

**REPORT OF
PRACTICE OF LAW COMMITTEE
TO THE
BOARD OF GOVERNORS**

December 11, 2002

This Committee was reappointed on November 6 by President Jim Nolan for the specific purpose of reviewing and reacting to the ABA's draft Model Definition of the Practice of Law recently proposed by the ABA's Task Force established for that purpose. The Committee's meeting of December 5 was postponed due to snow until December 11. In attendance were Don Proctor, Chair, Dena Feeney, Pat McKeever, Michael Brockmeyer, Jerry Lurie, Glenn Grossman and Paul Carlin.

The Committee's comments on the draft Model Definition are interlined on the text of the Model Definition set forth below. The Committee does point out, as it is sure that the Board of Governors is aware, that our own Pete Moser is one of the seven members of the ABA Task Force.

Draft (9/18/02)

DEFINITION OF THE PRACTICE OF LAW

(a) The practice of law shall be performed only by those authorized by the highest court of this jurisdiction.

(b) Definitions:

(1) The "practice of law" is the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law.

The Committee believes that this subsection also should include, as does our Business Occupations and Professions Code § 10-101, any activity deemed by the state's highest court to constitute the practice of law. Maryland's courts recognize that, "The power to regulate and define what constitutes the practice of law is vested solely in the judicial branch of government and not the executive nor the legislative." *Ginn v. Farley*, 43 Md. App. 229, 403 A.2d 858, cert. denied, 286 Md. 747 (1979), quoting from *Lukas v. Bar Association of Montgomery County*, 35 Md. App. 442, 371 A.2d 669, cert. denied, 280 Md. 733 (1977).

(2) "Person" includes the plural as well as the singular and denotes an individual or any legal or commercial entity.

(3) "Adjudicative body" includes a court, a mediator, an arbitrator or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral

official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

This subsection is confusing in that it mixes mediations and "other bodies" with those that "render binding legal judgments." The Committee believes that the key issue here is not so much the nature of the body before which one appears as is the fact that the person practicing law is representing another person before a body. The Committee believes that the Maryland solution on this issue is preferable. Maryland includes within its definition of practicing law, "representing another person before a unit of the State government or of a political subdivision." Business Occupations and Professions Code § 10-101(h)(1)(ii). To this can be added mediators and arbitrators, accomplishing the same result as the Model Definition with less ambiguity.

(c) A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another:

(1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;

The Committee simply does not understand what is meant by the last phrase in this clause.

(2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;

(3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or

See the Committee's comment to subsection (b)(3), above.

(4) Negotiating legal rights or responsibilities on behalf of a person.

(d) Exceptions and exclusions: Whether or not they constitute the practice of law, the following are permitted :

(1) Practicing law authorized by a limited license to practice;

(2) Pro se representation;

(3) Serving as a mediator, arbitrator, conciliator or facilitator; and

(4) Providing services under the supervision of a lawyer in compliance with the Rules of Professional Conduct.

The Committee believes that subsection (d) can either be entirely replaced by, or have added to it, a provision which permits those specific activities which are otherwise authorized by statute or court rule, of which Maryland has several.

(e) Any person engaged in the practice of law shall be held to the same standard of care and duty of loyalty to the client independent of whether the person is authorized to practice law in this jurisdiction. With regard to the exceptions and exclusions listed in paragraph (d), if the person providing the services is a nonlawyer, the person shall disclose that fact in writing. In the case of an entity engaged in the practice of law, the liability of the entity is unlimited and the liability of its constituent members is limited to those persons participating in such conduct and those persons who had knowledge of the conduct and failed to take remedial action immediately upon discovery of same.

The word “client” in this subsection should be replaced by the words “person represented.” The Committee does not believe that a non-professional engaged in representing others should be referred to as representing “clients.” The second sentence in this subsection, requiring written notice from one permitted to practice law under these exceptions and exclusions, that he or she is not a lawyer, should be removed as impractical, unrealistic and unenforceable. The third sentence in this subsection should also be removed. The Committee is concerned by the inclusion of this third sentence, which could potentially significantly amend the laws relating to the liability of members, shareholders and partners of various forms of business organizations (including those under which law firms are organized) in Maryland and other states. This should not be the work of this ABA Committee.

(f) If a person who is not authorized to practice law is engaged in the practice of law, that person shall be subject to the civil and criminal penalties of this jurisdiction.

This provision should also include civil “liabilities,” in addition to civil “penalties.”

Comment

[1] The primary consideration in defining the practice of law is the protection of the public. Thus, for a person’s conduct to be considered the practice of law, there must be another person toward whom the benefit of that conduct is directed. That explains the exception for pro se representation. The conduct also must be targeted toward the circumstances or objectives of a specific person. Thus, courts have held that the publication of legal self-help books is not the practice of law.

The Committee believes that the inclusion of this comment is potentially unduly restrictive and perhaps an overstatement. These issues should be left for the courts to resolve. The last sentence of this comment also fails to point out that other courts have held that self-help devices do involve the practice of law. See *Unauthorized Practice of Law Committee v. Parsons Technology*, 1999 WL 47235 (N.D.Texas 1999)(Barefoot Sanders, J.), vacated and remanded in 179 F.3d 956 (5th Cir. 1999) following the enactment by the Texas Legislature of legislation providing that “the ‘practice of law’ does not include the design, creation, publication, distribution, display, or sale ... [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney.”

[2] The exception for pro se representation in paragraph (d)(2) contemplates not only self-representation by an individual but also representation of an entity by an authorized nonlawyer agent of the entity in those jurisdictions that permit such representation.

Respectfully submitted,

K. Donald Proctor, Chairman