



Staff Memorandum

EXECUTIVE COMMITTEE Agenda Item #10

REQUESTED ACTION: Approval of an affirmative legislative proposal from the Committee on Unlawful Practice of Law to promulgate a new section and amendments to existing sections of the New York Judiciary Law.

Attached is a report from the Committee on Unlawful Practice of Law that outlines a proposal to enact New York Judiciary Law § 485-a and amend New York Judiciary Law §§ 486 and 495(3). As noted in the report, the current law is intended to protect citizens from the unlicensed practice of law. It currently imposes a criminal misdemeanor penalty -- regardless of the severity of the injury. The proposed revisions would elevate certain violations to criminal felony status -- thereby creating a scalable and proportionate penalty for cases involving severe injury. Specifically, the revisions would elevate to felony status violations involving monetary loss or damages exceeding one thousand dollars or other damage resulting from impairment of a legal right.

The Committee reports that the new law and amendments would accomplish the following:

- Reflect a recognition that the New York Judiciary Law protects against crimes that involve varying degrees of injury with respect to the unlicensed practice of law.
- Increase the New York Judiciary Law's deterrent effect on those who might otherwise engage in the unlicensed practice of law.
- Create a greater incentive for enforcement agencies to prosecute violators of the New York Judiciary Law as it relates to the unlicensed practice of law -- particularly in matters involving schemes of economic and criminal complexity. Examples of such matters include identity theft, bankruptcy fraud, reverse mortgage scams that target the elderly, immigration fraud, and illegal real estate schemes that deprive citizens of home equity and/or home ownership.
- Potentially benefit the integrity of the licensed legal profession by increasing protection for consumers against those who engage in the unlicensed practice of law.

Page six of the report provides proposed language for New York Judiciary Law § 485-a and a redlined version of the proposed amendments to New York Judiciary Law §§ 486 and 495(3).

In preparing this report, the Committee took into account information obtained in hearings relating to the unlawful practice of law that were held in New York City, Albany, Rochester, and Buffalo.

This report was originally scheduled for presentation at the June 2011 Executive Committee meeting. The committee withdrew the report in order to consult with the Criminal Justice Section; to date, the Section has not submitted formal comments on the proposal. Since that time, the Committee on Standards of Attorney Conduct also has reviewed the report and has submitted attached comments in opposition to the proposal on the basis that it does not take into account differing levels of culpability.

The report will be presented by Mark J. Solomon, chair of the Committee.

Committee on Unlawful Practice of Law
Proposal to Enact New Section 485-a and amend sections 486 and 495(3) of the Judiciary
Law

Judiciary Law sections 478, 484, 486 and 495, each of which deals with the unlawful practice of law, have their derivation in penal law that goes back to the year 1909 with various amendments up to the present. A violation of any of these sections has always been a criminal offense, a misdemeanor in classification rather than a felony. It is the respectfully considered view of the Committee on the Unlawful Practice of Law ("Committee") that the unlawful and unauthorized practice of law statutes are needful of updating and should evolve to recognize that there are varying degrees of injury and harm which are occasioned by the deliberate, and at times sophisticated and more heinous violations of this area of legal protection. Furthermore, that the flexibility of our legal structure recognizes in many instances that the heightened sophistication of the offense, the severity of injury or damage, should have a bearing upon the severity of the criminal penalty available for prosecutors to seek in light of more injurious acts perpetrated by offenders.

It is the Committee's view that the penalty for infraction of the law should be on scale according to the severity of the criminal act. In the 102 years since the first imposition of penal sanctions for the unlawful practice of law the state legislature has taken a strong public policy stance in the protection of its citizens from the unlicensed practice of over 63 different professional undertakings by making their practice without a license a felony under the Education Law. The imposition of felony-level charge for the unlicensed practice of these professions has had a dramatic protective benefit not only for the profession so proscribed, but more so for the citizens of our state.

The current Judiciary Law is intended to protect our citizens from the unlicensed practice of law irrespective of the damage occasioned, severity of their injury, pecuniary loss or loss of civil rights. The law imposes minor penalty for actions in violation of the statute without injury. In cases of dramatic damage and larger patterns of abuse, the law disproportionately imposes the same minor misdemeanor penalty, serving little deterrent to the criminal acts.

