



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #8

**REQUESTED ACTION:** Approval of the resolution endorsing the report and recommendations of the Special Committee on Unlawful Practice of Law.

The Special Committee on Unlawful Practice of Law was reconstituted in July of 2005 and charged with the preparation of a report and recommendations on issues of unlawful practice of law, rules, and means of enforcement for the protection of the public from the adverse effects of unlawful practice. Attached is an interim report from the committee, outlining its review process to date and its recommendations for the committee's future work in developing a final report and recommendations. The report reviews the Association's history with respect to unauthorized practice issues, legislative efforts with respect to unauthorized practice, and focal points that should be addressed by the committee. In particular, the committee notes the need to develop empirical evidence of the harm to the public caused by unauthorized practice; to examine efforts to enforce the laws relating to unauthorized practice; and to continue efforts to educate the public about the importance of consulting with an attorney when confronted with a legal problem.

Going forward, the committee recommends the following efforts to further these goals:

- Hold hearings around the state to receive input from the public, attorneys, and non-lawyer providers of legal services.
- Canvass local bar associations to determine the number and types of complaints and how those complaints are handled.
- Obtain input from Association sections regarding unauthorized practice concerns.
- Review cases in which the Attorney General, bar associations, or district attorneys have brought charges of unauthorized practice.
- Develop recommendations and goals to increase the role of law students and paralegals working under the supervision of attorneys.

- Open a dialogue with the Legislature, the Attorney General, and the Administrative Board to develop a comprehensive plan to address unauthorized practice.
- With respect to suspended or disbarred attorneys, recommend standards and guidelines for permissible activities.

Harvey B. Besunder, chair of the Special Committee, will attend the April 1 meeting to present the report and address any questions you may have.

**RESOLUTION OF SPECIAL COMMITTEE ON  
UNLAWFUL PRACTICE OF LAW**

WHEREAS, the Special Committee on Unlawful Practice of Law has been charged with making recommendations on issues of unlawful practice of law, rules, and means of enforcement for the protection of the public from the adverse effects of unauthorized practice; and

WHEREAS, the committee has concluded that there is a need to develop empirical evidence of the harm to the public caused by unauthorized practice, to examine efforts to enforce laws relating to unauthorized practice, and to continue efforts to educate the public about the importance of consulting an attorney when faced with legal problems; and

WHEREAS, the committee has made seven preliminary recommendations with respect to furthering these goals, as set forth in its report;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association hereby endorses the interim report of the Special Committee on Unlawful Practice of Law; and it is further

RESOLVED, that the officers of the Association are hereby empowered to take such steps as they may deem warranted to implement this resolution.

## **SPECIAL COMMITTEE ON UNLAWFUL PRACTICE OF LAW**

### **INTERIM REPORT**

#### **1. Background**

The Association has a relatively lengthy history in dealing with issues relating to unauthorized practice of law. In the 1960's and 1970's, a Committee on Unlawful Practice of Law issued advisory opinions as to whether particular conduct constituted unauthorized practice and investigated complaints of violations of the Judiciary Law provisions prohibiting unauthorized practice, referring matters when appropriate to the State Attorney General. Due to antitrust concerns, these activities were discontinued in 1981. The committee was discharged in 1992.

In 1994 the Association's Ad Hoc Committee on Non-Lawyer Practice was formed to "assess the implications of non-lawyer practice for society, the legal system and the profession, to represent the Association in communications with the ABA Commission on Non-Lawyer Practice, to review the Commission's proposals and to make recommendations regarding same to the Association's leadership".<sup>1</sup> The committee issued its report in May 1995 and made four recommendations as follows:

- Expansion of the use and role of the traditional paralegal as an approach preferable to the recognition of the legal technician.
- The continued study of the regulation of non-lawyers and no imposition of a new system of regulation for the time being.
- Active enforcement of laws prohibiting the practice of law by non-lawyers.

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<sup>1</sup> New York State Bar Association, Ad Hoc Committee on Non-Lawyer Practice, May 1995, p. 1, fn. 2.

- Consideration and implementation of alternative delivery systems for lawyers' services.<sup>2</sup>

As part of its recommendation with respect to enforcement of the applicable statutes, the Ad Hoc Committee recommended that the Committee on Unlawful Practice of Law be reconstituted. The report was approved in principle, and this recommendation in particular, by the House of Delegates in June 1995.<sup>3</sup> A new Special Committee on Unlawful Practice of Law was appointed in 1996.

In 1999, as a result of concerns about lawyers participating in business entities owned or controlled by non-lawyers, the Association's Special Committee on the Law Governing Firm Structure and Operation (the MacCrate Committee) was appointed to study multi-disciplinary practice – specifically, “to consider the present law and its effectiveness, whether there is a need for any changes in the law, the evidence in support of such changes, and whether potential advantages from such changes outweigh potential detrimental effects.”<sup>4</sup> In its report, the committee stated:

The reason for having prohibitions against the unauthorized practice of law is that it is in the public interest to prevent injury at the hands of people (a) who have not been duly licensed to practice law, that is, (i) who have not graduated from an accredited law school, (ii) who have not passed the bar examination or satisfied whatever substantive screening may be required under state law and (iii) who have not had their character and fitness investigated and certified by an appropriate governmental body, (b) who are not subject to continuing legal education requirements and (c) who are not subject in general to discipline for failure to adhere to a comprehensive and well developed set of ethical precepts.<sup>5</sup>

The committee then proceeded to recommend that

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<sup>2</sup> *Id.* at 6-7.

<sup>3</sup> New York State Bar Association, Minutes of House of Delegates Meeting, June 24, 1995, at 2-3.

<sup>4</sup> New York State Bar Association, Special Committee on the Law Governing Firm Structure and Operation, Preserving the Core Values of the Legal Profession 1 (2000)(hereinafter MacCrate Report).

<sup>5</sup> *Id.* a 370.

New York State should undertake to review and rewrite [those statutes that deal] with the unauthorized practice of law by those not subject to such regulation. A more clearly delineated and analytically supportable definition of the practice of law, rather than one that is brimming with ambiguity and stands begging for battles over its boundaries, could accomplish many societal goals, such as establishing the extent to which nonlawyers will be permitted to render quasilegal services to persons of modest means and providing a platform for meaningful consumer protection regulation over such services. Moreover, greater precision in defining the practice of law will enable more effective criminal prosecution of unlawful practitioners as well as eliminate uncertainty for persons working in law-related areas about the propriety of their conduct.<sup>6</sup>

The June 2000 resolution adopted by the House of Delegates approving the MacCrate Report therefore called for “an appropriate committee within the Association [to] be designated to evaluate and draft appropriate statutory amendments refining the definition of the practice of law in New York.”<sup>7</sup> Thereafter, a predecessor of the current Special Committee was asked to conduct the requested review.

In January 2002, the committee presented a report to the House of Delegates recommending amendments to Judiciary Law §478 to provide a definition of practice of law, prohibit unauthorized practice, and enumerate exceptions to the prohibition. In addition, the committee recommended amendment of Judiciary Law §484 to prohibit non-lawyers from holding themselves out as attorneys. A violation of section 478 would constitute a class E felony, while a violation of section 484 would constitute a class A misdemeanor.<sup>8</sup>

At the January 2002 House meeting, concerns were expressed about the breadth of the prohibition on unauthorized practice. In particular, the New York County Lawyers’ Association submitted comments recommending disapproval of the report on the basis that the proposed definition was overbroad and the public interest would be best

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<sup>6</sup> *Id.* at 373.

<sup>7</sup> New York State Bar Association, Minutes of House of Delegates Meeting, June 24, 2000, at 8.

<sup>8</sup> New York State Bar Association, Report of Special Committee on Unlawful Practice of Law (August 2001, as amended January 10, 2002)(Report and comments attached as Appendix “A”).

served by maintaining the law in its existing form. The comments noted that “There is no demonstration that the public is being injured by the current state of the Judiciary Law. *The New York State Bar Association’s Committee offers no empirical evidence of any such injury.*”<sup>9</sup>

After debate and comment, a motion to recommit the report to the Committee for further review was approved by a vote of 55-36.<sup>10</sup>

With this background in mind the Committee began the task of defining its own role.

## 2. The Committee

The committee has held four meetings in person and by telephone communication. In defining the committee’s role, we agreed that while we did not want to “reinvent the wheel,” there are certain focal areas that must be addressed. Those included:

- Determining whether there is an ongoing problem with respect to unauthorized practice, particularly the nature and extent of harm to consumers;
- Establishing empirical data as to the prevalence of unauthorized practice, since such data was absent from earlier studies;
- Reviewing the issue from the perspective of non-lawyer organizations that have been offering non-lawyer services in areas such as bankruptcy, real estate, trusts and estates, tax certiorari, immigration, and matrimonials, as well as with respect

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<sup>9</sup> Recommendations of NYCLA’s Committee on Professional Ethics, as approved by the Board of Directors of the New York County Lawyers’ Association ) (Dec. 10, 2001) (emphasis supplied) (included in Appendix “A”).

<sup>10</sup> New York State Bar Association, Minutes of House of Delegates Meeting, January 25, 2002, at 8-9.

to suspended and disbarred lawyers continuing to practice law in contravention of court orders;<sup>11</sup>

- Re-examining the definition of practice of law previously considered by the House of Delegates;
- With respect to enforcement, reviewing the current Judiciary Law provisions and examining the manner in which New York and other jurisdictions have addressed enforcement;
- With respect to public education, continuing the Association's efforts in the area of informing the public of the importance in consulting with attorneys when faced with a legal issue. Included in this effort should be education of lawyers, licensing, and character and fitness requirements; continuing legal education requirements; duty to abide by a code of ethics and availability of grievance committees to review professional misconduct allegations; the availability of the Lawyers' Fund for Client Protection for lawyers' misappropriations; and lawyers' liability for malpractice.<sup>12</sup>

### 3. Current Status of the Committee's Review

Under current New York law as interpreted by the Court of Appeals in *People v. Romero*,<sup>13</sup> Judiciary Law §476-a authorizes the Attorney General to bring civil actions – not criminal actions – against persons accused of the unauthorized practice of law.

Criminal actions must be brought by county district attorneys. In November 1998, the

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<sup>11</sup> See "Monograph" prepared by Michael Ross, January 24, 2001 "Conduct of Suspended and Disbarred Attorneys" (attached as Appendix "B").

<sup>12</sup> See "The Role of the Lawyer" prepared by the NYSBA (attached as Appendix "C").

