MEMORANDUM

TO: Task Force on the Model Definition of the Practice of Law (c/o agarwin@staff.abanet.org)

RE: Model Definition of the Practice of Law

DATE: December 20, 2002

The Relations with the Bar Committee (Committee) of the American Institute of Certified Public Accountants is pleased to submit its comments on the definition of the practice of law proposed by the American Bar Association's Task Force on the Model Definition of the Practice of Law (Task Force).

One of the purposes of the Committee is to maintain cooperative professional relations with the organized Bar. Members of the Committee constitute one-half of the National Conference of Lawyers and Certified Public Accountants, the other half being appointed by the American Bar Association (ABA). Established in 1944, the National Conference of Lawyers and Certified Public Accountants has engaged in meetings and in continuous communication for the purpose of promoting understanding between the legal and accounting professions.

RELATIONSHIP BETWEEN BAR AND ACCOUNTING PROFESSION

The Committee believes in cooperation between lawyers and certified public accountants (CPAs). As noted in a 1981 publication of the National Conference of Lawyers and Certified Public Accountants, "Every lawyer or CPA brought into a matter should determine at an early stage whether the talent and training of a member of the other profession are needed and should make appropriate recommendations to his or her client."[1]

As the foregoing statement recognizes, there is a mutual respect and a significant interrelationship between the professions. More than any other profession, the accounting profession and the legal profession are intricately linked in the nature of their services. In 1981 the National Conference of Lawyers and Certified Public Accountants emphasized that interrelationship as follows: "The lawyer ordinarily advises a client with respect to the legal implications involved in such problems, whereas the certified public accountant advises with respect to the accounting aspects thereof. Frequently the legal and accounting phases are so interrelated and interdependent and overlapping that they are difficult to distinguish. Particularly is this true in the field of income taxation where questions of law and accounting have sometimes been inextricably intermingled."[2]

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[1] National Conference of Lawyers and Certified Public Accountants, Lawyers and Certified Public Accountants: A Study of Interprofessional Relations (1981).

[2] Id., Exhibit A Statement on Practice in the Field of Federal Income Taxation. We are aware that the ABA House of Delegates has rescinded all statements of principles that had been

In light of the overlapping nature of the services, which lawyers and CPAs provide, the Uniform Accountancy Act (Third Edition, Revised November 2002), published jointly by the American Institute of Certified Public Accountants and the National Association of State Boards of Accountancy, excepts practicing attorneys from its prohibitions. Section 14(m) of that Act provides "Nothing herein shall prohibit a practicing attorney or firm of attorneys from preparing or presenting records or documents customarily prepared by an attorney or firm of attorneys in connection with the attorney's professional work in the practice of law."[3]

Because there is no similar exception in the definition the Task Force has issued and because of the interrelationship between the organized Bar and the accounting profession, the Committee believes it important to comment on the Task Force's proposed definition

We acknowledge that your task is not an easy one. The ABA's Model Code of Professional Responsibility[4] and various state courts[5] have eschewed a definitional approach because of perceived inherent difficulties in formulating such a definition. Whether or not a satisfactory definition is possible, we believe that the Task Force's current approach to the definition and its current draft definition are both highly problematic for the accounting profession.

APPROACH TO DEFINITION

We understand the Task Force intends to create a broad definition of the practice of law[6] and then, according to one task force member, "the states will define who can perform

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adopted by various national conferences to which the ABA had been a party, but we believe the statement cited remains as true today as it did when made in 1981.

[3] Uniform Accountancy Act (Third Edition, Revised November 2002) at http://www.aicpa.org/states/final11.htm.

[4] Model Code of Professional Responsibility EC 3-5 (1980) ("It is neither necessary nor desirable to attempt a formulation of a single, specific definition of what constitutes the practice of law.").

[5] E.g., State Bar of Arizona v. Arizona Land Title & Trust Co., 90 Ariz. 76, 87, 366 P.2d 1, 8-9 (1961), *modified* 91 Ariz. 293, 371 P.2d 1020 (1962) ("In the light of the historical development of the lawyer's functions, it is impossible to lay down an exhaustive definition of 'the practice of law' by attempting to enumerate every conceivable act performed by lawyers in the normal course of their work."); *In Re* Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 422 S.E. 2d 123 (S.C. 1992) ("We are convinced, however, that it is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules. Instead, we are convinced that the better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy.").