Over the last several decades violations of these sections often have not been prosecuted because the local enforcement agency, namely, the county district attorneys' offices, have not seen fit to prosecute the violators of the Judiciary Law irrespective of the deep injury occasioned upon citizens due to the economic and criminal complexity of such schemes whose successful misdemeanor convictions would only result in a mere slap on the wrist of the worst offenders. As a result, the persons who are responsible for violations of these sections of the Judiciary Law are either not prosecuted or, if they are, the sentences are minimal.

It had been previously perceived that violations of these sections against the unlawful practice of law were not considered a public menace but merely an attempt by the legal profession to "protect their own interest." At hearings held by the Committee, testimony has been elicited from judges, lawyers and citizens groups from all over the state that detailed the prevalence of identity theft, bankruptcy fraud, reverse mortgage scams that target the vulnerable elderly, widespread immigration abuse, and illegal real estate schemes that deprive citizens of their home equity and even ownership of their homes. These crimes have been mentioned among the prominent acts being perpetrated by unlicensed legal advisors and others who are

practicing law in violation of the states existing laws. It is readily acknowledged that the integrity of the licensed legal profession may derivatively benefit from enhanced consumer oriented protection under the Judiciary Law, however the fact that lawyers interests may be minimally impacted is not thought to be a compelling enough deterrent to prevent enactment of stronger penalties for a more egregious level of criminal conduct under the statutes.

The recent adoption of Judiciary Law section 476(d) allowing the Attorney General to prosecute violations of the statutes concerning the unlawful practice of law may result in more prosecutions. By enacting such legislation it is respectfully advanced that the legislature is obviously receptive to the prosecution of the larger, regional and more complex factual circumstances that would otherwise escape local prosecution, or be beyond their limited jurisdictional capability and physical boundaries. Violations of a “scalable law”, designed to penalize the illegal acts in relation to the depth of their consumer injury would also remove any hesitation that the proposed law is solely a subterfuge for professional advancement. It is our considered and respectful opinion that if these egregious violations were made felonies instead of misdemeanors so that sentencing could be more severe, that the prosecution of these violations as felonies will be much more of a deterrent, protecting the public from this ever developing area of criminality.

The testimony provided in recent hearings held by the Committee in New York City, Albany, Rochester, and Buffalo, have shown that the threat to the public arising out of the unlawful practice of law has resulted in harm to the public in many areas of law throughout the state. In particular reference to our redeveloping urban areas and in specific regard to our

vulnerable immigrant community, as well as, circumstances involving Bankruptcy Law, and Real Estate Law, there have been numerous cases that have resulted in serious difficulty to many members of the public.

Actions by persons providing legal advice without a license, especially in the New York City area, but also in other areas of the state, have resulted in serious harm to immigrants and prospective citizens of the United States. A recent noteworthy case in the Supreme Court in Brooklyn illustrates this problem. In *People v. Garcia*, 907 N.Y.S.2d 398, Jose Garcia, a permanent resident of the United States since 2005 and a native of the Dominican Republic, was arrested in May of 2006 for a certain drug-related crime. Mr. Garcia pled guilty to the crime after being advised by his criminal attorney that he (the attorney) was ignorant of the Immigration Law and after receiving advice from an immigration paralegal who erroneously told him that pleading guilty to a single misdemeanor conviction would not affect his immigration status. Much to his surprise and chagrin, Mr. Garcia thereafter faced a deportation proceeding based upon that conviction. A Brooklyn Supreme Court Judge allowed him to withdraw his guilty plea based upon ineffective assistance of counsel. The interesting part of this case for purposes of this new legislation is that a non-lawyer was offering advice to Mr. Garcia which was incorrect and which resulted in severe harm to him, i.e., facing deportation.

In addition, the district attorneys in the New York Area have recently prosecuted several cases involving non-lawyers preparing and advising clients with regard to immigration matters, charging exorbitant fees and ultimately disappearing with the client receiving no representation and harming their chances of citizenship.

