

**American Bar Association  
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**THE USE OF CONSULTANTS AND PARALEGALS  
IN FRANCHISING: ARE YOU AIDING AND ABETTING  
THE UNAUTHORIZED PRACTICE OF LAW?**

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## THE USE OF CONSULTANTS AND PARALEGALS IN FRANCHISING: ARE YOU AIDING AND ABETTING THE UNAUTHORIZED PRACTICE OF LAW?\*

The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the guardian of the public weal against invasions by the others, has been evinced by experiments ancient and modern, some of them in our country and under our own eyes. *George Washington, Farewell Address, 1796*<sup>1</sup>

[The] balance between the National and State governments ought to be dwelt on with peculiar attention, as it is of utmost importance. It forms a double security to the people. If one encroaches on their rights they will find a powerful protection in the other. *Alexander Hamilton, Speech to New York Ratifying Convention, 1788*<sup>2</sup>

### I. INTRODUCTION

Whether you are a lawyer, a consultant or a paralegal,<sup>3</sup> you are constrained by national and state rules, statutes and court decisions, from engaging in the unauthorized practice of law (sometimes "UPL"). Also, if you are a lawyer, you are constrained from aiding or abetting the unauthorized practice of law by other lawyers or by non-lawyers.

For any particular law-related activity, then, the logical question emerges, "Is this the unauthorized practice of law?" Giving an answer to that question is like giving an answer to the question, "Is this an unlawful offer of a franchise?" The initial response to both questions often is, "It depends." That does not mean that there is no answer, or that the answer will necessarily be murky or ambiguous. The answer might be crystal clear, but reaching the answer, taking into account all relevant facts, could require the analysis of judicial, legislative and executive authorities at the national and state level.

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<sup>1</sup> PBS, [http://www.pbs.org/georgewashington/milestones/farewell\\_address\\_read3.html](http://www.pbs.org/georgewashington/milestones/farewell_address_read3.html) (last visited July 22, 2011).

<sup>2</sup> 2 Alexander Hamilton, *The Works of Alexander Hamilton*, at 28 (Henry Cabot Lodge, 1904) (Speech on the Compromises of the Constitution (June 20, 1788)).

<sup>3</sup> We should explain what we mean by "consultants" and "paralegals" in this paper. When we refer to "consultants," we mean entities controlled by non-lawyers or individuals who are non-lawyers, to the extent that the entities or individuals provide substantive business advice, such as system development, marketing, sales, operational, strategic planning and management advice. When we refer to "paralegals," we mean entities controlled by non-lawyers or individuals who are non-lawyers, to the extent that the entities or individuals provide ministerial services, such as document creation, document processing and related counseling services. Of course, the line between consultants and paralegals is not always clear-cut. In franchising, for example, some consultants only provide substantive business advice, while others also offer ministerial services. Similarly, in franchising, some paralegals work for lawyers, but others operate independently and provide not only ministerial services, but also substantive business advice.

To add a twist of interest, it should be noted that the answer may change over time. That is because the regulation of the unauthorized practice of law is evolving in response to multi-national commerce, software, internet and communication technology changes, and in response to the public's growing demand for information on the internet and legal services delivered in a cost-effective manner. The federal government, the states, the American Bar Association ("ABA") and other groups seeking to promote "the public weal" are actively involved in dealing with or encouraging this evolution, which is moving forward rapidly.

In Section II, we describe the historic, current and evolving regulatory scheme governing the unauthorized practice of law. At the national level, the regulatory scheme mainly consists of laws and regulations that preempt state regulation of the unauthorized practice of law in specified fields, such as patent applications, bankruptcy petition preparation, food stamp certifications, and certain Internal Revenue Service and Social Security Administration matters.<sup>4</sup> Otherwise, at the national level, the U.S. Supreme Court has recognized that the states have the primary responsibility for regulating the unauthorized practice of law within their borders; and the executive branch, through the U.S. Department of Justice and the Federal Trade Commission, mainly has monitored the activities of the states and the ABA relating to the unauthorized practice of law, and sometimes has issued statements based on the promotion of public interest goals such as maintaining competition and increasing the availability of legal services to the public.<sup>5</sup> At the state level, the regulatory scheme mainly consists of court rules, court opinions and statutes prohibiting the unauthorized practice of law by lawyers and non-lawyers, and prohibiting lawyers from aiding and abetting others who are engaged in the unauthorized practice of law.

In Section III, we describe enforcement actions involving lawyers, as well as enforcement actions involving consultants and paralegals which illustrate UPL activities that lawyers should avoid aiding and abetting. Several of the actions---at least 15 identified at the time this paper---have involved franchising. Some have involved disciplinary proceedings against lawyers, but many have involved government or private lawsuits against law firms, individual lawyers, consultants and paralegals. Some of the actions have involved explicit allegations of the unauthorized practice of law, while others have involved allegations of legal malpractice and unfair trade practice law violations. The activities alleged in the actions have involved non-lawyer consultants and paralegals giving legal advice, improperly preparing and processing legal documents and improperly using in-house lawyers to provide legal services to third parties. They also have involved lawyers aiding and abetting UPL by non-lawyers, inadequately supervising non-lawyers and lawyers, failing to seek adequate supervision from senior lawyers, establishing improper business and referral relationships with non-lawyers, improperly giving multi-jurisdictional legal advice, giving incompetent legal advice, and improperly functioning as combination lawyer-business executives.

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<sup>4</sup> *Florida v. Sperry*, 373 U.S. 379, 83 S.Ct. 1322 (1963)(Commissioner of Patents authorizes practice before the U.S. Patent Office); 11 U.S.C. § 110 (permitting "bankruptcy petition preparers to prepare documents for filing by third parties"); 7 U.S.C. § 2020(e)(7) (permitting third parties to represent households applying for food stamps); 31 C.F.R. § 10.3 (CPAs may practice before the IRS); 42 U.S.C.A. § 406 (non-lawyers may practice before the Commissioner of Social Security). See <http://www.paralegals.org/displaycommon.cfm?an=1&subarticlenbr=334> for a list of additional federal and state agencies that allow certain non-lawyers representation.

<sup>5</sup> See, e.g., Letter from FTC and DOJ to Standing Comm. on the Unauthorized Practice of Law, State Bar of Ga., on Potential Unlicensed Practice of Law Opinion Regarding Real Estate Closing Activity (March 20, 2003), <http://www.justice.gov/atr/public/comments/200857.htm>; Letter from FTC and DOJ to Task Force on Model Definition of the Practice of Law (December 20, 2002), <http://www.justice.gov/atr/public/comments/200604.htm>.

In Section IV, based on the regulatory scheme and enforcement actions described in Sections II and III, we pose questions, and suggest best practices that lawyers in franchising may want to adopt in the interest of avoiding enforcement actions, interacting more efficiently with consultants and paralegals, and providing the best possible service to franchisor clients. Franchise consultants and paralegals are involved in offering almost endless à la carte and bundled services to prospective, emerging and established franchisors. Many consultants offer services ranging from general business advice, manual creation, marketing collateral and feasibility studies, to strategic planning, sales training, lead generation and employee recruitment. Several of the services include legal components, such as contracts, legal strategy, sales compliance and at least a basic understanding of franchise disclosure law. Paralegals often are involved in providing services related to organizing and maintaining franchisor entities, preparing and updating franchise disclosure documents ("FDDs"), and processing state franchise registrations, either as independents, as subcontractors to franchise consultants or while working under the supervision of franchise lawyers. Considering the array of services being offered, franchise consultants and paralegals face the prospect of consciously or inadvertently crossing the boundary into the unauthorized practice of law. Franchise lawyers often rely on and work with consultants and paralegals to deliver services to clients in a cost-effective manner. Also, franchise lawyers, for the most part, practice multi-jurisdictionally and are asked by their clients to give advice in fields of law that may not be their primary areas of focus, such as intellectual property, securities and taxation. These activities raise multiple unlawful practice of law issues for franchise lawyers.

## **II. REGULATORY SCHEME RELATED TO THE UNAUTHORIZED PRACTICE OF LAW**

### **A. Brief History of UPL Regulation**

In the U.S., regulation of the practice of law dates back to colonial times. Before the 20th century, regulation generally was limited to court rules regarding appearances before the courts.<sup>6</sup> The first model ethics rules adopted by the ABA, the 1908 Canons of Ethics, did not mention the unauthorized practice of law.<sup>7</sup> The very expansive concept of the unauthorized practice of law that is accepted today is a relatively modern phenomenon.<sup>8</sup> In the 20th century and the first years of this century, regulation of the unauthorized practice of law has evolved significantly, although not in a uniform manner.

Apart from relatively narrow areas of federal preemption, the authority to regulate the practice of law and the unauthorized practice of law resides with the states.<sup>9</sup> State supreme

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<sup>6</sup> *Restatement (Third) of the Law Governing Lawyers*, ch. 1, Intro. Note & Title B Intro. Note (2000); Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *Fordham L. Rev.* 2581, 2583 (1999).

<sup>7</sup> *Id.*

<sup>8</sup> Most U.S. lawyers today feel quite comfortable arguing in favor of restricting who can practice law, and there are good arguments in favor of restricting legal practice to duly licensed lawyers. However, it is noteworthy that the U.S. approach to the practice of law is not universally accepted. Each country has its own regulations, and in many countries the practice of law is subject to regulation that differs starkly from ours. For example, in Sweden, a lay person may not use the title "attorney" (advokat) unless they are admitted to the Swedish bar, but anyone may provide legal services, including representing another person in court. In Poland, court representation is reserved for lawyers, but besides that and a few limited areas of law (such as family law), anyone can practice law.

<sup>9</sup> *Supra* note 4.

courts usually have inherent, original and/or exclusive authority to regulate the practice of law by lawyers, and to restrict the unauthorized practice of law by lawyers and non-lawyers.<sup>10</sup> In the exercise of that authority, state supreme courts generally have adopted rules based on model rules proposed and revised by the ABA from time to time,<sup>11</sup> and have authorized state bar associations<sup>12</sup> or other authorities to assist in the enforcement of the rules through disciplinary proceedings against lawyers or civil proceedings against non-lawyers. Some state legislatures have enacted statutes exempting certain law-related activities of non-lawyers from UPL regulation.<sup>13</sup> Almost all state legislatures have enacted statutes prohibiting, and often criminalizing, the unauthorized practice of law.<sup>14</sup>

Below, we review ABA model rules and initiatives, and state rules and statutes, relevant to defining and regulating the practice of law and the unauthorized practice of law. We then review standing and remedies under the state rules and statutes relevant to UPL, other state

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<sup>10</sup> See, e.g., *Rhasiatry v. McCarty*, No. 5:11cv00841, 2011 U.S. Dist. LEXIS 56954 (N.D. Ohio May 26, 2011)(regulation of the practice of law is within the exclusive jurisdiction of the Ohio Supreme Court); *State v. Yah*, 281 Neb. 383, 389-90, 796 N.W.2d 189, 194-195 (2011)(Nebraska Supreme Court has inherent power to regulate the practice of law); *Brown v. Kelton*, --- S.W.3d ---, 2011 Ark. 93 (2011)(it is a judicial prerogative to regulate the practice of law); *Ill. State Bar Ass'n v. Shelton*, Civil No. 11-390-GPM, 1248-49 (S.D. Ill. 2011)(it is the constitutional prerogative of the Illinois Supreme Court to regulate the practice of law); *State v. Martin*, 240 P.3d 690, 695 (Okla. 2010)(Oklahoma Supreme Court has constitutionally vested authority to regulate the practice of law); *Disciplinary Counsel v. Pratt*, 127 Ohio St.3d 293, 296, 939 N.E.2d 170 (2010)(Ohio Supreme Court has original jurisdiction to regulate the practice of law); *Dayton Bar Ass'n v. Stewart*, 116 Ohio St.3d 289, 290, 878 N.E.2d 628, 630 (2007)(Ohio Supreme Court has original jurisdiction to regulate the unauthorized practice of law); *In re Creasy*, 198 Ariz. 539 (2000)(Arizona Supreme court has exclusive right to regulate the practice of law); *Turner v. Ky. Bar Ass'n*, 980 S.W.2d 560, 563 (Ky. 1998)(it is the exclusive power of the judiciary to make rules governing the practice of law); *People ex rel. Chi. Bar Ass'n v. Goodman*, 8 N.E.2d 941 (Ill. 1937)(the power to regulate the practice of law is vested in the judiciary). In an atypical and interesting twist, the Montana Supreme Court recently decided that it does not have the authority to regulate the unauthorized practice of law. *In re Dissolving the Comm'n on the Unauthorized Practice of Law*, 356 Mont. 109, 242 P.3d 1282 (2010). See also, *Bergman v. District of Columbia*, 986 A.2d 1208, 1226 (D.C. 2010) (DC Ct. of App. has inherent and exclusive authority to regulate the practice of law in DC). The constitutionality of most state statutes and court rules prohibiting the unauthorized practice of law have been upheld. See, e.g., *Steele v. Bonner*, 782 N.W.2d 379 (S.D. 2010) (association rights not violated by injunction against non-lawyer's practice of law); *Hackin v. State*, 427 P.2d 901 (Ariz. 1967) (free speech rights not violated by unauthorized practice of law conviction); *State v. Rogers*, 705 A.2d 397 (N.J. Super. Ct. App. Div. 1998) (criminal statute prohibiting UPL not unconstitutionally vague).