[6] John Gibeaut, *Another Try,* ABA Journal, December 2002, at 18 ("It draws a sweeping outline that leaves individual states adopting it to fill in the blanks and spell out the specifics of just what unauthorized practice entails.").

the practice of law."[7] We recognize the value of each state being able to determine the needs of its citizenry. A broad definition (including broad presumptions), however, places an enormous burden on the states to be completely accurate in creating exceptions to the definition or creating regulated rights to practice the activities falling within the definition. Any oversight by the states would result in penalizing the overlooked service practitioners and the citizens they serve.

The broader the definition, the more inevitable that it will include activities whose performance should not require regulation. Rather than risking the possibility that they do not fully comprehend the universe of service providers covered by a broad definition, states may well reject the definition out of hand. On the other hand, if states do utilize the definition, tailoring on a state-by-state basis which a broad definition invites will destroy any value that a uniform definition might otherwise provide.

In addition to the burden on the states, consider also the burden placed on all service providers and their trade or professional organizations to avoid the exposure of any of their members to liability.[8] Each organization would have to petition for an exception or licensing for their membership if there were any possibility their activities would fall within a broad definition. If an organization fails to do so and its state erroneously fails to exempt the service providers, then either the service providers will be inappropriately exposed to liability or that state's citizenry will inappropriately lose access to the benefit of those service providers, or both.

DEFINITION

The Task Force has proposed the following definition: "The 'practice of law' is the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law." We recognize that the proposed definition is based on one the Washington State Supreme Court has already adopted, but the Committee believes it needs to be modified.

The last clause of the definition reads "that require the knowledge and skill of a person trained in the law." The addition of this clause negatively implies that there are some

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[7] Id.

[8] In addition to civil and potential criminal liability referenced in paragraph (f) of the Task Force's definition, paragraph (e) provides for unlimited liability of entities involved in the practice of law and certain liability for constituent members of that entity. Paragraph (e) would presumably apply to lawyers practicing in law firms and we assume you will receive comments from them in this regard. We do note that the definition does not limit such liability to situations in which the person or entity was engaged in the practice of law nor does it indicate to whom the unlimited liability would run. Additionally, paragraph (e) provides that a person engaged in the practice of law shall be held to the same standard of care and duty of loyalty to the client without indicating what that standard is the same as. If it were to be the standard applicable to lawyers, then the standard should only apply when providing legal services.

applications of legal principles and judgment[9] to circumstances or objectives of a person, which would not constitute the practice of law unless they require the knowledge and skill of a person trained in the law. In fact, the drafters of the Washington State definition commented, "The phrase 'which require the knowledge and skill of a person trained in the law' was included to address concerns expressed to the Committee that not all activities of the kind described in the definition require that they be done by lawyers, and that they ought to be deemed the practice of law only when it is necessary that the individual performing the act have the knowledge and skill of a lawyer."[10] In short, the intent of adding the last clause is to limit the scope of the definition to activities requiring the knowledge and skill of a lawyer.

The terminology "trained in the law," however, is too vague to effect the intended limitation. That terminology could include college students who attended business law courses, students who have taken law courses from unaccredited educational institutions, and a wide variety of professionals (including police officers, real estate brokers, corporate fiduciaries, and, of course, CPAs) whose professional education includes course work in the law. As a result, for instance, a police officer giving a Miranda warning could be viewed as practicing law. Given the elasticity of the clause, it does little, if anything, to narrow the scope of the preceding portion of the definition.

The comment to the draft states that the "primary consideration in defining the practice of the law is the protection of the public." The use of the terminology "trained in the law," however, undercuts this purpose. If the application of legal principles and judgment in a particular situation do not require the knowledge and skill of a licensed attorney, what is the public interest that the proposal protects? There is certainly no reason why individuals should be required to prove that they fall within an exception or otherwise be subject to the penalties the proposal provides if in fact those individuals are applying legal principles in a manner which does not require the knowledge and skill of an attorney. As currently drafted, however, the proposed definition would appear to encompass the activity of almost anyone applying legal principles or judgment to the circumstance or objectives of a person.

