December 17, 2002

Task Force on the Model Definition of the Practice of Law
c/o Arthur Garwin, Esq.
American Bar Association
Center for Professional Responsibility
541 North Fairbanks Court
Chicago, IL 60611

Dear Colleagues:

The Association of Professional Responsibility Lawyers (APRL) is an independent national organization of lawyers practicing (and often concentrating) in the fields of professional responsibility, legal ethics, and the law of lawyering generally. Our membership includes law professors, bar counsel, counsel for respondents in disciplinary cases, expert witnesses and consultants, litigators involved on both sides of cases raising legal ethics issues, including legal malpractice cases, in-house ethics counsel for law firms, and in-house counsel to corporations and other entities, including insurance companies.

Consistent with this diverse membership, APRL frequently speaks out on issues of vital importance to the legal profession, especially as they affect our areas of practice and concentration. With respect to the ABA Task Force on the Model Definition of the Practice of Law, APRL President Anthony E. Davis of New York and Denver appointed a committee to formulate a response. That committee was chaired by W. William Hodes of Indianapolis, and included Peter R. Jarvis of Portland, Oregon, Kurt W. Melchior of San Francisco, and Professor Thomas D. Morgan of the George Washington University Law School. The committee's recommended response, which is embodied in this letter, was approved by the APRL Board of Directors.

In our view, it is neither possible nor desirable to adopt a *single* definition of the practice of law that will work even reasonably well in the many and varied contexts in which some definition might be useful. Thus, despite our appreciation for the effort the Task Force has already invested in this project, and despite the natural desire to complete a mission assigned by the President of the American Bar Association, we respectfully suggest that the effort be abandoned as unneeded and unworkable.

In the charge to the Task Force, and in his comments for the December 2002 issue of the ABA Journal, President A. P. Carlton referred to "numerous" policies adopted by the ABA over the years that depend for their operation on a definition of the practice of law. That may be so—Model Rule 5.5 on unauthorized practice and Model Rule 5.7 on law-related services come immediately to mind—but the idea that in each case *the same* uniform definition must be applied simply does not follow. Indeed, the contrary is true, as may be seen through a few common examples.

For someone who *is* a licensed lawyer in a particular jurisdiction, a definition of the practice of law would determine when the person is subject to most of the rules of professional conduct, when the person might be subject to legal malpractice liability, and when he or she might be well advised to purchase malpractice insurance coverage. In this context, there are many "easy" cases. According to virtually any definition (including the Task Force's draft), a lawyer trying a case to a jury, drafting trust and estate documents for a client, or advising a business on compliance with environmental regulations or workplace civil rights laws *would* be engaged in the practice of law. Just as clearly, even a licensed lawyer would *not* be practicing law if operating a scuba diving school or a florist shop, or coaching a child's softball team.

Few additional difficulties would be present if the same licensed lawyer "practiced law" as a solo or in a law firm, worked as in-house counsel in the law department of a corporation or other entity, or served as a full-time government lawyer—in each case still within the single jurisdiction of licensure. Most of the lawyer's "on duty" activities would still constitute the practice of law under most definitions.

Difficulties would begin to appear, however, if the lawyer maintained his or her license, continued to accrue continuing legal education credits, but left the above practice settings in order to pursue other professional activities. Now it would more difficult to craft a single definition that would reliably determine whether this kind of "non-practicing" lawyer who was selling life insurance full-time, serving as a claims adjuster for a liability insurance carrier, negotiating service contracts for sports and entertainment figures, giving tax or financial advice, working as a trust officer in a bank, or lobbying in the state legislature, was nonetheless "practicing law" while engaged in those endeavors.

But these difficulties pale when compared to the difficulty of applying the same definition to the situation of a person who is not licensed as a lawyer in *any* jurisdiction, but performs some of the same activities. To be sure, such a layperson could not try a jury case without "practicing law" under any conceivable definition, but what would be the status of a trust officer in a bank, a financial adviser, a lobbyist, a consultant on compliance with environmental regulations, or a human resources director advising his or her company about civil rights laws compliance, as in the earlier lawyer examples?

If a *lawyer* giving financial advice or negotiating a contract or lobbying for a bill *was* determined to be practicing law under a particular definition that the Task Force might develop, and that a large number of states adopted, how could the same activity *not* be the practice of law in those states if engaged in by a layperson? Yet, if the Task Force's mission is to create a definition *that can be held constant*, the result would be to condemn thousands of bank officers, insurance claims adjusters, and even automobile dealership salesmen and loan officers, to violation of rules against the unauthorized practice of law.

Still other difficulties would arise if an attempt was made to apply the same unvarying definition to the situation of a lawyer licensed in one state who has moved permanently to a new state, but not yet taken steps to apply for admission in the new location. Good answers to all such questions are unlikely to be given by a single definition applicable at all times and places.

Although our main quarrel is with the very assignment that has been put before the Task Force, we would be remiss in failing to point out two major flaws in the draft definition already proposed. Both are emblematic, we believe, of the impossibility of the task that has been assigned.

First, although the assignment was to craft a "definition" that would work across a broad array of contexts, the draft includes *both* a definition *and* a statement of substantive policy. Moreover, the latter—which is set forth in paragraph (a) of the draft—focuses exclusively on enforcement of prohibitions against the unauthorized practice of law, and provides no guidance concerning how the definition, once established, would apply in the numerous other substantive areas in which a definition might be useful. The problem can be cured by simply eliminating paragraph (a) altogether, which would be particularly appropriate, because that paragraph does not contribute to a definition in any event, as just noted.

Second, the definition that is provided in paragraph (b) is both circular and vague. In particular, paragraph (b)(1) ties the definition of "the practice of law" to situations that "require" the knowledge and skill of a person "trained in the law." But one of the very points of proposing a model definition of the practice of law is to clarify when having a lawyer rather than a nonlawyer involved *is* "required" in some sense, whether as a matter of good judgment or as a matter of legal constraint, or something in between.

And with respect to the phrase "trained in the law," it is hard to imagine a definition doing less to inform or warn a person considering what activities would and would not constitute the practice of law. A second year law student has considerable training in the law, but not as much as a law school graduate (whether or not the latter later becomes a licensed lawyer). Police officers, real estate agents, accountants, tax preparers, and human resource directors all receive more than a little training in certain areas of the law, but there is no way of telling whether that training would be sufficient to satisfy the Task Force's draft definition of what is "required."

In conclusion, it is our considered view that no single definition of the practice of law should be prepared or published by the ABA. The state courts and the state legislatures have developed a variety of definitions over a long period of time, tailored in many instances to meet specific situations. Although the problems of definition discussed in this letter have always been present in those efforts to one degree or another, the problems only get worse—not better—when an attempt is made to force all of the variations into a single nationalized mold.

Respectfully yours,

Anthony E. Davis, Esq.
President, APRL

W. William Hodes, Esq.
Chair, APRL Committee on Defining the Practice of Law

By: _____
W. William Hodes