

To: ABA Task Force to Define the Practice of Law

From: Steve Crossland, Chairperson, Practice of Law Board; former chairperson, Committee to Define the Practice of Law of the Washington State Bar Association

Date: January 16, 2003

Re: Draft Definition of the Practice of Law

In 2002, the Washington Supreme Court adopted a court rule defining the practice of law (General Rule 24) and establishing a Practice of Law Board (General Rule 25). The reasons for doing this were stated in the 1999 Report of the Committee to Define the Practice of Law:

Defining “the practice of law” lies at the heart of any effort to protect the public from untrained and unregulated persons who hold themselves out as able to offer advice and counsel in matters customarily performed by lawyers that affect individuals’ legal rights, property, and life. When licensed and regulated lawyers perform these functions, they are required to meet extensive educational requirements to become lawyers, required to maintain continuing legal education to stay current in the law, required to follow standards of ethical behavior with respect to their clients and others, and are subject to discipline up to and including suspension and disbarment. Nonlawyers are not required to meet any of these standards. The public has no recourse for poor, illegal or negligent performance of these functions by nonlawyers.

A definition of the practice of law is an important step in protecting the public from unqualified and unlicensed practitioners. A more specific definition than those current attempts to provide definition by case law and criminal statute may enable the enactment of consumer protection legislation; it may aid in securing funding for legal services; it may assist the criminal prosecution of unlawful practitioners; and it will eliminate uncertainty for persons working in law-related areas about the propriety of their conduct.

Background: The Board of Governors of the Washington State Bar Association established the Committee to Define the Practice of Law in February 1998 following appointment of an earlier ad hoc committee to review the delivery of legal services by lawyers and nonlawyers. That ad hoc committee concluded that before attempting to deal with the unauthorized practice of law, it is necessary to define what is “the practice of law.”

The ad hoc committee recommended that after a definition had been adopted, it would be appropriate for the WSBA and the Supreme Court to review how legal services are delivered and whether they fall within or without the definition. It was recommended that a committee should be established to advise the Supreme Court on a consistent philosophical basis as to whether any exception should be granted to the general rule that only lawyers may provide legal services.

The Committee reviewed a large quantity of written material from various organizations and individuals; definitions of the practice of law from other jurisdictions; and court opinions from Washington and elsewhere on this subject.

Definition: The definition (copy attached) ultimately recommended by the Committee and adopted by the Supreme Court was based on several agreed upon principles:

- The definition is based on the type of conduct performed rather than on the person or persons performing it.
- It takes a “pragmatic” approach in acknowledging that others besides lawyers may be authorized to perform legal services and to engage in the practice of law; thus the definition identifies “exclusions and exceptions.”
- The purpose of the definition is the protection of the public and not “turf protection” for lawyers.
- The definition will be refined and amended over time as experience and circumstances dictate.
- The definition defines “practice of law” and not “unauthorized practice of law.” While it was intended that the definition would be useful to enforcement agencies and courts in regulating the unauthorized practice of law, the definition was not intended to replace existing criminal and civil enforcement remedies.

The “exemptions and exclusions” were deliberately debated and carefully drawn to recognize at least two factors: first, only the Supreme Court has the power and authority to regulate the practice of law; and second, there are many areas in which the courts, by order, opinion, or custom, have authorized or allowed conduct that involves the practice of law to be performed by nonlawyers. In defining these exemptions and exclusions, the committee had in mind the interest of the public in allowing nonlawyers to engage in such conduct, as well as the protection of the public in ensuring that such conduct is regulated so that persons who provide legal services have the requisite knowledge, training, and regulation to strive to ensure that the public will not be preyed upon by those who are incompetent to provide such services.

Practice of Law Board: During the discussions on the adoption of this definition, it became clear that there needed to be some entity empowered to issue advisory opinions on the practice of law; to investigate complaints regarding unauthorized practice; and to make 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. Washington has had a limited licensing of nonlawyers to practice certain defined aspects of the practice of law in real property closings since 1983. It has worked well for the public and the bar, and it was thought that it might be a model for other areas of limited licensing.

A Practice of Law Board was established, consisting of 13 members, not fewer than 4 of which are nonlawyers. The present Board consists of 9 lawyers and 4 nonlawyers. The Board has met monthly in all day sessions for 4 months. The Board believed it was important to develop procedural rules for how the matters before it were to be processed. Much of the first 4 meetings involved the creation of these rules. The Board is now in a position to begin processing the many inquiries that have already been delivered to the Board. The Board looks forward to an exciting and challenging year as it begins its work.