<sup>11</sup> See, e.g., *State v. Martin*, 240 P.3d 690 (Okla. 2010).

<sup>12</sup> See, e.g., *State v. Whitebook*, 242 P.3d 517 (Okla. 2010). State bar associations may be created by statute (as in California) or by court rule (as in Oklahoma), and generally function as arms of their state supreme courts. State bar association members generally are considered to be officers of the courts.

<sup>13</sup> See, e.g., Ariz. Code of Judicial Admin., pt. 7, ch. 2, §7-208(C) (licensed non-lawyers permitted to prepare certain legal documents); *Unauthorized Practice of Law Comm. v. Dep't of Workers' Comp.*, 543 A.2d 662, 664-65 (R.I. 1988) (insurance adjusters, town clerks, bank employees, CPAs, interstate commerce practitioners, etc. permitted to engage in the practice of law). According to the ABA's *2009 Survey of Unlicensed Practice of Law Committee*, [http://www.americanbar.org/groups/professional\\_responsibility/resources/client\\_protection.html](http://www.americanbar.org/groups/professional_responsibility/resources/client_protection.html), 19 out of 38 jurisdictions responding then permitted non-lawyers to perform some legal services in certain areas.

<sup>14</sup> See, e.g., *Ill. State Bar Ass'n v. Shelton*, No. 11-390-GPM, 2011 U.S. Dist. LEXIS 54733 (S.D.Ill. May 23, 2011)(it is the constitutional prerogative of the Illinois Supreme Court to punish the practice of law); *State v. Yah*, 281 Neb. 383, 390, 796 N.W.2d 189, 195 (2011)(UPL is a Class III misdemeanor in Nebraska); *Morrison v. West*, 30 So.3d 561, 565 (Fla. 2010)(UPL is a misdemeanor of the first degree in Florida); *In re Mid-America Living Trust Assocs., Inc.*, 927 S.W.2d 855, 859 (Mo. 1996)(UPL is a misdemeanor crime in Missouri). Arizona had a statute criminalizing UPL, but allowed it to lapse in 1985.

laws that are sometimes invoked in the context of UPL, and certain recent state regulatory developments and technological trends relevant to UPL.

## **B. ABA Model Rules and Initiatives**

The ABA has promulgated Model Rules of Professional Conduct ("ABA Model Rules"), and has pursued initiatives that are ongoing, relevant to the practice of law and the unauthorized practice of law.

Model Rule 5.5 of the ABA Model Rules states:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.<sup>15</sup>

According to Comment 2 to Model Rule 5.5:

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.<sup>16</sup>

Thus, Model Rule 5.5 prohibits a lawyer from practicing law in an unauthorized manner, and from assisting anyone else---lawyer or non-lawyer---to practice law in an unauthorized manner, but does not define the "practice of law." This absence of a definition is not for lack of trying.

The latest attempt by the ABA to get consensus on a definition was made in 2003 by an ABA Task Force on the Model Definition of the Practice of Law. The Task Force proposed the following broad definition:

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

The proposed definition went on to include presumptions regarding certain types of activities that would constitute the practice of law (subsection (c)) and exceptions and exclusions (subsection (d)):

(c) A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another:

- (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;
- (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;

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<sup>15</sup> *ABA Model Rules*, R. 5.5(a).

<sup>16</sup> *ABA Model Rules*, R. 5.5(a) cmt. 2.



- (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or
  - (4) Negotiating legal rights or responsibilities on behalf of a person.
- (d) Exceptions and exclusions: Whether or not they constitute the practice of law, the following are permitted:
- (1) Practicing law authorized by a limited license to practice;
  - (2) Pro se representation;
  - (3) Serving as a mediator, arbitrator, conciliator or facilitator; and
  - (4) Providing services under the supervision of a lawyer in compliance with the Rules of Professional Conduct.

The proposed definition encountered resistance, including from the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”),<sup>17</sup> and eventually was not adopted.

The FTC and DOJ expressed concerns that the proposed definition was overly broad and, if adopted by states, would prohibit many different groups of non-lawyers from providing services already provided by those groups, because the services would fall within the proposed definition. As a result, competition would be reduced, and consumers would be deprived of choices and subject to higher prices for legal services. Of particular concern were the services provided by realtors in connection with the execution of standard form real estate contracts and real estate closings. Other concerns, such as the provision of web-based legal forms or software to assist in the preparation of common types of legal documents, were also raised. The FTC and DOJ acknowledged that while there may be problems related to the provision of legal services by non-lawyers, generally, the public benefited from the competition. For example, the FTC and DOJ referenced a New Jersey study of consumer costs for real estate closings, which compared the costs incurred in connection with real estate closings in different parts of that state. In some parts of the state, lawyers conducted closings, while in others non-lawyers handled closings. The cost for a closing by a lawyer, according to the study, was about \$400 more than the cost for a closing by a non-lawyer. The proposed definition was also seen as hindering the development of new ways of providing law-related services through e-commerce.

Several special interest groups, such as the Society for Human Resource Management, also raised objections to the definition. Those objections usually arose out of a concern that the definition would capture the activities of the specific groups’ members and prohibit them from continuing their businesses.<sup>18</sup> The Task Force concluded in its final report that, while provision of legal advice is at the center of the definition of the “practice of law,” each state should arrive

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<sup>17</sup> See R. Hewitt Pate, Letter from FTC and DOJ to Task Force on the Model Definition of the Practice of Law (December 20, 2002), <http://www.justice.gov/atr/public/comments/200604.htm>.

<sup>18</sup> See, e.g., Letter from the Society for Human Resource Management to the Center for Professional Responsibility of the ABA (December 20, 2002), Letter from the American Land Title Association to the Center for Professional Responsibility of the ABA (April 2, 2003), Letter from the ABA Section on Antitrust Law to the ABA Task Force on the Model Definition of the Practice of Law; *but see* Memorandum from the State Bar of Arizona to the ABA Task Force on the Model Definition of the Practice of Law (January 3, 2003) (complaining of the proliferation of non-lawyers engaged in the unauthorized practice of law in Arizona), ABA, [http://www.americanbar.org/groups/professional\\_responsibility/task\\_force\\_model\\_definition\\_practice\\_law/draft\\_definition\\_comment.html](http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/draft_definition_comment.html).

at its own definition, taking into consideration its unique culture and legal and social history.<sup>19</sup> The Task Force continues to work on finding common ground amongst state definitions and tracks state law developments in this area.<sup>20</sup>

Other ABA Model Rules of particular relevance to the unauthorized practice of law and the related issues addressed in this paper include: Model Rule 1.1 requiring a lawyer to "provide competent representation to a client [using] the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"; Model Rule 2.1 relating to a lawyer giving business advice (advice that takes into account not only the law but "other considerations such as moral, economic, social and political factors"); Model Rule 5.1 requiring the proper supervision of subordinate lawyers; Model Rule 5.2 specifying the responsibilities of a subordinate lawyer; Rule 5.3 requiring the proper supervision of non-lawyer assistants; Model Rule 5.4 regulating a lawyer's relationships with non-lawyers; Model Rule 5.5(c) relating to multi-jurisdictional practice;<sup>21</sup> Model Rule 5.7 specifying a lawyer's responsibilities when providing law-related services; and Model Rule 7.2 relating to advertising.

ABA initiatives of particular relevance to the unauthorized practice of law and the related issues addressed in this paper have included: May 2, 2011 Request for Comments on Initial Draft Proposals on Outsourcing, Confidentiality Related Technology Issues, and Limited Practice Authorization for Inbound Foreign Lawyers;<sup>22</sup> March 29, 2011 Request for Comments on Issues Paper Concerning Multijurisdictional Practice;<sup>23</sup> December 2, 2010 Request for Comments on Issues Paper Concerning the ABA Model Rule on Admission by Motion;<sup>24</sup> August 5, 2010 Formal Opinion 10-457 on Lawyer Websites;<sup>25</sup> 2009 Survey of Unlicensed Practice of Law Committees;<sup>26</sup> August 5, 2008 Formal Opinion 08-451 on Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services;<sup>27</sup> 2003 Model Guidelines for the Utilization of Paralegal Services;<sup>28</sup> 2002 Report of the Commission on Multijurisdictional Practice;<sup>29</sup> 1995

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<sup>19</sup> ABA Ctr. For Prof'l Responsibility, *Guidelines for the Adoption of a Definition of the Practice of Law* (August 11, 2003), [http://www.americanbar.org/groups/professional\\_responsibility/task\\_force\\_model\\_definition\\_practice\\_law.html](http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law.html).

<sup>20</sup> See ABA Ctr. For Prof'l Responsibility, [http://www.americanbar.org/groups/professional\\_responsibility/task\\_force\\_model\\_definition\\_practice\\_law.html](http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law.html) (additional information about the Task Force and its work) (last visited July 22, 2011).

<sup>21</sup> In 2009, when New York adopted new ethics rules based on the ABA Model Rules, it did not include the Model Rule 5.5(c) language relating to multi-jurisdictional practice.

<sup>22</sup> ABA, <http://www.abanow.org/2011/05/cover-memo-re-initial-draft-proposals-on-outsourcing-confidentiality-related-technology-issues-and-limited-practice-authorization-for-inbound-foreign-lawyers>.

<sup>23</sup> ABA, [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/mjp\\_issues\\_paper.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/mjp_issues_paper.authcheckdam.pdf).

<sup>24</sup> ABA, <http://www.americanbar.org/content/dam/aba/migrated/ethics2020/aomissuepaper.authcheckdam.pdf>.

<sup>25</sup> ABA, [http://www.americanbar.org/content/dam/aba/migrated/cpr/pdfs/10\\_457.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/pdfs/10_457.pdf)

<sup>26</sup> ABA, [http://www.americanbar.org/groups/professional\\_responsibility/resources/client\\_protection.html](http://www.americanbar.org/groups/professional_responsibility/resources/client_protection.html).

<sup>27</sup> ABA, [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/ethics\\_2020/ethicsopinion08451.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/ethicsopinion08451.pdf).

<sup>28</sup> ABA, <http://apps.americanbar.org/legalservices/paralegals/downloads/modelguidelines.pdf>.

<sup>29</sup> ABA, [http://www.americanbar.org/content/dam/aba/migrated/final\\_mjp\\_rpt\\_6\\_5\\_1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/final_mjp_rpt_6_5_1.authcheckdam.pdf).

