Antitrust Liability, Lack of Funding Trouble UPL Regulators

By Elizabeth J. Cohen

Unauthorized practice of law regulators’ top worries include being sued under antitrust laws, lack of funding, and difficulty in getting complainants to cooperate, according to contributors at the opening session of the ABA Center for Professional Responsibility’s third annual UPL School in Chicago Oct. 26.

A roomful of UPL regulators examined the state of UPL enforcement nationwide in “Meet the Players,” a session led by William D. Slease, chief disciplinary counsel of the New Mexico Supreme Court Disciplinary Board. Slease posed two questions: “What's the biggest challenge you face in your jurisdiction?” and “What are the areas of practice where you're seeing UPL?”

Whether the regulator was a volunteer, or was an employee of a government entity or bar association, and whether the jurisdiction had a unified bar or a voluntary bar, common themes emerged in the answers.

Problems

The problem causing the greatest gnashing of teeth is still N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101, 2015 BL 48206, 31 Law. Man. Prof. Conduct 108 (2015). That decision held that a state dental board was not immune as a state actor from antitrust liability, because the board was controlled by active market participants (i.e., practicing dentists) and was not subject to active oversight by the state.

Slease noted that after Dental Examiners, “cease-and-desist letters make a lot of people nervous.” Many jurisdictions have stopped issuing them; in New Mexico, he said, “we have taken the approach of quoting directly from the rules.”

Many regulators reported that after Dental Examiners, they are unlikely to take action in the absence of actual harm; many reported shifting their emphasis from enforcement to consumer education.

Most regulators also cited lack of funding as a major problem. Other common issues were lack of victim and witness cooperation, particularly with respect to immigration law; the unavailability of restitution; and the way enforcement responsibilities are divvied up, i.e., civil/criminal, state/local, and nonlawyer/lawyer UPL. (Lawyer UPL refers to out-of-state, disbarred, or suspended lawyers).

Victim/Witness Cooperation

An Illinois investigator reported that many people “don't want to cooperate with the government ... They're happy they didn't have to hire a lawyer and spend lots of money.”
“They don't want to get in any trouble,” Slease noted. “And their first question is, 'Will I get my money back?'”

Michigan’s representative said her most pressing issue is that victims and witnesses are unwilling to step up. She reported that Michigan is moving toward public outreach – more education, for example at senior centers, and less litigation.

Utah reported that enforcement is a challenge when there's a satisfied customer; it's also a challenge if the customer has been ripped off but doesn't want to complain.

Washington State reported that it is moving to education and away from enforcement; the Practice of Law Board as reconstituted in 2015 acts as a clearinghouse only. [Washington has about 20 Limited-License Legal Technicians now, all working in family law. See 31 Law. Man. Prof. Conduct 270. Two more practice areas are being considered for LLLT status: immigration and applying for government benefits.]

Allocation of Enforcement Responsibilities

Louisiana reported that if the suspected UPL involves a lawyer who is suspended or temporarily disbarred, disciplinary counsel handles the matter; if it involves a layperson or a permanently disbarred lawyer, a different office takes care of it. There's also a criminal statute, but Louisiana's representative said there's been just one prosecution in 10 years.

In Indiana, consumer complaints go to the attorney general's office and complaints from judges and lawyers go to the disciplinary commission. In addition, the state bar association has taken on some of the bigger cases.

In Colorado and New Mexico, the office of disciplinary counsel shares UPL enforcement responsibilities with the attorney general's office.

In Utah, nonlawyer UPL is prosecuted by the general counsel of the state bar with the help of a volunteer committee of bar members; lawyer UPL (e.g. out-of-state lawyers and lawyers who are suspended or disbarred but not permanently disbarred) is investigated and prosecuted by the Office of Disciplinary Counsel.

In Arizona, UPL cases (unlike disciplinary cases) go before hundreds of different judges in the local superior courts.

Practice Areas

Immigration consulting has long been the major problem, but several regulators reported a recent decline in that area and noted that victims may be less likely to complain because they are more afraid of deportation.

Regulators reported encountering UPL in claims adjustment, debt-management, mortgage “rescue,” salvage-title claims, and online help finding and filling out forms. In West Virginia, nonlawyers are advising miners and landowners; in Louisiana, paralegals and notaries are even handling divorces.

The District of Columbia reported that 90 percent of its UPL comes from applications for bar admission on waiver; the lawyer will have been in D.C. for too long by the time the application gets filed.

Ohio’s representative said the use of form documents by pro se parties has become an “entrepreneurial opportunity” for nonlawyers to make money by, for example, taking Department of Motor Vehicles forms,
putting them online, and then charging to get salvage title. A Texas regulator commented that Houston also had a salvage-title problem, and he imagines it will come up again because of Hurricane Harvey.

Slease asked attendees to consider the future of UPL enforcement. Given the access-to-justice crisis, and given the increased availability of nontraditional legal services, “Is UPL enforcement still viable?”