

REPORT

I. Introduction

In recommending the appointment of the Task Force on the Model Definition of the Practice of Law, ABA President Alfred P. Carlton, Jr. presented a challenge statement that stated:

The ABA has adopted numerous policies over the years that have been fundamentally related to and dependent upon the definition of the practice of law without ever adopting such a definition. There is no suggestion that these policies have been insubstantial or unenforceable when adopted by jurisdictions because of that void. The highest court of each jurisdiction has in one way or another addressed the definition when necessary to implement these policies. However, the changing environment surrounding the work that lawyers do and the needs of the public suggests that a fresh look be taken as to whether the time for a model definition has arrived.

The Association's interest in the parameters of the practice of law has been highlighted in recent years by the work of the Commission on Nonlawyer Practice and the Commission on Multidisciplinary Practice. The common thread in the work of these entities has been the revelation that there are an increasing number of situations where nonlawyers are providing services that are difficult to categorize under current statutes and case law as being, or not being, the delivery of legal services. This growing gray area may be partially responsible for the spotty enforcement of unauthorized practice of law statutes across the nation and arguably an increasing number of attendant problems related to the delivery of services by nonlawyers. Recently a number of jurisdictions, most prominently Washington, Arizona and the District of Columbia, have taken steps to codify a definition of the practice of law so as to attack these trends.¹ Given the Association's leadership role in this area, it is appropriate for it to consider anew the need to present a model definition to address on a national stage these issues and to aid other jurisdictions that may wish to take action.² The Association already has in place an entity, the Standing Committee on Client Protection, that

¹ The Task Force notes that in addition to those jurisdictions named by ABA President Carlton, bar association committees in Kansas, Wisconsin and Indiana are working on definitions of the practice of law.

² The consideration regarding a model definition is consistent with the action taken by the ABA House of Delegates on July 13, 2000 in adopting Revised Recommendation 10F, put forth by the Illinois State Bar Association, New Jersey State Bar Association, New York State Bar Association, The Florida Bar, Ohio State Bar Association, Bar Association of Erie County and Cuyahoga County Bar Association, paragraph five of the first resolution of which stated "Each jurisdiction should reevaluate and refine to the extent necessary the definition of the 'practice of law.'"

has done significant research in this area and that could be at the forefront of Association activity in this regard.

The ABA Board of Governors responded by adopting the following resolution:

RESOLVED, that a Task Force on the Model Definition of the Practice of Law with not more than seven members, including a chair, appointed by the President in consultation with the chair of the Standing Committee on Client Protection shall be established to work in conjunction with the Standing Committee on Client Protection regarding a model definition of the practice of law and to report to the Board of Governors not later than August 2003. This Task Force and the Standing Committee on Ethics and Professional Responsibility shall maintain a liaison relationship.

A. Methodology

The Task Force began its work by examining codified and case law definitions of the practice of law from around the country.³ Informed by the work of those jurisdictions that had already addressed the issue, the Task Force created a discussion draft definition, which it circulated for comment on September 18, 2002, with the goal of stimulating discussion. The Task Force was successful in that regard. Numerous individuals and groups provided useful written comments.⁴ In addition, on February 7, 2003, at the ABA Midyear Meeting in Seattle, Washington, nineteen speakers addressed the Task Force during a public hearing.⁵ Following the hearing, the Task Force reviewed its discussion draft definition in light of all the written and oral comments and crafted the recommendation that this Report advocates.

B. Philosophy

The Task Force heard testimony during the hearing about consumer harm from services that are included within the definition of the practice of law that were, in the instances related, provided by unregulated, incompetent providers, as well as testimony about the need to provide additional access to competent services. The Task Force agreed that a definition of the practice of law is an important step in protecting the public from unqualified service providers, eliminating uncertainty for persons working in law-related areas about the propriety of their conduct and enhancing the availability of services that are included within the definition of the practice of law. Moreover, the Task Force was persuaded by the efforts of Arizona, Washington, the District of Columbia and other jurisdictions that already have adopted definitions that it is possible to create a useful definition of the practice of law.