Report on Nonlawyer Activity in Law-Related Situations;<sup>30</sup> 1992 Standards for Imposing Lawyer Sanctions;<sup>31</sup> December 16, 1988 Formal Opinion 88-356 on Temporary Lawyers;<sup>32</sup> and 1984 Model Rules for Advisory Opinions on Unauthorized Practice of Law.<sup>33</sup>

## C. State UPL Regulation

### 1. State Rules, Court Opinions and Statutes

The three legs of state UPL regulation are: court-approved rules that are based on, but that often are not identical to, the ABA Model Rules;<sup>34</sup> court opinions on UPL; and statutes on UPL.

For lawyers and non-lawyers seeking to comply with their UPL responsibilities, the threshold issue is determining what is or isn't the practice of law. However, the difficulty of preparing a concise and complete definition of what constitutes the practice of law is reflected in current state definitions, court opinions<sup>35</sup> and the objections to the ABA proposed definition.<sup>36</sup>

<sup>30</sup> ABA, [http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/Non\\_Lawyer\\_Activity.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/Non_Lawyer_Activity.pdf).

<sup>31</sup> ABA, [http://www.americanbar.org/content/dam/aba/migrated/cpr/regulation/standards\\_sanctions.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/regulation/standards_sanctions.pdf).

<sup>32</sup> ABA Center for Prof'l Responsibility, *Formal and Informal Ethics Opinions* (1988). See also State Bar of Wis., [http://www.wisbar.org/am/template.cfm?section=wisconsin\\_lawyer&template=/cm/contentdisplay.cfm&contentid=38868](http://www.wisbar.org/am/template.cfm?section=wisconsin_lawyer&template=/cm/contentdisplay.cfm&contentid=38868).

<sup>33</sup> ABA, [www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/upl\\_op\\_rules.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/upl_op_rules.pdf).

<sup>34</sup> Currently, 49 states have adopted rules that are based on, but that often are not identical to, the ABA Model Rules. As of the writing of this paper, California is the only state that does not have professional conduct rules that follow the format of the ABA Model Rules of Professional Conduct. The ABA website contains analyses of how the state rules differ from the ABA Model Rules. See [http://www.americanbar.org/groups/professional\\_responsibility/policy/charts.html](http://www.americanbar.org/groups/professional_responsibility/policy/charts.html).

<sup>35</sup> See, e.g., *In re Hrones*, 457 Mass. 844, 849-50, 933 N.E.2d 622, 628 (2010)("[i]t is not easy to define the practice of law"); *In re Dissolving the Comm'n on the Unauthorized Practice of Law*, 356 Mont. 109, 110, 242 P.3d 1282, 1283 (2010)(the Montana Supreme Court has no constitutional authority to generally define UPL); *Samuels v. Am. Legal Clinic, Inc.*, 176 B.R. 616, 620-21 (Bankr. M.D. Fla. 1994)("[t]here is no precise definition of what is and is not the practice of law"); *Attorney Grievance Comm'n of Md. v. Hallmon*, 343 Md. 390, 397, 681 A.2d 510, 514 (1996)("This Court has always found it difficult to craft an all encompassing definition of the 'practice of law.'"); *In re Op. 24 of the Comm. on the Unauthorized Practice of Law*, 128 N.J. 114, 122, 607 A.2d 962, 966 (1992) ("No satisfactory, all-inclusive definition of what constitutes the practice of law has ever been devised."); *Comm. on Prof'l Ethics and Conduct v. Baker*, 492 N.W.2d 695, 701 (Iowa 1992)("This court has refrained from attempting an all-inclusive definition of the practice of law."); *La. State Bar Ass'n v. Edwins*, 540 So.2d 294, 299 (La. 1989)("No satisfactory, all-inclusive definition of what constitutes the practice of law has ever been devised."); *Or. State Bar v. Smith*, 149 Or. App. 171, 183, 942 P.2d 793, 800 (1977)("We cannot, and will not, purport to derive an omnibus definition of 'practice of law' from Johnston, Security Escrows, Miller, and Gilchrist. Indeed, Security Escrows cautions that a determination of unauthorized practice may depend on case-specific circumstances."); *State Bar of Mich. v. Cramer*, 399 Mich. 116, 133, 249 N.W.2d 1, 6-7 (1976)(" the Legislature has not seen fit to define what constitutes the 'practice of law'"). See 2 Geoffrey C. Hazzard, Jr., W. William Hodes & Peter R. Jarvis, *The Law of Lawyering*, § 46.4 (Wolters Kluwer, 3d ed. 2010) (hereinafter "*Hazzard*").

<sup>36</sup> See Letter from the FTC and DOJ to the Task Force on the Model Definition of the Practice of Law (December 20, 2002), <http://www.justice.gov/atr/public/comments/200604.htm>. As an anecdotal matter, not all states require municipal judges or county magistrates to have law degrees. Recent efforts in Indiana and New Mexico to require judges and magistrates in such courts to have law degrees failed. Likewise, the U.S. Constitution does not require

Exhibit A to this paper summarizes certain authorities relating to state definitions of the practice of law in all 50 states.<sup>37</sup>

Symptomatic of the majority of the state definitions, whether based on rules, court opinions or statutes, is that the practice of law is defined in general terms. State courts often observe the impracticality or impossibility of developing an all-encompassing definition. In *Arkansas Bar Ass'n v. Block*, for example, the Arkansas Supreme Court stated:

Research of authorities by able counsel and by this court has failed to turn up any clear, comprehensible definition of what really constitutes the practice of law. Courts are not in agreement. We believe it is impossible to frame any comprehensive definition of what constitutes the practice of law. Each case must be decided upon its own particular facts. The practice of law is difficult to define. Perhaps it does not admit of exact definition.<sup>38</sup>

In many states where the definitions of the practice of law are in rules or statutes, the definitions consist of general formulations that don't list specific activities, but rather focus on the philosophy behind regulating the practice of law. Such definitions focus on the use of professional judgment, applying the law to specific facts, and determining whether the activity includes a direct lawyer-client relationship. Other state definitions consist of more or less specific lists of activities that constitute the practice of law, and often specific exemptions and exclusions. Often, states that have general definitions of the practice of law complement them with lists of specific activities that constitute the practice of law. Kentucky's definition is representative of a general definition only:

The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services.<sup>39</sup>

North Carolina's definition is representative of definitions that enumerate prohibited activities:

The phrase "practice law" as used in this Chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial

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the U.S. Supreme Court justices to have law degrees. Brendan L. Smith, *Is there a Lawyer in the Court?*, ABA Journal, July 2011, at 13.

<sup>37</sup> See also, ABA 2003 summary of State Definitions of Practice of Law, [http://americanbar.org/content/dam/aba/migrated/cpr/model-def/model\\_def\\_statutes.authcheckdam.pdf](http://americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.pdf).

<sup>38</sup> 323 S.W.2d 912 (Ark. 1959). See also supra note 35.

<sup>39</sup> Ky. SCR 3.020 (2011). The general definitions have frequently been contested on the basis of being vague or conclusory. In spite of such concerns, statutes prohibiting UPL have withstood constitutional challenges. See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. Civ.A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999).

bodies, or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase "practice law" shall not be construed to limit the foregoing general definition of the term, but shall be construed to include the foregoing particular acts, as well as all other acts within the general definition. The phrase "practice law" does not encompass the writing of memoranda of understanding or other mediation summaries by mediators at community mediation centers authorized by G.S. 7A-38.5 or by mediators of personnel matters for The University of North Carolina or a constituent institution.<sup>40</sup>

As is evidenced from the above two examples, there is little consistency in the state approaches to the definition of the practice of law.

Whatever approach is used, whether based on general principles such as those included in the Kentucky definition or on a specific list of activities such as those included in the North Carolina definition, there is no doubt that appearing for another party in a court proceeding is within the scope of the definitions of the practice of law in all states. Beyond that, there is little uniformity in the definitions. In spite of the differences in the state definitions, however, the following activities are usually considered the practice of law in most states:

- giving legal advice in specific matters
- drawing up agreements or other legal documents<sup>41</sup>
- preparing wills
- negotiating legal rights

Commonly, states are sensitive to other professionals whose work is law-related, and recognize that society at large benefits from certain law-related services being provided by non-lawyers. Consequently, exclusions from the practice of law definitions often include:

- activities performed by professionals in connection with their business: for example title insurance companies and real estate brokers
- non-lawyers appearing before administrative tribunals or agencies
- employees representing their employers before administrative tribunals or agencies
- non-lawyers acting as mediators or arbitrators
- non-lawyers participating in labor negotiations
- lobbying
- preparation of tax returns
- selling legal forms.

Even though it appears that courts have taken a level-headed approach to the cases brought before them,<sup>42</sup> and we can make generalizations in this paper about the state definitions

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<sup>40</sup> N.C. Gen. Stat. § 84-2.1 (2011).

<sup>41</sup> As discussed in Section III.A.1.a, *Francorp, Inc. v. Siebert*, 211 F. Supp.2d 1051 (N.D. Ill. 2002) supports the view that drafting of an FDD constitutes the practice of law.

<sup>42</sup> See, e.g., *People v. Adams*, 243 P.3d 256 (Colo. 2010) (layman who took reversible assignment of bankruptcy claims and appeared *pro se* was engaged in UPL), *Disciplinary Counsel v. Foreclosure Alts., Inc.*, 940 N.E.2d 971 (Oh. 2010) (giving advice on foreclosure proceedings and negotiation with lenders by layman was UPL), *Ky. Bar*

of the practice of law, relying on such generalizations would be a dangerous practice for any lawyer, consultant, paralegal or other non-lawyer who is concerned that his or her activities may constitute the unauthorized practice of law. Likewise, the lawyer cooperating with consultants or paralegals must evaluate the particulars of the specific relationship to ensure that he or she is not enabling the consultant or paralegal to practice law. Discussions of how state UPL regulation has been enforced in franchise-related and other situations follows in Section III.

Though not an issue for consultants, paralegals and other non-lawyers, for lawyers, an additional tweak to the issue of the unauthorized practice of law is the multi-jurisdictional practice of law.<sup>43</sup> Lawyer licensing is a matter of state law, and the general rule is that, unless a lawyer is licensed in a particular state, he or she may not practice there. ABA Model Rule 5.5(c) addresses this issue. It permits lawyers licensed in one state to practice in another state on a “temporary basis” in enumerated circumstances.<sup>44</sup> More specifically, Model Rule 5.5(c) permits a lawyer to practice in another jurisdiction if the client representation is undertaken in association with a lawyer admitted in that jurisdiction; if the services provided are reasonably related to a proceeding before a tribunal in another jurisdiction, or to an arbitration, mediation or other alternative dispute resolution proceeding, related to the lawyer’s practice in a jurisdiction where the lawyer is licensed; or if the legal services to be provided on a temporary basis are “reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.”<sup>45</sup> While state rules regarding multi-jurisdictional practice are more uniform than state rules defining the practice of law, a lawyer still needs to take care to ensure that the ethics rules in the state where the lawyer wishes to practice on a temporary basis permit the desired practice. Assuming the activity to be undertaken falls within the practice of law definition in such state, the equivalent of Model Rule 5.5(c) needs to be examined. All states except California have adopted some version of Model Rule 5.5, but some states have not adopted, or have substantively modified, some subsections of Model Rule 5.5. For example, New York has not adopted subsection (c) of Model Rule 5.5, and Alabama has added exclusionary language to subsection (c) regarding “transactional, counseling, or other nonlitigation services.” Many other states, while substantially adopting Model Rule 5.5(c), have tweaked its language.<sup>46</sup>

## 2. Standing to Enforce State Rules and Statutes

State UPL rules, court opinions and statutes provide for a wide range of enforcement mechanisms, including bar association disciplinary proceedings, government lawsuits and

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*Ass’n v. Tarpinian*, 337 S.W.3d 2011 (Ky 2011) (preparation of forms for divorce proceedings that went beyond filling in the blanks was UPL), *but see Hargis v. JLB Corp.*, --- S.W.3d ---, No. ED 94750, 2011 WL 208368 (Mo. Ct. App. Jan. 25, 2011) (preparation of loan application and mortgage disclosure was not UPL); *Real Estate Bar Ass’n For Mass., Inc. v. Nat’l Real Estate Info.Servs.*, 946 N.E.2d 665 (Mass. 2011) (not all actions undertaken in connection with conveyancing of real estate constitute practice of law).

