



AMERICAN BAR ASSOCIATION

**Section of Real Property,
Probate and Trust Law**
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March 3, 2003

Mr. Arthur Garwin
Task Force on the Model Definition of the Practice of Law
American Bar Association
Center for Professional Responsibility
541 North Fairbanks
Chicago, IL 60611

Dear Mr. Garwin:

The Real Property, Probate and Trust Section appreciates the opportunity to provide its comments to the Task Force on the Model Definition of the Practice of Law. Our section is made up of over 30,000 lawyers whose real estate, trust and estate administration, and estate planning practices are directly impacted by the issues under consideration by the Task Force.

Because of the importance of this issue, our Section's Council appointed an ad hoc committee comprised of Roger D. Winston, Alan F. Rothschild, Jr. and Sidney G. Saltz to review the proposed Model Definition as it relates to our members' practice areas. Some of the issues and practical concerns discussed by the ad hoc committee included:

- In the real estate area, there are many activities performed by non-lawyers (such as those services performed by real estate agents and brokers, leasing agents, land planners, financial consultants, engineers) that are very similar to those provided by lawyers. For instance, land planners and engineers often appear before governmental agencies on behalf of clients seeking zoning and land use approvals.
- In the estate planning and administration area, there are many standard form documents available online or in print and statutory or state-promulgated forms, such as standard probate forms and health directives, that are frequently completed by social workers, volunteers and family members on behalf of others.
- What are the ramifications of services presently performed by non-lawyers being included within the proposed definition of the practice of law? Conversely, if these activities are excluded from the practice of law, what are the implications for lawyers who provide such services? Would legal malpractice insurance cover such "non-lawyer" activities?
- If a lawyer licensed to practice law in one state is assisting a member of the lawyer's family with a legal matter in another state (where the lawyer is not licensed), is this the unauthorized practice of law?

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- Are there implications under the proposed Gatekeeper Initiative and the USA Patriot Act regulations if activities performed by lawyers are not deemed to be the practice of law? For example, will the application of the anti-money laundering and anti-terrorist financing regimes on lawyers depend upon whether or not the lawyer's activities are deemed to be the practice of law?
- The use of the Internet for the dissemination of information, including legal information, has increased significantly in recent years. Is participating in an anonymous Internet group discussion deemed to be the practice of law? Does a distinction need to be made between providing legal information over media such as the Internet versus providing the same information directly to specific individuals who solicit the information?
- Will an attempt to define the practice of law be viewed as a means of expanding the legal monopoly, which may not be politically and practically feasible?
- What impact will defining the practice of law have on the affordability of legal services?
- How can a model definition reconcile the diverse state rules governing the practice of law within their respective jurisdictions? For example, a recent South Carolina Supreme Court decision [*Doe v. Condon*, No. 25508 (S.C. Aug. 5, 2002)] held that an attorney must supervise all key aspects of a real estate closing including title search and examination, preparation of loan and real estate documents, disbursement of loan proceeds and recordation of all instruments. This is contrary to the situation in many states where attorneys play little or no role in routine real estate closings.
- Are there Constitutional First Amendment issues, such as restrictions on the ability to speak about the law (through such media as the Internet), that conflict with restrictions on practicing law?
- A couple of years ago, the ABA's Commission on Multi-Disciplinary Practice attempted to promulgate a model definition of the practice of law based on one utilized in the District of Columbia. However, this Commission dropped the model definition in its final proposal in the face of widespread criticism from inside and outside the legal profession.

The ad hoc committee acknowledged that there may be benefits in the ABA adopting a model definition of the practice of law. Because lawyers are subject to high ethical standards and strict disciplinary codes for the violation of those standards, there may be some benefit in clarifying what activities are subject to those standards. However, does this mean that activities by lawyers outside such definition are not subject to similar standards? Further, there is merit in ensuring that unlicensed and/or improperly trained individuals are not providing legal services without the competency or regulatory oversight to do so.

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However, the Section's ad hoc committee was concerned that the proposed Model Definition ignores the realities of the marketplace and may also be perceived as a self-serving attempt by the ABA to prohibit competition. Further, the circular nature of the proposed Model Definition provides little practical guidance to our Section members who practice in the areas of real estate, trust and estates administration and estate planning.

The Section's ad hoc committee concluded that there are better means of protecting the public and ensuring the delivery of quality legal services than by casting a broad dragnet that includes activities that are routinely and competently performed by non-lawyers today. This might be accomplished by educating the public on the benefits of using lawyers, notwithstanding that non-lawyer alternatives exist.

Based on the Section's ad hoc committee's investigation and recommendations, the Real Property, Probate and Trust Section recommends that the ABA's energies be focused on protecting consumers from all incompetent or unscrupulous legal service providers, whether or not such individuals are lawyers, rather than developing a model definition of the practice of law.

Although the Section recognizes and appreciates the efforts of the Task Force, on balance, we think most lawyers, particularly those who are in the practice areas of our Section, would be better served if the ABA does not adopt the proposed model definition of the practice of law.

Very truly yours,

A handwritten signature in black ink, reading "Dennis I. Belcher". The signature is written in a cursive, flowing style.

Dennis I. Belcher
Chair, Section of Real Property, Probate
and Trust Law