³ See http://www.abanet.org/cpr/model-def/model_def_statutes.pdf.

⁴ See http://www.abanet.org/cpr/model-def/draft_def_comment.html for the text of those comments.

⁵ See http://www.abanet.org/cpr/model-def/draft_def_comment.html for the speakers' written submissions and http://www.abanet.org/cpr/model-def/task_force_transcript.pdf for a transcript of the hearing.

The Task Force's discussion draft definition provided a specific model definition of the practice of law and listed the exceptions and exclusions to the definition that might or might not constitute the practice of law, but would be permitted activity by nonlawyers in either event. Upon further deliberation, the Task Force became convinced that the considerations in defining the practice of law in each jurisdiction required that a procedural framework for jurisdictions to follow be recommended instead. The Task Force also became convinced that the necessary balancing test for determining who should be permitted to provide services that are included within the definition of the practice of law is best done at the state level.⁶ This is consistent with the Task Force's charge to "consider anew the need to present a model definition . . . and to aid other jurisdictions that may wish to take action." The Task Force acknowledges that each jurisdiction will weigh the factors provided in the framework in a manner that is best suited to resolving the harm/benefit equation for its citizens.⁷

II. The Basic Premise of the Definition of the Practice of Law

⁶ Each state has a unique culture, a specific legal and social history, a record of experience with nonlawyer activity and an economic, political and social environment that will affect its judgment about the types and amount of nonlawyer activity likely to enhance access to justice and protect the public. *See* American Bar Association Commission on Nonlawyer Practice, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS (August 1995) at 135.

This decision by the Task Force to recommend state-by-state consideration of the issue is not meant to contravene existing ABA policy or to establish new policy in regard to the specifics of a definition of the practice of law, as opposed to the framework for creating a definition. Thus, for example, it is not the purpose of this report or its accompanying recommendation to address the special circumstance in which lawyers and others serve as a mediator, arbitrator or neutral in other types of ADR proceedings. Moreover, it is not the intent of the Task Force to suggest that in providing such services these individuals are engaged in the practice of law. In fact, the Task Force recognizes that most states that have considered this issue specifically have excluded the activities of mediators and arbitrators from their definition of the practice of law. *See, e.g.*, Commentary to Rule 49(b)(2), District of Columbia Court of Appeals Rules ("The Rule is not intended to cover the provision of mediation or alternative dispute resolution ("ADR") services. This intent is expressed in the first sentence of the definition of the "practice of law" which requires the presence of two essential factors: The provision of legal advice or services and a client relationship of trust or reliance. ADR services are not given in circumstances where there is a client relationship of trust or reliance; and it is common practice for providers of ADR services explicitly to advise participants that they are not providing the services of legal counsel."); and Washington State Bar Ass'n, Comm. to Define the Practice of Law, Final Report (July 1999), adopted by Washington State Bar Association Board of Governors, September 1999 ("[P]ersons acting in [the] capacity of [mediator, arbitrator, conciliator or facilitator] are not engaged in the practice of law."); *but cf.* New Jersey. Sup. Ct. Advisory Comm. Prof'l Ethics, Op. No. 676 (April 4, 1994) (holding that when a lawyer serves as a third party neutral, he or she "is acting as a lawyer"); *see generally*, Resolution of the ABA Section of Dispute Resolution dated February 2, 2002 (available at <http://www.abanet.org/dispute/resolution2002.pdf>).

⁷ *See infra*, III. A. *The Balancing Process*.

The Task Force studied examples of broad definitions from around the country.⁸ Many of them, in some form or another, include providing legal advice.⁹ Some definitions specifically mention representing another in court and/or drafting legal documents.¹⁰ The Utah legislature recently passed a law that defines the practice of law only in terms of representation before a court.¹¹

Inherent in the drafting and selection of legal documents is the provision of legal advice. Inherent in the representation of another before a court is the provision of legal advice. This is the clear starting point for any definition of the practice of law. The Task Force determined that the application of legal principles and judgment to the circumstances or objectives of another person or entity is implicit in the giving of legal advice and thus used that expanded notion as the broad basic premise for creating a definition of the practice of law.¹² That broad premise would then be used in conjunction with the third resolution's guide for how each jurisdiction should determine who may provide services that are included within the jurisdiction's definition of the practice of law.

