



An Organization Of

AMERICANS FOR LEGAL REFORM

**Comments to
The Nebraska Supreme Court
Regarding
Proposed Rules Governing the Unauthorized Practice of Law**

**Submitted by
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December 17, 2004**

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 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 Court, on behalf of our 50,000 members nationwide, to reject its Proposed Rules Governing the Unauthorized Practice of Law in favor of a rule which recognizes consumers’ need for non-lawyer provision of legal services.

The Court acknowledges that the goal of regulation of providers of legal services “must be to maintain the integrity of the legal system and protect the

public, rather than to preserve the economic interests of lawyers.”¹ One wonders, then, why the Commission on Unauthorized Practice of Law created in Section 3.2.1 will be selected by the Nebraska State Bar Association and will consist of six lawyers and three non-lawyers, none of whom is required to be a consumer advocate. It is also puzzling that a set of rules ostensibly designed to protect consumers takes so little account of consumer needs. In reality, contrary to its asserted purpose of consumer protection, this set of rules could easily be re-titled the “Full Employment for Attorneys Act.”

The organized bar would have lawmakers believe that there is an epidemic of non-lawyers providing inadequate legal services to the public. In fact, non-lawyers can provide valuable services to the large number of people who are otherwise priced out of access to legal services. The greatest problem facing those who need legal help is that the bar does not provide average people the legal help they need. According to the American Bar Association, 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

¹ Proposed Rules Governing the Unauthorized Practice of Law, Article I, para. 4.

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.

lawyer. Part of the solution to this crisis in access lies in expanding the availability of less expensive legal services provided by non-lawyers. However, proposals such as the one before the Court limit all consumers to options that only the richest can afford, making it impossible for most consumers to find any legal assistance.

PROBLEMS WITH THE PROPOSED 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 Court's proposed definition, unfortunately, goes 180 degrees in the opposite direction, imposing burdensome restrictions on anyone wishing to provide consumers with law-related services.

The stated definition of "practice of law" in paragraph Section 2.1 is both logically and practically flawed. The logical flaw in the definition is that the *general* knowledge, judgment and skill of one trained as a lawyer is a requirement for practice in any *particular* area of the law. In reality, general training as a lawyer 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 who has successfully drafted thousands of wills is clearly competent to provide this specific service. States such as California and Arizona have acknowledged this competence by establishing a system of regulation under which

independent paralegals may provide these services. However, under the Court's proposed rules, such an independent paralegal would not be authorized to prepare a simple will, due to her lack of knowledge, skill, and training as a lawyer in general.

Conversely, no smart consumer would trust the drafting of her will to a recent law school graduate who has just been admitted to the bar and whose only training in estate law is as part of a bar review course quickly forgotten after finishing the Multistate Essay Exam. 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 Section 2.1 is that it does not explain what circumstances or objectives "require" knowledge, judgment and skill of one trained as a lawyer. Certainly the litigation of a complex antitrust case, for example, requires this knowledge, judgment, skill and training, just as the removal of a brain tumor requires the knowledge, judgment and skill of one trained as a surgeon. However, not all law-related tasks are brain surgery. Many simple legal 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 to claim that tasks

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.

which non-lawyers have performed competently for two-thirds of this nation's history now require the skills of lawyers.

Unfortunately, Sections 2.1.1 through 2.1.5 of the proposed rules make just such a presumption through the enumeration of activities which are *prima facie* considered the practice of law. Section 2.1.1 declares that giving advice to people about their legal rights or responsibilities for compensation, direct or indirect, 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 have to decline her syndication fees from Nebraska newspapers or be subject to prosecution every time she answered a reader's letter that dealt with a legal issue. Section 2.1.2 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. Section 2.1.4, which declares negotiating on behalf of another to be the practice of law, would prevent agents in fields from entertainment to sports to business from providing their services unless they were members of the bar. Furthermore, these latter two sections would prevent conduct as benign as a person helping his elderly neighbor negotiate a dispute with her landlord, or helping her fill out a complaint form in the case she wishes to bring when the landlord is unresponsive to her concerns.

The exceptions and exclusions enumerated in Section 2.4, while providing some additional measure of access to Nebraskans, serve mainly to underscore the lack of harm in allowing Nebraskans even greater access to legal service

providers. The fact that these excepted tasks are deemed not to cause consumer harm leads one to wonder what harm is likely from conduct that remains prohibited.

