

HALT *An Organization Of*
AMERICANS FOR LEGAL REFORM

**Comments to
the Wisconsin Supreme Court
Regarding
Proposed Supreme Court Rule Chapter 23,
Regulation of Unauthorized Practice of Law
Submitted by
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HALT ? *An Organization of Americans for Legal Reform* thanks the Court 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. As part of this mission, HALT believes that consumers should have access to a continuum of legal services provided by both attorneys and qualified nonlawyers that meet the full range of their legal needs.

On behalf of our 50,000 members nationwide and 1,200 members in Wisconsin, HALT urges the Court to reject the State Bar's Proposed Supreme Court Rule Chapter 23, Regulation of Unauthorized Practice of Law.

The Access Crisis

This Court should recognize that lawyers alone cannot provide all the legal services consumers need. Study after study has shown that lawyers have priced themselves beyond the reach of average Americans. According to a 1996 ABA study, for example, some 38 million low and moderate income American households simply cannot afford to hire a lawyer.¹ Lawyers' fees of \$100 per hour or more mean that the traditional source of legal services is out of the reach for many Americans.

¹ See *Agenda for Access: The American People and Civil Justice ? Final Report on the Implications of Comprehensive Legal Needs Study*, Consortium on Legal Services and the Public, American Bar Association (1996).

Wisconsin's own Access to Justice Study Committee stresses in *Bridging the Justice Gap: Wisconsin's Unmet Legal Needs* that more than "half a million Wisconsinites ? people with families, many of whom have jobs, own homes and pay taxes ? must contend with significant legal troubles without any legal help... because they cannot afford the professional legal help they need."

Access to Justice Commissions around the country are also expressing great concern about this growing accessibility crisis.²

The Protectionist Bar Proposal

Instead of responding to the access crisis, Wisconsin's organized Bar asks this Court to adopt a new draconian rule that will make it all but impossible for consumers to get help when they can't afford to hire a lawyer. The Bar's sweeping new definition of the practice of law ? "the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s)" ? covers every legal service imaginable. "Giving advice or counsel, ...selection, drafting or completion of legal documents, ...representation of another entity or person(s) in court, ...negotiation of

² California, for example, explains (*Action Plan for Justice*, The California Commission on Access to Justice, April 2007):

"The majority of Californians do not have the resources to obtain legal representation for the myriad legal problems affecting them every year, such as divorce, child support, child custody, domestic violence, loss of housing and employment, and discrimination."

Maine similarly reports (*Justice for All*, Justice Action Group Statewide Access to Justice Planning Initiative, October 2007):

"The principle of equal access to justice is a central tenet of our democracy, and yet access to justice is far from a reality for Maine's neediest and most vulnerable citizens. Despite the valiant efforts of Maine's legal aid providers and the private bar, access to justice remains an inspiring, but decidedly elusive goal. Today, as in 1990, more than 80% of those who need legal representation ? to meet basic human needs for food, clothing, shelter and health care, to maintain custody of their children, to gain protection from abuse ? are unable to obtain it."

Additional information about other Access to Justice Commissions is posted on the ABA Web site, www.abanet.org/legalservices/sclaid/atjresourcecenter.

legal rights or responsibilities on behalf of another, ...or any other activity determined to be the practice of law by the Wisconsin Supreme Court” would all become the exclusive domain of licensed Wisconsin attorneys.

Four years ago, the American Bar Association’s Task Force on the Model Definition of the Practice of Law proposed a similarly overbroad definition of the practice of law. After HALT and other consumer groups objected, these protectionist efforts were abandoned. It is surprising and disappointing to see the Wisconsin Bar attempt to resurrect this anti-consumer approach.

Nationwide there is a long history of bar associations acting as trade guilds and attempting to protect the perceived economic interests of their members by abusing unauthorized practice prohibitions to suppress competition by nonlawyers.³ In fact, on no fewer than six occasions, the United States Supreme Court has ordered state or local bar associations to cease protectionist practices which violate the Constitution or the Sherman Antitrust Act.⁴

Reforms that Improve Access

³ See Rhode, Deborah L., *Access to Justice* (New York: Oxford University Press, 2004), pp. 87-88, “Giving qualified nonlawyers a greater role in providing routine legal assistance is likely to have a positive effect, but the organized bar is pushing hard in the opposite direction State bar leaders repeatedly sound alarms along the lines issued by one Arizona committee that nonlawyer services are causing a ‘crisis in faith’ in the legal system.”