⁸ See http://www.abanet.org/cpr/model-def/model_def_statutes.pdf for all the definitions the Task Force reviewed.

⁹ See, e.g., ALASKA STAT. §08.08.230 (Unlawful Practice) and Alaska State Bar Rule 63 (Unauthorized Practice of Law); GA. CODE ANN. §15-19-50 (Practice of Law Defined); KY. REV. STAT. ANN., Rules of the Supreme Court, SCR 3.020 (Practice of Law Defined); MD. CODE ANN., Business Occupations & Professions, §10-101(h) (Definitions); N.M. STAT. ANN., Rules Governing Legal Assistant Services, Rule 20-102 (B) (Definition of Practice of Law); Rule 11 of the RULES OF THE SUPREME COURT OF WYOMING PROVIDING FOR THE ORGANIZATION AND GOVERNMENT OF THE BAR ASSOCIATION AND ATTORNEYS AT LAW OF THE STATE OF WYOMING.

¹⁰ See, e.g., ALA. CODE §34-3-6 (Who may practice as attorneys); LA REV. STAT. §37:212 (Practice of Law Defined); MO. REV. STAT. §484.010 (Practice of the law and law business defined); N.C. GEN. STAT. ANN. §84-2.1 ("Practice of law" defined); R.I. GEN. LAWS §11-27-2 ("Practice of law" defined); TENN. CODE ANN. §23-3-101 (Definitions).

¹¹ UTAH CODE ANN. §2, 78-9-102, effective May 3, 2004 ("The term "practice law" means appearing as an advocate in any criminal proceeding or before any court of record in this state in a representative capacity on behalf of another person.").

Compare the suggested approaches in three minority reports of the State of New Hampshire Task Force to Define the Practice of Law, each of which recommend that nonlawyers be permitted to represent parties in court, subject either to consideration limitations (see <http://www.nhbar.org/pdfs/CoopMR.pdf>), occurrence or consideration limitations, (see <http://www.nhbar.org/pdfs/GordMR.pdf>) or no limitations at all (see <http://www.nhbar.org/pdfs/SimaMR.pdf>). The Task Force's Final Report concluded that it was "unable to reach a consensus of opinion in order to offer specific findings and recommendations on the practice of law in New Hampshire." (See <http://www.nhbar.org/pdfs/HB1420FR.pdf>).

¹² The Task Force received many comments that suggested that its draft definition was overly broad. The broad starting point of the second resolution of its recommendation is exactly that, a starting point.

III. Who May Engage in the Practice of Law and Under What Circumstances

The chief reason for defining the practice of law and regulating those who perform services within the scope of the definition is to protect the public from harm that may result from the activities of dishonest, unethical and incompetent providers.¹³ Once the practice of law is defined, a jurisdiction must determine who may perform services that are included within the definition and under what circumstances. The scope of permissible conduct of persons who may engage in activities that are included within the definition of the practice of law will vary among jurisdictions, dependent upon the harm and benefit to the public and the requisite qualifications, competence, accountability and other requirements thought necessary to engage in those activities. Thus, in order to determine who may provide services that are included within the definition of the practice of law, jurisdictions must have sufficient information available to predict which nonlawyers, and under what circumstances, may provide a great benefit and which may create harm.¹⁴

The basic assumption of the Task Force is that jurisdictions will apply common sense in defining who may be authorized to provide services that are included within the definition of the practice of law and who does not need to be regulated. For instance, advice given by one neighbor to another regarding zoning issues or a mechanic's comments on warranty coverage is not conduct that needs to be regulated.