<sup>13</sup> 91 N.Y.2d 750, 698 N.E.2d 424, 675 N.Y.S.2d 588 (1998).



Association's Executive Committee approved an affirmative legislative proposal presented by this committee's predecessor that would amend section 476-a to clarify that the Attorney General has the authority to bring both civil and criminal actions with respect to unauthorized practice. This proposal remains a part of the Association's legislative package, promoted by the Department of Governmental Relations.

With respect to enforcement, Committee member Richard Rifkin conducted a survey of Attorneys General around the country with regard to enforcement of the unlawful practice of law. He reports that there are numerous differences among the states as to how the cases are handled. There does not seem to be a predominant enforcement mechanism.

More recently, the state Senate Judiciary Committee approved a bill that would make the unauthorized practice of law a felony. The current proposal would amend Section 484 of the Judiciary Law. We plan to reach out to the sponsor, Charles Fuschillo Jr., for discussion and to determine whether the Committee should recommend that the Department of Government Relations make support of the bill to amend Section 484 a priority. Measuring the extent of support within the Legislature should contribute to the Association's ability to evaluate any recommendations regarding enforcement that the Committee might make.

One of the flaws in prior reports has been the lack of evidence that there is an existing problem. Licensing and enforcement of laws against unauthorized practice are intended to benefit the public by creating a system in which clients have some assurance of quality and oversight. It is therefore quite important to demonstrate the harm to consumers that can result from the work of unlicensed practitioners, as well as the harm to

the entire system of providing legal counsel and to licensed, trained lawyers themselves that results from doubt cast on the ability and honesty of lawyers in general from unauthorized practice. Going forward, the committee's consensus is that we should undertake the following activities:

- Hold hearings around the state to gather data, hear testimony from the public, attorneys, and non-lawyer providers of legal services. In order to be successful, we will need to advertise broadly in order to ensure participation.
- Canvass local bar associations to determine the number and types of complaints and how complaints are handled. We note that the Monroe and Erie County Bar Associations have active committees studying the issue, and we are fortunate to have members of each committee on our panel.
- Obtain input from our own sections regarding the topic. As an example, the Real Property Law Section has been studying the issue of transactions being handled by non-lawyers, including title companies.
- Review cases in which the Attorney General or bar associations have brought actions pursuant to Judiciary Law §476-a and cases in which the district attorneys have brought charges pursuant to Judiciary Law §485.
- Develop recommendations and goals to increase the role of law students and paralegals working under the supervision of licensed attorneys. If the role of non-lawyer providers is to provide "legal services" at lower costs, bar association lawyer referral services should be further encouraged, and the use by practicing lawyers of supervised non-lawyer staff should be facilitated to increase the provision of quality services at reasonable rates.

- Open a dialogue with the Legislature, the Attorney General, and the Administrative Board to work toward consensus on a comprehensive plan to address unauthorized practice, including defining the practice of law, effective enforcement of the law, and increasing the permitted activities available to law students and paralegals.
- With respect to suspended or disbarred attorneys, recommend definite standards for permissible activities and guidelines to be followed.

Dated: March 2006

## **APPENDIX "A"**



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #9

**REQUESTED ACTION:** Approval of the report and recommendations of the Special Committee on Unlawful Practice of Law.

As part of the resolution approving the report of the Special Committee on the Law Governing Firm Structure and Operation (the MacCrate Committee) in June 2000, the House directed that the statutes governing the unauthorized practice of law be reevaluated and refined to provide a definition of the "practice of law." Consequently, the Special Committee on Unlawful Practice of Law was asked to undertake a review of the existing provisions contained in the Judiciary Law regarding unauthorized practice and to develop a statutory definition of the "practice of law." The committee has completed its review of the statutory provisions (a review of provisions in the Code of Professional Responsibility is ongoing), and is proposing that sections 478 and 484 of the Judiciary Law be amended. The amended section 478 would provide a definition of the practice of law, prohibit unauthorized practice, and provide enumerated exceptions to the prohibition. Section 484 would be amended to prohibit a nonlawyer from using the title of attorney, a provision based upon existing provisions in the Education Law with respect to other professions.

In August 2001, this report was circulated to section and committee chairs, county and local bar associations, and to you for review and comment. In addition, this report was presented to you on an informational basis at the November 3, 2001 meeting. Following that meeting, the committee reviewed the comments received and made some modifications to the proposal, which are outlined in the attached January 10, 2002 memorandum from Mark J. Solomon, chair of the Special Committee.

Two sets of comments received since the November 3 meeting are attached. The first, submitted by the New York County Lawyers' Association, indicates that the association is opposed to the recommendations on the basis that the proposal is overbroad and the public interest would be better served by making no changes to New York's existing unauthorized practice statutes. The second, submitted by Deputy Chief Administrative Judge Juanita Bing Newton, asks that consideration be given to some type of exemption for court personnel who assist pro se litigants with respect to court procedures. (Upon review, the committee agreed that a specific exemption for court personnel should be included in the statute.)

**Mr. Solomon will be present at the January 25 meeting to discuss the report and respond to any questions you may have.**



# New York State Bar Association

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## SPECIAL COMMITTEE ON UNLAWFUL PRACTICE OF LAW

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January 10, 2002

**To: Members of the House of Delegates**

**Re: Proposed Amendments to Judiciary Law §§478, 484**

Following our committee's informational presentation to you in November, we met to review the comments we had received from individuals and groups to determine what changes should be made to our proposal. As a result of that review, we made several modifications to the proposal, outlined below:

- The phrase "but is not limited to" has been deleted from §478(1).
- "Indentures" and bonds" have been added to the list of legal instruments in §478(1)(b).
- A new §478(2)(b)(vi) has been added to clarify that a paralegal or other non-lawyer employee working under the supervision and direction of an attorney is not engaged in the practice of law when performing properly delegated tasks.
- A new §478(2)(b)(vii) has been added to clarify that authorized court personnel, working under the supervision and direction of the court, may provide general information to members of the public.
- Section 478(2)(b)(viii) (formerly [2][b][vi]) has been expanded to list possible sources of authority for authorized acts.
- A new §484(2) has been added to make clear that an out-of-state attorney may use the title "attorney" or its equivalent, provided that if the attorney is targeting communications to members of the public in New York, such communications make clear the attorney's jurisdictional limitations and address of his or her principal law office and is in compliance with New York rules governing advertising and solicitation.

We hope that these changes are responsive to the many thoughtful comments we received over the past several months, and thank everyone who submitted suggestions to us.

Mark J. Solomon

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**SPECIAL COMMITTEE ON UNLAWFUL PRACTICE OF LAW**

**PROPOSED AMENDMENT**

**AN ACT** to amend the judiciary law, in relation to unauthorized practice of law.

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

Section 1. Section four hundred seventy-eight of the judiciary law is amended to read as follows:

**§478 Unauthorized practice of law prohibited**

~~Practicing or appearing as attorney-at-law without being admitted and registered. 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. Provided, however, that nothing in this section shall be held to apply~~

1. "Practice of Law" means the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person. The practice of law includes:

a. the provision of advice involving the application of legal principles to specific facts or purposes;

b. the preparation of legal instruments of any character, including but not limited to pleadings and other papers incident to actions or proceedings, deeds, indentures, mortgages, bonds, assignments, discharges,



leases, or other instruments affecting real estate, wills, codicils, trusts, or other instruments affecting the disposition of property after death; and

c. except as otherwise authorized by law, the representation of the interest of another before any judicial, executive, or administrative tribunal.

2. a. It shall be unlawful for any natural person, who has not first been duly and regularly licensed and admitted to practice in the courts of record of this state and who has not taken the constitutional oath:

i. to engage in the practice of law as defined in this section, while holding himself or herself out as being an attorney-at-law, or while asking for or receiving, directly or indirectly, compensation for such practice, or while doing any act or thing prohibited by section 484 of this chapter; or

ii. to appear as an attorney-at-law for a person other than himself or herself in a court of record in this state; or

iii. to furnish attorneys or counsel or an attorney and counsel to render legal services.

b. This subsection shall not be held to apply to the following activities, whether or not they constitute the practice of law:

i. serving as a judge, mediator, arbitrator, conciliator, or facilitator, whether or not designated by a party to the proceeding;

ii. the mere selling of blank legal forms in any format;

iii. ~~1. to~~ officers of societies for the prevention of cruelty to animals, duly appointed, when exercising the special powers conferred upon such corporations under section fourteen hundred three of the not-for-profit corporation law; or

iv. ~~2. to~~ law students who have completed at least two semesters of law school or persons who have graduated from a law school, who have taken the examination for admittance to practice law in the courts of record in the state immediately available after graduation from law school, or the examination immediately available after being notified by the board of law examiners that they failed to pass said exam, and who have not been notified by the board of law examiners that they have failed to pass two such examinations, acting under the supervision of a legal aid organization when such students and persons are acting under a program approved by the appellate division of the

supreme court of the department in which the principal office of such organization is located and specifying the extent to which such students and persons may engage in activities otherwise prohibited by this statute; or

v. ~~3.~~ to law students who have completed at least two semesters of law school, or to persons who have graduated from a law school approved pursuant to the rules of the court of appeals for the admission of attorneys and counselors-at-law and who have taken the examination for admission to practice as an attorney and counselor-at-law immediately available after graduation from law school or the examination immediately available after being notified by the board of law examiners that they failed to pass said exam, and who have not been notified by the board of law examiners that they have failed to pass two such examinations, when such students or persons are acting under the supervision of the state or a subdivision thereof or of any officer or agency of the state or a subdivision thereof, pursuant to a program approved by the appellate division of the supreme court of the department within which such activities are taking place and specifying the extent to which they may engage in activities otherwise prohibited by this statute and those powers of the supervising governmental entity or officer in connection with which they may engage in such activities;

vi. the carrying out by paralegals, clerks, secretaries, and other non-lawyers of tasks lawfully and properly delegated by a lawyer, provided the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work product;

vii. the provision by authorized court personnel to members of the public of general information about court requirements, options and procedures, under the supervision and instruction of the court;

viii. any other activity authorized by statute, common law, a rule of court or tribunal, administrative regulation, or other applicable law.