⁴ *NAACP v. Button*, 371 U.S. 415 (1963)(Virginia court injunction enforcing state anti-solicitation rules against NAACP lawyers violates the First and Fourteenth Amendments); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964) (injunction against union-sponsored lawyer referral service relying on state bar regulations violates the First and Fourteenth Amendments); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967)(state bar use of unauthorized practice of law regulations to prevent union from hiring attorneys on salary basis violates the First and Fourteenth Amendments); *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971)(injunction secured by state bar against union-sponsored legal services and lawyer referral program violates the First and Fourteenth Amendments); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975)(minimum legal fee schedules violate the Sherman Antitrust Act); *Bates v. Arizona State Bar*, 433 U.S. 350, 383 (1977)(blanket prohibition on attorney advertising violates the First Amendment).

There is a better approach. Across the country, courts and state legislatures are addressing the access crisis by adopting reforms that ensure the availability of nonlawyer legal services. California and Arizona have recognized the real crisis in access that exists and have rejected protectionist arguments by enacting legislation and adopting rules that authorize legal document preparers to help fulfill consumers legal needs.⁵ These legal document preparers serve tens of thousands of consumers each year by completing routine documents in proceedings such as uncontested divorces and bankruptcies, wills and articles of incorporation.

In addition, the Utah Supreme Court recently adopted practice rules that protect legal consumers' access to a range of legal service providers, including less expensive nonlawyers. Utah allows nonlawyers to provide general legal information and advice, distribute legal forms to the public and provide clerical assistance to another "to complete a form provided by a municipal, state or federal court located in the State of Utah" providing no fee is charged. Nonlawyers are also allowed to represent legal consumers in mediation sessions, arbitration proceedings and labor negotiations and with court approval, represent a person in small claims court providing no fee is charged.⁶

Given the large number of people who cannot afford a lawyer, improving services for *pro se* litigants and other self-represented individuals is also an important component of improving access to the legal system. Many consumers are forced to represent themselves in court, often times without adequate support or access to appropriate resources. In some jurisdictions, up to 90 percent of all divorce cases involve at least one party without representation.⁷ In Wisconsin, more than half of the litigants in family court represent themselves.⁸ Across the nation, *pro se* litigants are also flooding into bankruptcy, traffic, landlord-tenant and small claims court. In fact, Wisconsin judges and court personnel recently ranked "self-represented litigants the number one concern facing the court system."⁹

⁵ See Cal. Bus. & Prof. Code § 6400 et al. (2007); Arizona Supreme Court Rules, Rule 31 (d) (23) (2007).

⁶ See Utah R. Judicial Admin. Rule 14-802 (2007).

⁷ Wilgoren, Jodi, "Divorce Court is Now In Lawyer-Free Session," *New York Times*, Feb. 9, 2002.

⁸ Pinkowski, Jennifer, "WI Librarians Trained To Help Lawyerless Litigants Find Legal Resources," *Library Journal*, Oct. 9, 2007.

⁹ *Critical Issues: Planning Priorities for the Wisconsin Court System Fiscal Years 2006-2007 and 2007-2008*, Wisconsin Supreme Court Planning and Policy Advisory Committee, May 2006.

To address the challenge of burgeoning caseloads and *pro se* litigants who aren't always well prepared, Wisconsin and other states are instituting a variety of *pro se* assistance programs.¹⁰ Librarians, nonlawyer advocates, *pro bono* attorneys and nonlawyer document preparers are helping to meet the needs of this growing but vulnerable population.

Rejecting a Lawyers Monopoly

Forty-six years ago, this Court recognized the legitimate role played by nonlawyers in Wisconsin real estate closings and acted to protect consumers from efforts to establish a lawyers monopoly in this area. In *State ex rel. Reynolds v. Dinger*, 14 Wis. 2d 193, 205 (1961), this Court held:

“[W]e do not think it would be in the interest of the public welfare to restrain brokers from drafting the ordinary instruments necessary to effectuate the closing of the ordinary real-estate transaction in which they are acting. We do not think the possible harm which might come to the public from the rare instances of defective conveyances in such transactions is sufficient to outweigh the great public inconvenience which would follow if it were necessary to call in a lawyer to draft these simple instruments.”

Adopting the Wisconsin Bar's unauthorized practice definition would effectively reverse this long established precedent.

