

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.