3. Any person violating the provisions of this section shall be guilty of a class "E" felony.

Section 2. Section four hundred eighty-four of the judiciary law is amended to read as follows:

**§484 Unauthorized use of title of attorney prohibited**

~~None but attorneys to practice in the state. No natural person shall ask or receive, directly or indirectly, compensation for appearing for a person other than himself as attorney in any court or before any magistrate, or for preparing deeds, mortgages, assignments, discharges, leases or any other instruments affecting real estate, wills, codicils, or any other instrument affecting the disposition of property after death, or decedents' estates, or pleadings of any kind in any action brought before any court of record in this state, or make it a business to practice for another as an attorney in any court or before any magistrate unless he has been regularly admitted to practice, as an attorney or counselor, in the courts of record in the state; but nothing in this section shall apply (1) to officers of societies for the prevention of cruelty to animals, duly appointed, when exercising the special powers conferred upon such corporations under section fourteen hundred three of the not-for-profit corporation law; or (2) to law students who have completed at least two semesters of law school or persons who have graduated from a law school, who have taken the examination for admittance to practice law in the courts of record in the state immediately available after graduation from law school, or the examination immediately available after being notified by the board of law examiners that they failed to pass said exam, and who have not been notified by the board of law examiners that they have failed to pass two such examinations; acting under the supervision of a legal aid organization, when such students and persons are acting under a program approved by the appellate division of the supreme court of the department in which the principal office of such organization is located and specifying the extent to which such students and persons may engage in activities prohibited by this statute; or (3) to persons who have graduated from a law school approved pursuant to the rules of the court of appeals for the admission of attorneys and counselors-at-law and who have taken the examination for admission to practice as an attorney and counselor-at-law immediately available after graduation from law school or the examination immediately available after being notified by the board of law examiners that they failed to pass said exam, and who have not been notified by the board of law examiners that they have failed to pass two such examinations, when such persons are acting under the supervision of the state or a subdivision thereof or of any officer or agency of the state or a subdivision thereof, pursuant to a program approved by the appellate division of the supreme court of the department within which such activities are taking place and specifying the extent to which they may engage in activities otherwise prohibited by this statute and those powers of the supervising governmental entity or officer in connection with which they may engage in such activities.~~

1. It shall be unlawful for any natural person, without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state:

a. to hold himself or herself out to the public as being entitled to engage in the practice of law;

b. to assume, use or advertise the title of "lawyer," or "attorney and counselor-at-law," or "attorney-at-law," or "counselor-at-law," or equivalent terms in any language as would convey the impression that he or she is entitled to practice law; or

c. in any manner advertise that he or she either alone or with any other person or persons has, owns, conducts or maintains a law office, or law and collection office, or office of any kind for the practice of law.

2. Paragraph 1 of this Section shall not apply to any attorney who has been duly and regularly licensed and admitted to practice law in the courts of record of another jurisdiction besides New York, and who is in good standing in that jurisdiction, provided that any public communication targeted to or intended to be seen or heard by residents of New York State that uses the title "attorney," "attorney-at-law," "lawyer," "law firm," "counselor-at-law," or similar term complies with the following:

a. The out-of-state attorney states the jurisdictional limitations on his or her practice and expressly indicates that he or she is not admitted to practice in New York;

b. The out-of-state attorney conspicuously states the office address and telephone number of his or her principal law office;

c. The out-of-state attorney complies with all New York statutes and court rules regulating lawyer advertising and solicitation;

d. The out-of-state attorney is not currently disbarred or suspended from the practice of law in any other jurisdiction.

An out-of-state attorney who violates this paragraph may be required by a court to disgorge or refund any fee earned as a result of the violation.

3. Any person violating the provisions of this section shall be guilty of a class "A" misdemeanor.

Section 3. Section four hundred eighty-five of the judiciary law is amended to read as follows:

§485 Violation of certain preceding sections a misdemeanor.

Any persons violating the provisions of sections ~~four hundred seventy-eight~~, four hundred seventy-nine, four hundred eighty, four hundred eighty-one, four hundred eighty-two, or four hundred eighty-three ~~or four hundred eighty-four~~, shall be guilty of a misdemeanor.

Section 4. This act shall take effect immediately.

[Additions to original statutes indicated by **bold text**; deletions indicated by ~~strike-through~~.]

## MEMORANDUM IN SUPPORT OF LEGISLATION

### INTRODUCED AT THE REQUEST OF:

### TITLE OF BILL:

AN ACT to amend the judiciary law, in relation to unauthorized practice of law.

### PURPOSE OF BILL:

To recodify those provisions of the Judiciary Law relating to unauthorized practice.

### SUMMARY OF SPECIFIC PROVISIONS:

Amends section 478 of the judiciary law to define the term "practice of law," and sets forth specific acts that would constitute the unauthorized practice of law. The portion of existing section 478 providing certain exceptions for officers of societies for prevention of cruelty to animals and certain law students or law school graduates is retained.

Amends section 484 of the judiciary law to prohibit the unauthorized use of the title of attorney, or equivalent title.

Amends section 485 of the judiciary law to delete references to sections 478 and 484 as unnecessary.

### JUSTIFICATION:

The proposed bill would recodify those provisions of the Judiciary Law defining and prohibiting the unlawful practice of law at present dealt with in Judiciary Law §§478 and 484, and it would amend §485 accordingly. The proposed definition would not be an exhaustive definition; rather, it would contain a non-exclusive listing of activities that are considered to be included in

the term. This definition would permit the retention of previous case law interpretation of the term while permitting the development of future case law interpretations that may be broader than permitted by the current statute, which should be especially helpful for the enforcement of the statute against the unlawful practice of law on the civil side.

The present statute has the disadvantage of not having a provision defining the fundamental term "practice of law," although that term, either actually or implicitly, is employed in language stating some of the prohibitions. Thus, for example, at present it does not seem that a non-attorney offering legal advice and services in connection with immigration matters would run afoul of any existing prohibition except that prohibiting the statutorily undefined "practice of law," and the lack of a definition presents a serious obstacle to the possibility of a successful criminal prosecution. The definition contained in the proposed statute should therefore benefit the criminal enforcement of the law by providing needed clarity.

The proposed bill also reorganizes the two sections according to the evils proscribed. In the existing statute, §478 addresses, without distinction, both the performance of certain acts by persons not admitted to the bar as well as falsely holding oneself out as a member of the bar, while §484 addresses the performance of certain acts by non-attorneys in connection with receiving or requesting compensation. Modeled after the provisions of the Education Law in relation to other professions (*see*, Education Law §§6512, 6513), the proposed bill would distinguish the gravity of the evil of simply falsely holding oneself out as an attorney – which would continue to be a misdemeanor offense – from that of performing acts reserved to members of the bar, which would be elevated to the level of a felony offense, thus reflecting the seriousness of the potential harm visited upon the public due to the unlawful practice of law.

Because the proposed §478 and §484 contain within them provisions regarding the level of offense resulting from a violation of the statutes, references to §478 and §484 are deleted from §485 under the proposed bill.

**PRIOR LEGISLATIVE HISTORY:** None

**FISCAL IMPLICATIONS:** None

**EFFECTIVE DATE:** Immediately

**SPECIAL COMMITTEE ON UNLAWFUL PRACTICE OF LAW**

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August 2001

**REPORT OF SPECIAL COMMITTEE ON  
UNLAWFUL PRACTICE OF LAW**

In June 2000, the NYSBA House of Delegates approved the report of the Special Committee on the Law Governing Firm Structure and Operation (the MacCrate report). In that report, the committee noted that New York's statutory regulation of unauthorized practice was in need of substantial overhaul, and recommended "that an appropriate [NYSBA] committee...be directed to study this issue and make appropriate proposals...for the adoption of a provision defining the practice of law." (MacCrate report, pp. 374-75.) Our committee was assigned the task of conducting this study and developing an appropriate definition of unauthorized practice.

Our committee reviewed other states' statutory provisions regarding unauthorized practice. In particular, the committee was guided by the report and recommendations of the Washington State Bar Association's Committee to Define the Practice of Law, referenced in the MacCrate Report. The committee also conducted a program during the NYSBA Annual Meeting entitled "Symposium on Unauthorized Practice: Toward a Definition of 'Practice of Law.'"

The existing provisions of the Judiciary Law relating to unauthorized practice include section 478, entitled "Practicing or appearing as attorney-at-law without being admitted and registered," and section 484, entitled "None but attorneys to practice in the state." We propose replacing these sections with a new section 478, entitled "Unauthorized practice of law prohibited," and a new section 484, entitled "Unauthorized use of title of attorney prohibited." Section 478 in our proposal consists of a definition of the practice of law; a prohibition on unauthorized practice; and a listing of activities to which the prohibition on unauthorized practice does not apply. This latter portion of the statute incorporates the existing exceptions contained in section 478, and also includes serving as a judge or neutral; selling blank legal forms; and any other activity authorized by law. The "authorized by law" exception recognizes that there are activities that a nonlawyer can perform pursuant to statute or case law. A violation of section 478 would be classified as a class "E" felony; currently a violation of section 478 is an unclassified misdemeanor.

Section 484 as amended would prohibit a nonlawyer from holding himself or herself out as an attorney or as being able to engage in the practice of law. It is patterned after comparable provisions in the New York Education Law with respect to other professions, and a violation of section 484 would be a class "A" misdemeanor.



We would like to point out that in addition to statutory amendments, it is also necessary to consider amendments to Canon 3 of the Code of Professional Responsibility. As an example, existing EC 3-5 states that "[i]t is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law." Our committee is currently working on proposed Code revisions to address this and other issues.

We would also note that this report does not take into account current concerns regarding multi-jurisdictional practice, aside from noting that a lawyer admitted to practice in another state is not subject to the prohibition on falsely holding oneself out as an attorney, contained in proposed section 484. It is our understanding that this question is under study by others. We note two possible modifications that could be made to this draft to allow practice in New York by lawyers admitted elsewhere. If lawyers admitted in other states are to be permitted unrestricted practice in New York, then paragraph 2(a) of §478 could be modified to change "in this state" to "in any state." A less permissive alternative would include in paragraph 2(b) a carve-out to permit practice in New York by attorneys admitted elsewhere if that practice is incidental or ancillary to their authorized practice in another jurisdiction. Our committee expresses no view on the desirability of these or any other possible accommodations to multi-jurisdictional practice.