It is also unclear whether the clause "that require the knowledge and skill of a person trained in the law" modifies "circumstances or objectives" or other language. If that clause modifies "circumstances or objectives," then the definition is problematical for another reason. The fact that certain circumstances or objectives require such knowledge and skill does not preclude the possibility that the same circumstances or objectives require other skills and knowledge. For example, the Florida Supreme Court has stated, "It is apparent that pension plan preparation and administration is a field of practice that requires the knowledge and skill of

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[9] It might be helpful for the Task Force to clarify whether "legal" modifies only "principles" or both "principles" and "judgment" and whether the object of "of" in "application of" is only "legal principles" or also "judgment."

[10] The Committee to Define the Practice of Law of the Washington State Bar Association, Final Report (July, 1999), at http://www.wsba.org/cdpl/report.htm.

lawyers, CPAs, actuaries, and life insurance professionals."[11] That the definition would require the "application of legal principles and judgment" before it included an activity within its scope does not provide a sufficient limiting factor since that phrase could encompass everything from reading a contract to determining whether to make a right turn. As noted above, the drafters of the Washington State definition realized that the terms "application of legal principles and judgment" by themselves were not sufficiently limiting.[12] A CPA's application of legal principles and judgment to circumstances which require the CPA's knowledge and skill should not constitute the practice of law simply because another aspect of those circumstances or objectives requires the knowledge and skill of an attorney.

We know that the organized Bar has objected to an SEC proposal regarding standards of professional conduct for attorneys.[13] In part, the Bar objects to a definition of "appearing and practicing before the Commission" on the grounds that the definition provides no guidance as to how an attorney may determine what conduct, not listed in the definition, falls within the scope of the term. The Bar believes that this results in the unfair imposition of duties without providing notice to those who will be affected.[14] We believe the proposed definition of the practice of law creates similar difficulties for the accounting profession.

PRESUMPTIONS

The proposed definition provides for certain activities, which are presumed to constitute the practice of law. These presumptions extend the breadth of the definition of the practice of law. We believe these presumptions would include a number of activities that CPAs and/or other non-lawyer professional service providers legitimately engage in as part of their professional practice. Set forth below opposite each of the four presumptions is a list of some of such activities:

> (1) "Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others"--general business advice; real estate advisory services relating to accounting and finance including economic and feasibility studies, work-outs and restructuring, due diligence, location planning; employee benefit services including pension consulting; tax aspects of business operations and investments; estate planning; compensation advice.

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[11] *In re* Florida Bar Advisory Opinion—Nonlawyer Preparation of Pension Plans, 571 So. 2d 430 (Fla. 1990).

[12] See *supra* note 10 and accompanying text.

[13] Exchange Act Release No. 34-46868, 67 FR 7160 (December 2, 2002).

[14] Letter from Alfred P. Carlton, Jr., President, American Bar Association, to Securities and Exchange Commission (December 18, 2002) at http://www.manningproductions.com/ BA257/ ABA_Letter Comments.htm

(2) "Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person"--asset inventories and appraisals in probate proceedings; preparation of probate accountings; protests of tax assessments; estate planning Crummey notices; securities law documents relating to financial disclosures; annual returns and reports necessary for pension plan administration; tax returns.

(3) "Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery"--activity before various tax and administrative authorities; certain types of lobbying activities; preparation and filing of tax returns.

(4) "Negotiating legal rights or responsibilities on behalf of a person"--merger and acquisition negotiations involving financial statements or performance and tax issues; negotiations with tax authorities; negotiation on behalf of clients with various governmental entities utilizing financial and accounting expertise.

EXCEPTIONS

The only exceptions in the proposed definition, which appear to be applicable to CPAs, are those of "pro se representation" and of "serving as a mediator, arbitrator, conciliator or facilitator." We believe these exceptions would be of limited value to CPAs.

The comment to the "pro se" exception states that "the exception contemplates not only self-representation by an individual but also representation of an entity by an authorized nonlawyer agent of the entity in those jurisdictions that permit such representation." As drafted, it is not clear whether the Task Force contemplates the representation by an independent agent of an entity (e.g., an accountant representing a client in a real estate tax hearing) or whether it merely contemplates representation by an employee of the entity. We assume, given the use of "pro se" terminology, that the Task Force contemplates the latter. If that were not the case, however, then there would seem to be no reason not to permit representation of individuals in addition to the permitted representation of entities.

