

Comments of
HALT – *An Organization of Americans for Legal Reform*
Before the American Bar Association
Task Force on the Model Definition of the Practice of Law

Submitted by
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HALT – *An Organization of Americans for Legal Reform* thanks the Task Force for the opportunity to submit these comments. HALT is a national nonprofit organization representing the interests of consumers of legal services by working to make the civil justice system more accessible and accountable to those consumers. As part of this mission, HALT advocates that consumers have access to a continuum of legal services to meet a range of legal needs. HALT therefore urges the Task Force, on behalf of our 50,000 members nationwide, to reject its Draft Definition of the Practice of Law in favor of a definition which recognizes consumers' need for non-lawyer provision of legal services.

THE NEED FOR ACCESS TO LEGAL SERVICES

The ABA's Challenge Statement to the Task Force urges it "to create a model definition of the practice of law that would support the goal to provide [*sic*] the public with better access to legal services." Also, the Task Force's Draft Definition notes that "[t]he primary consideration in defining the practice of law is the protection of the public." These two goals coincide with HALT's two-pronged mission of increasing access to the legal system and protecting consumers of legal services. However, the ABA is currently proceeding in the exact opposite direction of what is necessary to help the public.

It is puzzling that a definition of the practice of law that is ostensibly meant to improve access to legal services prevents so many people from providing these services. In 1999, Ada Shen-Jaffe, the Director of Legal Services in Washington State, described a typical client population as presenting a pyramid of legal needs that can be served by a variety of providers:

- Fifty percent can be served through very low-cost interventions such as self-help legal publications and software, self-help legal videos, cable-access television, and multi-lingual brochures.
- Thirty-five percent need low-cost intervention involving a trained non-lawyer (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 non-lawyer support.
- Only five percent require full-range, high-cost lawyer representation to address their more complex legal needs.¹

Thus, 85 percent of all legal services could effectively be provided without any assistance from a lawyer, and 95 percent could be most effectively provided by using a non-lawyer for some portion of the work.

Such reasonably-priced legal assistance is all the more necessary because most Americans cannot afford to hire an attorney. While Ms. Shen-Jaffe's comments were made in the context of legal services to the indigent, they apply much more broadly. According to the ABA, each year, 38 million low- and moderate-income households need legal help, but are denied access to the American civil justice system.² In some jurisdictions, up to 90 percent of all divorce cases involve at least one party without representation.³ The vast majority of Americans who require legal assistance continue to have unmet needs because they simply cannot afford the \$100 or more per hour in fees it takes to hire a lawyer. Part of the solution to this crisis in access lies in expanding the availability of less expensive legal services provided by non-lawyers. By limiting all

¹ James C. Turner & Joyce A. McGee, *Freedom of Legal Information: Increasing Court Access for Americans of Limited Means*, 13 Management Information Exchange Journal 58-61 (1999).

consumers to options that only the richest can afford, the organized bar makes it impossible for most consumers to find any legal representation.

PROBLEMS WITH THE DRAFT DEFINITION

Due to the need for greater availability of reasonably-priced legal services, a definition of the practice of law should be as narrow as possible, allowing competent non-lawyers to provide necessary services at an affordable price. The Draft Model Definition, unfortunately, goes 180 degrees in the opposite direction, imposing greater restrictions than those imposed by nearly any individual jurisdiction.

The stated definition of “practice of law” in paragraph (b)(1) is both logically and practically flawed. The logical flaw in the definition is that *general* knowledge, skill, and training in the law is a requirement for practice in any *particular* area of the law. In reality, general training in the law is neither necessary nor sufficient to insure competence in the delivery of a particular legal service.

For example, an independent paralegal with extensive education in estate law and who has successfully drafted thousands of wills is clearly

² See Consortium on Legal Services and the Public, American Bar Association, *Agenda for Access: The American People and Civil Justice – Final Report on the Implications of Comprehensive Legal Needs Study* (1996).

³ Jodi Wilgoren, *Divorce Court is Now In Lawyer-Free Session*, N.Y. Times, Feb. 9, 2002, at A12.

competent to provide this specific service. However, under the Draft Definition, she would not be authorized to prepare a simple will, due to her lack of knowledge, skill, and training in “the law” in general. Conversely, no smart consumer would trust the drafting of her will to a recent law school graduate who just passed the bar last week and has no training in estate law. Yet, this recently-minted lawyer would be authorized to prepare a will on the basis of his general training in the law.

The practical flaw with the definition in paragraph (b)(1) is that it does not explain what circumstances or objectives “require” knowledge, skill, and training in the law. Perhaps those tasks in the upper five or fifteen percent of the pyramid of legal needs above require such skill. However, the remaining tasks have been performed competently by non-lawyers for decades. In fact, until the 1930’s, there were virtually no prohibitions of the unauthorized practice of law in this country, and non-lawyers performed legal services up to and including litigation without prosecution.⁴ It would be presumptuous of the bar to claim that tasks which non-lawyers have performed competently for two-thirds of this nation’s history now require the skills of lawyers.