Respectfully Submitted,

Special Committee on Unlawful  
Practice of Law

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**JONATHAN LIPPMAN**  
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**JUANITA BING NEWTON**  
Deputy Chief Administrative Judge  
for Justice Initiatives

December 13, 2001

Kathleen Baxter, Esq.  
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New York State Bar Association  
One Elk Street  
Albany, New York

Dear Ms. Baxter:

My office has reviewed, on behalf of the Office of Court Administration, the Report of the Special Committee on the Unlawful Practice of Law ("Report") proposing legislation to amend section 478 of the Judiciary Law prohibiting the unauthorized practice of law. This amendment would apply to court personnel because, as salaried employees, they are "receiving, directly or indirectly, compensation" for the performance of their duties. §478(2)(a)(i). We are deeply concerned that the proposal, in its current form, may jeopardize the essential role these court employees play in assisting self-represented litigants who seek access to our courts.

One of my principal responsibilities as Deputy Chief Administrative Judge for Justice Initiatives is to ensure that persons have access to the courts regardless of whether they have an attorney. In courts where there are large numbers of unrepresented litigants, such as Family Court, Surrogate's Court, and local courts of limited jurisdiction, court clerks are specially trained to assist the unrepresented by explaining the procedural requirements of the court and by helping them complete the forms necessary to obtain judicial relief. Some of this assistance is required by statute. See, e.g., §1803(a) of all of the Uniform Court Acts [commencement of small claims actions -- clerk fills out the statement of the cause of action]; §110(o) of the New York City Civil Court Act [requiring that there be clerks in the Housing Part to assist persons without counsel]. Some assistance is implied by statute. See Family Court Act, §216-c [clerk in assisting petitioner must include all allegations asserted by petitioner]. Most assistance has no direct statutory underpinning. We currently have begun programs in our Supreme Courts to assist the self-represented, as we see more and more people seeking access to that court without lawyers.

The amendments to section 478 of the Judiciary Law proposed in the Report define "practice of law " as including "the provision of advice involving the application of legal principles to specific facts or purposes." §478(1)(a). We have no quarrel with that definition. In fact, we expressly instruct our clerks that they may provide unrepresented litigants only with general information and options, and not select the particular allegations or options applicable to the facts presented. The problem is that the line between the general and the fact-based specific is often so close that court personnel whose duties include assisting pro se litigants continually run the risk of inadvertently crossing that line. With the Committee 's proposal, our clerks theoretically can be charged with a felony for doing so. And whether or not that outcome is realistic, awareness of that possibility could cast a chilling effect on the scope of assistance that court personnel actually give --to the detriment of the unrepresented litigant and the effective resolution of their claims by the courts.

The exception in the proposal for "any other activity authorized by applicable law" does not cure this. As noted above, much of the assistance that our clerks provide to unrepresented litigants is not addressed by statute. And to the extent that statutes authorize court personnel to assist the unrepresented, they do not resolve how this assistance would be reconciled with the definition of "practice of law."

It is imperative that there be some exemption in the proposed amended section 478 for the provision of assistance by court personnel to self-represented litigants. The State Bar's Special Committee on the Law Governing Firm Structure and Operation touched on this concern in its April 2000 report and suggested a provision governing the prohibition on the practice of law that would not "affect the ability of a governmental agency to carry out responsibilities provided by law." April 2000 report, p. 376. This protection is especially needed by the court system.

I thank you in advance for your attention and consideration of this matter.

Very truly yours,



Juanita Bing Newton

c: Hon. Jonathan Lippman  
Patricia Bucklin, Esq.  
Mark Solomon, Esq.



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December 14, 2001

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Mr. John A. Williamson Jr.  
Associate Executive Director  
New York State Bar Association  
One Elk Street  
Albany, NY 12207

Dear Mr. Williamson:

In anticipation of discussion at the January NYSBA House of Delegates meeting, the New York County Lawyers' Association is submitting its Report and Recommendations with respect to the Report of the NYSBA Special Committee on the Unlawful Practice of Law. NYCLA opposes enactment of the Special Committee's proposed revisions to the Judiciary Law for the reasons set forth in the attached report.

Sincerely,

  
Craig A. Landy  
President

enclosure

CAL/rz



Recommendations by NYCLA's Committee on Professional Ethics on Judiciary Law Revisions  
Proposed by the NYSBA Special Committee on Unlawful Practice of Law

These recommendations by its Committee on Professional Ethics were approved by the Board of Directors of the New York County Lawyers' Association at its regular meeting on December 10, 2001.

The members of the Committee on Professional Ethics of the New York County Lawyers' Association ("NYCLA") make the following recommendation to the Board of Directors of the NYCLA as to what we described in our memorandum to the Board of Directors dated October 8, 2001 as "the New York State Bar Association's Special Committee on Unlawful Practice of Law proposal to amend the Judiciary Law in relation to unlawful practice of law."

The Special Committee on Unlawful Practice of Law has drafted proposed revisions to Sections 478, 484 and 485 of the Judiciary Law . . . it deletes the current Section [sic.] 478 and 484. It also amends Section 485, which makes violations of unlawful practice of law a misdemeanor by deleting Sections 478 and 484 since they have incorporated the crime into those sections. They have also made the penalty a Class E felony instead of a misdemeanor for a violation of Section 478.

The Committee on Professional Ethics at its meeting on November 27, 2001<sup>1</sup> reviewed a subcommittee report and it recommends that the Board of Directors of the NYCLA oppose enactment of the above proposal. Our reasons are set forth below.

1. The Proposed Definition of "Practice of Law" is Overbroad and Would Do Substantial Injury to the Public Interest.

Section 478(l), as proposed, would define the "Practice of Law" as, including but ... not limited to ... (a) "the provision of advice involving the application of legal principles to specific facts or purposes ..." and (b) the preparation of legal instruments of any character ..."

The breadth of the definition is obvious. Within the proposed statutory definition of "Practice of Law" would be included numerous currently performed activities of non-licensed professionals. Included in the dragnet of the "Practice of Law" whose proper practice or calling involves to some extent the "application of legal principles to specific facts" or "the preparation of legal instruments of any character."

Surely, it would be an undue burden to require employment of a lawyer in each of these many instances.

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<sup>1</sup> The vote of the Committee in attendance was unanimous.

Presumably, if the adviser provides services for free, then that adviser would not run afoul of the law. It is hard to see why if provision of such services by an unlicensed provider to the public is a social evil, it should make a difference whether the provider of the services asks for or receives compensation. The injury is to the members of the public regardless of whether the advice is paid for. Indeed, a reason for the distinction between compensated and uncompensated for advice could well be regarded as the concern of members of the organized bar that their own financial circumstances would be adversely affected by competition with unlicensed advisers to the public. Such a reason hardly does credit to our profession.

The requirement that the provider ask for or receive "direct" or "indirect" compensation is inherently ambiguous. For example, does the social worker, employed by a not-for-profit organization, seek "compensation" when he or she receives payment (i.e. "salary") for his/her services to the indigent? What about a bank officer who arranges a retail loan without the benefit of counsel for the borrower? His or her services are being compensated for by salary; wouldn't that officer then be "practicing law" in violation of the proposed statute, making the officer and the bank lender susceptible to a felony prosecution? Even if we considered the officer a mere agent, is not the bank lender "indirectly" or even "directly" asking for or receiving compensation by payment to it of bank charges or interest?

The proposed legislation is further flawed in that it does not clearly exempt from its prohibition the work of legal assistants or clerks who act under supervision of lawyers. Ironically, the recommended statute does allow for employment of law students who have completed "at least two semesters of law school when they are acting under the supervision of legal aid or government agencies. See proposed Section 478(2)(b)(iii) and (iv). Implicitly, non-lawyers "supervised" by lawyers who are not affiliated with such agencies are subject to the sanctions of the proposed amendments.

## 2. The Public Interest Would Be Best Served by Maintaining The Status Quo

There is no demonstration that the public is being injured by the current state of the Judiciary Law. The New York State Bar Association's Committee offers no empirical evidence of any such injury. Its primary inspiration seems to come not from the need to address a need of New York citizenry but the concern of the MacCrate report as to multidisciplinary practice. At the very least, in the absence of evidence of public injury or concern, that inspiration seems economically self-serving.<sup>2</sup>

It is our view that the definition of "Practice of Law" and the problem of unauthorized practice is a matter far better left to the judiciary and the Attorney General of the State. The organized bar has long recognized the rule that certain services often performed by non-lawyers may constitute the practice of law when performed by those licensed to practice law.<sup>3</sup> The organized bar has always accepted that duality. However, it also has emphasized the importance that the receiver of those services understand the difference between the trust he or

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<sup>2</sup> Although beyond the scope of this recommendation, a far more serious issue would appear to be the critical need of the population for advice concerning law furnished at a modest price.

<sup>3</sup> e.g., American Bar Association, Committee on Professional Ethics, Opinions 194 (1939), 224 (1941), 257 (1944), 305 (1962).

she can place in lawyers who are governed by codes of ethics and regulation by appropriate agencies contrasted with those are not so regulated or licensed. The foregoing is one of the cardinal features of the newly promulgated rules dealing with multidisciplinary practice by New York State licensed lawyers (i.e. the duty of the provider of law related services to disclose the absence of a license to practice law). It is hard to understand how the proposed legislation would square with the multidisciplinary practice now accepted under the new rules.

The legislation proposed by the New York State Bar Association's Special Committee on Unauthorized Practice would also interfere with the constructive ways that the New York courts have treated the drafting of real estate brokerage contracts by non-lawyer real estate professionals. See, Willinger and Lee, "Drafting Preparation of Contracts of Sale by Brokers," Land Title Trends, N.Y.L.J. (August 20, 2001), 54 et seq and cases cited therein.

3. Proposed Section 484 Is Inconsistent With New York's Policies on Multijurisdictional Practice Including the Opinions of the New York State Bar Association

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Proposed Section 484 seeks to rewrite the current provision in an effort to make it consistent with proposed Section 478, defining the "Practice of Law" and prohibiting engagement therein by those who are unlicensed and directly or indirectly compensated.

We would have no comment on proposed Section 484 since it is not a substantive change in law to the extent that the proposed Section 478 would be adopted. However, we must observe that, by oversight or otherwise, the newly proposed Section 484(1) "makes unlawful" any "natural person" not "admitted to practice law in the courts of record of any state...in any manner advertising that he or she either alone or with any person or persons has, owns, conducts or maintains a law office, or law and collection office, or office of any kind of, or for the practice of law..."

The restriction to those "admitted to practice law in the courts of record of any state" overlooks that multistate law partnerships and professional corporations operating in New York have long consisted of lawyers admitted in New York and other states, but also lawyers admitted in the District of Columbia and foreign nations. e.g. See: New York State Bar Association Professional Ethics Committee Opinions 542 (1982), 646 (1993); ABA Formal Opinion 01-423 (2001).