It is significant to note that the Education Law which regulates other professions including physicians, physicians' assistants, and specialists' assistants, chiropractors, dentists, veterinarians, physical therapists, pharmacists, nurses, and midwives, provides that unauthorized practice in these professions is a felony (cf Education Law, section 6512). The change suggested to the Judiciary Law by our panel is consistent with the consumer protection afforded under the Education Law in relation to those other highly regarded and equally important professions in New York State.

It is the Committee's view that making the unauthorized practice of law a felony where there is clear financial injury or personal harm to members of the public with its attendant upgraded sentencing guidelines will serve to be more of a deterrent to the unlawful practice of law and represents a modern, scalable and proportionate penalty for cases of severe injury and damage resulting from illegal acts of unlicensed lawyers.

AN ACT to amend the judiciary law, in relation to actions against non-lawyers who act or seek to act as lawyers

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. A new section 485-a is hereby added to the judiciary law to read as follows:

Section 485-a. Violation of certain sections a Class E felony.

Any person who violates the provisions of sections four hundred seventy-eight, four hundred eighty-four, four hundred eighty-six or four hundred ninety five of this chapter is guilty of a class E felony when he or she causes another person to suffer monetary loss or damages exceeding one thousand dollars or other damage resulting from impairment of a legal right to which he or she is entitled according to law.

Section 2. Section 486 of such law is hereby amended to read as follows:

Any person whose admission to practice as an attorney and counselor-at law has been revoked or who has been removed from office as attorney and counselor-at-law or, being an attorney and counselor-at-law, has been convicted of a felony or has been suspended from practice and has not been duly and regularly reinstated, who does any act forbidden by the provision of this article to be done by any person not regularly admitted to practice law in the courts of record of this state, unless the judgment, decree or order suspending him shall permit such act, shall be guilty of a misdemeanor unless otherwise provided by section 485-a of this article.

Section 3. Subdivision three of section 495 of such law is hereby amended to read as follows:

No voluntary association or corporation shall ask or receive directly or indirectly, compensation for preparing deeds, mortgages, assignments, discharges, leases, or any other instruments affecting real estate, will, codicils, or any other instruments affecting disposition of property after death or decedents' estates, or pleadings of any kind in actions or proceedings of any nature. Any association or corporation violating the provisions of this subdivision is guilty of a misdemeanor unless otherwise provided by section 485-a of this article.

Section 4. This act shall take effect on the sixtieth day after it shall have become a law and apply to all actions taken on or after the effective date.

**COMMENTS BY THE COMMITTEE ON STANDARDS OF ATTORNEY CONDUCT (COSAC)
ON
THE REPORT OF THE
COMMITTEE ON UNLAWFUL PRACTICE OF LAW
PROPOSING AMENDMENTS TO THE JUDICIARY LAW**

The Committee on Standards of Attorney Conduct (“COSAC”) shares with the Committee on the Unlawful Practice of Law (“CUPL”) the ultimate objective of protecting the public from incompetent and irresponsible legal representation, but COSAC does not support the specific amendments to the Judiciary Law that CUPL has proposed. Our concern is that the concept of unauthorized practice of law can be read to sweep in work by out-of-state lawyers temporarily working in the state or work by non-lawyers in professions that frequently interact with the legal system. Increasing the penalties for unauthorized practice of law could chill that wholly innocent and often salutary conduct.

The Proposed Amendments Do Not Recognize Distinctions in the Level of Culpability Among Various Types of Violations.

Whatever may be the situation for other professions, the “unauthorized practice of law” is a concept that has been notoriously difficult to define. The Restatement (Third) of the Law Governing Lawyers observes that “definitions and tests employed by courts to delineate unauthorized practice by non-lawyers have been vague or conclusory.” § 4 cmt. c (2000). The history of attempts to make the definition more specific has been long and fruitless. In 2002, NYSBA’s House of Delegates rejected a proposed definition by the Special Committee on the Unlawful Practice of Law (“SCUPL”), and no alternate proposal has since been put forward. *See* SCUPL Interim Report, at 3–4 (2006). The ABA’s Task Force on the Model Definition of the Practice of Law (“ABA Task Force”) failed to draft a uniform model definition and recommended to the House of Delegates only that each state adopt its own definition based on the premise that “the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity.” *See* ABA Task Force Recommendations as Adopted (Aug. 11, 2003).¹

¹ Available at http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law.html.