New Jersey, Kentucky and Virginia have all rejected more recent efforts to require lawyers to administer real estate closings.¹¹ In adopting the Consumer Real Estate

¹⁰ Many states are implementing some form of assistance for *pro se* litigants in response to consumer demand. “Citizens now demand much greater accountability from publicly supported institutions, and they are much less tolerant of government agencies that cannot deliver services or explain their institutional functions in ways that are comprehensible to people of average intelligence and education. These new demands for public accountability have forced courts to become more responsive to non-lawyer users of the court system by developing court-based programs to assist self-represented litigants.” See *Final Report of the Joint Task Force on Pro Se Litigation*, Conference of Chief Justices and Conference of State Court Administrators (July 29, 2002).

¹¹ Finding that there was no more risk from lay closings than attorney closings, the New Jersey Supreme Court held that there was no reason to prohibit laypersons from

Settlement Act, the Virginia legislature agreed with HALT, the US Department of Justice and the Federal Trade Commission that prohibiting nonlawyers from performing closings would not be in the public interest and would violate antitrust protections. As the Justice Department and FTC explained in their letter to the Virginia State Bar:

“Consumers who hire attorneys may get better service and representation at the closing than those who do not. But, as the New Jersey Supreme Court has concluded, this is not a reason to eliminate lay closing services as an alternative for consumers who wish to utilize them.”¹²

In 1999, protectionist elements in the Texas Bar also failed in their attempt to ban the sale and distribution of the popular do-it-yourself legal software program, *Quicken Family Lawyer*. The state legislature intervened with emergency legislation (House Bill 1507) after unauthorized practice vigilantes convinced a U.S. district judge that the software should be banned. Shortly after, the Fifth Circuit Court of Appeals vacated the district judge’s order banning *Quicken Family Lawyer*.¹³

The Unsupported Bar Proposal

The Wisconsin Bar’s unauthorized practice proposal ignores the reality that consumers need inexpensive legal assistance and that nonlawyer service providers can help meet that need. If adopted, this radical proposal would seriously undermine the availability of innovative approaches that have proved their value in Utah, California, Arizona and other states.

conducting real estate closing services, *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, 139 N.J. 323, 353(1995). In its decision permitting nonlawyer real estate providers, the Kentucky Supreme Court noted that consumers are adequately protected from fraudulent or incompetent laypersons in *Countrywide Home Loans, Inc. v. Kentucky Bar Association, et al.*, 113 S.W. 3d 105, 121 (Ky. 2003). In 1996, Virginia lawmakers decided that the public interest would be better served by continuing to allow nonlawyers to provide real estate closing services, Va. Code Ann. §§6.1-2.19 to 6.1-2.29.

¹² Letter from Federal Trade Commission and Department of Justice to Thomas A. Edmonds, Executive Director of the Virginia State Bar, September 20, 1996, page 5.

¹³ See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. 3:97-CV-2859-H, 1999 U.S. Dist. LEXIS 813, at *2 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999).

Previous attempts by the Wisconsin Bar to impose a sweeping definition of unauthorized practice have been wisely denied by this Court because there is no evidence that consumers are being harmed by nonlawyer legal service providers. There still is no evidence.

At the Court's suggestion, in 2005 the Bar began collecting examples of unauthorized practice that have harmed consumers. Almost 90 percent of the examples collected were from people who are not consumers (54 complaints were submitted by 25 attorneys, one judge and one court clerk). A mere six examples were based on information provided by consumers about nonlawyer legal service providers.¹⁴ During this same time frame, consumers filed 2,061 complaints against Wisconsin attorneys.¹⁵ Rather than substantiating their calls for a new overly broad definition of unauthorized practice, the Bar has failed to produce any evidence that demonstrates that such a change is needed or wise.¹⁶

Protecting Consumers

HALT believes that consumers should be protected from incompetent legal service providers and fraudulent businesses that deceive individual consumers or target vulnerable populations, such as the elderly and the immigrant community. We disagree,

¹⁴ *Exhibit D: Representative Complaints Filed with the State Bar of Wisconsin Regarding the Unauthorized Practice of Law*. Petition for Supreme Court Rule In the Matter of the Definition of the Practice of Law and the Administration of a Rule Defining the Practice of Law, Board of Governors of the State Bar of Wisconsin. The Wisconsin Bar merely cites advertisements for document preparation services; information about professionals who are a perceived economic threat to attorneys (financial advisors, real estate agents, title companies, divorce mediators and estate planners); and information about notarios and individuals who conduct living trust seminars. The handful of cases that were actually based on consumer information are ones that can be handled by state protective services already in place.

¹⁵ *Wisconsin Supreme Court's Report of the Lawyer Regulation System (2005-2006 Fiscal Year Report)*.