A. *The Balancing Process*

The Task Force recommends that certain factors be balanced to determine who should be able to provide services and under what circumstances. The process of balancing harm and benefit is not an easy one. There is no simple formula. It requires an exercise of discretion and judgment based on the best available evidence. Each jurisdiction should weigh concerns for public protection and consumer safety, access to justice, preservation of individual choice, judicial economy, maintenance of professional standards, efficient operation of the marketplace, costs of regulation and implementation of public policy.¹⁵

In particular, each jurisdiction should consider the following factors in determining who should be permitted to practice law and under what circumstances. The Task Force recognizes that the balancing process may produce divergent results among jurisdictions.

1. Minimum Qualifications

¹³ Potential for harm is too quickly discounted by those who want to expand the field of who may provide services within the definition of the practice of law and too easily found by those who want to restrict the practice of law to lawyers.

¹⁴ See *infra*, IV. Implementation, for a discussion regarding the need for each jurisdiction to conduct a study of potential harm.

¹⁵ See AMERICAN BAR ASSOCIATION COMMISSION ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS (August 1995) at 135, 136.

In most jurisdictions, the qualifications for admission to the practice of law include graduation from an accredited law school, passage of a bar examination with a testing component on professional responsibility law, and determinations of character and fitness. While several jurisdictions have diverged from the traditional model of institutional education, examination and fitness determination, all mandate qualifications for admission to practice law through varying systems of education, testing, apprenticeship, and lawyer mentoring.¹⁶

As a member of the legal profession, a lawyer serves the complex role as a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.¹⁷ The lawyer's complex role includes special obligations such as client confidentiality, conflicts avoidance, competent performance and professional independence that underscore the need for a comprehensive system of minimum qualifications for admission to the practice of law. The principal objective of the qualification system is to ensure that education, training, examination and fitness criteria are satisfied prior to admission and licensing. Thereafter, the jurisdiction's regulatory system monitors the ethical conduct and competency of lawyers through an extensive system of professional continuing education, periodic registration, professional conduct rules and professional liability standards, and disciplinary enforcement.

A qualification system also should be established for nonlawyers authorized to provide services within the definition of the practice of law. The harm/benefit determination by the jurisdiction authorizing other service providers should dictate the scope and breadth of the system. In the delicate balance of access to justice and public protection, both factors are fundamental.

Jurisdictions should strive to establish minimum qualifications that promote the delivery of services within a framework of public protection, competence and accountability. The system should provide a continuum that starts with minimal necessary qualifications under certain circumstances and proceeds to qualifications that might rival those required of lawyers if the extensiveness or sophistication of the service merits it.

The experience in several jurisdictions and in federal administrative agencies demonstrates diversity in approach. These qualification systems have spanned the spectrum from self-declaration of competence to formal licensure. Many of the qualification systems include components of minimal training, formal education, disclosure of qualifications and training, testing, registration, accreditation, and certification. The challenge for each jurisdiction in setting

¹⁶ COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, 2002 Edition, National Conference of Bar Examiners and American Bar Association Section on Legal Education and Admissions to the Bar: 9 jurisdictions allow applicants to write the bar examinations after law office study or correspondence study; 42 jurisdictions require a J.D., LL.B or LL.M to write the bar examination; 25 jurisdictions require a J.D., LL.B. or LL.M from an ABA-approved law school or else a foreign law degree; 4 jurisdictions require completion of certain courses or skills training during law school for initial admission to the bar; 16 jurisdictions require completion of certain courses or skills training after law school for initial admission to the bar.

¹⁷ See ABA MODEL RULES OF PROFESSIONAL CONDUCT Preamble: A Lawyer's Responsibilities (2003).

minimum qualifications is the balancing of the potential risk of harm, the consumer's level of knowledge, the potential benefits to the public and the costs of regulation.¹⁸

2. Competence

The skills needed to provide services that are included within the definition of the practice of law and the potential harm that might result from the lack of competence are primary concerns. The existence of a licensing procedure, whether related to the law license or some other relevant license, is one consideration of this factor. The requirements for a license to practice law demand a prescribed level of competence by those obtaining the license. This usually includes extensive educational and testing requirements to establish competence to practice law.

