M E M O R A N D U M

TO: **American Bar Association**
Task Force on the Model Definition of the Practice of Law

VIA: **Arthur Garwin**
ABA Center for Professional Responsibility
541 N. Fairbanks Court
Chicago, Illinois 60611
agarwin@staff.abanet.org

FROM: **Sonia E. Miller**
Attorney-at-Law
S.E. MILLER Law Firm
244 Fifth Avenue, Suite H228
New York, New York 10001-7604
Tel: (212) 488-3417
Fax: (212) 432-7600
sonia@esquirewire.com

Doron Zanani
Attorney-at-Law
685 Third Avenue, 30th FL
New York, New York 10017
Tel: (212) 616-8175
Fax: (212) 605-0999
dzanani@earthlink.net

DATE: **December 18, 2002**

SUBJECT: **Comments to ABA Model Definition of the Practice of Law**

What is a Lawyer, Attorney, or Counsellor-at-Law?

Where can the definition of a *lawyer, attorney*, or *counsellor-at-law* be found? It is easy to find definitions of a *non-lawyer*, a *retired lawyer,* a *disbarred lawyer*, and a *suspended lawyer*. Case law, ethics opinions, and the like have attempted to define the "practice of law", but not what it actually means to be a *lawyer*. However, in order to attempt to define the "practice of law", first one must understand what it actually means to be a lawyer.

Judiciary Law §460 extrapolates the qualifications required to be admitted to practice as an attorney or counsellor in New York State. They include being examined and licensed to practice by statute and the rules of the Court of Appeals. Application Of Brennan, 230 A.D. 218, 243 N.Y.S. 705 (2d Dep't 1930) and Kraushaar v. LaVin, 181 Misc. 508, 42 N.Y.S.2d 857 (Sup. Ct. Queens Cty. 1943), cite the four phases of bar admission qualifications as (1) academic training, (2) legal training, (3) moral character, and (4) belief in the form and loyalty to the government of the United States.

According to Webster's Desk Dictionary of the English Language (1983), a *lawyer* is defined as: "a person whose profession is to conduct lawsuits for clients or to advise or act for them in other legal matters". It defines an *attorney* as a lawyer, especially an attorney-at-law and defines a *counselor* as a person who counsels, or a lawyer, esp. a trial lawyer.

Black's Law Dictionary, Sixth Edition, (1990) defines a *lawyer* as "a person learned in the law; as an attorney, counsel, or solicitor; a person licensed to practice law. Any person who prosecutes or defends causes in courts of record or other judicial tribunals of the United States, or of any of the states, or whose business it is to give legal advice or assistance in relation to any cause or matter whatever." It defines

attorney as "an agent or substitute, or one who is appointed and authorized to act in the place or stead of another". It "includes a party prosecuting or defending an action in person". Black's defines *attorney-at-law* as a "person admitted to practice law in his respective state and authorized to perform both civil and criminal legal functions for clients, including drafting of legal documents, giving of legal advice, and representing such before courts, administrative agencies, boards, etc." It defines *counsellor* as "an attorney; lawyer, member of the legal profession who gives legal advice and handles the legal affairs of client, including, if necessary, appearing on his or her behalf in civil, criminal, or administrative actions and proceedings."

In order to better formulate the definition of the "practice of law", one must initially understand the concept of what it means to be a "practicing" lawyer.

What constitutes the "authorized" versus the "unauthorized" *practice of law*?

The authorized "practice of law" must be in accordance with: (1) Judiciary Law §484 - graduating from an accredited law school; (2) Judiciary Law §460 - passing the bar examination, and applying for admission to the State; (3) Judiciary Law §466 - upon admission, taking the oath of office in open court, and being subscribed in a roll or book; and (4) Judiciary Law §468 - filing a biennial registration statement with the administrative office of the courts. Upon the completion of these requirements, a person can subsequently hold himself out as an attorney, lawyer, or counsellor-at-law.

Judiciary Law §484 designates five categories of conduct as constituting the *unauthorized practice of law* if done by someone not admitted to practice: (1) appearing for a person other than himself as an attorney before any court or magistrate; (2) preparing instruments affecting real estate; (3) preparing instruments affecting the disposition of property after death or decedent's estate; (4) preparing pleadings of any kind in any action brought before any court of record; and (5) making it a business to practice for another as an attorney in any court or before any magistrate unless he has been regularly admitted to practice.