We can only assume that the foregoing language was an oversight by the drafters.

4. Conclusion

The Committee recommends disapproval of what the Special Committee on Unlawful Practice of Law of the New York State Bar Association describes as proposed "amendments to New York's Judiciary Law" to define the 'practice of law' and to clarify and modernize the prohibitions against organized practice.

## **APPENDIX "B"**



**NEW YORK STATE BAR ASSOCIATION  
ANNUAL MEETING**

**COMMITTEE ON PROFESSIONAL DISCIPLINE  
ETHICS PRESENTATION**

**"CONDUCT OF SUSPENDED AND DISBARRED ATTORNEYS"**

**JANUARY 24, 2001**

**NEW YORK MARRIOTT MARQUIS**

**MONOGRAPH  
PREPARED BY:**

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A. Introduction.

One of the most difficult issues relating to the suspension and disbarment of attorneys in New York State, is precisely what such attorneys can do after they are formally prohibited by Court order from "practicing law." But unlike other states -- which either through statute or court decisions clearly define the "practice of law" in the context of post-suspension or post-disbarment conduct -- guidance in New York on this issue is scant and unpersuasive to say the least.

The lack of clarity in New York on this issue creates serious problems. For the suspended or disbarred the attorney, the lack of clarity places him or her in the position of possibly violating the law and court order by engaging in prohibited practices. For the attorney who wishes to employ the suspended or disbarred attorney, there is the fear of violating of Disciplinary Rules and perhaps statutes as well. Finally, the possibility of engaging in the

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prohibited practice of law by a suspended or disbarred attorney jeopardizes the possibility of future reinstatement.

As discussed below, I submit that that there is inadequate guidance by the Appellate Divisions concerning the acceptable and unacceptable employment of attorneys who are suspended or disbarred, with respect to activities such as the administrative and nonlegal work which is done on a day-to-day basis in law offices. In analyzing this issue, I have intentionally not utilized the term "paralegal" in my discussion, because that term is subject to a very broad, and often confusing, interpretation. Indeed, paralegal institutes currently train their students to do legal research, draft memoranda, meet with clients, cover calendar calls, etc., all ostensibly under the supervision of an attorney. In this regard, if one were to consider whether a suspended or disbarred attorney could act as a paralegal in the broadest sense of the word, then surely the answer would be "no."

Instead, in this monograph I have utilized the notion of a suspended or disbarred attorney performing purely administrative work on an "in-office" basis, with the understanding that this individual is not drafting legal documents, filling out legal-type documents, performing legal research, interacting with clients, etc. Viewed in this purely administrative setting, and not in the context of the amorphous term "paralegal," the issue of what

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administrative or nonlegal activities a suspended or disbarred attorney may perform can be more clearly understood and analyzed.

As set forth below, with regard to the issue of whether a suspended or disbarred attorney can do in-office administrative work, the law gives little guidance; bar associations give either no guidance or ego-driven ipse dixits; and court decisions seem divergent and of little use. At the end of the day, because of the Judiciary Law's silence on the issue, it appears that although a suspended or disbarred attorney cannot perform acts traditionally associated with the practice of law, he or she is legally permitted to perform administrative-type work that does not involve interacting with attorneys or clients in a manner traditionally associated with giving legal opinions, drafting legal papers, etc.

B. The Relevant Law.

The Rules of the Appellate Division, First Department (22 N.Y.C.R.R. section 606.13(a) (and its counterpart in the other Appellate Divisions)), state that a disbarred, suspended or resigned attorney must comply fully and completely with the letter and spirit of sections 478, 479, 484 and 486 of the Judiciary Law relating to attorney practice.<sup>1</sup> Section 478 establishes that it is

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<sup>1</sup>Section 603.13(a) states in pertinent part:

Disbarred, suspended and resigned attorneys  
shall comply fully and completely with the  
letter and spirit of sections 478, 479, 484  
(continued...)

unlawful for any person to practice law or to appear as an attorney or counselor, to furnish attorneys or counsel, or to otherwise hold himself out as an attorney without having been admitted to practice in New York; section 479 prohibits the solicitation of business on behalf of an attorney; section 484 establishes that non-lawyers may

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(...continued)

and 486 of the Judiciary Law relating to practicing as attorneys at law without being admitted and registered, and soliciting of business on behalf of an attorney at law and the practice of law by an attorney who has been disbarred, suspended or convicted of a felony.

Section 478 of the Judiciary Law 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

. . . . .

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not appear in court, prepare any instruments affecting the disposition of property, prepare pleadings of any kind, or practice in any court or before any magistrate in New York courts of record. Under section 486 any attorney who has been disbarred, suspended or convicted of a felony and who "does any act forbidden by the provisions of this article" is guilty of a misdemeanor.

Pursuant to Judiciary Law section 90(2), the Appellate Division must insert into each suspension order a provision that the attorney must "thereafter ... desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee." Thus, a suspended attorney is prohibited from making an appearance "before any court, judge, justice, board, commission or other public authority" and from giving to another any opinion "as to the law or its application, or of any advice in relation thereto." Id.<sup>2</sup>

The Judiciary Law, however, is completely devoid of any definition as to what constitutes the "practice of law."

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<sup>2</sup>Judiciary Law section 90, subdivision 2, requires that orders of suspension and disbarment include a provision that the individual "desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another." Subsection 2 continues to specifically address prohibited misconduct which clearly comes within the definition of law, such as appearing before a court and giving legal opinions. Thus, section 90(2) seems to define what is traditionally considered the unauthorized practice of law, but does not seem intended to prevent a suspended or disbarred attorney from acting as the agent or employee of an attorney, because to do so would prevent suspended or disbarred lawyers from being janitors or even painters in the employ of a law firm.

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Furthermore, it does not provide any guidance as to what types of jobs a suspended or disbarred attorney may perform. Although the courts have made several case specific determinations as to what does or does not constitute the "practice of law," there is no consensus among the opinions as to what, in broad terms, is allowed pursuant to the Judiciary Law and thus, no rule for a suspended or disbarred attorney to follow.

The New York State Court of Appeals has defined the "practice of law" solely as it relates to the representation of clients or providing advice to clients. Specifically, the Court has held that "[t]he 'practice' of law reserved to duly licensed New York attorneys includes the rendering of legal advice as well as appearing in court and holding oneself out to be a lawyer. El Gemayel v. Seaman, 72 N.Y.2d 701, 536 N.Y.S.2d 406 (1988) (citing Spivak v. Sachs, 16 N.Y.2d 163, 166, 263 N.Y.S.2d 953 [1965]). The court has further defined the "practice" of law to include "advice or services ... rendered to particular clients" and not merely provided to the public in general. El Gemayel, 536 N.Y.S.2d 406, 409 (citing Matter of New York County Lawyer's Ass'n v. Dacey, 21 N.Y.2d 694, 287 N.Y.S.2d 422 (1967)), rev'g on dissenting opn. below 28 A.D.2d 161, 283 N.Y.S.2d 984 (holding that publishing a book on "How to Avoid Probate" does not constitute the unauthorized "practice of law").

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Indeed, in 1992, the Court of Appeals held that publishing a law-related article and using the letters "J.D.," does not constitute the practice of law prohibited by a suspension order. Matter of Rowe, 80 N.Y.2d 336, 590 N.Y.S.2d 179 (Ct. App. 1992). In its discussion, the court defined "[t]he practice of law" as "the rendering of legal advice and opinions to particular clients" and held that the article, which addressed the right to refuse treatment, was permissible as an exercise of the First Amendment because it "sought only to present the state of the law to any reader interested in the subject" and "neither rendered advice to a particular person nor was intended to respond to known needs and circumstances of a larger group." Id. at 341, 590 N.Y.S.2d at 182.

The First Department has specified several areas which are considered the "practice" of law and are therefore beyond the permissible scope of conduct in which a suspended attorney may engage. However, these specified areas involve obvious violations of the rules. For example, an attorney's representation of a client while the attorney is subject to an order of suspension constitutes unauthorized practice and warrants immediate disbarment. See, e.g., Matter of Glassman, 126 A.D.2d 214, 513 N.Y.S.2d 685 (1st Dept. 1987) (suspended attorney represented a client in connection with the purchase of real estate); Matter of Kaufman, 105 A.D.2d 145, 483 N.Y.S.2d 291 (1st Dept. 1985) (suspended attorney represented client by, inter alia,



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executing and submitting an affirmation to the court, preparing motion papers, and conducting examinations before trial); Matter of Javitz, 100 A.D.2d 288, 473 N.Y.S.2d 797 (1st Dept. 1984) (suspended attorney represented clients in real estate litigation); Matter of Teplin, 82 A.D.2d 296, 441 N.Y.S.2d 463 (1st Dept. 1981) (suspended attorney practiced law, maintaining a law office, business cards and letterheads thereby representing himself to be an attorney). Likewise, a suspended attorney who appears in court and participates at trial engages in the unauthorized practice of law, see, e.g., Matter of Anderson, 180 A.D.2d 146, 585 N.Y.S.2d 19 (1st Dept. 1992), as does an attorney who meets with and counsels clients. Matter of Becker, 95 A.D.2d 67, 465 N.Y.S.2d 33 (1st Dept. 1983).

Other "law-related" activities which have resulted in the disbarment of suspended attorneys include negotiating the purchase of a long-term leasehold, Matter of Brill, 131 A.D.2d 3, 519 N.Y.S.2d 816 (1st Dept. 1987); acting as house counsel of a brokerage firm in which the suspended attorney has a controlling interest, Matter of Olitt, 145 A.D.2d 273, 538 N.Y.S.2d 537 (1st Dept. 1989); and negotiating to obtain witness protection for a friend and former client, Matter of Goldberg, 190 A.D.2d 269, 599 N.Y.S.2d 225 (1st Dept. 1993). See also Matter of Parker, 241 A.D.2d 208, 670 N.Y.S.2d 414 (1st Dept. 1998) (holding that an attorney violated D.R. 3-101(A) by aiding a non-lawyer in the

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practice of law by allowing a suspended attorney to prepare a contract of sale and appear on the seller's behalf to postpone a foreclosure sale and recognizing "that there is no clear cut definition of the unauthorized 'practice of law' and the nature and scope of activities appropriately permissible to [non-lawyers] ....").