<sup>43</sup> An extensive review of the subject of multi-jurisdictional practice is beyond the scope of this paper. See John R. F. Baer and Rupert M. Barkoff, *Ethics Issues in Multijurisdictional Franchise Practice*, 31st Annual Forum on Franchising (2008) (more complete analysis of the issues involved in the multi-jurisdictional practice).

<sup>44</sup> *ABA Model Rules*, R. 5.5(c).

<sup>45</sup> *ABA Model Rules*, R. 5.5(c)(4).

<sup>46</sup> See, e.g., Del. Lawyers’ Rules of Prof’l Conduct, R. 5.5, The Rules Regulating The Fla. Bar, R. 4.5-5, Miss. Rules of Prof’l Conduct, R. 5.5, and N.C. Rules of Prof’l Conduct, R.5.5.

private lawsuits.<sup>47</sup> In most states, the primary authority to enforce unauthorized practice of law court rules and statutes is with a special bar committee, the attorney general or sometimes local prosecutors.<sup>48</sup>

### 3. Remedies

State UPL rules, court opinions and statutes permit a broad array of remedies, including lawyer disciplinary sanctions ranging from private reprimands to disbarments, injunctions, damages, civil fines, attorneys' fees, costs, inability to collect legal fees, and even criminal penalties.

A typical remedy afforded in UPL cases is the repayment of fees, or barring a lawyer who practiced without a license in a state or a non-lawyer from collecting fees.<sup>49</sup> States often bar non-lawyers from any further practice of law and impose civil fines on them.<sup>50</sup> It should be noted that these types of remedies are available irrespective of whether the lawyer's or non-lawyer's client is unhappy with the services rendered. Where a lawyer or non-lawyer has received warnings but has disregarded those warnings, the state may find the person in contempt of court.<sup>51</sup> For even more egregious conduct, criminal prosecution is sometimes an alternative.<sup>52</sup>

When imposing penalties on lawyers, states often refer to the ABA 1992 Model Rules on Lawyer Sanctions.<sup>53</sup>

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<sup>47</sup> In *Richard F. Mallen & Assocs., Ltd. v. Myinjuryclaim.com Corp.*, 329 Ill. App.3d 953, 769 N.E.2d 74 (App. Ct., 1st Dist., 4th Div. 2002), an Illinois Appellate Court held that law firms practicing personal injury law had standing to sue the operator of a website advising individuals who had been involved in automobile accidents about their legal rights and claims. The law firms were permitted to allege the unauthorized practice of law, and violations of the Uniform Deceptive Trade Practices Act and Consumer Fraud Act.

<sup>48</sup> A related issue is whether lawyers who learn about someone practicing law without authorization have an obligation to report that to the state bar or another authority. ABA Model Rule 8.3 requires lawyers to report lawyer misconduct that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness." ABA Model Rules, R. 8.3. While all states except for California and Kentucky have adopted some version of Model Rule 8.3, there is much variation among the state definitions. Also, the state rules only target misconduct by lawyers. Thus, to the extent a lawyer is involved in UPL other lawyers may have a duty to report the same or may themselves risk being subject to serious remedies. See, e.g., *In re Himmel*, 125 Ill.2d 531 (1988), in which the Illinois Supreme Court sanctioned a lawyer by suspending him for one year for the failure to report that his client's former lawyer had converted \$35,000 of the client's settlement funds. The ethics rules, however, do not require lawyers to report non-lawyers.

<sup>49</sup> See, e.g., *State v. Midland Equities of N.Y., Inc.*, 458 N.Y.S.2d 126 (1982)(court ordered restitution of money to consumers affected by the UPL); *State ex rel. Ind. State Bar Ass'n v. United Fin. Sys. Corp.*, 926 N.E.2d 8 (Ind. 2010)(court ordered disgorgement of fees).

<sup>50</sup> *Disciplinary Counsel v. Foreclosure Alts., Inc.*, 940 N.E.2d 971 (Oh. 2010).

<sup>51</sup> *Ky. Bar Ass'n v. Tarpinian*, 337 S.W.3d 627, 631 (Ky. 2011).

<sup>52</sup> *Satterwhite v. State*, 979 S.W.2d 626 (Tex. Crim. App. 1998) (lawyer who failed to pay bar dues but continued to hold himself out as a lawyer was sentenced to four and a half years in prison); *Fla. Bar v. Furman*, 451 So.2d 808 (Fla. 1984) (non-lawyer who provided often erroneous legal advice regarding divorces and adoptions was sentenced to 120 days in jail after continuing unauthorized practice of law after first court order).

<sup>53</sup> See ABA, *supra* note 30.

#### 4. Recent State Regulatory Developments

In recent years, several states have undertaken reviews of their UPL regulation.

For example, in June 2005 the Utah Supreme Court adopted a new rule definition of the “practice of law.”<sup>54</sup> The rule definition was a reaction to an attempt in April 2003 by the Utah legislature to adopt a very narrow definition of the practice of law. The legislature’s definition would have encompassed only court appearances. In the words of Gary Sackett, the chair of the *ad hoc* subcommittee of the Utah Supreme Court’s Advisory Committee on the Rules of Professional Conduct: “[i]t would have, perforce, allowed the untrained, unregulated village idiot to perform [legal] services for the unsuspecting citizen with no fear of prosecution or other legal or regulatory restraint.”<sup>55</sup> The Utah Supreme Court, claiming its authority to regulate the practice of law in the state, instead adopted its own rule definition. The Utah rule follows that of many other states, having a broad definition, but then enumerating specific activities and exceptions. Utah defines the practice of law as “the representation of the interest of another person by informing, counseling, advising, assisting, advocating for or drafting documents for that person through the application of the law and associated legal principles to that person’s fact and circumstances.” The carve-outs include those found in many other state rules: sale of legal forms, providing general legal information, appearance in small claims courts, acting as a mediator or arbitrator, lobbying, and activities by a real estate agent that are related to the sale of real estate.<sup>56</sup>

In Nebraska, a new rule became effective on January 1, 2008. It is a mix of the Utah rule and the ABA proposed definition approach. While it contains a general definition of the practice of law, and a long list of exclusions, it also lists specific activities that constitute the practice of law:

The “practice of law,” or “to practice law,” is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person which require the knowledge, judgment, and skill of a person trained as a lawyer. This includes, but is not limited to, the following:

(A) Giving advice or counsel to another entity or person as to the legal rights of that entity or person or the legal rights of others for compensation, direct or indirect, where a relationship of trust or reliance exists between the party giving such advice or counsel and the party to whom it is given.

(B) Selection, drafting, or completion, for another entity or person, of legal documents which affect the legal rights of the entity or person.

(C) Representation of another entity or person in a court, in a formal administrative adjudicative proceeding or other formal dispute resolution process,

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<sup>54</sup> Utah Code of Judicial Admin., § 14-802 (2011) (originally numbered chapter 13A, rule 101).

<sup>55</sup> Gary G. Sackett, *An Analytic Approach to Defining the “Practice of Law” – Utah’s New Definition*, Utah Bar Journal, no. 18, vol. 6, Nov./Dec. 2005, at 12-13.

<sup>56</sup> Utah Code of Judicial Admin., § 14-802(b)(1)-(c) (2011).



or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.

(D) Negotiation of legal rights or responsibilities on behalf of another entity or person.

(E) Holding oneself out to another as being entitled to practice law as defined herein.

Some other states that have recently considered the adoption of new rules have not been able to do so. In 2007, the Hawaii Bar Association, at the request of the Hawaii Supreme Court, presented a first suggested definition of the “practice of law.” The proposed definition encountered much opposition, both from special interest groups and from the Hawaii Attorney General. After a second proposed definition was also strongly opposed, the Hawaii Supreme Court decided to table the efforts indefinitely.<sup>57</sup>

In a recent surprising development, the Montana Supreme Court recently decided that it does not have the authority to regulate UPL, withdrew its rules and disbanded the bar committee that had been enforcing the rules.<sup>58</sup>

#### **D. Other State Laws**

Where certain practices or activities don’t fall squarely within a state’s UPL regulation, there may still be other remedies available, in particular, to a party who has used the legal services of a lawyer not properly licensed in the party’s jurisdiction, or who has purchased law-related services from a consultant or paralegal. Each state in the U.S. has some form of deceptive trade practices act that prohibits conduct which is misleading or otherwise causes confusion in connection with the sale of products and services. Available remedies vary by state, but usually a plaintiff has the right to recover damages and possibly attorneys’ fees.

A recent example of application of a state deceptive practices act against the unauthorized practice of law can be found in *Campbell v. Asbury Automotive, Inc.*,<sup>59</sup> which also raises interesting issues about the constitutionality of statutory regulation of the practice of law. In *Campbell*, the plaintiffs brought a class action against Asbury Automotive, claiming that Asbury had charged an illegal document preparation fee in connection with the preparation of a vehicle installment contract, and that the activities undertaken by Asbury constituted the unauthorized practice of law.<sup>60</sup> After a lower court ruled that the unauthorized practice of law could not be subject to the Arkansas Deceptive Trade Practices Act, because the practice of law could only be regulated by the judiciary, the plaintiffs appealed. The Supreme Court of Arkansas agreed with the lower court to the extent that the regulation of practice of law by lawyers was solely within its purview. With regard to the unauthorized practice of law by non-lawyers,

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<sup>57</sup> Letter from Chief Justice Moon of the Hawaii Supreme Court to the president of the Hawaii State Bar Association (July 2, 2009), <http://www.aldap.org/PR/Hi-SupCtLtr-UPL-090702.pdf>.

<sup>58</sup> *In re Dissolving the Comm’n on the Unauthorized Practice of Law*, 356 Mont. 109, 242 P.3d 1282 (2010). Under a Memorandum of Understanding between the bar association and the Montana Attorney General’s Office of Consumer Protection, the Office of Consumer Protection is now addressing complaints of UPL by non-lawyers.

<sup>59</sup> --- S.W.3d ---, No. 10–575, 2011 WL 1422897 (Ark. April 14, 2011).

<sup>60</sup> *Id.* at 1.

however, the court found that the legislature could regulate such activity, as long as the legislation didn't interfere with or restrict the judiciary's powers, thus reversing the lower court and remanding the matter.<sup>61</sup>

In addition, there are many other state laws that a plaintiff may want to consider. In California, for example, the Los Angeles District Attorney's Office suggests theories such as false advertising and unfair competition, grand theft by false pretenses and the illegal practice of business.<sup>62</sup>

## **E. Recent Technology Trends**

New technology is the unifying factor in two trends that are affecting UPL regulation: the outsourcing of legal services to foreign lawyers and non-lawyers, and the proliferation of software-based legal document preparation programs and services that act as "form book plus" versions of old form books.

### **1. Outsourcing**

The outsourcing of services to India and other countries that is now common-place in many industries and service areas also has affected legal services. The difference between hourly rates charged by U.S. and Indian lawyers is staggering, and some companies, such as General Electric, have taken outsourcing so far as to set up their own in-house legal departments in India.<sup>63</sup> Outsourcing seems to affect certain areas of the law, such as patent law, more than others, but according to recent reports, matters involving just about all areas of the law are being outsourced.<sup>64</sup>

Aside from whether outsourcing provides meaningful cost savings and whether the time difference between Asia and the U.S. is a benefit or a barrier to outsourcing, lawyers considering outsourcing some of their work need to consider what ethical duties apply to them and whether they may inadvertently be assisting the unauthorized practice of law in their home states. The main concerns that have surfaced so far are supervision of foreign lawyers or non-

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<sup>61</sup> *Id.* at 5.

<sup>62</sup> Los Angeles Cnty. Dist. Attorney's Office, <http://da.co.la.ca.us/pdf/UPLpublic.pdf> (last visited July 22, 2011).

