

The Last Thing We Need

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The last thing in the world we lawyers need is a new definition of the term practice of law. Virtually every state has one. Some states avoid a precise definition but tell us instead what actions constitute the unlawful practice of law. By defining those things which nonlawyers may not do, these states effectively prevent incursions upon the lawful activities of lawyers.

New York is one of those states which have chosen to resolve the issue by defining those acts which constitute the unlawful practice of law. After setting forth a number of acts which are prohibited by provisions of the penal law, Judiciary Law § 476-a (1) (b) supplies the following general definition of the unlawful practice of law:

Any other act forbidden by law to be done by any person not regularly licensed and admitted to practice law in this state...

Dissatisfied with the present state of things, the ABA has now embarked on a new effort to define the practice of law. A task force appointed by ABA President Alfred P. Carlton Jr. has offered the text of a new definition. The text will be the subject of a public hearing on February 7, a few days following the date of this issue.

After stating that the practice of law may be performed only "by those authorized by the highest court of this jurisdiction," the ABA draft offers the following general definition:

- (1) The "practice of law" is the application of legal principles and judgment with regard to the circumstances of a person that require the knowledge and skill of a person trained in the law.

Under the ABA's draft definition, all of the following acts are presumed to constitute the practice of law:

- (1) giving advice or counsel to persons as to their legal rights or responsibilities;
- (2) selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;
- (3) representing a person before an adjudicative body, including preparing or filing documents or conducting discovery;
- (4) negotiating legal rights or responsibilities on behalf of a person.

The draft recognizes a number of exceptions which are "permitted" whether or not they may come within the acts constituting the practice of law:

- (1) practicing law under a limited license to practice; (2) pro se representation;
- (3) service as a mediator or arbitrator;
- (4) providing services under the supervision of a lawyer in compliance with the Rules of Professional Conduct.

Persons performing any of these "permitted" exceptions must disclose that fact in writing.

As the drafters should have anticipated, these proposals have incited a great public outcry, principally from persons who argue that the definition is so broad as to entrap virtually anyone who contributes to the public's knowledge or use of the law. Among these are the operators of websites which offer access to recent statutes and decisions, books about the law (e.g., How to Form an LLC), legal forms and software, and even on-line advice on legal problems (e.g. Dealing with the Police). On-line tax preparers and advisors have also expressed their intense opposition to the ABA draft.

The FTC and the Department of Justice have now joined the ranks of vociferous opponents to the new definition. In a twelve-page letter, the two agencies questioned the need for the ABA's new attack on perceived interlopers. The agencies suggested that the ABA was motivated simply by a desire to preserve the competitive advantage of lawyers in a new world which encourages the dissemination of information by a variety of means. Although both the President of the ABA and the chairman of the ABA task force have denied that this is their motive, the public will undoubtedly adopt the same perception as the FTC and the DOJ.

The debate over what constitutes the practice of law comes at an unfortunate time for our profession. It is generally acknowledged that the image cast by lawyers is not especially salubrious. The nation's bar associations know this, and they are making strenuous efforts to overcome the public perception of lawyers.

In a letter addressed to the entire membership of the New York State Bar Association, President Lorraine Power Tharp has undertaken steps to restore the public's confidence. First of these steps is, "Enhance the reputation of the profession by seeking media coverage and encouraging attorneys to speak publicly about legal trends, cases and issues."

We suggest that one essential word is missing from this worthwhile objective. The word is "positive." We should be seeking "positive media coverage," not the kind of negative media coverage created by the ABA's proposed definition.

In the interest of promoting simplicity, may we also suggest our own definition for the practice of law:

The practice of law is the professional relationship between lawyer and client. A lawyer is any person licensed as a lawyer by the courts empowered to confer such a license. A client is any person who, or any entity which, consults with a lawyer or solicits the advice or services of a lawyer.