In Matter of Olitt, the attorney had been suspended from the practice of law by the Appellate Division, Second Department. However, he remained in good standing in the United States District Courts for the Southern and Eastern districts where he continued to practice law. 538 N.Y.S.2d 537, 538. During his suspension from the state courts, he acted as house counsel for a brokerage firm in which he had a controlling interest. In order to do so, he registered as an attorney with the New York State Office of Court Administration without providing information about his suspension and without indicating that his practice was limited to the federal courts or federal matters. Id. at 539. In addition, he appeared for the brokerage firm in a law suit filed in State Supreme Court, New York County, and filed the necessary legal papers in connection with the suit in his own name. Id. He further practiced law by providing legal advice to a client who had a claim against another broker and drafting leases and contracts for the brokerage firm. Olitt argued that he had appeared only in arbitration hearings before the New York Stock Exchange on behalf of the company, which,

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as a result of his interest in the company, was a pro se appearance and therefore, was allowed under the rules. He further argued that a lay person may practice before the Arbitration Panel. Nonetheless, the Court viewed his conduct as the unlawful "practice of law" and ordered that he be disbarred. Id.

In In re Rosenbluth, a suspended attorney sought permission to continue operating a calendar watching service for New York attorneys during the course of his suspension. 36 A.D.2d 383, 320 N.S.2d 839, 840 (1st Dept. 1971). In its opinion, the First Department importantly noted that "[a] suspended or disbarred attorney holds approximately the same status as one who has never been admitted . . . and there are some law related activities which such attorneys have been permitted to engage in." 320 N.Y.S.2d at 840-41 (internal citations omitted; emphasis added). The court listed several permissible activities which suspended or disbarred attorneys may engage in, such as: "aiding an attorney in good standing in the preparation of a law book (and his name may be used)"; "soliciting lawyers for process serving business to be turned over to a process serving firm"; and associating as a principal with a process serving company or being employed by an insurance company as an investigator or adjuster." 320 N.Y.S.2d at 841 (citing A.B.A. Opinions of Committee on Professional Ethics and Grievances Informal Decision C-566 (1962); Association of the Bar of the City of New York, No. 132, No. 147 (1930), respectively).

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Stating that the activities listed above appeared to be "equally, if not more, law-related than respondent's chosen activity," the Rosenbluth court granted the request and allowed the suspended attorney to continue operating his calendar watching service. 320 N.Y.S.2d at 841. However, the court also noted that the dissent, which did not agree that this activity was permissible, relied, in part, upon Matter of Katz, 35 A.D.2d 159, 315 N.Y.S.2d 97 (1st Dept. 1970), which involved the employment of a suspended attorney by a City Marshal. The court ruled that "[a] City Marshal's 'work is closely allied with the courts and judicial proceedings' and 'his duties include the enforcement of court orders' and related activities .... Running a calendar watching service does not entail such duties or activities." 320 N.Y.S.2d at 841 (citing Katz, 35 A.D.2d at 160, 315 N.Y.S.2d at 98).

This line of cases seem to be reflected in the May 24, 2000 decision by Justice Caesar Cirigliano in People v. Jakubowitz, Ind. No. 3867/99 (Bronx Co. Sup Ct. 2000). In Jakubowitz, the defendant was an attorney who had been disbarred in 1993 by the First Department, but who met with members of the public, held himself out as an attorney and undertook to prepare, file and prosecute a mechanic's lien on behalf of a client, and was to be paid \$4,000.00 for these efforts. He was indicted for violating Judiciary Law section 478, proscribing the unauthorized practice of law. The defendant moved to dismiss the indictment on the ground that

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Section 478 was unconstitutional vague. Justice Cirigliano noted that while

Judiciary Law section 478 is not a model of clarity, it clearly prohibits a non-licensed individual from practicing law in this state as follows: to appear as an attorney in a court of record in this State, to render legal services, or to hold himself out as being entitled to practice law as aforesaid or in any other manner. Moreover, the prohibited practice of law includes the rendering of legal advice and preparation of legal papers in New York even if performed out of court with respect to foreign law. [citations omitted] While there are grey areas in the law -- such as attending a conference in New York and negotiating there on behalf of a client [citation omitted] -- which might render the prosecution of a defendant who inadvertently overstepped such bounds inappropriate on constitution grounds, this is not such a case. Since at least 1957, the preparation in New York of legal documents for filing out of state and the hold out of oneself as an attorney has been prohibited. [Citation omitted] Defendant cannot therefore claim surprise.

Having discussed the various decisions by the courts on the issue of the unauthorized practice of law by suspended and disbarred attorneys, let me turn my attention to the fog-like thicket of bar association opinions which relate to this issue. The New York City Bar Association's Opinion 1998-1 (1998) addressed, albeit in not a particularly helpful manner, the question of "[u]nder what circumstances, if any, may an attorney in good standing employ a disbarred or suspended attorney to work in a law office." It concluded that:

[I]t is clearly improper for a lawyer or law firm to employ a disbarred or suspended attorney in any capacity related to the practice of law. What acts constitute the

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unauthorized practice of law is a question of  
law for the Appellate Division.

Association of the Bar of the City of New York, No. 1998-1.

New York City Opinion 1998-1 noted that New York County Opinion 666 (1985) "is not as deferential, holding that an attorney may not employ a disbarred lawyer as a law clerk whose functions would include the conduct of pre-trial depositions and the attendance at real estate closings on behalf of the inquiring attorney." Association of the Bar of the City of New York, No. 1998-1. That City Bar Opinion also stated that "Nass. Co. 92-15, suggested that an adjudication of the question of what a disbarred or suspended attorney may do in a specific instance might be obtained by motion in the Appellate Division." Furthermore, the City Bar Opinion concluded by noting:

It is worth repeating that N.Y. County 666 declined to opine on whether a disbarred lawyer might properly be employed by a law firm as a process server, messenger, secretary<sup>3</sup> or investigator; and we concur that only the Appellate Division, on proper application, can decide such an issue or, for that matter, whether there are circumstances in which a disbarred attorney might be able to act as a paralegal while 'desist[ing] and refrain[ing] from the practice of law in any form.

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<sup>3</sup>In many ways, the question of whether a suspended or disbarred attorney may work in a law office as a "secretary" is closely related to the question of whether a former attorney may perform in-office administrative work -- which is the key unanswered question in this area.

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It is clearly improper for a lawyer or law firm to employ a disbarred or suspended attorney in any capacity related to the practice of law. What acts constitute the unauthorized practice of law is a question of law for the Appellate Division."

Association of the Bar of the City of New York, No. 1998-1.  
(Emphasis added.)

In Nassau County Opinion No. 95-15 (1995), the Committee on Professional Ethics of the Bar Association of Nassau County addressed the "[p]ropriety of employing a suspended attorney to draft pleadings, contracts, trust agreements and wills, and to perform legal research as a 'litigation analyst,' and [the] duty to report [the] employing attorney and/or suspended attorney to appropriate authorities." The Opinion, citing American Bar Association ("A.B.A.") Opinion 1434, unpublished Opinion 7 of the A.B.A. Ethics Committee, and Opinion 666 of the New York County Lawyers' Association, concluded that "the statutory and code provisions ... impliedly place greater restrictions upon the ability of a disbarred lawyer from earning a living by use of his or her training and talent and experience than are encountered by non-lawyers generally."

The Nassau County Opinion, noted that notwithstanding Judiciary Law §§ 478, 486 and 90(2) and D.R. 3-101(A), Ethical Consideration 3-6 contemplates that it is permissible for lawyers to "delegate[] tasks to clerks, secretaries and other lay persons

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acting under the attorneys' supervision." Citing to its previous opinion, No. 92-15, the Opinion stated that "these are questions of law that are beyond the jurisdiction of this Committee" and declined to respond to the inquiry. However, the Committee noted that "the inquiring attorney may be able to seek guidance on this issue from the Appellate Division that issued the order of suspension." But see American Bar Association, Informal Ethics Op. 1434 (stating that a lawyer may not employ a disbarred attorney, even to perform "nonlegal" work such as office work".)

In addition to the confusion stemming from the New York Judiciary law and various opinions issued by courts and Bar Associations within the state, the conduct which constitutes the unauthorized practice of law varies greatly in other jurisdictions across the country. See Charles W. Wolfram, Modern Legal Ethics § 15.1.4 (1986). In general, a suspended lawyer has no greater power to practice law than a non-lawyer, and the same conduct constitutes unlawful practice for both. See, e.g., In re Eisenberg, 96 Wis.2d 342, 291 N.W.2d 565 (1980) (appearance before administrative agency on behalf of corporation of which suspended

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D.R. 3-101(A) states that "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law." Ethical Consideration 3-6 states that "[a] lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently."



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lawyer was president and sole shareholder is unauthorized practice); Farnham v. State Bar, 17 Cal.3d 605, 131 Cal. Rptr. 661, 552 P.2d 445 (1976) (holding that suspended lawyer has no greater power to practice law than a non-lawyer and that by drafting legal documents and giving legal advice suspended lawyer engaged in unauthorized practice).

By way of non-exhaustive examples, a number of states permit suspended attorneys to act as law clerks, including Florida, California, Delaware, Kansas, Michigan, North Dakota and Oregon. In re Mitchell, 901 F.2d 1179, 1186 and n.11-n.17 (3d Cir. 1990); see, e.g., In re Wilkinson, Kan. S.Ct., No. 67, 413 (1992) (holding that "[a] suspended attorney is permitted to work as a law clerk, investigator, paralegal, or in any capacity as a non-lawyer for a licensed attorney-employer if the suspended lawyer's functions are limited to work of a preparatory nature under the attorney-employer's supervision and does not involve client contact") (emphasis added); Florida Bar v. Thompson, 310 So.2d 300, 87 A.L.R.3d 272 (Fla. 1975) (holding that a suspended attorney may act as "a law clerk or investigator for members in good standing of The Florida Bar")<sup>5</sup>; In re McKelvey, 82 Cal.App. 426, 255 P. 834

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<sup>5</sup>But, in Florida, an attorney "practiced law" in violation of an order removing him from the roster of attorneys authorized to practice in bankruptcy court by assisting debtors in preparation of their bankruptcy schedules and petitions and by advising them regarding their bankruptcy. In re Corbett, 145 B.R. 332 (Bkrtcy. (continued...))