The ABA Model Rules of Professional Conduct, Rule 5.5(b) parallels New York Disciplinary Rule 3-101(A), which prohibits a lawyer from assisting a non-lawyer in practicing law without a license, thereby constituting the *unauthorized practice of law*.

Simon's New York Code of Professional Responsibility Annotated, 2002 Edition, Commentary to DR 3-101(A) [("Simon's New York Code")] explains that non-lawyers are permitted to do many things that lawyers do without constituting the *unauthorized practice of law*, such as: (1) negotiating contracts; (2) adjusting insurance claims; (3) preparing tax returns; (4) interviewing clients and witnesses; and (5) conducting legal research. This is in direct opposition to the ABA's list of included conduct within its proposed definition of the "practice of law" which they claim is presumptively practicing law and subject to civil and criminal penalties, the exception being representing a person before an adjudicative body.

It is a constitutional right for any natural person to represent himself or to act as his own counsel under all circumstances. Legal authorities address the *unauthorized practice of law* as concerning the practice of law by one person for the benefit of another. Simon limits the *unauthorized practice of law* to a situation where a non-lawyer exercises legal judgment by applying the law to a particular set of facts while the ABA's model definition suggests the opposite – that any person advising or counseling people about their legal rights or responsibilities would be presumptively practicing law and subject to civil and criminal penalties - an overly broad interpretation.

The Practicality of the Proposed ABA Model Definition of the "Practice of Law"

One purpose of adopting a model definition of the "practice of law" is to enable both attorneys and non-attorneys to distinguish between permissible versus non-permissible actions and conduct. If engaging in the unauthorized "practice of law" is subject to civil and criminal penalties, the definition of the "practice of law" should be sufficiently precise and specific so that it is not a trap for the unwary.

Another purpose of adopting a model definition of the "practice of law" is to educate and protect the public by providing guidelines of conduct warranting the retention of a licensed professional. If the definition of the "practice of law" is overly broad and vague, it will essentially be a toothless tiger - unenforceable.

An overly broad definition of the "practice of law" runs the risk of unknowing or unintentional violation by attorneys and non-attorneys alike. A well-defined "practice of law" will gain the respect of the general public while enhancing the perception of the legal profession and the environment under which attorneys practice law.

An entertaining critique of the ABA model definition of the "practice of law" is in the article written by Anthony E. Davis, Professional Responsibility Defining the Practice of Law: A Fool's Errand?, New York Law Journal, November 4, 2002, p. 3, col. 1. The ABA definition of the "practice of law" subjects to civil and criminal penalties conduct such as "advising or counselling people", "selecting, drafting or completing legal documents or agreements", "negotiating legal rights or responsibilities". This model rule would thereby give the legal profession the authority to challenge everyday conversations and interactions among ordinary people.

The undersigned do not discern any justification to prohibit, restrict or otherwise limit the choices people should have in designating the persons with whom they wish to consult, seek advice, or retain to do acts which they may do for themselves.

If a non-attorney has the right to conduct his own "research" in order to ascertain his legal rights and responsibilities, he should be permitted to seek advice or counsel from a more informed person, even if that person is not an attorney. Given the proliferation of research materials and resources available (internet, TV, books) and the easy online accessibility of legal information by a non-attorney, the proposed model definition of the "practice of law" is overly broad, vague, open to many interpretations, and to varied standards of conduct.

According to Simon's New York Code, the test of *unauthorized practice* is "the exercise of legal judgment by a non-lawyer, in particular "the application of legal principles to a particular set of facts". Under this standard, a person is not engaged in the unauthorized "practice of law" unless he: (1) applies legal principles (2) to a particular set of facts. At least this standard is one attorneys use with a reasonable degree of certainty to determine whether they are committing an act that is subject to civil and criminal penalties. It also has the advantage of excluding the types of conduct covered by the ABA model definition.

What is the ABA's application of "legal judgment" and why should that application be subject to civil and criminal penalties? How does an attorney know if the legal principles or judgment are being applied "with regard to the circumstances or objectives of a person"? How does one determine if what one is doing requires "the knowledge and skill of a person trained in the law"? Answers to these questions leave open many interpretations, thereby creating confusion and ambiguity.

Recommendations

Trends such as the "unbundling" of legal services, wherein attorneys provide one-time or ongoing advice for clients who represent themselves, assist with the drafting of legal documents and pleadings, or limited appearances of counsel must be considered when defining what constitutes the "practice of law".

Additionally, does the ABA's definition take into account: (1) a *virtual* attorney practicing in the seamless world of cyberspace; (2) in-house corporate counsel; (3) an attorney within a multi-disciplinary practice; (4) an attorney established as a business alliance entity; (5) the multi-jurisdictional practice; or (6) the transactional practitioner versus the litigator?

