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COMMENTS BY THE NEW YORK COUNTY LAWYERS' ASSOCIATION ON THE ABA MODEL DEFINITION OF THE PRACTICE OF LAW

The ABA's Task Force on the Model Definition of the Practice of Law has released a draft of such a definition dated September 18, 2002 (the "Draft") and has requested comments for consideration when the Task Force convenes, and holds a hearing, at the time of the ABA's Mid-Year Meeting in Seattle, Washington in February 2003. The Task Force's schedule contemplates a final report to the ABA Board of Governors by or before the ABA's next Annual Meeting in San Francisco in August 2003.

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The Draft is still a work in progress. The present Draft appears to disregard important contextual considerations and leaves unclear its application to many commonplace situations that most of us are likely to find untroubling, but which its definitions seem to reach. Indeed, the very concision of the Draft raises the question of whether a single black-letter paragraph or two, unaccompanied by many detailed qualifications or caveats or, at the very least, by exhaustive commentary, can adequately cover the many discrete areas of concern implicated by the concept of "unauthorized practice of law." This view is buttressed by the unsuccessful effort to craft a definition of "practice of law" by the House of Delegates of the New York State Bar Association some years ago.

In the paragraphs following, this memorandum comments *seriatim* on the lettered sections of the Draft.

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Section (a)

Paragraph (a) states that "the practice of law shall be performed only by those authorized by the highest court of this jurisdiction." This paragraph, as written, appears to ignore the amendments to ABA Model Rule 5.5 and companion amendments to ABA Model Rule 8.5 and the Model Rules of Lawyer Disciplinary Enforcement that the ABA House of Delegates

adopted last summer. These were designed to create numerous broad exceptions to the oft-ignored "iron curtains" that States' licensing statutes and rules traditionally have erected against out-of-State lawyers doing anything within their jurisdictions.

It may be argued, of course, that the provisions of Model Rule 5.5 and its companions are not self-executing and can have no effect until adopted by a State jurisdiction's "highest court" or other authority. Nevertheless, the Draft's formulation does seem to undercut the policy of Model Rule 5.5. This effect could be avoided by expanding Section (d)(1)'s exception for "Practicing Law by a limited license to practice" so as to include an explicit reference to the activities of a lawyer that Model Rule 5.5 seeks to view as licit.

Section (b)

The Draft's "definitions" section also presents problems.

Paragraph (1), together with the "presumptions" of section (c), defines the "practice of law" so broadly that it is difficult, even with the many "exceptions and exclusions" of section (d), to know what activity the paragraph is intended to reach. This possible overbreadth is troublesome since bar association pursuit of the "unauthorized practice of law" has, in the past, attracted the attention of the Anti-Trust Division of the Department of Justice by reason of its alleged anti-competitive efforts. E.g., United States v. New York County Lawyers Association, 1981-2 (CCH) Trade Cases ¶64, 371 (S.D.N.Y. Oct. 14, 1981) (consent decree).

In contrast with N.Y. Judiciary Law § 484, which defines licit practice in terms of the lawyer's "holding out" of his status, and with District of Columbia Rule 49 (included in the packet of Task Force materials), which includes "a client relationship of trust or reliance" in its definition of "practice of law," the Draft's definition appears to reach almost any comment about the law that is addressed by anyone to another concerning the rights of the other or a third person. While the concept of a "client" arguably is implicit in this definition, it does, in fact, leave uncertain who is the recipient of the "applications of legal principles." In many cases, lawyers (and pseudo lawyers) address them to adversaries.

How does the Draft's definition apply to the interface between the citizen and government officials in a host of contexts — *e.g.*, the court clerk answering questions of some befuddled courier or litigant (or lawyer) at the clerk's counter, the social worker warning a mother about what the Family Court can do to a delinquent child or neglectful parent, the police officer giving an arrestee her *Miranda* warning? Comparable situations can be visualized between private actors — for example, the filling out by a customer and salesperson of the forms needed to accomplish the sale of a car or insurance policy or the opening of a brokerage or bank account.

While the "exceptions and exclusions" of section (d) are meant to legitimate some of, perhaps all of, the bizarre instances of "law practice" outlined above, these "exceptions" depend on the parsing of other uncertain terms in that section, such as "pro se representation" and "facilitator" and "conciliator." Moreover, non-lawyers "practicing" pursuant to the "exceptions and exclusions" appear to be subject to discipline (section (f)) and other standards applicable to the Bar (section (e)(does an attorney-client privilege arise?) (are these

cases really grist for the Disciplinary Committee?) The definition requires substantial clarification.

The Draft's definition of "practice of law" also is disturbingly subjective insofar as it refers to "circumstances or objectives of a person require the knowledge and skill of a person trained in the law." Whose notion or what notion of "require" applies? This concern could be ameliorated by adding after "require" the clause "or are reasonably believed by such person to require." This would afford the lawyers some opportunity to defend against an unjustified claim of reliance, which, in the wake of some unexpected fiasco, may be exaggerated by a *soi-disant* "client."