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(1927) (holding that attorney did not violate suspension by working as an employee of another attorney performing research, drafting pleadings, and writing briefs) (emphasis added); Matter of Frabizzio, 508 A.2d 468 (Del. 1986) (holding that a suspended lawyer "may perform the tasks usually performed by law clerks and by paralegals ... except that he may not have direct contact as a law clerk or paralegal with clients, witnesses, or prospective witnesses"); Grievance Administrator v. Chappell, 418 Mich. 1202, 344 N.W.2d 1 (1984) (holding that Attorney Discipline Board's power to suspend attorney does not include power to bar respondent from "working as an agent, clerk or employee of a licensed attorney").<sup>6</sup>

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(...continued)  
M.D. Fla. 1992).

<sup>6</sup>In Colorado, providing consulting services involving legal areas or issues is not the "practice of law" if a consultant does not enter an appearance or perform direct legal services. Dietrich Corp. v. King Resources Company, 596 F.2d 422 (10th Cir. 1979). The collection of claims is also not considered the practice of law. Sequa Corp. v. Lititech, Inc., 780 F. Supp. 1349 (D. Colo. 1992) (citing Thibodeaux v. Creditor's Service, Inc., 191 Colo. 215, 551 P.2d 714 (1976)). A management firm acting as a company's agent to supervise, manage and direct the litigation of approximately 1800 separate products liability cases was not practicing law, even though it coordinated and managed attorneys who submitted periodic reports and approved costs and attorney fees before they were incurred, where the firm neither entered an appearance in the cases nor rendered direct legal services or advice. Sequa Corp., 780 F. Supp. 1349. In Illinois, a disbarred attorney may work as a law clerk. See In re Schelly, 94 Ill.2d 234, 446 N.E.2d 236 (1983) (lawyer hired disbarred attorney as law clerk to prepare case files, update docket book, and request continuances; instead clerk actually tried cases. The lawyer was found to have aided in the unauthorized practice of law by failing to supervise -- but the (continued...)

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Indeed, the Third Circuit has held "that an attorney suspended from the bar of this court can have no contact with this court, its staff, or a client in any proceeding before this court, except if the attorney is representing only himself or herself as a party<sup>7</sup>, but may act as a law clerk or legal assistant under the close supervision of a member in good standing of the bar of this court." Mitchell, 901 F.2d at 1185 (emphasis added).

Additionally, the Fifth Circuit has stated that "a suspension amounts to a temporary disbarment. Suspended lawyers ... can research law but can't have any client contact." Christi Harlan and Milo Geyelin, Suspended Lawyer Held In Criminal Contempt For Continuing Practice, Wall St. J., May 8, 1992, at B7 (citing In re Strauss, 5th Cir., 91-3446). In In re Strauss, the suspended

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(...continued)  
court did not fault him for hiring the disbarred attorney as a clerk.) However, the drafting of a simple complaint and uncomplicated petition for dissolution of marriage, which required some degree of legal knowledge or skill constituted the practice of law under Illinois law. U.S. v. Hardy, 681 F. Supp. 1326 (N.D. Ill. 1988). In New Mexico, laypersons may perform legal services when they are incidental to another transaction only when "difficult or doubtful legal questions are not involved." State Board of New Mexico v. Guardian Abstract and Title Co., Inc., 91 N.M. 434, 575 P.2d 943 (1978). Under Tennessee state law, the unauthorized "practice of law" is limited to an appearance as an advocate in a representative capacity. T.C.A. §§ 23-3-101, 23-3-103; In re Clemmons, 151 B.R. 860 (Bkrtcy. M.D. Tenn. 1993).

<sup>7</sup>The right to litigate pro se does not include the right of a suspended lawyer to litigate on behalf of anyone else as a co-party. See WOLFRAM, supra, p. 11, § 15.1.4.

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attorney was disbarred for overtly engaging in the practice of law during the period of his suspension. Subsequent to his suspension, "Strauss hired two associates to handle his case load, oversaw their work, solicited clients, participated in depositions, negotiated and approved settlements and earned fees." Id.

However, a suspended lawyer may not work as a law clerk in Illinois and New Jersey. Mitchell, 901 F.2d at 1186, n.18-19; see also In re Kuta, 86 Ill.2d 154, 427 N.E.2d 136 (1981) (suggesting that suspended lawyers may be barred from activities legitimately performed by non-lawyers if such activities are believed by the public to be customarily performed by lawyers); In re Robson, 575 P.2d 771 (Alaska 1978) (because of prior recognition as a lawyer, suspended lawyer must be particularly prudent in avoiding appearance of holding self out as lawyer).

In addition, lawyers are generally required to refrain from aiding or encouraging the unauthorized practice of law. See, e.g., Matter of Gajewski, 217 A.D.2d 90, 634 N.Y.S.2d 704 (1st Dept. 1995) (attorney disciplined for allowing a disbarred attorney to affix her name to affirmations included in court papers); Matter of Takvorian, 240 A.D.2d 95, 670 N.Y.S.2d 211 (2d Dept. 1998) (holding that even inadvertently aiding a non-lawyer in the practice of law can warrant professional discipline); Matter of Reilly, 101 A.D.2d 351, 475 N.Y.S.2d 473 (2d Dept. 1984) (attorney disciplined for "aiding a suspended attorney in the unauthorized practice of law").

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The discussion above demonstrates that this area of the law is unclear.<sup>8</sup> Suspended or disbarred attorneys are left in a precarious situation not knowing what type of work they can or cannot perform, even though the law seems to permit on its face the performance of administrative-type work in a law office. This lack of clarity has, in effect, disenfranchised suspended and disbarred attorneys from performing work and earning a living even in situations where the individual is not practicing law as that term is defined by existing law, but rather seeks to perform in-office administrative work where there is little risk to the public.

C. Some Closing Thoughts.

Irrespective of the lack of clarity concerning the reach of section 478 and 22 N.Y.C.R.R. section 606.13(a), and its counterpart in the other three Judicial Departments, there is another way in which the Disciplinary and Grievance Committees, as well as the Appellate Divisions, have in the past, imposed their view concerning an expansive reading of the notion of the unauthorized practice of law. There appears to be an institutional view on quasi-paralegal-type conduct. Stated simply, some disciplinarians have adopted a view over the years -- which have originated with the courts or conversely, been adopted by the

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<sup>8</sup>See generally "Legal Background" to Rule 5.5 of the Annotated Model Rules of Professional Conduct, (4th ed. (1999), pp. 457-58 (collecting cases from various jurisdictions with diverging views on the issue).

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courts -- that when a suspended or disbarred attorney works in a law firm performing in-office administrative tasks, this will either cause the committee/court to look askance at the Petition for Reinstatement, or to at least examine the bona fides of the application with greater care.

Obviously, the control over the reinstatement process seems a very poor substitute for a priori guidance by the courts. It makes little sense for an attorney to guess which standards will be applied at the end of a period of suspension or disbarment. Moreover, there seems to be little consensus as to what exactly the views of the Appellate Divisions are, and what institutional view will be exercised by the disciplinary or grievance committee in question.

From all of the discussion above, it is clear that there is a need for clarity concerning what suspended and disbarred attorneys can do during the period of their suspension. Moreover, based upon the discussion, a compelling case can be made that if a broad interpretation of the unauthorized practice of law is to be adopted (i.e., broad enough to include simple in-office administrative work), then such an approach would require an amendment to the Judiciary Law.

## **APPENDIX "C"**

## **THE ROLE OF THE LAWYER**

You get involved in a legal situation. You know you need help. But you don't think you can afford a lawyer. So you go elsewhere for legal advice.

But your "simple" problem turned out to be complicated. Things didn't happen the way they were supposed to...because you didn't know all of your options. When you are sick, you see a doctor because you know a doctor is trained and licensed to give you the best advice for your medical problem. When you have a legal problem, you should get qualified, professional advice from a lawyer. Many lawyers offer free or low-cost initial consultations. And your lawyer can save you money and avoid hassles in the long run by giving you advice up front.

The law can be complex. So protect your legal rights and know your legal options. Get expert advice from an experienced, licensed professional.

### **What is a Lawyer?**

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. He or she is authorized to explain and interpret the law for you, handle legal matters, and appear in court. In addition to other tasks, a lawyer's work involves counseling and advising clients, and preparing documents. But, foremost, a lawyer is a representative or an advocate on behalf of a client.

### **How Does Someone Become a Lawyer?**

To be admitted to practice law in New York, you must have college undergraduate and law degrees. The law degree must be from an accredited law school and you must successfully pass an exhaustive written examination given by the Board of Law Examiners. In addition, before being sworn in to the practicing bar, an applicant's character and moral fitness to practice law are subject to approval after a thorough investigation by a Committee on Character and Fitness.

### **Can Non-Lawyers Practice Law?**

No. Only those persons who have obtained a license to practice law can give legal advice, draft legal documents and appear in court on behalf of litigants. But before one can represent another in court, or make a practice of giving legal advice, the high standards set down by the Court of Appeals for admission to the bar must be met. This is for the protection of all who may employ lawyers.

The law covers many different fields. Any one set of facts may involve one or more of these fields. Laws and their interpretation are constantly changing, and while a non-lawyer might have a good deal of knowledge about one subject or field, such as real estate or insurance, it is impossible for them to be familiar with the whole body of law relating to a particular field. A non-lawyer can not know all the possible legal consequences or hazards. As members of the New York Bar, attorneys are required to attend continuing legal education seminars, to stay up-to-date and to serve their clients better. This is why a license to practice law is granted exclusively to trained experts. It is a public safeguard, established and enforced by the courts.



### **Who Regulates the Conduct of Non-Lawyers (When They Are Acting Like Lawyers)?**

A person found to have engaged in the Unauthorized Practice of Law (UPL) is guilty of a crime. It is a misdemeanor punishable by up to a year of imprisonment and/or fine. Any County District Attorney has the authority to bring criminal charges against persons accused of the unauthorized practice of law. In addition, the Attorney General of the State of New York may bring a civil action against such persons and seek an injunction to prevent them from practicing illegally.

### **What are the Standards of Conduct for a Lawyer?**

Lawyers are subject to the highest degree of ethical conduct under New York's Code of Professional Responsibility. New York was among the leaders in adopting a code to govern the daily ethical and business behavior of lawyers.

### **What is the Role of the Lawyer?**

Many clients do not understand the role of a lawyer in representing a client. In many ways, the lawyer's role is limited and in other ways it is quite broad. Remember that when a decision must be made about how a matter should be handled or about how a dispute should be resolved, a lawyer can provide you with information, advice and recommendations about the decision. However, you must make the decision.

