The ABA's Attack on "Unauthorized" Practice of Law and Consumer Choice

*By George W. C. McCarter**

Judge Posner is not alone in observing that the legal profession is "a cartel of providers of services relating to society's laws" and that restricting entry is the focus of that cartel. Modern economists call it "rent seeking", but throughout recorded history, skilled crafts and professions have tried to raise their members' incomes by using the power of the state to limit entry. The organized bar's preferred method is Unauthorized Practice of Law (UPL) statutes, which generally criminalize the provision of legal services by non-lawyers. For example, in my state of New Jersey, it is a "disorderly persons offense" knowingly to engage in the unauthorized practice of law, and a "crime in the fourth degree" to commit UPL if one (a) creates a false impression that one is a lawyer; (b) derives a benefit from UPL, or (c) causes an injury by UPL. See N.J.S A. 2C:21-22. But state rules vary widely, and Arizona has no rule at all. With accountants at one end and paralegals at the other poaching on traditional legal ground, sentiment has grown within the bar to adopt a consistent and, implicitly, broad definition of the practice of law. Thus when the American Bar Association announced its intention to draft a model Unauthorized Practice of Law statute, few observers, inside or outside the profession, expected this project to open the practice of law to lay competition and wider consumer choice.

The model statute arrived at by the ABA's Task Force on the Model Definition of the Practice of Law provides as follows:

> (a) The practice of law shall be performed only by those authorized by the highest court of this jurisdiction.
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> (b) Definitions:
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> (1) 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.
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> (2) "Person" includes the plural as well as the singular and denotes an individual or any legal or commercial entity.
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> (3) "Adjudicative body" includes a court, a mediator, an arbitrator or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.
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> (c) A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another:
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> (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;
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> (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;
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> (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or
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> (4) Negotiating legal rights or responsibilities on behalf of a person.
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> (d) Exceptions and exclusions: Whether or not they constitute the practice of law, the following are permitted :
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> (1) Practicing law authorized by a limited license to practice;
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> (2) Pro se representation;
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> (3) Serving as a mediator, arbitrator, conciliator or facilitator; and
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> (4) Providing services under the supervision of a lawyer in compliance with the Rules of Professional Conduct.
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> (e) Any person engaged in the practice of law shall be held to the same standard of care and duty of loyalty to the client independent of whether the person is authorized to practice law in this jurisdiction. With regard to the exceptions and exclusions listed in paragraph (d), if the person providing the services is a nonlawyer, the person shall disclose that fact in writing. In the case of an entity engaged in the practice of law, the liability of the entity is unlimited and the liability of its constituent members is limited to those persons participating in such conduct and those persons who had knowledge of the conduct and failed to take remedial action immediately upon discovery of same.
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> (f) If a person who is not authorized to practice law is engaged in the practice of law, that person shall be subject to the civil and criminal penalties of this jurisdiction.

The troublesome section is "c", which sets forth a series of broad presumptions. The Task Force has not indicated whether these presumptions are rebuttable, and, if so, how. Logic suggests they may be rebutted by showing that the activity "presumed" to constitute UPL nonetheless does not meet the definition stated in paragraph "b", in particular that it does not require "the knowledge and skill of a person trained in the law". But what does "trained in the law" mean? Three years in law school, a constitutional law course at college, or business law at a vocational school? Use of the definite article "*the* law", rather than "law", implies that the definition includes only a Juris Doctor degree. Since every state but California requires a law degree for bar admission, the Task Force probably assumed that requirement into the definition without expressly stating it.

The model definition does not require that a person be compensated in order to commit UPL. In New Jersey, both lay and lawyer veterans of traffic court know you never plead guilty to a speeding charge, but always negotiate with the prosecutor to plead down to a lesser offense. If one lay person gives this advice to another, is that UPL? Surely not, because such street wisdom does not "require the knowledge and skill of a person trained in the law."