While the training that lawyers receive in law school prepares them to think analytically in a way that can be applied to any area of practice, many lawyers concentrate their practices in certain areas of the law. Accordingly, there may be areas of the law with which a particular lawyer is not familiar. While the Comment to Model Rule of Professional Conduct 1.1 states that “[a] lawyer can provide adequate representation in a wholly novel field through necessary study,” it is nevertheless true that there are nonlawyers whose specialized knowledge and experience may make them as competent as many lawyers in certain areas related to the law. Furthermore, competence of nonlawyers providing services that are included within the definition of the practice of law could be assured, for instance, through experience, education or training standards, certification or licensing, or supervision by a lawyer. In most jurisdictions, the lawyer's continuing competency is supervised through a system of mandatory continuing legal education. Forty-one jurisdictions have such programs with requirements of 10 to 15 hours of education per calendar year. In thirty-eight jurisdictions, the programs also must include ethics education.¹⁹

3. Accountability

The existence and utility of methods of accountability for actions taken by anyone providing services that are included within the definition of the practice of law is another key factor for consideration by jurisdictions in determining who should be permitted to provide services that are included within the definition of the practice of law and under what circumstances. Lawyers are made accountable by the rules of professional conduct, a disciplinary system that enforces

¹⁸ See, e.g., MD. CODE ANN., State Government, §9-1607.1 (1994) (in-state organizations train and certify tenant advocates to appear against landlords' agents); WASH. COURT RULES, Admission to Practice Rule 12 (Limited Practice Rule for Closing Officers); ARIZ. CODE OF JUDICIAL ADMINISTRATION §7-208 (Legal Document Preparer); ABA MODEL GUIDELINES FOR THE UTILIZATION OF LEGAL ASSISTANT SERVICES; MINN. STAT. ANN. §572.37, MINN. CIVIL MEDIATION ACT (mediation service providers must provide potential parties with a written statement of qualifications, education, and training before commencing mediation).

¹⁹ See ABA Center for Continuing Legal Education, Summary of MCLE State Requirements, *at* <http://www.abanet.org/cle/mcleview.html>.

those rules, court controls such as Rule 11 sanctions and disqualification for conflicts of interest, and established standards of care in civil liability cases.²⁰

There are circumstances under which nonlawyers are held accountable pursuant to a state regulatory scheme.²¹ In addition, there are federal administrative agencies that permit nonlawyers to represent clients before the agency.²² These nonlawyers are governed by the agencies' regulations. As part of the process, each jurisdiction should review the scope of permitted services within its definition to determine what level of professional accountability is needed for all who provide the services within the definition. More specifically, jurisdictions should consider whether a law license, another professional license, or a newly formed licensing requirement is needed. They should also determine whether educational or testing requirements, evidence of financial responsibility, continuing education, ethics codes, or other requirements are needed to ensure protection of the public. In some instances, accountability already is assured without the need for any new regulatory system or standards. For instance, there is no regulatory system for paralegals working under the supervision of a lawyer because their accountability is assured through regulation of the lawyer.

4. Access to Justice

The Task Force believes that defining the practice of law appropriately will improve access to justice. The need for services that are included within the definition of the practice of law is growing and in many cases does not appear to be met. There are many efforts to meet these needs, some sanctioned by the profession, the courts or the legislature, and others not sanctioned in any way. The growing delivery of services that are included within the definition of the practice of law by nonlawyers presents a dilemma for those who are concerned with both the protection of the public from unqualified persons offering services that are included within the definition of the practice of law and with the need to provide services that are included within the definition of the practice of law to persons otherwise disenfranchised from the legal system.

²⁰ See RESTATEMENT OF THE LAW THIRD – THE LAW GOVERNING LAWYERS, §52 (2000).