You should keep in mind that in any legal matter there are important rights at stake - and it is your obligation to remain informed and interested in your lawyer's handling of the matter. While a lawyer can never guarantee the outcome in contested legal matters, a lawyer is always obligated to use his or her best efforts on your behalf.

### **When do I Need a Lawyer?**

Many people believe they need a lawyer's services only to solve a problem or to get out of a difficult situation. Often, the best time to see a lawyer is not when you are facing legal trouble but before that trouble occurs. Preventive law is one of the most valuable services a lawyer can perform. By eliminating potential problems, preventive law can save you time, money and needless worry.

### **What Kind of Lawyer?**

General practice lawyers handle a wide variety of legal problems. Because of the complexity of so many areas of the law, many attorneys concentrate their practice in one or two fields of expertise. These include fields such as litigation; elder law; criminal law; taxation; worker's compensation; labor and employment; real property; trusts and estates; and matrimonial law.

Obviously, the nature of your legal problem will help to define the type of lawyer you will want to retain. In choosing a lawyer, keep in mind competence as well as accessibility and price. One way to judge competence is by the amount of time the lawyer has devoted to keeping up with changes in the law through continuing legal education. In New York, all lawyers admitted to practice for more than two years must take 24 hours of mandatory continuing legal education courses every two years in order to retain their license to practice. Newly admitted attorneys are required to complete 32 hours of continuing legal education. Since you are hiring a lawyer to

perform services for you, don't be reluctant to ask the attorney about his or her qualifications or experience.

### **What is the Basis for a Legal Fee?**

Although the practice of law is a profession, clients should remember that the lawyer is also in business. As Abraham Lincoln once said, "A lawyer's advice is his stock in trade."

The lawyer must charge sufficiently to cover the cost of operating the business including rent, equipment, libraries, employee payrolls and benefits, and taxes and insurance, as well as support the lawyer and his or her family.

The most basic ingredients in any fee charged by a lawyer are the amount of time spent on a particular problem and the relative complexity of the matter. Much of the lawyer's work is accomplished when the client is not present. Thus, a lawyer's professional services differ from those of a doctor or dentist.

### **How is the Fee Computed?**

Various types of fee arrangements are available. You may agree to any one or a combination of them. They include:

**Fixed fee:** This type of fee, sometimes called a "standard" fee, is used most often for routine legal matters, for example, simple wills or uncontested divorces. When you agree to a fixed fee, be sure that you know what it does and does not include. You also should find out if any other charges, for example, expenses, might be added to the bill.

**Hourly fee:** Many lawyers charge by the hour. The hourly rate can vary widely. To know approximately how much your total bill will be, ask the lawyer to estimate the amount of time your case will take. But remember that circumstances may change, and your case may take longer to handle than the lawyer expected at the beginning.

**Contingency fee:** This kind of fee is frequently used in accident, personal injury and other cases where you are seeking money damages. A contingency fee agreement means that you will pay your lawyer a certain percentage of the money you recover if you win your case or if you settle out of court. If you lose, the lawyer does not receive a fee. A lawyer may advance court costs and expenses of litigation; however, these expenses must be repaid whether or not you win your case. Because these expenses can be quite high, especially when you need to have doctors or other experts as witnesses, you should ask your lawyer to estimate the case's expenses and costs.

New York court rules require that all contingent fee agreements must be in writing, and establish limitations regarding the percentages that may be charged. The agreement must state what percentage of the money recovered will be paid to the lawyer and whether this percentage is computed before or after costs and expenses have been deducted. Some agreements provide for varying percentages depending on whether the case is settled, goes to trial or has to be appealed. If so, those varying percentages must be stated in the agreement as well.

**Statutory fee:** The lawyer's fee for some legal work is set by law or agency regulation. For those matters, a court or agency either sets or must approve the fee you will pay. In some cases, such as civil rights and consumer protection matters, you may be awarded the reasonable cost of your lawyer's fees as part of your damages.

**Retainer fee:** A fee paid to the lawyer to be available to handle a client's legal problems during a period of time. Business clients often use this arrangement to assure that the lawyer will be "on call" to handle the client's legal matters. It is sometimes combined with an hourly fee.

### **What About Discussing the Fee?**

You should discuss the cost of legal services at your first interview with a lawyer. Although not all fee agreements are required to be in writing, it is recommended that a written fee agreement be used whenever you hire a lawyer. Effective communications between you and your lawyer are essential to a good lawyer/client relationship. This is a two-way process and requires the lawyer and client to keep each other informed throughout the representation.

You should NEVER hesitate to discuss fees at any time during the handling of your legal matter. If you receive a statement and have any questions, talk them over with your lawyer.

### **Do Lawyers Make the Law More Complicated?**

No. Their function is to interpret and apply complex and technical laws and judicial precedents on your behalf.

### **What are a Lawyer's Duties?**

Lawyers must promptly, conscientiously and to the best of their ability advise clients on all matters presented to them and try to obtain the lawful objectives of their clients through all reasonably available means permitted by law and the disciplinary rules. They must adhere strictly to the Code of Professional Responsibility adopted by the Appellate Division of State Supreme Court. If a lawyer is not professionally qualified to advise a client on a particular matter or cannot exercise independent judgment on behalf of a client, he or she must refuse the employment.

### **Why Can't I Handle My Own Legal Affairs With a "Do-it Yourself Kit"?**

A number of do-it yourself "kits" are offered for sale on the Internet and through various publications. Kits are available for getting a divorce, avoiding probate, declaring bankruptcy, forming a business or estate planning. It is not illegal for you to use these for your own affairs; however, you must be prepared to take the consequences of using a general form designed for national use in New York. Kits may appear to save you money, but a minor detail, one that you might overlook but one that a lawyer is trained to notice, could result in a loss far greater than what you "save" by trying to be your own lawyer

It is illegal for anyone not admitted to practice law in New York to give you legal advice or to act on your behalf in a legal matter in New York. This is known as the unauthorized practice of law and there are stiff penalties if convicted. Moreover, some non-lawyers do not have the status

of a professional license, recovering your losses from them could be difficult if you are given bad advice.

### **What is the Difference Between a Lawyer and a Notary Public?**

A notary public certifies that deeds, affidavits, depositions and other writings are authentic or genuine. Some people are confused as to what services a notary public -- sometimes identified in Spanish as "notaria," "consultoria" or "notario publico" -- can provide regarding immigration matters. In fact, these persons are not attorneys unless properly licensed to practice law, and they should not be relied upon for legal advice. Complaints have been received from people who have been harmed after mistakenly seeking legal assistance from notaries who offer such services in immigration matters.

In New York, notaries public, as opposed to lawyers, do not have any minimum educational requirement. They must be at least 18 years of age and a permanent resident of this state. They must submit a signed application with the appropriate fee, have two witnesses vouch for the applicant's good moral character, post a bond and take an oath.

### **What about Paralegals?**

A paralegal is a person who is qualified -- through education, training or work experience -- to perform substantive legal work under the direction of a lawyer. Paralegals assist lawyers in providing cost-effective, high-quality legal services. However, the lawyer is responsible for the conduct of paralegals he or she employs, and paralegals are not entitled to work independently of the lawyer.

### **Ten Reasons to Hire a Lawyer to Handle a Matter and Not an "Independent" Paralegal**

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|---|--|
| 1. Lawyers are required to complete four years of college and three years of law school.  | Paralegals have no minimum education requirement.                                      |
| 2. Lawyers are required to take a stringent admittance examination to attest to their competency.   | Paralegals have no entrance requirements.  |
| 3. Lawyers must pass a rigorous character and fitness investigation before they can be admitted to practice law.  | Paralegals have no such requirement.   |
| 4. Lawyers are required to maintain their legal education and take ethics courses periodically.   | Paralegals have no continuing education requirement.                                   |
| 5. Lawyers are required to abide by comprehensive and exacting ethical rules.   | Ethical codes governing paralegals are only voluntary.                                 |
| 6. Lawyers are regulated by the Court.  | No court or state agency regulates paralegals.   |
| 7. Lawyers accused of ethical misbehavior are investigated by court-appointed Grievance Committees whose findings can lead to losing their ability to practice law. | Paralegals are not professionally accountable to any authority.                        |
| 8. Lawyers are required to maintain client confidences.   | Unless supervised by a lawyer, paralegals have no such requirement of confidentiality. |

|   |  |
|---|--|
| 9. Lawyers, as a profession, maintain the Lawyer's Fund for Client Protection intended to reimburse clients for their loss if a lawyer misappropriates funds.               | Paralegals have no such program for restitution if one of their number steals from a client. |
| 10. Lawyers are counselors and advocates for their clients, empowered to give legal advice, and use the law and legal system to justly resolve conflicts for their clients. | Paralegals are prohibited from giving legal advice. It is against the law to do so.          |

### **Lawyers Are Lawyers**

Members of the legal profession are trained and licensed to perform legal services. You should not expect a non-lawyer such as an accountant or investment counselor to have this expertise unless they have the necessary education, training and experience.

### **Can Lawyers Advertise?**

From 1908 to 1977 lawyers were forbidden to advertise their services. This prohibition came about through fear of "puffery" and the belief that even the best executed advertising could be unintentionally false, misleading or deceptive because of the complex nature of legal services. A 1977 ruling by the U.S. Supreme Court changed the rules.

Today many lawyers advertise. That is why you see so many listings in the local Yellow Pages as well as commercials on radio and television. However, while any attorney can claim to practice in the areas in which they have experience, they can't claim to "specialize" in any area of the law unless he or she has been approved by an authority having jurisdiction over specialization in another state. Certification as a specialist is not a requirement for the practice of law in New York. Make sure you exercise caution when seeking a lawyer based solely on the fact that he or she advertises. You need to have all of the facts in order to make an informed decision.

You can follow these steps when you contact a lawyer whose advertisement you see or hear:

- Don't take the ad literally; ask the lawyer for references and be sure to check his or her experience with your type of case.
- Ask the lawyer about the services advertised and what's included, for example, in a "simple will," or a "simple divorce."
- Don't leave the office without getting a written explanation of what the fee will be, what it will cover and whether or not you can anticipate having to pay extra charges.
- Keep a copy of the ad so you can check to see whether the lawyer is performing as advertised.

## **Conclusion**

The suggestion that you consult a trained legal expert is for your benefit, not for the benefit of the lawyer. Competent legal advice will help you explore other avenues. Preventing legal problems before they arise will not only save you money, but will also save our judicial process valuable time. Let a lawyer advise you before you make a change or a decision -- it's worth the investment.