MEMORANDUM

To: Lish Whitson, Chair, Task Force on the Model Definition of the Practice of Law

From: Mary K. Ryan, Chair, Standing Committee on the Delivery of Legal Services

Re: Draft Model Definition of the Practice of Law

Date: December 19, 2002

As chair of the ABA Standing Committee on the Delivery of Legal Services, I thank you for the opportunity to submit comments to the Task Force on the Model Definition of the Practice of Law on behalf of the Committee. In light of the widespread unmet personal civil legal needs of those of low and moderate income, the Standing Committee fosters innovative means that connect people to the legal help they need and can afford. The Standing Committee has been a national leader in the research and analysis of various aspects of pro se litigation and has been an advocate of expanding the lawyer's role in the delivery of affordable personal legal services, such as through the use of unbundling. At its fall meeting, the Committee reviewed the Task Force's Draft Definition of the Practice of Law. The Committee concluded that the fundamental undertaking of the Task Force was extremely significant not only to the legal profession, but also to the general public, and that the Committee's insight may be of benefit to the Task Force.

Whether or not it is wise to embrace a definition of the practice of law is ultimately a decision for each state to make and we do not weigh in here on that wisdom, except to note that most efforts thus far have been unsatisfactory. The definition in the 1969 Model Code of Professional Responsibility was circular and of little benefit, as it stated, "Functionally, the practice of law relates to rendition of services for others that call for the professional judgment of a lawyer." The subsequent Model Rules of Professional Conduct note that the practice of law is defined from jurisdiction to jurisdiction, while the Restatement of the Law Governing Lawyers indicates that efforts to define the practice of law have been vague or conclusory. If the definition of the practice of law is nothing more, the vague and circular definitions may be acceptable. However, if the definition is to play a role in laws setting out the unauthorized practice of law, it must have sufficient specificity to give due process to anyone accused of violating those laws.

The significance of having a model definition of the practice of law is the convenience that results from the creation of a dichotomy that sets out what lawyers do and what those who are not lawyers are prohibited from doing. Through this definition of the practice of law and the correlative unauthorized practice statutes, the legal profession offers society protection from those who lack the necessary skills and standards to provide legal services. The legitimacy for the creation and advancement of a definition of the practice of law is public protection. Nevertheless, the legal profession must consider the impact of the definition on the ability of people to access affordable legal services.

If we are to define that which can only be done by a lawyer, our challenge is to be certain that lawyers will provide those functions to the public at costs making them readily available to the population as a whole. This obligation goes beyond the need to provide pro bono services to the poor. In the past two decades, we have seen a shift in the paradigm of divorce services. In the early 1980s, almost all divorce cases involved lawyers. In many jurisdictions today, the involvement of lawyers in all but the most complicated domestic relations cases is rare. Experts on this issue have attributed a high portion of pro se litigation to the prohibitive expense of engaging lawyers for these services.

If we craft a definition of the practice of law that precludes lay persons from providing services, while lawyers do not offer those services at costs affordable to those of moderate income, we will not meet our objective of public protection. Instead, we will have contributed to an underground network of scriveners and independent paralegals or a system where people forego legal services by lawyers because they cannot afford them. In short, the rule of law for personal civil legal services will fail.

At the core of the draft model definition set out by the Task Force is a list of functions and exclusions. We note that unlike many of the corresponding state definitions, the list of functions are set out as those which are presumptively, rather than conclusively, the practice of law. Nevertheless, the Standing Committee is concerned that a definition based on functions and exclusions will be overly broad in those things which are to be done by lawyers (and conversely, overly restrictive in that which may not be done by others) and under-inclusive in the exceptions that are created.

Let me offer this quote, addressing the debate about accounting practices, to illustrate the limitations of a definition that relies on functions:

> The problem is often put in terms of "practice of law." Only lawyers can "practice law," it is said, and if what an accountant is doing is "practice of law," then he is acting improperly.
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> I feel fairly sure myself that this is not a sound way to approach the problem. The trouble is that it really begs the question. If we start with that approach, then the conclusion is going to follow as surely as the night follows the day that much of what the accountants have long and customarily done is improper for them to do. The people who think in terms of "practicing law" – and this includes many of those who have been active on unauthorized practice committees – proceed from that major premise to a minor premise that if the problem involves a matter of law, such as the application of a statute or regulation or court decision, then it is "practice of law" and can only be done by a lawyer.
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> But this is surely too broad… Obviously, there are many things involving the law and its application which can and must be done by non-lawyers. The "practice of law" is not a safe and sound approach, it seems to me, if it is taken to include a rule that any matter involving application of statutes, regulations and court decisions can only be handled by lawyers.