<sup>63</sup> Helen Coster, *The American Lawyer*, *Briefed in Bangalore* (Nov. 1, 2004), <http://www.quislex.com/pdf/Our%20Clients%20in%20American%20Lawyer.pdf>.

<sup>64</sup> This includes preparation of appellate court briefs and different aspects of mergers and acquisitions. Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 *Geo. J. Int'l L.* 401 (2007), (hereinafter "*Daly & Silver*").

lawyers, conflicts of interest, and confidentiality.<sup>65</sup> When those ethical issues can be overcome, there seems to be consensus that outsourcing of legal services is not a UPL violation.<sup>66</sup>

There are several ethical opinions on this topic, both from the ABA<sup>67</sup> and from several state bar associations.<sup>68</sup> While the opinions conclude that U.S. lawyers may outsource services to foreign lawyers and non-lawyers without aiding and abetting UPL, the reasoning behind the opinions differ a little and may impose different ethical obligations on the U.S. lawyer. An ABA opinion distinguishes between delegation to foreign lawyers and delegation to foreign non-lawyers. For delegation to foreign lawyers, the opinion finds that ABA Model Rule 5.1 applies and requires the delegating lawyer to “make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.”<sup>69</sup> Under ABA Model Rule 5.3, which applies to the supervision of non-lawyers, the supervising lawyer must “make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.”<sup>70</sup> Many state bar opinions require a U.S. lawyer to treat a foreign lawyer to whom assignments are delegated like a non-lawyer, in order to avoid being guilty of aiding and abetting UPL and mostly refer to the state equivalent of ABA Model Rule 5.3.<sup>71</sup> A common thread in all of the opinions is that they find that some degree of heightened supervision is necessary if outsourcing is to a foreign lawyer or non-lawyer. For example, the ABA opinion specifies that a U.S. lawyer should conduct background and reference checks, interview the principal foreign lawyer, investigate the security of the foreign lawyer's premises, and investigate the quality of the legal education in the foreign lawyer's country, as well as its professional regulatory system and disciplinary enforcement. The ABA opinion also requires the U.S. lawyer to inform the client of the outsourcing arrangement, and possibly get the client's informed consent.<sup>72</sup> The implementation of a policy requiring the U.S. lawyer's foreign lawyers to comply with the ethical obligations of the U.S. lawyer's home state, and the adoption of procedures and practices for monitoring and supervising the foreign lawyers and their ethics compliance, are likely required.<sup>73</sup>

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<sup>65</sup> A lawyer who outsources work to a foreign lawyer should ensure that the foreign lawyer (or non-lawyer) does not have a conflict of interest vis-a-vis the lawyer's client. The lawyer will also need to ensure that any confidential client information is subject to the same degree of protection that the lawyer must afford it under his home state's equivalent to ABA Model Rule 1.6 and that the client consents to sharing the confidential information with the foreign lawyer. ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008).

<sup>66</sup> For a more in-depth analysis of the arguments for and against outsourcing and further elaboration on the ethical issues that arise, see, e.g., Darya V. Pallak, “I'm Calling My Lawyer...In India!": Ethical Issues in International Legal Outsourcing, 11 UCLA Int'l L. & Foreign Aff. 99 (2006); Mark L. Tuft, *Supervising Offshore Outsourcing of Legal Services in a Global Environment: Re-Examining Current Ethical Standards*, 43 Akron L. Rev. 825 (2010).

<sup>67</sup> ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008).

<sup>68</sup> New York: Bar of the City of N.Y. Formal Op. 2006-3 (2006); California: Los Angeles Cnty. Bar Ass'n Formal Op. 518 and San Diego Bar Ass'n Formal Op. 2007-1; Florida: Fla. State Bar Formal Op. 07-2 (2008); and North Carolina: N.C. Formal Ethics Opinion 12.

<sup>69</sup> *ABA Model Rules*, R. 5.1(b).

<sup>70</sup> *ABA Model Rules*, R. 5.3(b).

<sup>71</sup> *But see* San Diego Cnty. Bar Ass'n Formal Op. 2007-1, which refers to ABA Model Rule 5.1(b).

<sup>72</sup> ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008) at 4.

<sup>73</sup> *Daly & Silver*, *supra* note 64, at 433.

## 2. Legal Document Preparation Software

A more contested area is software-based legal document preparation programs. It has long been generally acknowledged that the mere sale of legal forms to the general public does not constitute UPL.<sup>74</sup> As software programs and the internet have developed, more sophisticated and personalized alternatives to the old form book have emerged. Websites have popped up that help customers with various law-related matters, such as setting up a legal entity, filing for divorce or bankruptcy, or preparing a patent application. These functions are, at their most basic level, form-based, but knowing what form to use and understanding the consequences of the choice often require lawyer-based analysis and thought. Whether the offering of forms through software programs or over the internet should be classified the same way as the sale of a form book has been reviewed by several courts and bar ethics committees over the last few years. In most instances, the reviewing bodies have concluded that, as long as there is no additional, human involvement in the preparation of the forms, which in itself would constitute the practice of law, the sale alone of forms generated through software programs or over the internet does not constitute UPL.<sup>75</sup>

But, in some instances, court opinions have found legal document preparation software sellers to be practicing law. In *United Practice of Law Committee v. Parsons Technology Inc.*,<sup>76</sup> for example, a District Court in Texas found that the sale of a software program called Quicken Family Lawyer constituted UPL under Texas law. However, as a result of the case, the Texas legislature adopted a statute excluding the creation and sale of legal document preparation software from the definition of the “practice of law,” provided that the software conspicuously states that it is not a substitute for the advice of a lawyer.<sup>77</sup>

*Parsons Technology* is a good example of how varying state definitions of UPL may lead to different outcomes in different states. The Oregon State Bar Association has on two different occasions had the opportunity to address how web-based services fit into the Oregon definition of the practice of law, and in both instances found that the offering of certain services over the internet did not constitute the practice of law.<sup>78</sup>

By the same token, a company that has found itself at the heart of the legal document preparation software controversy, is California-based LegalZoom.com, Inc. There is a fair amount of uncertainty about whether LegalZoom’s employees assist LegalZoom’s customers in such a fashion that the services provided cross the line to UPL. This issue has been the focus

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<sup>74</sup> ABA/BNA Lawyer’s Manual on Professional Conduct, § 21:8022.

<sup>75</sup> See, e.g., Or. Eth. Op. 1994-137, 1994 WL 455098 at \*2 (Or. St. Bar. Ass’n).

<sup>76</sup> No. Civ.A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan 22, 1999).

<sup>77</sup> Tex. Gov’t Code Ann. § 81.101 (West 2011).

<sup>78</sup> Or. Eth. Op. 1994-137, 1994 WL 455098 at \*2 (Or. St. Bar. Ass’n) (offering services through legal document preparation software alone was not UPL), Or. Eth. Op. 2005-137, 2005 WL 5679561 (Or. St. Bar. Ass’n) (web-based online information system is the equivalent of a legal form book).

of various ethics opinions involving the company.<sup>79</sup> LegalZoom also recently faced a class action in Missouri that largely disregarded the human aspects involved in LegalZoom's services. Instead, the Missouri class action was based on the definition of "law business" in the state's practice of law definition. "Law business" is defined as "... the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights ..."<sup>80</sup> The definition seems to capture the mere preparation of a legal document irrespective of human assistance. At the time of this paper, the parties to the class action had reached an agreement in principle that would allow LegalZoom to provide services in Missouri, though it would be required to make some undisclosed business modifications first.<sup>81</sup> Similar to the Missouri class action, the DeKalb County Bar Association has brought an action asking the court to permanently enjoin LegalZoom from offering its services in Alabama. The basis for the action is the same as in Missouri - that the online services offered by LegalZoom fall within the Alabama definition of UPL.<sup>82</sup>

While some states initially considered the provision of software programs and internet-based services to fall within the scope of UPL, it seems most states have decided that the modern, computerized form book is still just that, and should still be outside of practice of law definitions.<sup>83</sup> But it's certainly a much closer call than the traditional form book. What if the buyer of the software can call a help-line to obtain additional guidance on how to fill in the forms? It is in those situations, when the legal document preparation software no longer stands alone, but the customer also has access to additional human advice, that courts tend to find that the software provider is involved in UPL. For example, in *In re Reynoso*,<sup>84</sup> Frankfort Digital Services, Ltd. sold access to a website that allowed customers to prepare bankruptcy petitions and filings. The site was promoted as offering expertise in bankruptcy law, and in addition to preparation of form petitions, for an additional fee, customers could get access to loopholes and stealth techniques.<sup>85</sup> The court found that Frankfort was acting as a bankruptcy petition preparer,<sup>86</sup> but that its services went beyond those that non-lawyers are permitted to perform.<sup>87</sup> One factor that seems to have distinguished the services of Frankfort from companies merely selling legal forms was that the web-based software didn't just insert the customer's responses into blank forms. Instead, the software sometimes restated the customer's responses,

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<sup>79</sup> Conn. Bar. Informal Op. 2008-1, Pa. Bar Formal Op. 2010-01, and N.C. Bar, May 5, 2008 cease and desist letter to LegalZoom.com, Inc. No formal action appears to have been taken as a result of any of the opinions. LegalZoom.com, Inc. is contesting that their employees render any legal advice to their customers.

<sup>80</sup> Mo. Rev. Stat. § 484.020 (2011).

<sup>81</sup> Debra Cassens Weis, LegalZoom Can Continue to Offer Documents in Missouri under Proposed Settlement, ABA Journal, August 23, 2011, [http://www.abajournal.com/news/article/legalzoom\\_can\\_continue\\_to\\_offer\\_documents\\_in\\_missouri\\_under\\_proposed\\_settle/](http://www.abajournal.com/news/article/legalzoom_can_continue_to_offer_documents_in_missouri_under_proposed_settle/)

<sup>82</sup> Rachel M. Zahorsky, Alabama Bar Group Files Suit to Ban LegalZoom, ABA Journal, July 15, 2011, [http://www.abajournal.com/news/article/alabama\\_lawyer\\_group\\_files\\_suit\\_to\\_ban\\_legalzoom/](http://www.abajournal.com/news/article/alabama_lawyer_group_files_suit_to_ban_legalzoom/)

<sup>83</sup> *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. Civ.A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999).

<sup>84</sup> 477 F.3d 1117 (9th Cir. 2007).

<sup>85</sup> *Id.* at 1121

<sup>86</sup> *Id.* at 1124

determined where in the forms to insert the responses or restated responses, and even selected available exemptions for the customer.<sup>88</sup>

### III. ENFORCEMENT ACTIONS

Having described in Section II the regulatory scheme that applies to the unauthorized practice of law, we now focus in this Section III on analyzing UPL and UPL-related enforcement actions involving various activities engaged in by lawyers, consultants and paralegals.

In Sections III.A-D, we focus on activities directly related to UPL issues, such as facilitating UPL activities of non-lawyers, failing to supervise paralegals or other non-lawyers, accepting referrals from non-lawyers engaged in UPL, and giving legal advice multi-jurisdictionally to clients in states where the lawyers are not licensed. Within Section III.A on facilitating UPL activities of non-lawyers, we describe actions in which consultants or paralegals have been alleged or found to be engaging in UPL by giving legal advice, preparing and processing legal documents, having in-house lawyers provide legal advice to third parties and working under inadequate lawyer supervision. In Sections III.E-I, we focus on activities that are "close cousins" to UPL issues, such as giving incompetent legal advice on franchising and non-franchising issues, failing to adequately supervise associates, failing to seek adequate supervision, and functioning as a combination lawyer-business executive.

