What constitutes the practice of law does not lend itself to precise and all-inclusive definition. There is no definitive formula which automatically classifies every case."<sup>4</sup> There is however a more challenging, and hopefully more beneficial approach to defining the practice of law. In my opinion, the ABA should take the horizontal approach. The definition should be a much more organic manifestation, one that truly reflects the

relationships associated with the practice of law. The Task Force should attempt to define the practice of law less in terms of what *a lawyer does* and more in terms of *who a lawyer is*. This approach will yield a very broad and holistic definition; serving two purposes of great importance to the ABA.

First, a broad definition will address the task at hand posed by the Center for Professional Responsibility's challenge statement. The Task Force is created now because of the "changing environment surrounding the work that lawyers do and the needs of the public."<sup>5</sup> The proposed definition must address the "increasing number of situations where nonlawyers are providing services that are being difficult to categorize under current statutes and case law as being, or not being, the delivery of legal services."<sup>6</sup> As the caveat to the challenge statement correctly notes, policy directed at the practicing of law are not unenforceable because of a lack of a definition.<sup>7</sup> The highest court in each state can address this issue. The horizontal definition approach will enforce the court's interpretive role and the self regulating nature of the profession. "We do not propose to submit a definition of the practice of law that may be employed to fit all situations and activities. We consider that each case must be examined in the light of its own facts."<sup>8</sup>

The second purpose of a more holistic definition of the practice of law is its reinforcement of our profession's commitment toward the law. A holistic definition can emphasize the "good work" lawyer's do, not only in business and litigation matters, but in the lawyer's role for a just society. Laws can be inspirational, and I see no reason why the definition the Task Force proposes not only protects the profession, but inspires it as well.

The law is complex and the practice of law is even more complex. Law has its own culture, and lawyers must successfully navigate through this legal culture. Lawyers must also ensure that the public is protected from unqualified and irresponsible persons from practicing law. The practice of law is more than what a lawyer does; it is what only a lawyer can do. With everything that a lawyer does, comes great responsibility. These responsibilities can be categorized as public responsibilities (to the public and to the profession) and personal responsibilities (to the client and to oneself).

#### Responsibility to the Public

The practice of law is indeed a noble profession. A lawyer should practice law in a way that transcends beyond specific use for his or her client. A lawyer should "further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority."<sup>9</sup> The definition of the practice of law should reflect the activities that attach to this responsibility.

Specifically, "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay."<sup>10</sup> The practice of law includes an expectancy of pro bono work. Lawyers should, and some would argue must, take up the cause of the indigent and the unpopular. Practicing law by definition should reflect this responsibility.

### Responsibility to the Profession

Lawyers have a responsibility to other lawyers and to their profession. The practice of law requires lawyers to submit one's self to a set of professional ethics. Self regulating is an essential aspect within the legal profession. "Every lawyer is responsible for observance of the Rules of Professional Conduct...Neglect of these responsibilities compromises the independence of the profession and public interest which it serves."<sup>11</sup> To be bound by legal ethics is essential in the practice of law.

### Responsibility to Client

A lawyer has a responsibility to their client. "If...it is even possible to define what lawyers do, it can only be done in terms of the existence of the attorney-client relationship and the duties imposed on the lawyer and the rights accruing to the lawyer's client, arising from the existence of that relationship."<sup>12</sup> This responsibility impacts all aspects of the practice. This responsibility may be the differentiating factor between the practice of law this Task Force attempts to define it, and the practice of law that occurs in everyday situations by nonprofessionals. Attorney Anthony Davis suggests that the attorney - client relationship establishes two duties: loyalty and confidentiality.<sup>13</sup>

Practicing law means that you have a special relationship with a client. This relationship is comprised of many different aspects. The duties of loyalty and confidentiality require a lawyer to provide diligence, truthfulness, independence, candor and professionalism. These are solemn duties, as illustrated by the language in the California's Business and Professions Code. A lawyer must "...maintain in violate the confidence, and at every peril to himself to preserve the secrets, of his client."<sup>14</sup>

This Task Force must be careful not to fall back on the vertical approach here. The definition of the practice of law can become as lengthy as the activities and responsibilities that attach to the practice. This Task Force should keep in mind that these responsibilities are to guide, and not to prescribe. The practice of law includes the activities that occur as a result of the attorney client relationship, and the definition should reflect this.