⁴ Deborah Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *Stanford Law Review* 1, 6-7 (1981); J.W. Hurst, *The Growth of American Law* 323 (1950); Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors – or Even Good Sense?* 1980 *Am. B. Found. Research J.* 159, 179-181.

Unfortunately, section (c) of the Draft Definition makes just such a presumption through its enumeration of activities which are *prima facie* considered the practice of law. Paragraph (1) of this section declares that giving advice to people about their legal rights or responsibilities is the practice of law. Giving advice is protected by the First Amendment and should not require a license. Under this section, however, Dear Abby would be subject to prosecution every time she answered a reader's letter that dealt with a legal issue. Paragraph (2) defines the practice of law to include selecting, drafting, or completing documents affecting legal rights. This provision would prevent typing services from filling in the blanks on pre-printed forms. Paragraph (4), which declares negotiating on behalf of another to be the practice of law, would prevent agents in fields from real estate to sports to business from providing their services unless they were members of the bar.

Section (c) is also flawed for including elements that are not included in most state definitions. Among the states with statutory definitions of the practice of law, most do not include negotiating on behalf of another as part of that definition. In addition, states such as California allow independent paralegals and legal document assistants to prepare documents directly for consumers, who have been quite satisfied with the service provided by these

businesses. If these states have allowed such services to exist without significant complaint from consumers, then why should the ABA forbid them under its definition of the practice of law?

The likely response from the bar is the mantra that it always repeats in defending the promulgation of unauthorized practice laws: “We’re just trying to protect consumers from unethical paralegals.” One wonders, though, how these restrictions benefit consumers. To be sure, any service industry will have some number of practitioners who are acting unethically toward their clients. However, such misconduct is already actionable under consumer fraud laws in every state. It is hypocritical for the bar to claim that paralegals and others must be banned from practice because of a few bad actors, when lawyers (who in most jurisdictions are not even subject to consumer fraud laws) face over 100,000 complaints to state disciplinary agencies in a typical year.⁵

HALT’S RECOMMENDATION

The organized bar needs to acknowledge that lawyers are not the only people who can provide legal services. In fact, for the large majority of consumers with legal issues, hiring a lawyer would be like hiring a surgeon

⁵ Center for Professional Responsibility, American Bar Association, *Survey on Lawyer Disciplinary Systems* 4 (2000).

to treat a headache or a hangnail. It is simply too expensive for the average consumer to hire an attorney for many simple legal problems when there are equally competent alternatives available for a fraction of the cost.

The bar also needs to recognize that the purpose of unauthorized practice laws should be to protect consumers, not to protect the lawyer monopoly on the provision of legal services. According to a national study, only two percent of complaints against non-lawyer practice involved an allegation of injury by a consumer; the rest are brought by competing lawyers, unauthorized practice committees, state bar associations, and others.⁶ Any definition of the practice of law promulgated by the Task Force that fails to acknowledge that unauthorized practice laws should not be used by lawyers to protect their business interests will surely run afoul of its challenge to “be in concert with governmental concerns about anticompetitive restraints.”

Therefore, HALT proposes a simple, two-sentence definition of the practice of law:

- (1) The unauthorized practice of law is the act of falsely claiming to be a lawyer.
- (2) No civil or criminal action shall be taken against a person for unauthorized practice of law without a client complaint against that person.

⁶ Rhode, *supra*, at 33.

As noted above, bar membership is neither necessary nor sufficient for competent performance of any legal service. The defining characteristic of the practice of law is the establishment of an attorney-client relationship. The definition of practice of law should reflect this core value. When a person hires a lawyer, he expects to receive this kind of relationship. Therefore, the first provision protects the public against the only thing that a non-lawyer could not possibly do – hold the title of “lawyer” and thus hold oneself out as offering an attorney-client relationship. The second provision insures that unauthorized practice laws will be used only for actual consumer complaints and not as protection of the lawyer monopoly against other service providers.

CONCLUSION

The bar must drop the sword of unauthorized practice laws and make peace with other providers of legal services. If the bar wants to protect consumers from being harmed by legal service providers, it should clean its own house first – for instance, by advocating that lawyers be subject to consumer fraud laws and by improving client compensation funds – before concerning itself with the behavior of non-lawyers. Access to the law for all Americans will be achieved only when the bar recognizes the demand and need for non-lawyer legal service providers. Therefore, HALT urges the

Task Force to recommend the definition of the practice of law that is the least restrictive of consumer choice in this area.