Before describing particular UPL enforcement actions, we note that, while some commentators observed a downward trend in UPL enforcement activity nearing the end of the 20th century,<sup>89</sup> in the course of doing our research for this paper, we have seen what may be evidence of an upward trend in UPL enforcement activity during the first 10 years of the 21<sup>st</sup> century. In this regard, a search applying the term "unauthorized practice of law" to Westlaw's "all state cases (ALLSTATES)" on-line database produces the following results:

<u>Year</u>	<u>Number of actions containing the term "unauthorized practice of law"</u>	<u>Year</u>	<u>Number of actions containing the term "unauthorized practice of law"</u>
1991	66	2001	151
1992	82	2002	191
1993	92	2003	185
1994	75	2004	178
1995	89	2005	193
1996	90	2006	214
1997	130	2007	190
1998	124	2008	182
1999	128	2009	192
2000	149	2010	188

The numbers show a pattern of less than 100 reported actions per year from 1991 to 1996, increasing to 124-151 per year from 1997 to 2001, and then increasing again to more or less 200 per year since 2002. Thus, the numbers appear to show an upward trend in UPL

<sup>87</sup> *Id.* at 1125-26

<sup>88</sup> *Id.* at 1123

<sup>89</sup> See, e.g., Restatement of the Law Governing Lawyers, ch. 1, topic 2, tit. B, §§ 3 and 4 (ALI 1998).

enforcement over the past 20 years.<sup>90</sup> At a minimum, the numbers clearly show that there has been steady overall UPL enforcement in the U.S. in the 2000's. A snapshot analysis of the 2005 and 2010 numbers shows that, while UPL enforcement may be steady overall, it varies widely by state. Thus, in 2005 and 2010, some states were enforcement "champions," including: Ohio (64 actions reported in the 2 years); Louisiana (27); Texas (22); New York (20); California (19); Oklahoma (19); and South Carolina (14). Most states had low or moderate UPL enforcement, with 1 to 12 actions reported in the 2 years. The moderate enforcement states included: Connecticut (12); Indiana (12); Florida (10); New Jersey (10); Delaware (9); Colorado (8); Illinois (8); Kentucky (8); Maryland (8); Massachusetts (7); and Pennsylvania (7). Some states had no actions reported in the 2 years, including: Idaho, New Hampshire, Oregon, Utah, Vermont and Wyoming. A snapshot analysis of the 2010 numbers gives an indication of the kind of UPL enforcement that is occurring. Of the 188 actions reported in 2010, 159 involved findings related to UPL issues, while 29 merely mentioned UPL peripherally or in case citations. Of the 159 actions involving findings related to UPL issues: 92 were civil actions, 57 were disciplinary proceedings, 9 were criminal actions, and 1 was a solicitation for public comment; and 92 involved non-lawyers, 65 involved lawyers, 1 involved a proposed rule change, and 1 involved a law challenge.

The ABA's 2009 Survey of Unlicensed Practice of Law Committees sheds light on one factor that causes the likelihood of UPL enforcement to vary significantly in different states. Certain states spend significant amounts on UPL enforcement, while others designate no budget or a minimal budget for that purpose. For example, in 2009, Florida spent approximately \$1,600,000 on enforcement actions, but Oregon spent only \$5,000.<sup>91</sup>

Now, let's move on to describing particular UPL enforcement actions.

#### **A. Facilitating the Activities of Non-Lawyers Engaged in UPL**

Whether a lawyer is facilitating the activities of an organization with non-lawyers who are engaged in UPL or is accepting referrals from such an organization, the lawyer may be found to be facilitating UPL. The organization could be a formal entity such as a corporation, LLC or partnership, or could be an informal joint marketing endeavor by two or more separate entities. In either case, there are ethical pitfalls for a lawyer. In this paper, we address enforcement actions involving facilitation in this Section III.A, and we address enforcement actions involving the acceptance of referrals in Section III.C.

Some of the ethical pitfalls for a lawyer facilitating the activities of an organization with non-lawyers involve: being associated with any misleading advertising of the organization; sharing fees with non-lawyers in the organization; failing to adequately supervise the legal work

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<sup>90</sup> A Westlaw research lawyer has assured us that there was no change in the "all state cases (ALLSTATES)" on-line database in 1996 that would have caused an artificial increase in the number of reported UPL enforcement actions after that year.

<sup>91</sup> ABA March 2009 Survey of Unlicensed Practice of Law Committees, Chart I. Apparently, Florida enforcement is so aggressive that there are a fair number of Florida law firms that specialize in the defense of UPL actions. See <http://floridabarhearing.com/unauthorizedpracticeoflaw.html> (last visited July 22, 2011).

of non-lawyers in the organization; and dealing with conflicts between the interests of the organization and the interests of the client.<sup>92</sup>

In franchising, we have found one enforcement action, *In re Zenner*.<sup>93</sup> The *Zenner* action involved a disciplinary proceeding against a lawyer who affiliated with a COLLECT AMERICA franchisee who operated a collection agency. Unfortunately for the lawyer, the franchisee's collectors held themselves out as being part of the lawyer's law firm and gave legal advice. Because the lawyer failed to exercise control, the South Carolina Supreme Court found that he was assisting UPL and ordered a public reprimand.

This year, the Colorado Attorney General filed a lawsuit against a Florida law firm The Johnson Law Group, PLLC, and its lawyer owner, alleging UPL and violation of the Colorado consumer protection act.<sup>94</sup> The defendants were advertising and providing debt management services to Colorado residents. In addition to allegedly failing to register as required under Colorado law to provide such services, the defendants were accused of advertising that the services would be provided by or under the supervision of lawyers, when in fact the services were outsourced to back-end companies operated by non-lawyers and the defendants were not actively involved in providing or supervising the services. The Colorado Attorney General is seeking an injunction, consumer restitution, disgorgement, civil penalties, attorneys' fees and costs. The action is pending.

In *In re Jones*,<sup>95</sup> the Supreme Court of Oregon found that a lawyer was facilitating UPL by associating with a non-lawyer who was advertising and providing divorce services. The lawyer permitted the non-lawyer to use his name, forms and letterhead, and knew about advertisements referring to him that were being used by the non-lawyer. The court suspended the lawyer for 6 months, finding that he knew the advertised services would be performed by the non-lawyer with the non-lawyer "having sole discretion [to determine] whether the [lawyer's] legal experience was required in any particular case,"<sup>96</sup> and that clients were deceived into believing that their divorce proceedings were being handled by or under the supervision of the lawyer. Even though the lawyer had instructed the non-lawyer to refrain from dealing with legal questions, the court stated:

His directive to [the non-lawyer] to refrain from dealing with legal questions was neither enforced by the accused nor supervised with the diligence necessary for such enforcement. By analogy, the accused knowingly loaded and cocked a

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<sup>92</sup> See, generally, *In re Mid-America Living Trust Assocs. Inc.*, 927 S.W.2d 855 (Mo. 1996)(lawyers hired by company preparing trust documents were only marginally involved in preparation of documents for their clients); *In re Nassif*, 547 N.W.2d 541 (N.D. 1996)(lack of supervision over employees); *Comm. on Prof'l Ethics and Conduct v. Baker*, 492 N.W.2d 695 (Iowa 1992)(aiding a nonlawyer in the UPL); *In re Yamaguchi*, 515 N.E.2d 1235 (Ill. 1987) (aiding a nonlawyer in the UPL); *Fla. Bar v. James*, 478 So.2d 27 (Fla. 1985)(attorney partnering with nonlawyer); *Ky. Bar Ass'n v. Tiller*, 641 S.W.2d 421 (Ky. 1982)(aiding, assisting, or abetting debt collection agency in UPL).

<sup>93</sup> 348 S.C. 499, 560 S.E.2d 406 (2002).

<sup>94</sup> *Colorado v. The Johnson Law Group, PLLC*, Case No. 2011CV2749 (filed April 28, 2011), <http://www.coloradoattorneygeneral.gov/press> (last visited July 21, 2011).

<sup>95</sup> 308 Or. 306, 779 P.2d 1016 (1989).

<sup>96</sup> 308 Or. at 309, 779 P.2d at 1017.



pistol which he handed to [the non-lawyer], knowing she lacked the training to fire it safely, when he enabled her to perform dissolution services using his name.<sup>97</sup>

In this situation, the non-lawyer's conduct was at times fraudulent and harmful to people who used her services. Even though the lawyer apparently was not aware of this, his suspension likely was lengthened because of the harm caused by the non-lawyer.

In *Louisiana State Bar Ass'n v. Edwins*,<sup>98</sup> a disciplinary proceeding was brought against a lawyer for facilitating the activities of a free lance paralegal service, whereby the non-lawyer owner of the service became the lawyer's paralegal, investigator and client-relations representative. The non-lawyer acted independently in dealing with clients, mishandled client funds, and allegedly made statements that misled clients about his status. While the Supreme Court of Louisiana acknowledged that "a lawyer may delegate various tasks to paralegals, clerks, secretaries and other non-lawyers," it found in *Edwins* that the lawyer had not properly supervised the non-lawyer, had improperly delegated responsibilities to the non-lawyer which involved the exercise of professional judgment, and had improperly shared legal fees with the non-lawyer.<sup>99</sup>

Of course, if a lawyer is prohibited from facilitating UPL activities of non-lawyers such as consultants and paralegals, he or she must know what activities have been found by the courts to be UPL. Sections III.A.1 and III.A.2 describe the types of activities of consultants and paralegals that have been found to be UPL.

## 1. UPL Activities of Consultants

### a. Giving Legal Advice

By "giving legal advice," we mean counseling clients on law-related options. For purposes of this paper, we distinguish giving legal advice from "preparing and processing documents," which generally is done after counseling to achieve a particular goal, such as, in the franchising context, having a legally adequate FDD, or registering an FDD, or in a non-franchising context, for example, having a will or trust, or processing a patent, divorce, adoption or bankruptcy application.

Two actions in franchising have involved allegations of a consultant engaging in UPL by giving legal advice. Francorp, Inc. was a party to both actions.

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<sup>97</sup> 308 Or. at 310, 779 P.2d at 1017-18.

<sup>98</sup> 540 So.2d 294 (La. 1989).

<sup>99</sup> *Id.* at 300. See also, *In re Kaplan*, 47 So.3d 408 (La. 2010)(permanent prohibition from the practice of law due to facilitating UPL by nonlawyer employees); *In re O'Brien-Carriman*, 288 Ga. 239, 702 S.E.2d 635 (2010)(improper sharing of legal fees with nonlawyer); *In re Shepard*, 169 Wash.2d 697, 239 P.3d 1066 (2010)(aiding a nonlawyer in the UPL); *State v. Martin*, 240 P.3d 690 (Okla. 2010)(failure to supervise nonlawyer); *Sneed v. Tenn. Board of Prof'l Responsibility*, 301 S.W.3d 603 (Tenn. 2010)(fee splitting and aiding a nonlawyer in the UPL).

In *Francorp, Inc. v. Siebert*,<sup>100</sup> Mark Siebert & Associates, Inc. (MSA), a competitor of Francorp formed by Francorp's former president, Mark Siebert, alleged that Francorp was violating the Illinois deceptive trade practices act by engaging in the unauthorized practice of law. Denying a motion for summary judgment, in 2002, the U.S. District Court for the Northern District of Illinois found that there were issues of fact to be tried concerning "the extent of Francorp's involvement in creating legal documents and whether those activities crossed the line from consulting into legal practice."<sup>101</sup> Before reaching this conclusion, the court discussed the record and the law. The record showed that "Francorp's business involves informing clients about the benefits and disadvantages of franchising, and helping them to design and implement an appropriate program." Francorp promoted itself as a "one stop shop," claimed knowledge of franchise law, and had in-house lawyers who helped to prepare disclosure documents, franchise agreements, state franchise registration documents and related documents. Francorp advised clients to have their own independent lawyers review the documents that were prepared. In reviewing the law, the court observed that: the unauthorized practice of law could be found to be an unfair trade practice; a consultant engaging in UPL "has a distinct competitive advantage over consultants who do not attempt to offer legal services;" Francorp's in-house lawyers could not perform legal work for Francorp's clients, because the documents being prepared governed the clients' relationships with third parties; and having independent lawyers review and "sign off" on the documents "does not absolve the company from unauthorized practice."<sup>102</sup> The court stated:

Illinois courts have not adopted a precise definition of "practice of law." ... We evaluate each case individually to determine whether the activity in question requires specialized legal training beyond that of a layperson. ... Courts have recognized that consulting in law related fields is not [the] same as practicing law. ... But the line between consulting and practicing is sometimes a blurry one. ... Simply filling in the blanks on standardized forms drafted by attorneys, if doing so requires legal judgment, can constitute unauthorized practice. ... Drafting franchise agreements, offering circulars and licensing agreements and executing registration certificates is practicing law.