We also note that paragraph (e) of the definition requires any nonlawyer engaged in an activity permitted under paragraph (d) must disclose in writing that the person is not a lawyer. Paragraph (d) does not indicate to whom and when the written disclosure must be made. Presumably the task force contemplates that States will provide for additional exemptions in paragraph (d). More objectionable, therefore, is the concept that a person must disclose nonlawyer status when engaging in activities a state has expressly determined do not constitute the practice of law. Even in a case where a state determines that an activity constitutes the practice of law, but determines that certain non-lawyer service providers should be able to engage in that activity, we do not see the public interest, which is protected by such a disclosure. Just as state boards of accountancy do not require lawyers providing services which might also constitute the practice of accountancy (were it not for the lawyers' statutory exemption) to disclose that they are not

accountants, we see no reason why accountants should have to state publicly that they are not lawyers.

TAX PRACTICE

The proposed definition does not pay heed to the tax practice of CPAs. House Financial Services Committee Chairman Michael Oxley recently stated that, in passing the Sarbanes-Oxley Act of 2002, Congress determined that tax advice is "part and parcel" of the traditional package of services that auditors provide to clients.[15] Tax practice has historically been a significant part of the services CPAs provide their clients, whether they are audit clients or not. The Committee believes that any issues relating to the right of CPAs to engage in tax practice should not be resolved without a careful evaluation of the needs of the public and the competencies of CPAs. Certainly the tax Bar would be concerned if accountants defined the practice of accounting in a manner that could be viewed as monopolizing the provision of tax services for accountants.

What is law and what is accounting? Given the fact that the tax law incorporates accounting concepts, is an accountant's tax practice automatically converted to a law practice? Is there a provable or even an alleged harm to the public interest that would justify precluding CPAs from engaging in tax practice? In this regard, in order to become a CPA a person must pass an exam a significant portion of which specifically tests knowledge of federal tax law. In contrast, the Multistate Bar Examination does not test knowledge of federal tax law and the extent to which individual states test federal tax law knowledge varies considerably. It would do a disservice to the Bar, the accounting profession and the public to deem all tax practice to be the practice of law without very careful consideration.

We know that the Task Force is familiar with the concept of Federal preemption since the Washington State definition of the practice of law expressly provides an exception (which would be applicable as a matter of law in any event) with respect to matters preempted by Federal law. Federal law provides that an "individual who is duly qualified to practice as a certified public accountant in a State may represent a person before the Internal Revenue Service. . . ."[16] Regulations, embodied in what is commonly known as Treasury Circular 230, defines practice before the Internal Revenue Service to comprehend "all matters connected with the presentation to the Internal Revenue Service or any of its officers or employees relating to a client's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include the preparation and filing of necessary documents, correspondence with and communications to the Internal Revenue Service, and the representation of the client at conferences, hearings and meetings."[17] Additionally, Treasury

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[15] Jack Duffy, *Oxley Says Governance Law Does Not Seek to Ban Tax Service*, Bloomberg, Dec. 9, 2002.

[16] 5 U.S.C. 500.

[17] Treasury Circular 230, Section 10.2(d).

Circular 230 regulates tax shelter opinions, implying that such opinions may constitute practice before the Internal Revenue Service.[18]

PUBLIC'S INTEREST IN COMPETITION AND ABILITY TO CHOOSE

Adoption of a definition that would not permit CPAs to represent clients before state entities such as revenue boards, commissions and tribunals would have a disparate and inequitable effect on individual taxpayers and small businesses. If the professional service may only be provided by an attorney, individuals and small businesses might entirely forgo seeking assistance that is currently provided by a highly qualified CPA who might provide efficient, expert professional services at a lower cost than might be charged by an attorney. Denying consumers the opportunity to choose for themselves the individual from whom they might seek professional expertise is clearly not in the public interest. This is particularly true where, as under the proposed definition, a CPA, however qualified and experienced that individual might be, would be prohibited from providing the services while any attorney, regardless of that individual's experience or training, would be allowed to provide the service. Such a result would not meet the public's needs or expectations.

