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Lawyer vs. Nonlawyer

ABA Chose Wrong Side in Drafting 'Unauthorized Practice' Rule

What exactly are the "practice of law" and its corollary, the "unauthorized practice"? The American Bar Association is in the process of coming to the wrong answer to that key question.

BY JAMES C. TURNER

The ABA has drafted its first-ever model rule defining these terms (and scheduled hearings on the rule for Feb. 7 at its midyear meeting in Seattle). Unfortunately, the significance of the rule is not what it tells lawyers they're allowed to do, but what it tells nonlawyers they're forbidden to do.

The sweeping definition of the practice of law now being proposed—"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"—arguably covers every legal service imaginable. Giving advice, drafting documents, negotiating, and representing clients are all deemed the exclusive domain of lawyers.

The model rule thus poses a major threat to the rights of millions of American consumers who choose to handle their routine legal tasks with the help of nonlawyer resources, such as document preparers, independent paralegals, title agents, independent insurance adjusters, even self-help books and software. If eventually adopted by the states, the ABA proposal would largely stymie much-needed efforts to increase accessibility to our civil justice system through the expansion of such nonlawyer services.

NO MORE TURBO TAX?

There's no other way to put it: The fallout from the ABA's model rule would border on the ludicrous.

Providers of services with any legal aspects would be in trouble. The First Amendment notwithstanding, "Dear Abby" would be subject to prosecution whenever she answered a reader's letter that raised a legal issue. Typing services could not be hired to fill in the blanks on preprinted legal forms. Procurement specialists in government and private industry would have to pass the bar to continue negotiating contracts of any kind. And not only court proceedings, but also arbitrations, mediations, and other alternative dispute resolution mechanisms would require lawyer representation or no representation at all.

The implications for consumers are equally frightening. Does the ABA really want a definition of the practice of law that would make Turbo Tax software unavailable? Does the organized bar really want to foreclose the development of new means of making legal information available over the Internet? Are we going to ignore the warnings of the Justice Department and the Federal Trade Commission that the proposed definition is "overbroad and could restrain competition between lawyers and nonlawyers to

provide similar services to American consumers"?

Despite ABA President Alfred Carlton Jr.'s disingenuous claim to *Legal Times* last week that the bar is acting to correct "a chilling effect for nonlawyers to provide allied legal services because they are afraid they'll be called in for unauthorized practice of law," the proposal does exactly the opposite. In fact, the model rule is so broadly framed that it represents little more than a naked attempt on the part of the organized bar to stifle competition from nonlawyer legal service providers. Responsible lawyers should reject such sophistry out of hand.

REMOVING THE COMPETITION

The ABA proposal does not come in a vacuum. There is a long history of state bar associations misusing unauthorized-practice restrictions to attack perceived economic threats to lawyer dominance over the delivery of legal services.

Oregon independent paralegal Robin Smith provided affordable document preparation services for more than 10,000 uncontested divorces without a single consumer complaint, yet was successfully targeted by the state unauthorized-practice committee and driven out of business.

In Delaware, disability advocate Marilyn Arons provided expert services for families who could not afford lawyers to represent their children in educational placement proceedings for more than a decade. But she was so successful that lawyers for the school districts that lost used an unauthorized-practice injunction to silence her.

In Florida, legal secretary Rosemary Furman even faced incarceration for unauthorized practice, when her typing and document preparation service raised the hackles of local attorneys who did similar routine work at much higher prices.

In Virginia, despite antitrust objections registered by the FTC and the Justice Department, real estate lawyers continue their efforts to require attorney representation at every real estate closing.

And in Texas, the state legislature had to intervene after unauthorized-practice vigilantes convinced a U.S. district judge that the nation's most popular do-it-yourself legal software, Quicken Family Lawyer, should be banned.

A LOT OF ROUTINE TASKS

As disastrous as these state practices are for the nonlawyers who have the temerity to provide legal services, consumers are the big losers. Rather than protecting the public, unauthorized-practice rules have been systematically abused to curtail consumers' options to choose legal services that meet their needs and budgets. As a result, according to a 1996 ABA study, some 38 million low- and moderate-income Americans are closed out of our civil justice system because they simply cannot afford to hire a lawyer to help them.

The legal needs that go unmet fall on a wide continuum, ranging from routine, cookie-cutter jobs—preparing a simple will, writing a sales contract, resolving a consumer complaint—to complex transactions and adversary proceedings where representation by counsel is indispensable. The needs are felt by the full range of our society, from the profoundly disadvantaged to the highly educated and sophisticated.

Ada Shen-Jaffe, the director of Columbia Legal Services in Washington state, has described a typical client population as presenting a pyramid of legal wants that can be met by a variety of providers. Fifty percent can be served through very low-cost interventions such as self-help publications, software, videos, and cable access television. Thirty-five percent need low-cost intervention involving a trained nonlawyer (for example, a domestic violence shelter worker or a legal forms preparer). Ten percent require some help from an attorney, but the legal representation involved is low-cost and may be supplemented with paralegal or nonlawyer support. Only 5 percent require full-range, high-cost lawyer representation to address their more complex needs.

This is not a new insight, and reforms have been proposed across the country to ensure the availability of nonlawyer legal services. The state of California has gone so far as to enact legislation that authorizes legal document preparers to help fulfill these needs. But other states have been less forward-looking.

And now the national leadership of the organized bar is advancing a proposal that can only strengthen the stranglehold of lawyers on the delivery of legal services, and discourage the development of innovative and affordable alternatives to full-blown legal representation.

IN THE PUBLIC INTEREST

Perhaps the ABA has forgotten that on six occasions in the 1960s and 1970s, the Supreme Court ordered bar associations to cease anti-competitive practices that violated the Constitution or the Sherman Antitrust Act. Do we really want to repeat the errors of the past?

We face a growing accessibility crisis. As reported by *The New York Times* (in a Feb. 9, 2002, article), up to 90 percent of divorce cases in some jurisdictions involve at least one party who lacks lawyer representation. Under the ABA's approach, these individuals would be forced to proceed *pro se* with no outside help at all. Such irrational protectionism flies in the face of our shared responsibility to practice law in a manner consistent with the public interest.

There is a better approach. We should limit the concept of unauthorized practice by establishing a common-sense, bright-line test that equates it to fraudulent practice—that is, saying you're a lawyer when you're not. At the core of the practice of law is a special fiduciary concept, the attorney-client relationship. Unless an individual is falsely claiming to offer this unique service, she is not practicing law. Consumers understand this, and so should the profession.

This simple definition would go far toward eliminating the abuses of unauthorized-practice rules and would allow desperately needed innovation. At the same time, it would not meaningfully reduce consumer protection. Unlike lawyers, who are generally exempt from coverage, nonlawyers are accountable under state consumer fraud laws—a far more potent remedy than lawyer-run unauthorized-practice proceedings. Finally, this definition would get the bar out of the business of trying to regulate the activities of nonlawyers—a sphere where it really doesn't belong.

Whether the ABA likes it or not, lawyers cannot fully serve the legal needs of the public, and nonlawyer legal providers are here to stay. It is time to come into the 21st century and repudiate protectionist practices that hurt consumers and justifiably engender disdain for the legal profession. Junking the proposed model rule on the practice of law would be a good first step.

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