²¹ For example, Arizona has recently established (effective April 2003) a Certification and Licensing Program for Legal Document Preparers. See ARIZONA CODE OF JUDICIAL ADMINISTRATION, Part 7, Chapter 2, §7-208 (C):

C. Purpose. The supreme court has inherent regulatory power over all persons providing legal services to the public, regardless of whether they are lawyers or nonlawyers. The court recognizes, however, that the need to protect the public from possible harm caused by nonlawyers providing legal services must be balanced against the public's need for access to legal services. Accordingly, this code section is intended to:

1. Protect the public through the certification of legal document preparers to ensure conformance to the highest ethical standards and performance of responsibilities in a professional and competent manner, in accordance with all applicable statutes, code sections, and Arizona court rules; and

2. Result in the effective administration of the Legal Document Preparer Program.

²² For example, the Internal Revenue Service and the Social Security Administration.

The Task Force received comments that questioned the existence of evidence of consumer harm from providers of certain services that are included within the definition of the practice of law and cautioned against decreasing access to services provided by nonlawyers without such evidence. Other comments addressed the many benefits provided by nonlawyers supplying services that are included within the definition of the practice of law and the harm to access that would be forthcoming if a broad definition of the practice of law eliminated those nonlawyers as alternative service providers. Thus the Task Force emphasizes that the balancing process must be based upon a detailed investigation and determination of facts related to harm and benefit. The evidence should be applied not only to the determination of whether someone should be permitted to provide services that are within the definition of the practice of law, but also to the determination of the extent of regulation, if any, that would be necessary to adequately protect the public in each instance of permitting nonlawyers to deliver services that are included in the definition of the practice of law.

B. Examples of Service Providers

Several states have identified categories of providers of services that are included within the definition of the practice of law who the jurisdictions have determined are accountable and competent to provide those services in certain circumstances. For example, a person who is licensed in another jurisdiction may be granted authority to engage on a limited basis in transactions, litigation, arbitration, or representation of her employer business subject to specified requirements that include accountability for the person's actions.²³

²³ See ABA MODEL RULES OF PROFESSIONAL CONDUCT (2003) Rule 5.5 (2003), providing

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in this matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

Persons never admitted to practice as lawyers in any jurisdiction also may be permitted to perform services that fall within the definition of practice of law and would be deemed the practice of law if provided by lawyers admitted to practice in the jurisdiction. Supervised law students may provide services that are included within the definition of the practice of law pursuant to supreme court rules.²⁴ Certified Public Accountants may represent others in certain administrative hearings.²⁵ Paralegal personnel may in most jurisdictions perform functions that would, if done by a lawyer, constitute the practice of law. Authority to do so usually is conditioned upon the person being under the supervision of a member of the bar.²⁶ Nevertheless, a jurisdiction may prohibit a lawyer who has been disbarred or suspended from performing services permitted of a paralegal even if the disbarred or suspended lawyer were to be supervised

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

The laws of two states, Michigan and Virginia, specifically authorize occasional or incidental practice by out-of-state lawyers. Michigan's UPL statute provides that it does not apply to an out-of-state lawyer who is "temporarily in [Michigan] and engaged in a particular matter." The Virginia rules permit an out-of-state lawyer occasionally to provide legal advice or services in Virginia "incidental to representation of a client whom the attorney represents elsewhere." *See* MICH. COMP. LAW ANN. §600.916 and VA. STATE BAR RULE, Pt. 6, §1(C).

See also ABA MODEL RULE FOR THE LICENSING OF LEGAL CONSULTANTS (*available at* <http://www.abanet.org/cpr/mjp/201h.doc>) and MODEL RULE FOR TEMPORARY PRACTICE BY FOREIGN LAWYERS (*available at* <http://www.abanet.org/cpr/mjp/201j.doc>).

²⁴ *See, e.g.*, ILL. SUP. CT. R. 711.

²⁵ *See, e.g.*, AZ. SUP. CT. R. 31(c)(13).