What about drafting an "I love you will" (entire estate to surviving spouse, or to descendants by stocks if none)? Explaining that concept to a lay person takes less than five minutes; training in the law is not required for comprehension. Anyone who sets up shop to draft simple wills without a law license may run afoul of the "presumption" in c(2), but can he point to the basic definition to rebut the presumption? To say that "legal training" may be required to know when a simple will is inappropriate is unpersuasive. Drafting QTIP and credit shelter trusts may require "training in the law", but knowing when they are called for does not. Accountants and financial planners spot this issue all the time.

If the definitional language in paragraph "b" is interpreted liberally as a way to rebut the presumptions in "c", the Model Definition may prove to be fairly harmless. But few commentators expect that result, and the Justice Department and Federal Trade Commission were sufficiently troubled by the Model Definition to submit written objections to the ABA in late December. "Those who would not pay for a lawyer would be forced to do so. And traditionally, lawyers charge more than lay providers for such services. Without competition from nonlawyers, lawyers' fees are likely to increase," said Hewitt Pate, acting assistant attorney general for antitrust, as reported by the A.P. on December 27, 2002.

It is not just the Bush Administration's DOJ that has taken this pro-consumer stance. Even the notoriously lawyer-friendly Clinton Administration objected to broad state definitions of UPL. In 1997, for example, Janet Reno's DOJ opposed an opinion by the Kentucky Bar Association that would have prohibited lay persons from closing real estate transactions. In a letter signed by Assistant Attorney General Joel Klein, the Department argued that "Ending competition from [lay] services is likely to hurt Kentuckians by raising their closing costs and has not been justified as necessary to protect consumers."

The lack of justification noted by AAG Klein has been a consistent hallmark of UPL rules, and the ABA's foray into this area is no different. Although the ABA launched its Task Force with the predictable claim that "[t]he primary consideration in defining the practice of law is the protection of the public," it made no effort to support that conclusion with facts. If protecting the public is the ABA's "primary consideration", the question arises: protection from what? From inept charlatans masquerading as experienced practitioners is what the ABA would have us assume. But what about protection from an exclusive trade guild licensed to charge monopoly prices for even routine clerical services? While both problems may exist in the real world, few readers will infer that the second category was high on the Task Force's agenda.

The ABA's "Challenge Statement" to the Task Force noted that "the ABA has adopted numerous policies over the years that have been fundamentally related to and dependent upon the definition of the practice of law without ever adopting such a definition." Apparently, then, until recently the public has not needed the "protection" of an ABA sanctioned model definition. But the "Challenge Statement" refers to "an increasing number of situations where nonlawyers are providing services that are difficult to categorize under current statutes and case law as being, or not being, the delivery of legal services." The sudden need for a uniform definition is not because the states have run amok with regulations restricting the powers of realtors, paralegals, and adjusters to complete simple transactions without the help of a three digit hourly rate. The only "problem" that the ABA cited in support of this project is "spotty enforcement of unauthorized practice of law statutes across the nation and arguably an increasing number of attendant problems related to the delivery of services by nonlawyers."

No state has ever enforced its UPL rule by forcing a client to hire a paralegal. If the states now tolerate "spotty enforcement", then the "un-spotty" enforcement the ABA has in mind must be intended to put many paralegals and others out of business. But the ABA has told us its primary concern is protecting the public. If so, the restriction on consumer choice it seeks must be necessary to protect a vital public interest. Let's look again at the ABA's explication of the alleged problem, as quoted in the previous paragraph: "*arguably* an increasing number of attendant problems related to the delivery of services by nonlawyers" (emphasis added).

When a lawyer describes a proposition as "arguable," he is either belittling it (that point is at best arguable), or he is contending desperately to keep it alive (my point is surely at least arguable, your Honor). A merely "arguable" point is probably not very persuasive, and it must have been an institutional Freudian slip that caused the ABA to use that word to describe the supposed problems arising from the delivery of quasi-legal services by nonlawyers. The ABA may have "argument" to support the need for a broad UPL statute to protect the public. It needs evidence and should present it.