In New York, Judiciary Law § 478 states:

It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court of record in this state, or to furnish attorneys or counsel or an attorney and counsel to render legal services, or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, or to assume to be an attorney or counselor-at-law, or to assume, use, or advertise the title of lawyer, or attorney and counselor-at-law, or attorney-at-law or counselor-at-law, or attorney, or counselor, or attorney and counselor, or equivalent terms in any language, in such manner as to convey the impression that he is a legal practitioner of law or in any manner to advertise that he either alone or together with any other persons or person has, owns, conducts or maintains a law office or law and collection office, or office of any kind for the practice of law, without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath. . . .

This statute may be read to cover four broad categories of unauthorized practice:

- a. a nonlawyer impersonating a lawyer;
- b. a nonlawyer offering services that are clearly legal services to the public under the guise of another title (such as “notary”);
- c. a nonlawyer applying law or advising on legal issues in the course of his or her professional work who crosses the often unclear line between permissible and impermissible conduct; and
- d. a lawyer admitted elsewhere (but not New York) engaging in conduct in New York that is considered unauthorized practice .

In COSAC’s view, these four categories of conduct entail different levels of culpability. The first – a nonlawyer impersonating a lawyer – is plainly wrong. The second – a nonlawyer offering clearly legal services under another title – is likewise clearly improper and dangerous, but difficult to distinguish in statutory text from the third category. The third – a nonlawyer engaging in work near the indistinct line that separates law practice from legitimate nonlegal work – may or may not be pernicious. The fourth – an out-of-state lawyer practicing law in New York – is often legal but depends on many variables. Yet the proposal to make certain instances of the unauthorized practice of law a felony treats all four categories the same. The only mechanism in the proposed amendment for distinguishing among various types of violations is the \$1,000 damages trigger for felony liability.² This, however, does not sufficiently reflect

² CUPL’s proposed new § 485-a provides that any person who has violated the unauthorized practice of law prohibitions “is guilty of a class E felony when he or she causes another person to suffer monetary loss or damages

the nuances among different types of conduct that are potentially criminalized by the expansive language of § 478.

New York courts interpreting Judiciary Law § 478 (and related statutes governing the unauthorized practice of law) do not distinguish among the four categories set out above. For example, in *Spivak v. Sachs*, 211 N.E.2d 329 (1965), the Court of Appeals upheld the denial of fees to a California attorney who had stayed in a hotel in New York fourteen days while advising a client who was a personal acquaintance regarding her divorce proceedings in a New York court. In *Sussman v. Grado*, 746 N.Y.S.2d 548 (Dist. Ct. Nassau Co. 2002), the court awarded treble damages to a civil plaintiff and referred the matter to the Attorney General's office for criminal investigation where a paralegal used independent judgment in preparing papers for a turnover proceeding. Under the proposed amendments, violations such as these by persons apparently acting in good-faith — whether competently or incompetently — would be subject to the same felony criminal liability as violations by fraudsters and imposters, as long as the total damages exceeded \$1,000. Moreover, upgrading the unauthorized practice of law to a felony may be unnecessary because prosecutors have long had and used an array of prosecutorial tools — such as felony-level fraud or larceny charges — to pursue truly pernicious conduct by nonlawyers who damage others by illegally providing legal services.

Several jurisdictions have made preliminary efforts to recognize some differences among various types of unauthorized practice offenses. While most unauthorized practice of law violations remain misdemeanors in California, any attempt by a disbarred attorney to practice law is subject to possible felony punishment. *See* CAL. BUS. & PROF. CODE § 6126. Texas reserves felony criminal liability for lawyers who have previously committed a disciplinary violation, whereas a first-time offense is punished only as a misdemeanor, regardless of the amount of damage to the victim. *See* TEX PENAL CODE § 38.123(d). In our view, any attempt to increase the penalties for conduct that most, if not all, would agree

exceeding one thousand dollars or other damages resulting from impairment of a legal right to which he or she is entitled according to law.”

is a serious violation, must also address how best to avoid chilling innocent and useful conduct that sometimes gets subsumed into the classic crime of impersonating a lawyer.