> It would be my own view, for what it is worth, that this is the error into which the trial court has fallen, to some extent, in the well known [*Agran*] case. The court has taken a too literal, or semantic, view of the concept of "practice of law," and has not recognized that there are many things that lawyers do which are properly also done by others. The concept of "practice of law" cannot be as exclusive as it sounds when it is put in those terms. There is a very considerable overlap at the edges, and injustice is done if that overlap is not recognized.

These remarks were made by Dean Erwin Griswold at the ABA Annual Meeting in 1955. They go to the core of the concern that this "functions" approach to the definition of the practice of law is overly broad. Even though the Task Force has positioned functions such as giving advice about legal rights, drafting legal documents and negotiating responsibilities as presumptive aspects of the practice of law, we are concerned this short, but extremely broad, list will become the basis for absolute functions when adopted by the states. The list of functions as presumptively the practice of law does not cure the shortcomings of relying on functions to define the practice of law.

Similarly, if we conclude, as Dean Griswold did, that there is "considerable overlap at the edges," this "functions" approach imposes the burden of listing all exceptions. Who may do these things listed as presumptively the practice of law without violating this definition? While the Task Force's draft definition includes four important exceptions, it merely scratches the surface of those who provide the enumerated functions in the scope of their daily activities.

Consider these examples of the "overlap" that come within the functions of the current definition, but fall outside of the exceptions. Financial planners, investment brokers, victim advocates and the clergy routinely give "advice and counsel to persons as to their legal rights and responsibilities." Realtors, entertainment and sports agents, government officials, social workers, law librarians, contractors who obtain construction permits and tax preparers select, draft and complete legal documents on behalf of others within the scope of their jobs. Qualified lay representatives are frequently employed by those appearing before certain adjudicative bodies that explicitly authorized these representatives, while others appear or assist in tribunals assembled by churches, schools and condo association boards, for example. Affinity groups, lobbyists, consumer advocates, news reporters, insurance adjusters and agents negotiate legal rights for others on a daily basis.

We do not believe a comprehensive list can be developed. But even if it could, there are two fatal issues. First, the effort to create a comprehensive carve-out would result in the inclusion of those who are organized and willing to voice their concerns. Others who are not organized or institutionalized, such as friends and neighbors who would help the handicapped draft documents, are the ones who would be precluded from the exceptions, along with those working in circumstances we have not even considered. Second, if the exceptions strive to be comprehensive, they would overtake the rule. If we were to say "these functions" are the practice of law, but they may be done by all of those who are not lawyers, but who are in "these positions," we would not give the public the protection we set out to give. Instead, we would merely create more confusion about those who are qualified to provide services that have legal aspects to them.

We believe the "functions and exclusions" approach adopted by many states and advanced in the Task Force's definition is inherently overly broad and under-inclusive. We do not believe that this approach can be remedied by wordsmithing. Instead, the Standing Committee encourages the Task Force to take a step back and create a model definition that is focused on the public's interest, that will not interfere with the flow of commerce, and that meets the needs of people to obtain affordable legal services. The greatest threat to the public arises not when lay people, in the performance of their professional or business roles touch on issues concerning legal rights and responsibilities, but when lay people mislead consumers into the belief that they are lawyers or have the qualifications that a lawyer has. Fundamentally, the unauthorized practice of law takes place when someone who is not a lawyer holds himself or herself out to be a lawyer. The interest of the public is best served by prohibiting those who are not lawyers from representing that they are capable of practicing law.

The question then is how to create this dichotomy in a way that is not based on the functions performed by lawyers (and frequently by others). The Standing Committee urges the Task Force to craft a definition that focuses on the benefits the legal profession, and only the legal profession, provides the public. We have embraced a system that sets lawyers apart from all others, but we have not extolled the virtues of those differences. ABA President A. P. Carlton is quoted in the ABA Journal as seeing the "definition as key to preserving the core value of client confidentiality and key in dealing with other issues facing the profession… ." To take that idea a step further, we believe the legal profession's special training and core values should serve as the basis for the definition of the practice of law.

We believe the definition of the practice of law is far more likely to serve the interests of both the legal profession and the public if the definition simply creates the dichotomy between lawyers and lay persons by setting out the inherent benefits lawyers provide to their clients. No one who is not a lawyer is capable of providing these benefits. The Standing Committee urges the Task Force to adopt the following definition of the practice of law:

> *The practice of law involves all activities that when done by a lawyer assure the client representation that is skilled, knowledgeable and fully competent and is provided diligently, confidentially and with full fidelity, within a system of ethical rules and disciplinary remedies.*

We believe that the practice of law is not about what a lawyer does, but rather who a lawyer is. This short definition captures that belief. Thank you again for the opportunity to express this view.