Nonetheless, the court found summary judgment to be inappropriate, because the precise division of responsibilities between Francorp and its clients' independent lawyers was "unclear and very much in dispute." There was no later trial, because the action was later settled.

The second action, *Jitterswing, Inc. v. Francorp, Inc.*,<sup>103</sup> involved a tort action brought against Francorp by its client, Jitterswing, a dance school. Jitterswing was located in Missouri and alleged that Francorp performed services under its consulting agreement that constituted the practice of law without a license in violation of a Missouri statute. Both parties agreed that all documents and forms prepared by Francorp would be submitted to Jitterswing's independent lawyer for review and approval, and that Francorp could not act as Jitterswing's lawyer. The consulting agreement contained a forum selection clause specifying that any dispute arising under the agreement would be resolved in an Illinois court. Jitterswing brought its action in a

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<sup>100</sup> 211 F.Supp. 2d 1051 (N.D. Ill. 2002).

<sup>101</sup> *Id.* at 1057.

<sup>102</sup> *Id.* at 1056.

<sup>103</sup> 311 S.W. 3d 828 (Mo. Ct. App. 2010).

Missouri court. Francorp sought dismissal on that basis. In 2010, the Missouri Court of Appeals, reversing a lower court's dismissal without prejudice, found that the language in the forum selection clause was "not specific enough to encompass the tort claim for practice of law without a law license," and that even if the clause were specific enough, it would be unenforceable because it would create an unfair result. The court did not reach the merits of Jitterswing's tort claim, but did note that the Missouri statute permitted a recovery of treble the amount paid under the consulting agreement.

In a non-franchising context, consultant-type professionals such as certified public accountants have been found to be engaged in UPL when advising clients on "corporate-structuring strategies and then drawing up the documents to produce incorporated status."<sup>104</sup>

### **b. Preparing and Processing Legal Documents for Clients**

*Francorp, Inc. v. Seibert*, discussed in Section III.A.1.a, supports the position that a consultant merely preparing and processing legal documents for clients may be engaged in UPL, "if doing so requires legal judgment."<sup>105</sup>

In addition, the actions described in Section III.A.2.b, involving paralegals engaged in preparing and processing legal documents, relate equally to consultants engaged to the same types of activities.

### **c. Having In-House Lawyers Do Legal Work for Clients**

*Francorp, Inc. v. Seibert*, discussed in Section III.A.1.a, supports the position that a consultant having its in-house lawyers doing legal work for its clients may be engaged in UPL.<sup>106</sup> In this regard, the court noted that Illinois prohibited corporations from practicing law, and that this rule covered licensed lawyers working for corporations. The court stated:

These lawyers are permitted to do legal work on behalf of the corporation, but may not act as attorneys for the corporation's clients. Lay corporations may prepare legal documents that are incidental to their primary business. For example, a bank, in the business of making loans, may draft and execute loan documents defining its relationship with the borrower. ... But this exception is not applicable here. The documents in question are not contracts defining Francorp's relationship with its clients, such as engagement letters or fee agreements. They are documents prepared on behalf of clients to govern their relationships with third parties. ... Francorp's in-house lawyers' duty of loyalty runs primarily to the corporation, not to the client. This divided loyalty is precisely what the prohibition on the corporate practice of law is intended to prevent.<sup>107</sup>

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<sup>104</sup> *Dayton Bar Ass'n v. Stewart*, 116 Ohio St.3d 289, 291, 878 N.E.2d 628, 630 (2007).

<sup>105</sup> 211 F.Supp. 2d at 1056.

<sup>106</sup> *Id.* at 1055-56.

<sup>107</sup> *Id.* See also *Chi. Bar Ass'n v. Quinlan & Tyson, Inc.*, 34 Ill.2d 116, 122-23, 214 N.E.2d 771 (1966).

In *Jitterswing v. Francorp*,<sup>108</sup> the parties both recognized that Francorp could not act as Jitterswing's lawyer.

Other enforcement actions support the position that non-lawyer entities, including their licensed in-house lawyers, may engage in the practice of law for themselves, but may not engage in the practice of law for others unless they are authorized to do so by statute or court rule. See, for example, *Johnson v. Pistakee Highlands Community Ass'n* (non-profit corporation was not engaged in UPL when it prepared and filed documents asserting lien claims against properties for its own benefit);<sup>109</sup> *Illinois Bar Ass'n v. People's Stock Yards State Bank* (bank was engaged in UPL when its licensed in-house lawyers performed multiple legal services for the bank's customers);<sup>110</sup> *In re Mid-America Living Trust Associates, Inc.*<sup>111</sup> (in-house lawyers are prohibited from providing legal services to their employers' clients); and *Chi. Bar Ass'n v. Quinlan & Tyson, Inc.*<sup>112</sup> (real estate brokerage company was not engaged in UPL when it filled in real estate offers for clients, but it was engaged in UPL when it filled in title document forms for clients).

## **2. UPL Activities of Paralegals**

### **a. Giving Legal Advice**

We have not located any enforcement actions involving paralegals allegedly giving legal advice in the field of franchising.

There are, however, numerous enforcement actions against or by paralegals in other fields relating to their giving legal advice, and numerous disciplinary proceedings against lawyers addressing the activities of paralegals giving legal advice. Most of the reported enforcement actions are in fields that are personally-oriented and cost-sensitive for typical clients, such as adoptions, bankruptcy, children with disabilities, divorces, debt collection, debt management, divorces, living trusts, routine real estate transactions and wills.

There are significant reasons for permitting non-lawyers to provide independent counseling services to clients on law-related options, at least in some fields. The reasons generally focus on considerations such as reducing costs for clients, making legal assistance available to persons who would otherwise not be able to afford it, and using the talents of non-lawyers with unique expertise in narrowly defined fields of practice.

Based on these considerations, some fields have been opened to non-lawyers by statutes, administrative agency rules or court rules. At the national level, for example, U.S. Patent and Trademark Office (USPTO) rules have long permitted registered non-lawyers to

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<sup>108</sup> 311 S.W. 3d 828 (Mo. Ct. App. 2010).

<sup>109</sup> 72 Ill. App. 3d 402, 390 N.E.2d 640 (Ill. App. 2d Dist. 1973).

<sup>110</sup> 344 Ill. 462, 176 N.E. 901 (1931).

<sup>111</sup> 927 S.W.2d 855, 867 (Mo. 1996).

<sup>112</sup> 34 Ill.2d 116, 122-23, 214 N.E.2d 771 (1966).

counsel on, prepare and prosecute patent applications. In *Sperry v. Florida*,<sup>113</sup> while acknowledging that the activities are the practice of law and that the states have the right to regulate the practice of law, the U.S. Supreme Court found that the USPTO's authorizing statute and rules preempted state regulation as to the patent-related activities involved. Similarly, at the national level, non-lawyers may represent households in certification proceedings under the federal Food Stamp Act;<sup>114</sup> inmates at prisons may assist other inmates in the preparation of writs and other legal matters;<sup>115</sup> bankruptcy petition preparers may prepare bankruptcy petitions;<sup>116</sup> and non-lawyers may perform law-related functions in other specified circumstances.<sup>117</sup> At the state level, similar efforts have been made by the courts, legislators and administrative agencies to open certain law-related fields to non-lawyers.<sup>118</sup>

However, in the absence of statutes or rules permitting non-lawyers to counsel clients on law-related options in particular fields, the courts have jealously guarded their right to prevent non-lawyers from giving legal advice.<sup>119</sup> In *In re Arons*,<sup>120</sup> for example, a non-profit organization was offering counseling and advocacy services to families of children with disabilities under the federal Individuals with Disabilities Education Act (IDEA). Although the non-lawyer operators of the organization and the U.S. Department of Justice argued for the organization's right under IDEA to engage in the activities, acknowledged by all parties to be the practice of law, the Supreme Court of Delaware found that the language in IDEA was insufficiently explicit to preempt state regulation. Explaining its position, the court stated:

While we recognize that Appellants possess some expertise in the area of the educational needs of disabled children, they admittedly lack the training and skills that lawyers are expected to exhibit in matters of evidence and procedure. ... This Court does not exercise its inherent authority to regulate the practice of law for the purpose of protecting the financial interests of the lawyer. Our role is to insure that the public will enjoy the representation of individuals who have been found to possess the necessary skills and training to represent others.<sup>121</sup>

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<sup>113</sup> 373 U.S. 379, 383-385, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963).

<sup>114</sup> 7 U.S.C. § 2020(e)(7) (2011).

<sup>115</sup> *Johnson v. Avery*, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969).

<sup>116</sup> 11 U.S.C. § 110

<sup>117</sup> See, e.g., *Hazzard*, *supra* note 35, § 46.4.

<sup>118</sup> See, e.g., *Unauthorized Practice of Law Comm. v. Dep't of Workers' Comp.*, 543 A.2d 662, 664-67 (R.I. 1988); *Hazzard*, *supra* note 35, § 46.4.

<sup>119</sup> A long-held and succinct rationale for this approach is stated in *R.I. Bar Ass'n v. Auto. Serv. Ass'n*, 55 R.I. 122, 134-35, 179 A. 139, 144 (1935):

The work of the office lawyer is the groundwork for future possible contests in courts. It has profound effect on the whole scheme of the administration of justice. It is performed with that possibility in mind, and otherwise would hardly be needed . . . It is of importance to the welfare of the public that these manifold customary functions be performed by persons possessed of adequate learning and skill, of sound moral character, and acting at all times under the heavy trust obligation to clients which rests upon all attorneys.

<sup>120</sup> 756 A.2d 867 (Del. 2000).

<sup>121</sup> *Id.* at 874.

*Florida Bar v. Furman*<sup>122</sup> involved a "secretarial service" that was offering counseling and processing services for adoptions, divorces, real estate transactions and wills. Rejecting a constitutional challenge to its right to regulate these activities, the Supreme Court of Florida imposed civil and eventually criminal sanctions on the operator of the secretarial service for engaging in the unauthorized practice of law, stating:

The fact she is an expert stenographer does not give her any legal right to engage in divorce and adoption practice anymore than a nurse has the right to set up an office for performing tonsillectomy or appendectomy operations or a dental assistant to do extractions or fill teeth.<sup>123</sup>

Similar rulings have been issued by other courts.<sup>124</sup>

As mentioned above, numerous disciplinary proceedings against lawyers have been based, in part, on the activities of non-lawyers found to be engaging in UPL.<sup>125</sup>

We have not located statutes or rules anywhere in the country that permit non-lawyers such as paralegals to provide independent counseling on law-related options in the field of franchising.

#### **b. Preparing and Processing Legal Documents for Clients**

In several enforcement actions, courts have recognized that non-lawyers such as paralegals may advertise and sell sample legal forms or documents without engaging in UPL.<sup>126</sup>

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<sup>122</sup> 376 So.2d 378 (Fla. 1979); 451 So.2d 808 (Fla. 1984).

<sup>123</sup> 376 So.2d at 381.

<sup>124</sup> See, e.g., *Steele v. Bonner*, 782 N.W.2d 379 (S.D. 2010) (South Dakota Supreme Court rejected non-lawyer's constitutional challenges to the regulation of UPL); *Richard F. Mallen & Assocs., Ltd. v. Myinjuryclaim.com Corp.*, 329 Ill. App.3d 953, 769 N.E.2d 74, 263 Ill. Dec. 872 (App. Ct., 1st Dist., 4th Div. 2002) (personal injury law firms were held to have standing to sue to prevent the operation of a non-lawyer's website that advised individuals injured in automobile accidents about their legal rights and claims); *State Bar of Mich. v. Cramer*, 399 Mich. 116, 249 N.W.2d 1 (1976) (rejecting an argument that the state statute prohibiting UPL was unconstitutionally vague, the Supreme Court of Michigan found that non-lawyers providing divorce counseling services were engaged in UPL).