According to Simon's New York Code, "the problem with developing a single definition [of the 'practice of law'] is that so much depends on context." One size does not fit all.

Attorneys today cross international borders and borderless worlds not just as counsel, but as business advisors, financial consultants, risk managers, lobbyists, regulators and marketing and public relations mavens – all under the aegis of "attorney".

It is our recommendation that one definition with inclusions and exclusions is not a basis for a standard definition for all practitioners, non-practitioners, and non-lawyers alike, with punitive damages narrowly defined. The ABA should draft a workable model rule from a national and international perspective, realizing that attorneys participate in and are required to engage in many roles in order to fully and zealously represent their clients. Today's society and legal system is comprised of and functioning within an international, borderless, information-driven age where the traditional roles and expectations of legal counsel must be interpreted within a "whole-istic" framework, and not just by its parts.

The barriers separating what services may be rendered without constituting the unauthorized "practice of law" have already started to crumble. Any model rule promulgated by the ABA should be consistent with and at the forefront of these cutting edge developments. Otherwise, the ABA is at risk of being treated as an irrelevant anachronism.

The case of Birbrower v. Superior Court Of Santa Clara, 949 P.2d 1(1998), by the California Supreme Court, shows that the geographic restrictions inherent in the existing state licensing requirements for the practice of law conflict with the reality of the interstate and international nature of the "practice of law". This realization resulted in suspension of that ruling until December 31, 2005.

There is simply no rationale or justification to prohibit a professional from using his education and skills to help people in other states. Any model rule for the "practice of law" should maximize the opportunities for professionals to serve the public and for the public to obtain legal advice from persons who are more qualified than they.

Two recent articles concerning developments in New Jersey illustrate the tensions that exist in the legal profession as it is confronted with and adapts to the increasing ability of persons other than state-licensed attorneys to give legal advice to those who want it without geographic confinement.

In Estate Work by Out-of-State Lawyers Called Unauthorized Practice of Law**,** Henry Gottlieb, New Jersey Law Journal, July 8, 2002, an opinion issued by a New Jersey Supreme Court committee enforced the historical restrictions on legal services rendered by out-of-state estate attorneys in New Jersey.

This opinion, according to Glenn Henkel, vice chairman of the New Jersey State Bar's Real Property, Probate and Trust Law Section and a partner in Haddonfield, N.J.'s Kulzer & DiPadova, fails to make clear what constitutes the "practice of law" in the handling of an estate. Mr. Henkel noted that this was a particular problem because most estate matters in New Jersey do not require the employment of a lawyer.

We believe that this provincial and restrictive interpretation of what a person may do for the benefit of another without engaging in the unauthorized practice of law is unrealistic, impractical and unenforceable. Is it really in the realm of possibility that if someone in State A calls an attorney in State B, whether because he read an article by or about that attorney or because someone commented favorably about that attorney, that the attorney is required to hang up the phone? To take the example discussed at the end of the article, why may inheritance tax returns be prepared by accountants without constituting the unauthorized practice of law? If an accountant can do such work, why not an out-of-state lawyer?

In N.J. Court Panels Urge End to Parochial Practice**,** Henry Gottlieb, New Jersey Law Journal, December 17, 2002, two New Jersey Supreme Court committees recommended to abolish state barriers to lawyering and sweep away protectionist rules that have characterized New Jersey also for a century, because "The nature of the practice of law is changing". The committees also adopted a substantial number of proposals to modify almost 60 rules of professional conduct that circumscribe lawyers' lives day in and day out. Allan Gordon, chancellor of the Philadelphia Bar Association, said, "I'm delighted. It is the right thing to do and it's consistent with the realities of practice in the 21st Century."

We agree. The proposed ABA model rule for the "practice of law" does not accomplish its stated goals. It does not provide the public with better access to legal services because it retains and continues to strengthen the states' restrictions and limitations on those who are best qualified to offer legal advice. The rule's ambiguity and overly broad reach does not provide the states with the necessary tools to effectively monitor and implement enforcement provisions against the *unauthorized practice of law* statutes. The proposed model rule retains the already existent barriers to lawyering.

While the concept of a model definition of the "practice of law" is a good one, it should be carefully revisited bearing in mind the direction in which lawyering and the evolving "practice of law" are heading within the information-driven, scientifically-based, cyberspace world of the 21st Century. This requires foresight and a vision for the future.