²⁶ *See, e.g.*, AZ. SUP. CT. R. 31(c) (Regulation of the Practice of Law)

(c) Exceptions. Notwithstanding the provisions of section (b):

* * *

15. Nothing in this rule shall affect the ability of nonlawyer assistants to act under the supervision of a lawyer in compliance with Rule 5.3 of the rules of professional conduct.

See also, WASHINGTON COURT RULES - Part I - Rules of General Application - General Rules - GR 24 (Definition of the Practice of Law)

* * *

(c) Nonlawyer Assistants: Nothing in this rule shall affect the ability of nonlawyer assistants to act under the supervision of a lawyer in compliance with Rule 5.3 of the Rules of Professional Conduct.

by a member of the bar.²⁷ Customarily, the foregoing matters are appropriately regulated by the courts of a jurisdiction, sometimes within parameters established by the legislature.²⁸

The Task Force does not propose a list of specific nonlawyers who should or should not be authorized. It is more constructive for each jurisdiction to undertake its own process, as have Washington, Arizona, the District of Columbia and others, and to carefully study the factors enumerated in the third resolution in light of its own unique circumstances.²⁹ That said, it would still be useful for jurisdictions to consider in their studies the examples of authorized providers that the Task Force has gathered from around the country.³⁰

²⁷ See, e.g., ILL. SUP. CT. R. 764(b) (a suspended or disbarred lawyer may not “maintain a presence or occupy an office” where a law practice is being conducted); WIS. SUP. CT. R. 22.26 (a suspended or disbarred lawyer may not engage in any “law work activity customarily done by law students, law clerks or other paralegal personnel, except . . . in law-related work for a commercial employer not itself engaged in the practice of law.”).

²⁸ See Recommendation 201A, adopted by the ABA House of Delegates in August 2002: “RESOLVED, that the American Bar Association affirms its support for the principle of state judicial regulation of the practice of law.” (The full Report is available at <http://www.abanet.org/cpr/mjp/201a.doc>)

²⁹ The August 1995 Report of the ABA Commission on Nonlawyer Practice stated that:

[T]he most important conclusion of the Commission is that each state should conduct its own careful analytical examination, under the leadership of its supreme court, to determine whether and how to regulate the varied forms of nonlawyer activity that exist or are emerging in its jurisdiction.

....

The Commission recommends a specific analytical approach for use by the state in determining what level of regulation, if any, is appropriate. The approach will help in assessing whether a particular activity should be unregulated, regulated or prohibited. Three broad criteria are suggested:

1. Does the nonlawyer activity pose a serious risk to the consumer's life, health, safety or economic well-being?
2. Do potential consumers of law-related nonlawyer services have the knowledge needed to properly evaluate the qualifications of nonlawyers offering the services?
3. Do the actual benefits of regulation likely to accrue to the public outweigh any likely negative consequences of regulation?

....

At the root of this balancing of interests lies a difficult question, which a state will have to answer based on its particular culture and values. . . . What should be the level of trade off, if any, between a consumer's interest in having at least some assistance from a nonlawyer and the increased risk of harm from the possibly less qualified assistance of a nonlawyer?

NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS at 136, 137.

³⁰ See http://www.abanet.org/cpr/model-def/model_def_statutes.pdf for exceptions listed among the definitions of the practice of law.

IV. Implementation

The Task Force recommends a set of principles to be used in the implementation of a procedural framework for defining the practice of law and the determination of who may provide services that are included within the definition under certain conditions. These principles will aid the states in the process of establishing the framework and ultimately in the difficult process of weighing the factors of minimum qualifications, competence and accountability.

(1) Comprehensive studies of harm and potential harm should be conducted concerning the provision of services that are included within the definition of the practice of law by lawyers and nonlawyers and weighed against potential benefits of allowing additional service providers. For example, Arizona spent over a year studying complaints filed at the bar against unlicensed providers in determining which areas needed continued or additional regulation and which areas might allow new services by nonlawyers.

(2) In the initial process of analyzing evidence and in subsequent reviews of harm and benefit there should be a diverse, impartial cross section of representation from the legal profession, other relevant professions and the public as a whole. A definition of the practice of law directly affects not only lawyers, but also consumers of services that are included within the definition of the practice of law and nonlawyer providers.