Heightened Penalties May Restrain Desirable Activity by Nonlawyers and Lawyers Licensed Elsewhere, Because What Constitutes the Unauthorized Practice of Law Is Elusive.

Accountants, architects, bankers, real estate agents, social workers, and stock-brokers are among the professionals who frequently counsel clients regarding relevant laws and their application. *See In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, 139 N.J. 323, 654 A.2d 1344, 1352 (advice provided by knowledgeable nonlawyer professionals often serves the public even when it clearly involves the practice of law). Without a clear definition of what specific conduct is prohibited, the specter of felony liability may deter these professionals from providing necessary services that their clients rightfully need and expect. Thus, while the proposed upgrade to a felony is intended to protect the public against harmful instances of the unauthorized practice of law, its unintended consequence may be to deprive the public of helpful advice by nonlawyers who are legitimately performing their jobs.

Moreover, the threat of felony criminal liability for a poorly defined set of actions may impede lawyers licensed in other jurisdictions from providing legal services to clients when their practice would bring them into contact with New York. Contemporary legal practice often crosses jurisdictional boundaries. Supporting the free mobility of lawyers is necessary to ensure that clients are able to obtain the full scope of the legal representation that they need from their counsel of choice. The Court of Appeals has warned lower courts against applying § 478 to outlaw “customary and innocuous practices,” *Spivak v. Sachs*, 211 N.E.2d 329, 331 (1965), and the court has sometimes excused minor physical and electronic intrusions into New York by out-of-state lawyers, *see El Gemayel v. Seaman*, 533 N.E.2d 245, 249 (N.Y. 1998) (“phone calls to New York by . . . an attorney licensed in a foreign jurisdiction to advise his client of the progress of legal proceedings in that foreign jurisdiction, did not, without more, constitute the ‘practice’ of law”). But the breadth of this exception has never been well defined and some cases suggest that the exception may be quite narrow, *see, e.g., Servidone Constr. Corp. v. St. Paul Fir & Marine Ins. Co.*, 911 F. Supp. 560, 563 (N.D.N.Y. 1995) (out-of-state attorney committed unauthorized

practice of law in New York by entering into individual retainer agreement with New York corporation, even though other attorneys in attorney's firm who were licensed in New York worked on case, and even though out-of-state attorney never appeared in court of record in New York).

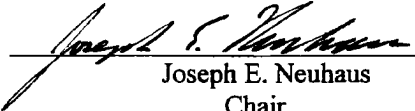
Any definition of the unauthorized practice of law should balance protecting the public from incompetent legal representation, on the one hand, with other public interests including, *inter alia*, maintaining the availability of legal services in a particular area or for a particular individual, limiting overall costs to clients, and authorizing licensed brokers and other trained professionals to engage in activity in which they have special expertise. *See Cultum v. Heritage House Realtors Inc.*, 694 P.2d 630, 633–34 (Wash. 1985) (listing factors related to public convenience and choice that must be balanced against the need to protect the public from incompetent representation); *accord In re First Escrow Inc.*, 840 S.W.2d 839, 844 (Mo. 1992) (court has “duty to strike a workable balance between the public’s protection and the public’s convenience”). Ratcheting up the penalty for engaging in prohibited conduct, without better defining the prohibited conduct, will upset this balance by chilling the activity of nonlawyers who commonly interact with the legal system and provide valuable services to their clients, as well as out-of-state lawyers who may not realize that they are violating a vague set of rules.

Conclusion

We commend the Committee on Unlawful Practice of Law for their work in spotlighting the extent of unauthorized practice of law and its consequences. While COSAC opposes the broad-brush approach of increasing penalties for all unauthorized practice of law, we urge drafting efforts that are more targeted to the level of culpability of the conduct in question. One possibility that COSAC considered, for example, was amendment of the Judiciary Law to elevate to a felony the crimes of (a) impersonating a lawyer and (b) unauthorized practice by suspended or disbarred lawyers. Focusing on such categories of clearly improper conduct – and potentially others that may be defined with reasonable

precision – might better achieve the goal of discouraging dangerous conduct without simultaneously discouraging helpful and widely accepted conduct by nonlegal professionals and out-of-state lawyers.

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