The U.S. Department of Justice itself has sought to protect those interests through judgments obtained against bar associations[19] and through Competition Advisory Letters sent to various state and local bar associations related to actions which would restrict competition in the service arena.[20] In general, the Department of Justice has expressed the following concerns regarding unauthorized practice of law rules: (1) the public interest should guide the adoption of such rules; (2) concerns are raised when such a rule hurts the public by causing the price of services to rise and the elimination of service competition; (3) there must be a showing of actual harm to consumers to justify the rule (4) often, where there is a public interest concern, there are less restrictive measures which can protect consumers.[21]

EXCEPTION FOR CERTIFIED PUBLIC ACCOUNTANTS

If, despite the foregoing, the Task Force determines to proceed with a broad definition of the practice of law, we would recommend that the Task Force provide an exclusion for CPAs engaging in activities customarily undertaken by a CPA or firm of CPAs in connection with the CPA's professional services, echoing the similar exemption in the Uniform Accountancy Act for lawyers. We also believe this exception should not be placed in paragraph (d), because of the impact of the non-lawyer "notification" provision in paragraph (e) noted

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[18] Treasury Circular 230, Section 10.33.

[19] E.g., United States v. Allen County Indiana Bar Association, Civ. No. F-79-0042 (N.D. Ind. 1980); United States v. New York County Lawyers' Association, No. 80 Civ. 6129 (S.D.N.Y. 1981).

[20] See http://www.usdoj.gov/atr/public/comments/comments.htm.

[21] Id.

above. In this regard, we note that the UAA exemption for lawyers does not require that lawyers notify anyone that they are not CPAs.

CPAs are subject to stringent and exacting requirements, including examinations, continuing education, licensing procedures, and disciplinary mechanisms. Under the accounting profession's ethical requirements a CPA cannot undertake any effort as a CPA for which that person is not competent. Rule 201 of the Code of Conduct of the American Institute of Certified Public Accountants requires that a member "(u)ndertake only those professional services that the member or the member's firm can reasonably expect to be completed with professional competence" and that a member "(e)xercise due professional care in the performance of professional services." States have incorporated that Code into their rules and a violation of those rules constitutes grounds for revocation or suspension of a CPA's license.[22] In short, if a CPA engages in activity for which the CPA is not competent, the CPA is already subject to discipline under the accounting profession's disciplinary process, including regulation by the states. With respect to particular services, CPAs are also subject to discipline by the Internal Revenue Service, the Securities and Exchange Commission, and the new Public Company Accounting Oversight Board.

The South Carolina Supreme Court has recognized the foregoing as an appropriate basis to reject an unauthorized practice of law rule which could have affected CPAs engaging in conduct within their professional purview. That Court, in declining to adopt a broad unauthorized practice of law rule, stated, "(O)ur respect for the rigorous professional training, certification and licensing procedures, continuing education requirements, and ethical code required of Certified Public Accountants (CPAs) convinces us that they are entitled to recognition of their unique status. We hold that CPAs do not engage in the unauthorized practice of law when they render professional assistance, including compensated representation before agencies and the Probate Court, that is within their professional expertise. We are confident that allowing CPAs to practice in their areas of expertise, subject to their own professional regulation, will best serve to both protect and promote the public interest."[23]

As noted initially in this letter, there is an overlap between the practices of attorneys and CPAs. The National Conference of Lawyers and Certified Public Accountants has recognized this basic fact in written materials.[24] The accounting profession has provided an exception for attorneys from the prohibition of the Uniform Accountancy Act.[25] The Committee believes the relationship between the accountancy and legal professions demands an appropriate exception from the proposed definition–especially such a broad definition as that proposed by

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[22] E.g., Section 10 of the Uniform Accountancy Act (Third Edition, Revised November 1999).

[23] *In Re* Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 422 S.E. 2d 123 (S.C. 1992).

[24] See *supra* notes 1-2.

[25] See *supra* note 3.

the Task Force. As the Supreme Court of New Jersey recognized, "(I)n cases involving an overlap of professional disciplines we must try to avoid arbitrary classifications and focus instead on the public's realistic need for protection and regulation."[26]

The Committee hopes its comments have been helpful and would be happy to provide the Task Force any further assistance it might request.

Respectfully submitted,

Relations with the Bar Committee,
American Institute of Certified Public Accountants

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[26] Application of N.J. Soc'y of Certified Pub. Accountants, 102 N.J. 231, 237, 507 A.2d, 711, 714 (N.J. 1986).