For example, under Section 2.4.8(a), non-lawyers may prepare tax returns. There is no license or educational requirement for the preparation of tax returns. Yet, despite this fact, the tax preparation industry has served consumers well. Tax preparers, like any other business, will only thrive if they serve their customers well, and thus have little reason to do their work poorly or to defraud their customers. And in the rare instance where a service provider does try to take advantage of a customer, that customer has access to consumer protection laws to remedy the situation. If consumer choice and consumer protection laws are sufficient protection for consumers using tax preparers, why should bar membership be required of those who would fill out far simpler forms?

Other exceptions in the rule provide additional illumination on this issue. For instance, Sections 2.4.3(b) and 2.4.3(c) allow non-lawyers to represent parties before tribunals under certain circumstances, most notably that the non-lawyers not be paid specifically for their representation. There is no plausible benefit to consumers derived from forcing them to use unpaid service providers. The only benefit from this regulation is that lawyers will not face competition for their services from non-lawyers.

Allowing only lawyers to provide the broad categories of services defined by the proposed rules as the practice of law would not be as egregious an offense

against consumers if lawyers were, as the Preamble to the proposed rules asserts, more accountable for their actions than other service providers.⁵ However, that is simply not the case. Nebraska lawyers are practically immune from legal malpractice liability.⁶ Nebraska lawyers are not required to carry malpractice insurance, or even to notify their clients if they are uninsured. Nebraska lawyers may even be exempt from the state’s consumer protection laws.⁷ Finally, Nebraska lawyers face a very lax, self-regulated disciplinary system, in which only four percent of investigations against lawyers result in formal punishment of any sort.⁸ This hardly appears indicative of lawyers being “held accountable for errors, misrepresentations, and unethical practices.”⁹

HALT’S RECOMMENDATION

The Court should 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 to treat a headache or a hangnail. It is simply too expensive for the average consumer to hire an attorney

⁵ Proposed Rules Governing the Unauthorized Practice of Law, Article I, para. 3.

⁶ In Nebraska, legal malpractice cases are decided under the “case within a case” doctrine, which requires the speculative re-litigation of the underlying case to prove damages. *Bowers v. Dougherty*, 615 N.W.2d 449, 457 (Neb. 2000).

⁷ The court has not ruled on this issue. However, other states’ supreme courts have held that since, under the separation of powers doctrine, the regulation of the practice of law is the purview of the judicial branch, the legislature may not assert authority over attorneys through consumer protection laws. *See Cripe v. Leiter*, 184 Ill.2d 185 (Ill. 1998).

⁸ Center for Professional Responsibility, American Bar Association, *Survey on Lawyer Disciplinary Systems* 20, 24 (2000).

⁹ Proposed Rules Governing the Unauthorized Practice of Law, Article I, para. 1.

for many simple legal problems, especially when there are equally competent alternatives available for a fraction of the cost.

The Court should also 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.¹⁰ Any definition of the practice of law promulgated by the Court that fails to acknowledge that unauthorized practice laws should not be used by lawyers to protect their business interests is not only contrary to the stated goal of these rules, but also contrary to the public interest.

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 consumer complaint against that person.

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

¹⁰ Rhode, *supra*, at 33.

lawyer, he expects to receive this kind of relationship. 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.

If the Court finds a need for some form of licensure for non-lawyers providing legal services, it would do well to follow the example of the Arizona Supreme Court, which has created by court rule a reasonable system of regulation of independent paralegals that acts to protect the interests of consumers, rather than those of lawyers. Arizona Supreme Court Rule 31(c)(21) provides an exception to the prohibition on unauthorized practice of law for certified legal document preparers. The regulatory structure for Arizona document preparers is delineated in Arizona Code of Judicial Administration, Section 7-208. It sets minimum requirements for education and experience for document preparers and establishes a Board of Legal Document Preparers composed of paralegals, lawyers, court officials and members of the public. Such a system of regulation is far preferable to the one-size-fits-all approach proposed by the Court.

CONCLUSION

Allowing consumer choice in selecting the most appropriate provider of legal services is the preference of consumer advocates nationwide. The Consumer

Federation of America (CFA), a national umbrella organization with over 300 member groups, representing over 50 million American consumers, recommends this approach. Its policy handbook states: “CFA opposes any attempt by a government body or bar association to define the ‘practice of law’ in such a way as to limit consumer access to qualified non-lawyer providers of legal services. The services of qualified independent paralegals and other financially responsible non-traditional legal service providers ... should also be encouraged and publicized.”¹¹

The alternative to allowing consumer choice is the proposed rule being considered by the Court, which attempts to impose regulation of the provision of legal services solely by lawyers under the guise of consumer protection. HALT urges the Court to reject this transparent attempt by the bar to stifle its competition and to instead listen to the voices of consumers nationwide by adopting rules that would give them a real say in their own legal affairs.

¹¹ Consumer Federation of America, *2004 Policy Resolutions*, 111.