(3) There should be a process in each jurisdiction for the continual review of both the definition of the practice of law and who may provide services that are included within the definition under certain circumstances to take into account changing market factors and other additional evidence, with an eye to the future. Examples of such processes already in place include the hearing process used by the Florida Supreme Court to determine the appropriate parameters of who may provide services within the definition of the practice of law based upon a weighing of potential harm versus possible benefits to the public.³¹ Likewise, the establishment in Washington of the Washington Practice of Law Board allows a similar review.³² A board such as Washington's should include representatives from many constituent bodies.

(4) Each review should give careful consideration to evidence of accountability and competence of other regulated professionals and of lawyers licensed in other jurisdictions, examining whether there already exist sufficient controls to allow them to provide services that

³¹ See RULES REGULATING THE FLORIDA BAR RULE §10-9.1 (Procedures for Issuance of Advisory Opinions on the Unlicensed Practice of Law).

³² See http://www.abanet.org/cpr/model-def/atj_gr24.pdf for the rules of the Washington Practice of Law Board. Washington's Practice of Law Board is charged with issuing advisory opinions on the practice of law, investigating complaints regarding unauthorized practice and making recommendations to the Supreme Court regarding any changes to the definition as well as any areas of practice that might be appropriate for limited licensing of nonlawyers. (For example, Washington has had a limited licensing of nonlawyers to practice certain defined aspects of the practice of law in real property closings since 1983.)

are included within the definition of the practice of law in the jurisdiction reviewing their possible entry.³³

Implementation requires adequate resources, funding and periodic review, as does enforcement. Far fewer resources are devoted nationally to enforcement of remedies and sanctions against nonlawyers than against lawyers. If additional service providers are authorized under certain conditions, then those conditions must be enforced.

V. Conclusion

Many jurisdictions have left the determination as to what constitutes the practice of law to a case-by-case analysis. As a result, there are an increasing number of situations where nonlawyers, or lawyers licensed in a different jurisdiction, are providing services that are difficult to categorize under current state authority as being, or not being, the delivery of services that are included within the definition of the practice of law. The adoption of a definition of the practice of law is a necessary step in protecting the public from unqualified service providers and in eliminating qualified providers' uncertainty about the propriety of their conduct in any particular jurisdiction.

The Task Force believes that each jurisdiction's definition should include the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity. This basic premise is not a model for a definition, but rather a part of a framework.

Upon adding elements to the basic premise, each jurisdiction should then use a balancing process to determine who may provide services that are included within the jurisdiction's definition of the practice of law and under what circumstances, based upon the potential harm and benefit to the public. The determination should include consideration of minimum qualifications, competence and accountability. The results may differ from jurisdiction to jurisdiction.

In creating the definition, the jurisdiction must consider regulatory concerns. There must be sufficient resources to maintain any additional regulatory procedures resulting from a change in the jurisdiction's current approach. In the discharge of its fundamental role to regulate the practice of law, the judicial branch of government should participate in defining the practice of law and in establishing a regulatory structure that promotes access to justice, accountability, and client protection. Since protection of the public is a paramount goal of the legal profession and

³³ A regulatory approach for nonlawyer activity may be needed if the activity presents a serious risk of harm, if consumers cannot protect themselves against that risk because they will find it difficult or impossible to evaluate the nonlawyer service provider's qualifications, or if the likely benefits of regulation outweigh the likely negative consequences of regulation. The type of regulation chosen will depend upon the predicted costs and effectiveness (of different regulatory options) in reducing the predicted harm while avoiding counterbalancing negative consequences. The activity should be prohibited if no regulatory approach will effectively accomplish an appropriate level of public protection.

of the justice system it serves, the regulatory process should enforce accountability by all who provide services within the definition of the practice of law.

Respectfully submitted,
Task Force on the Model Definition of the Practice of Law

Lish Whitson, Chair
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