### Responsibility to Oneself

Above all, people practice law. "The practice of the law is personal. It is open only to individuals proved to the satisfaction of the court to possess sufficient knowledge and adequate special qualifications as to the learning in the law and to be good moral character."<sup>15</sup> Lawyers are responsible to attain a certain degree of knowledge and skill, and maintain that level. The real challenge of defining the practice of law lies in the realization that people other than lawyers can do the "things" that a lawyer does, but only a lawyer should engage in these activities because of intangible experiences.

A lawyer's proper professional activities can be codified, and he or she will have little difficulty finding them somewhere in a manual. However, as any thorough examination of legal ethics demonstrates, a lawyer is guided through these procedures by their conscious. "A lawyer should strive to attain the highest level of skill, to improve the law

and the legal profession and to exemplify the legal profession's ideals of public service."<sup>16</sup> The practice of law should reflect a lawyer's personal responsibility.

### Conclusion

The Task Force should define the practice of law as broadly as possible and let the courts interpret and enforce the practice of law. "It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law."<sup>17</sup>

I recommend the Task Force start with a definition more closely related to the one below rather than a more vertical definition:

**THE PRACTICE OF LAW IS CONNECTING YOURSELF INTO LEGAL INTERACTIONS ON BEHALF OF OTHERS.**

But as this memo suggests, a second component must be added to the definition, one that reflects the responsibilities mentioned, the submission, surrender and sacrifice of a practicing lawyer:

**THE PRACTICE OF LAW IS CONNECTING YOURSELF INTO LEGAL INTERACTIONS ON BEHALF OF OTHERS; THE CONNECTION OF WHICH IS PREDICATED BY DUTY.**

Not every lawyer will live up to this definition and many non-lawyers may see it as an avenue for the unauthorized practice of law. But the approach this Task Force should take will not alter the vertical definitions useful in enforcement issues. The state statutes and court opinions will be adequate to "define" the practice of law and to restrict its unauthorized use. These definitions accurately reflect the comprising elements of the practice of law. However these definitions are unable to reflect the fundamental qualities that define the practice of law. Instead of trying to create a "statement of the meaning of the word" this Task Force should look at the different meaning of the word definition. This Task Force should attempt to determine what embodies the practice of law. The bar and the bench have the tools for defining, but what is needed is a tool for reminding lawyers what they signed up for. The definition of the practice of law is more than an outward manifestation of activity; it is an inward recognition of responsibility.

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<sup>1</sup> JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976), reprinted in *LEGAL ETHICS IN THE PRACTICE OF LAW*, at 9 (Richard A. Zitrin & Carol M. Langford) (2002).

<sup>2</sup> American Bar Association, *Center for Professional Responsibility Task Force on the Model Definition of the Practice of Law State Definitions of the Practice of Law*, (December 9, 2002) <[http://www.abanet.org/cpr/model\\_def\\_statutes.html](http://www.abanet.org/cpr/model_def_statutes.html)>.

<sup>3</sup> *State ex rel. Norvell v. Credit Bureau*, 85 N.M. 521, 526 (1973).

<sup>4</sup> *Auerbacher v. Wood*, 142 N.J. Eq. 484, (1948).

<sup>5</sup> American Bar Association, *Center for Professional Responsibility Task Force on the Model Definition of the Practice of Law Challenge Statement* (December 9, 2002) <[http://www.abanet.org/cpr/model\\_def\\_challenge.html](http://www.abanet.org/cpr/model_def_challenge.html)>.

<sup>6</sup> American Bar Association, *supra* note 5.

<sup>7</sup> *Id.* Caveat.

<sup>8</sup> *Sparkman v. State Bd. of Bar Examiners*, 77 N.M. 551, 556 (1967).

<sup>9</sup> MODEL RULES OF PROFESSIONAL CONDUCT Preamble ¶ 6 (2002).

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- <sup>10</sup> MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.1 (2002).
- <sup>11</sup> MODEL RULES OF PROFESSIONAL CONDUCT Preamble ¶ 12 (2002).
- <sup>12</sup> Anthony E. Davis, *Professional Responsibility Defining the Practice of Law: A Fool's Errand?*, NEW YORK LAW JOURNAL, Nov. 4, 2002, at page 3 col. 1.
- <sup>13</sup> Davis *supra* note 12.
- <sup>14</sup> CAL. BUSINESS AND PROFESSIONS CODE § 6068 (e)(2002) (West 1962).
- <sup>15</sup> Opinion of the Justices to the Senate, 289 Mass. 607; 194 N.E. 313 (1934).
- <sup>16</sup> MODEL RULES OF PROFESSIONAL CONDUCT Preamble ¶ 7 (2002).
- <sup>17</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 3 EC 3-5 (LexisNexis 2002).