Paragraphs (2) and (3) are generally unexceptional and warrant only brief comment. The definition of "person" (paragraph (2)) probably should be accompanied by some explanatory comment fleshing out the intended reach of "legal or commercial entity." The term plainly is meant to be broad, while excluding most instances of people talking about "the application of legal principles" around a bridge table or bar, but its scope seems uncertain.

Paragraph (3) includes within its definition of "adjudicative body" a "legislative body" meeting certain tests of "adjudication" in the same enumeration as "administrative agency or other body acting in an adjudicative capacity." Since a "legislative body" would be an "other body acting in an adjudicative capacity" if it did adjudicate in the manner defined, and since a "legislative body" will rarely, if ever, do so, it is unclear why "legislative body" is included in the enumeration. Perhaps, this is an effort to address appearances at legislative hearings, responses to legislative subpoenas, *etc.* If so, it doesn't belong here. On the other hand, the explicit addition of "hearing officer" and "referee" to the list of "adjudicatory bodies" would be helpful although it is, of course, difficult to include in a Model Rule all variations in nomenclature that obtain in 50 States.

The definition of "adjudication" in terms of bodies that render "judgments" also should be amplified. Arbitrators traditionally issue "awards," administrative agencies "orders," not "judgments." A broader portmanteau phrase seems in order here.

Section (c)

Paragraphs (1) and (2), which set up "presumptions" as to when law is being "practiced," when read in conjunction with section (b), can, as written, be read as reaching many situations in which the parties to the exchange are adverse. *See* the discussion under section (b), *supra*. This presumably is not intended, but the formulations of paragraphs (1) and (2) contrast with those of paragraphs (3) and (4), which define, as paragraphs (1) and (2) do not, the "other" for whom the practitioner is practicing.

The definitions of this section (c) also read, in a troublesome way, on the role of those who perform "in-house" for business or other entities. Broadly speaking, why can't a corporate executive receive advice from or select to draft her company's forms whomever she pleases, whether the counselor or draftsperson is admitted to the Bar in the executive's State or not? In the case of a national corporation, the draftsperson will almost surely not be admitted in all the States where her boilerplate is deployed.

While the definition of "*pro se* representation" in section (d) apparently is intended to legitimate such practices, it surely is unclear whether it will suffice to do so or not.

Section (d)

Section (d) lists "exceptions and exclusions," which define conduct that is permissible whether it constitutes the "practice of law" or not. These are critical provisions of the Draft.

Paragraph (1) permits practices "authorized by a limited license to practice." This presumably is intended to reach *pro hoc vice* appearances, lay representation before agencies when permitted by their rules, practitioners authorized by the special certification for foreign lawyers in New York, and so on. While this paragraph, as written, may be thought to incorporate the policies of Model Rule 5.5 adopted by the ABA last summer, an explicit reference to those policies would be helpful here.

Paragraph (2) authorizes "*pro se* representation." An accompanying commentary indicates that this concept is meant to extend, when a "jurisdiction permits such representation," to activities of many advisors and agents of entities insofar as they are acting solely for the entity. Whether this is meant to refer only to authorized lay appearance before judicatory bodies and the like or to extend to the whole range of advice and other activities that a corporate employee or representative may seek to perform intramurally or to something in-between is unclear. Surely an entity should have broad capacity to engage whomever it pleases to advise itself (as distinguished from dealing on its behalf with the public) in matters touching on the law's application.

Whether this paragraph is sufficient to protect that right is unclear. This uncertainty illustrates the difficulty of writing a brief one-size-fits-all definition of the "practice of law."

The concepts of "facilitator" and "conciliator" should be the subject of explanatory commentary. Some of the other State rules attached to the Task Force packet suggest the terms are meant to reach the "advice" dispensed by court clerks and the like. The terms are, however, "buzz" words drawn from other fields of social science, rather than well-established terms of art in the law. Their incorporation in a Model Rule would benefit from some explication as to their intended scope.

Paragraph (d)(4)'s reference to "Rules of Professional Conduct" would be improved by adding "as adopted in this jurisdiction" given the several other places (most notably here and in section (e)) in which the Draft employs the words "this jurisdiction." Obviously, in New York "Code of Professional Responsibility" would have to replace "Rules of Professional Conduct."

Section (e)

Section (e)'s second sentence refers to the obligation of a non-lawyer who relies on one or another of the exceptions and exclusions of section (d) to justify his or her provision of "legal" services to "disclose that fact in writing." The clause neglects to specify to whom and at what point in time the written disclosure is to be made. Presumably it should be made in advance of (or contemporaneously with) the actual provision of service and should be made

to the person on whose behalf the services are to be rendered. This should be made clear, and an express exception should be made for one who acts *pro se* (as per paragraph (d)(2)).

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The Draft represents a useful start towards a definition or definitions that, when adopted, will help deal with the vexing issues of multi-jurisdictional practice that exist in this country and with the many other problems, for the public and lawyers, that attend uncertainty about what constitutes the "practice of law."

This Draft is, however, only a start. It still needs work. The Task Force has, it seems, tried to pack too much into too small a package.