Given that its primary constituency is lawyers, the ABA Task Force may have assumed it didn't really need to demonstrate a "problem", since the problem of concern to the profession (lay competition) was obvious. But scholars who have examined the data have consistently found no genuine threat to the public from lay provision of legal services. Professor Deborah Rhode of Stanford University, for example, did a study in 1981 entitled "Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions," 34 Stanford Law Review 1 (1981). She reported that "Although the organized bar has often suggested that the campaign against lay practice arose as a result of a public demand, the consensus among historians is to the contrary." Her analysis found that of all incidents of UPL in 1979, only two percent were consumer complaints that involved actual damage.

More recently, in 2002 the Arizona Chapter of the Institute for Justice submitted comments in opposition to a proposed rule in that state that would bar anyone but a lawyer from "[p]reparing any document in any medium intended to affect or secure legal rights for a specific person or entity." The Arizona Bar claimed it had "received four hundred com-

plaints alleging that 'non-lawyers' were practicing law in Arizona." IJ did its own research and found the following:

Out of the 378[1] complaints (not 400) filed with the State Bar we discovered that:

- 123 were nothing more than copies of advertisements, including 48 one-page flyers for estate seminars.
- 38 of the flyers were submitted by a single lawyer who practices estate law.
- Ten of the flyers were collected by the Bar's UPL lawyer and her husband.
- 80 complaints were made anonymously; 50 of the anonymous complaints were advertisements.
- 26 complaints were against licensed attorneys.
- 24 were complaints against 13 disbarred lawyers, the most troublesome complaints being against disbarred Arizona lawyers already under this Court's jurisdiction.
- 20 were complaints against out-of-state lawyers practicing without membership in the Arizona Bar.
- Seven complaints against independent paralegals/ document preparers were filed by third-parties who thought the work being performed sounded like the practice of law.
- 25 complaints were against eight individuals whose conduct clearly constituted criminal behavior under current law (in fact, the Bar's UPL lawyer informed us during our review that several of the respondents had already served time in jail for fraudulent behavior).
- 14 complaints of UPL were filed by State Bar personnel or their spouses.
- 74 of the complaints were filed by lawyers.
- At least 32 complaints were against public adjusters, who may fall under the jurisdiction of the Arizona Department of Insurance.
- *Only 11 complaints were filed by a consumer against independent paralegals/document preparers*.

Emphasis in original. Consumers generally have enough sense to figure out for themselves when they do and when they don't need a lawyer. If the ABA were truly interested in a pro-consumer definition of UPL, and one that has the great benefit of simplicity, it could adopt the definition proposed by HALT, an organization advocating legal reform: "The unauthorized practice of law means saying you are a lawyer when you are not." But the ABA, like so many lawyers, has little affinity for simplicity.

The "problem" that broad UPL rules are intended to address is reminiscent of the "problem" said to be solved by mandatory continuing legal education (CLE) rules. I have never heard of a study showing that lawyers in mandatory CLE jurisdictions are more competent, or serve the public better, than elsewhere, but that has not stopped numerous state bar associations from ramming mandatory CLE down their members' throats. Because "continuing education" sounds like such a good idea, making it mandatory must be better. Because "unauthorized practice" sounds like a bad thing, outlawing it broadly must be in the public interest. Thus, the ABA even concludes its "Challenge Statement" by predicting, without a hint of irony, that the model definition would "support the goal to provide the public with better access to legal services, be in concert with governmental concerns about anticompetitive restraints, and provide a basis for effective enforcement of unauthorized practice of law statutes." Now that the Task Force has produced its Model Definition, the kindest observation might be that a .333 average is not bad in baseball.

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Footnotes

[1] Because an individual complaint may fall into more than one category the total number of complaints discussed will not add up to 378.