¹⁶ The small number of consumer complaints in Wisconsin is typical. According to a national study of unauthorized practice prohibitions published in the *Stanford Law Review*, only 2 percent of complaints are filed by consumers. The lion's share of the claims are made by lawyers themselves and state bar associations – those with the most to lose in the face of low-cost competition. See Rhode, Deborah L., *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 *Stan. L. Rev.* 1 (1981).

however, that the best way to protect consumers is by allowing only lawyers to provide legal services. Nor do we believe it is in the public's interest to put lawyers in charge of policing their own competition.

While there may be some instances where consumers are not well served by nonlawyer legal service providers, there is no evidence that this is a common or significant occurrence in Wisconsin or across the nation. Under any circumstances, such misconduct is already punishable as a misdemeanor,¹⁷ and actionable under consumer fraud statutes or as common law fraud in Wisconsin.

An individual who suffers harm has the right to sue a service provider alleging common law fraud. In *Ollerman v. O'Rourke Co.*, this Court recognized three categories of misrepresentation: intentional, negligent and strict liability misrepresentation.¹⁸ All misrepresentation claims share three elements: 1) the defendant must have made a representation of a fact to the plaintiff; 2) the representation of fact must be false; and 3) the plaintiff must have believed and relied on the misrepresentation to his detriment or damage. In addition to recovering compensatory damages, a plaintiff may receive punitive damages if a fraudulent representation is made and relied on to induce a contract in willful, wanton or reckless disregard to the plaintiff's rights.¹⁹

In addition, a nonlawyer service provider may be sued under Wisconsin's Deceptive Trade Practices Act, which prohibits false, deceptive, or misleading representations or statements of fact in public advertisements or sales announcements.²⁰

¹⁷ Chapter 757 of the Wisconsin Code prohibits nonlawyers from holding themselves out as attorneys, from representing another party in court, and from giving legal advice or providing other legal services for compensation. The law provides for fines of up to \$500, imprisonment of up to one year, and a holding of contempt of court for violators. Wis. Stat § 757.30 (2006).

¹⁸ *Ollerman v. O'Rourke Co.*, 94 Wis. 2d 17, 24 (1980).

¹⁹ *Lundin v. Shimanski*, 124 Wis. 2d. 175, 176 (1985).

²⁰ The Wisconsin Deceptive Trade Practices Act, Wis. Stat. § 100.18 (2006), provides: "No person, firm, corporation or association, or agent or employee thereof . . . with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any . . . merchandise . . . shall make . . . an advertisement, announcement, statement or representation of any kind to the public . . . which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading."

The statute establishes a cause of action against any “person, firm, corporation or association, or agent or employee thereof, with intent to sell . . . any service.” If successful, a plaintiff suing under the statute may recover her pecuniary loss, together with costs, including reasonable attorney fees.

Finally, consumers can file a complaint against a nonlawyer service provider with the Wisconsin Department of Agriculture, Trade and Consumer Protection. If misrepresentation or deceit occurred, the department can send the business a formal warning notice. If it is a serious violation, the department may recommend the case for prosecution to the Department of Justice or a district attorney.

With these protections in place, it is ludicrous for the Bar to ask the Court to create an entire new bureaucracy ? the “Legal Services Office of Consumer Protection” ? to handle what amounts to a handful of complaints.

Conclusion

The Wisconsin Bar’s petition ignores the reform trend to expand, rather than contract, access to nonlawyer legal service providers. In state after state that has considered the reality of the access crisis, courts and legislatures have acted to protect consumer choice.

We urge the Court to allow innovative alternatives to flourish. Many consumers are turning to alternatives to traditional legal representation, such as legal document preparers, title agents, independent insurance adjusters and self-help books and software. The Wisconsin Bar’s proposal would make almost every conceivable service that involves any legal question whatsoever the exclusive monopoly of lawyers.

If the Court believes that some clarification is needed, we suggest a simple definition ? the unauthorized practice of law is the act of falsely claiming to be a lawyer. The defining characteristic of the practice of law is the establishment of an attorney-client relationship. The definition of the practice of law should reflect this core value. When a person hires a lawyer, she expects to receive this kind of relationship.

HALT urges the Court to reject the Wisconsin Bar’s transparent attempt to stifle its competition in the guise of consumer protection. We also ask the Court to reassert its commitment to expanding access to the Wisconsin judicial system and encouraging innovations that provide consumers with affordable legal assistance.