<sup>125</sup> UPL was found, for example, in: *In re Shepard*, 169 Wash.2d 697, 239 P.3d 1066 (2010), and *State v. Laden*, 893 P.2d 771 (Colo. 1995), both involving non-lawyers who counseled clients about living trusts; *Comm. on Prof'l Ethics and Conduct v. Baker*, 492 N.W.2d 695 (Iowa 1992), involving a non-lawyer certified financial planner who gave seminars and counseled clients on living trusts; *In re Jones*, 308 Or. 306, 779 P.2d 1016 (1989), involving a non-lawyer who handled domestic relations matters for clients; *La. State Bar Ass'n v. Edwins*, 540 So.2d 294 (La. 1989), involving an independent paralegal who counseled on and processed various types of legal claims for clients; *In re Yamaguchi*, 515 N.E.2d 1235 (Ill. 1987), involving a real estate broker who was counseling on, preparing and processing clients' real estate valuation complaints; *Musselman v. Willoughby Corp.*, 230 Va. 337, 337 S.E.2d 724 (1985), involving an unsupervised paralegal who gave advice and prepared documents for a lawyer's corporate client on a real estate transaction; *Fla. Bar v. James*, 478 So.2d 27 (Fla. 1985), involving a for-profit corporation engaged in filing legal actions for corporate clients to collect on delinquent consumer credit accounts.

<sup>126</sup> See, e.g., *Nebraska v. Yah*, 281 Neb. 383, 393, 796 N.W.2d 189, 196-97 (2011)(family law related forms and advice); *Fla. Bar v. Catarcio*, 709 So.2d 96, 98-100 (Fla. 1998)(bankruptcy related forms and advice); *In re Mid-America Living Trust Assocs. Inc.*, 927 S.W.2d 855, 859 (Mo. 1996)(living trusts and related legal documents); *Fla. Bar v. Furman*, 376 So.2d 378, 381 (Fla. 1979)(legal forms related to divorce proceedings); *State v. Cramer*, 399

In franchising, similar activity is engaged in by companies such as FranDATA, which advertise and sell FDDs that have been registered in various states. Like the activity permitted in the enforcement actions, this latter activity involves the distribution of documents that can be used as forms for new FDDs prepared by or for other franchisors, but does not involve advising clients on their law-related options.

When non-lawyers have gone one step further, providing general legal information about the field of law relevant to the forms or documents and general instructions on how to use or complete the forms or documents, for the most part, the courts have continued to find no UPL.<sup>127</sup> Some courts, however, have ruled that providing general information and instructions can be UPL, even if there has been no individualized counseling.<sup>128</sup>

Non-lawyers such as paralegals have been permitted to provide secretarial and notary services relating to the completion of legal forms or documents, but they have been limited to inserting into the forms or documents only information provided to them by clients.<sup>129</sup>

When non-lawyers such as paralegals have become involved in deciding what legal forms to use, what information to include or not include in the legal forms, or in changing or adding information to be included in the legal forms, in the absence of statutes or rules permitting such activity, the courts have ruled such activity to be UPL.<sup>130</sup>

Enforcement actions against non-lawyers generally have been for injunctions based on state laws prohibiting the unlicensed or unauthorized practice of law. In the context of franchising, in *Statewide Grievance Committee v. Patton*,<sup>131</sup> the Connecticut bar grievance committee filed an action seeking an injunction to restrain a franchisee of DOC-U-PREP from

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Mich. 116, 249 N.W.2d 1, 8-9 (1976)(legal forms related to divorce proceedings); *N.Y. Cnty. Lawyers' Ass'n v. Dacey*, 21 N.Y.2d 694, 287 N.Y.S.2d 422 (1967)(case involving the iconic "How to Avoid Probate!" form book).

<sup>127</sup> *Id.* But see, e.g., *Statewide Grievance Committee v. Goldstein*, No. CV960558603S, 1996 WL 753092 (Conn. Super. Ct. 1996 Dec. 26, 1996): "It is almost rhetorical to reaffirm the principle that the preparation and selection of legal documents constitutes the practice of law. [Citations omitted.] Advertising such services by non-attorneys and soliciting personal information in order to select or prepare legal documents fall under the same prohibition."

<sup>128</sup> See, e.g., *Fla. Bar v. Stupica*, 300 So.2d 683 (Fla. 1974).

<sup>129</sup> *Fla. Bar v. Catarcio*, 709 So.2d 96, 98-100 (Fla. 1998)(consulting and advising on how to fill out form constituted UPL); *In re Samuels*, 176 B.R. 616, 621 (Bankr. M.D. Fla. 1994)(bankruptcy preparer eliciting information from client to determine what forms to use was involved in UPL).

<sup>130</sup> *State v. Yah*, 281 Neb. 383, 796 N.W.2d 189 (2011) (divorce and parental rights documents); *Ky. Bar Ass'n v. Tarpinian*, 397 S.W.3d 627 (Ky. 2011) (uncontested divorce documents); *Fla. Bar v. Catarcio*, 709 So.2d 96 (Fla. 1998) (bankruptcy petitions); *Or. State Bar v. Smith*, 149 Or. App. 171, 942 P.2d 793 (Ct. App. 1977) (various legal forms); *Statewide Grievance Comm. v. Patton*, 239 Conn. 251, 254-55, 683 A.2d 1359 (Conn. 1996) (various legal forms); *In re Mid-America Living Trust Assocs. Inc.*, 927 S.W.2d 855, 860-62 (Mo. 1996) (trust documents); *In re Samuels*, 176 B.R. 616, 620-625 (Bankr. M.D. Fla. 1994) (bankruptcy documents); *Monroe v. Horwitch*, 820 F.Supp. 682, 686-687 (D. Conn. 1993) (documents in simple divorce actions); *Chi. Bar Ass'n v. Quinlan and Tyson, Inc.*, 34 Ill.2d 116, 214 N.E.2d 771 (1966)(documents related to real estate purchase).

<sup>131</sup> 239 Conn. 251, 683 A.2d 1359 (1996). See also *Ohio State Bar Ass'n v. Martin*, 118 Ohio St.3d 119, 886 N.E.2d 827 (2008), a successful action for an injunction and civil penalties brought by the State Bar Association against the WE THE PEOPLE franchisor and a franchisee, who were using the slogan "No Lawyers! Save Money" in their business of preparing documents for use by clients in uncontested legal matters.

advertising and providing legal document preparation services. The franchisee's advertisement stated:

ANNOUNCING DOC-U-PREP OF NEW ENGLAND, The Non Lawyer Legal Document Center, HELPING PEOPLE WHO CAN'T AFFORD THE HIGH COST OF ROUTINE LEGAL DOCUMENT PREPARATION, We will Do Your Wills \$45.00, Corporation \$250.00, Divorce (uncontested) \$125.00, Living Trust \$499.00, Bankruptcy (chapter 7) \$279.00, Name Change \$99.00 and many more documents, all at low cost.<sup>132</sup>

The franchisee used forms and questionnaires to elicit information from clients, and then prepared documents based on that information. Upholding an injunction, the Supreme Court of Connecticut found that this activity was UPL, relying in part on the following quote in *State Bar Ass'n v. Connecticut Bank & Trust Co.*:

The practice of law consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces the giving of legal advice on a large variety of subjects and the preparation of legal instruments covering an extensive field. Although such transactions have no direct connection with court proceedings, they are always subject to subsequent involvement in litigation. They require in many aspects a high degree of legal skill and great capacity for adaptation to difficult and complex situations.<sup>133</sup>

In *In re Mid-America Living Trust Associates, Inc.*,<sup>134</sup> the Missouri disciplinary counsel sought an injunction to restrain a marketing company and its owner from advertising and preparing trust documents. The defendant's non-lawyer independent contractors were conducting educational programs, gathering information from clients, preparing trust documents and then recommending to clients that the trust documents be reviewed by recommended lawyers or the clients' personal lawyers. Reviewing reported decisions in numerous states and ordering an injunction, the court stated:

Merely gathering information for use in a legal document does not necessarily constitute the unauthorized practice of law. ...However, that is not all that the trust associates did here. ... The trust associates were not merely collecting information to fill in standardized forms .... Instead, they also were giving legal advice to the clients about choices to be made and the legal effects of those choices.<sup>135</sup>

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<sup>132</sup> 239 Conn. at 253, 683 A.2d at 1360.

<sup>133</sup> 145 Conn. 222, 234-35, 140 A.2d 863, 870 (1958).

<sup>134</sup> 927 S.W.2d 855 (Mo. 1996).

<sup>135</sup> *Id.* at 865. See also *Fla. Bar v. Catarcio*, 709 So.2d 96 (Fla. 1998)(providing legal advice in connection with preparation of bankruptcy petitions); *Or. State Bar v. Smith*, 149 Or. App. 171, 942 P.2d 793 (Ct. App. 1977)(providing legal advice in connection with preparation of various legal forms); *Chi. Bar Ass'n v. Quinlan & Tyson, Inc.*, 34 Ill.2d 116, 214 N.E.2d 771 (1966)(realtors may only fill in blanks on standard contract of sale).



Some enforcement actions have been brought by clients against non-lawyers. For example, in *Samuels v. American Legal Clinic, Inc.*,<sup>136</sup> a former client brought an action for damages and an injunction, under federal bankruptcy law and the Florida deceptive and unfair trade practices act, against a corporation that prepared and processed bankruptcy documents for the client, as well as the corporation's owner. Addressing the dangers inherent in permitting non-lawyer advise on clients' legal options, the court observed that

even if [the corporation's owner gave] good advice and listed proper exemptions, she still [was] practicing law. The issue is not that her advice was good or bad, proper or improper; rather the issue is the fact that she gave advice that she is not licensed to give.<sup>137</sup>

The court did not award damages, because the bankruptcy documents had been successfully processed, but did enter an injunction and a judgment for attorneys' fees against the corporation and the owner.<sup>138</sup>

Some enforcement actions have been brought by non-lawyers themselves. In *Monroe v. Horwitch*,<sup>139</sup> for example, a paralegal sued the Connecticut bar grievance committee, alleging that her constitutional rights were being violated because of a threat of criminal prosecution for her divorce document preparation activities. The court upheld the state's right to regulate the practice of law, and found that statutes forbidding the unauthorized practice of law are "sufficiently definite' to withstand constitutional scrutiny,"<sup>140</sup> stating:

Preparation of legal documents is "commonly understood to be the practice of law." ... What constitutes "preparation of legal documents" is construed broadly. "Preparation of instruments, even with *preprinted forms*, involves more than a mere scrivener's duties" and, therefore, constitutes the practice of law. ... Legal documents purport to allocate legal obligations.<sup>141</sup>

The court rejected the paralegal's argument that treating paralegals differently, "depending upon the existence of attorney supervision," was a violation of her Fourteenth Amendment equal protection rights.<sup>142</sup>

In franchising, while some may question whether an FDD is a legal document, at a minimum, it is a hybrid of a factual document and a legal document. As observed in *In re Southland Corp. v. Attorney General of New York*.<sup>143</sup>

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<sup>136</sup> 176 B.R. 616 (Bankr. M.D. Fla. 1994).

<sup>137</sup> *Id.* at 624.

<sup>138</sup> *Id.* at 628-29.

<sup>139</sup> 820 F.Supp. 682 (D. Conn. 1993). See also *In re Opinion 24 of the Comm. on the Unauthorized Practice of Law*, 128 N.J. 114, 607 A.2d 962 (1992)(action brought by paralegals).

<sup>140</sup> *Id.* at 686.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 687.

The purchase of a franchise ... results in an ongoing contractual relationship between the franchisor and franchisee pursuant to which the franchisee plays an active role in the business enterprise.

The [FDD], therefore, represents a hybrid. Accordingly, the [FDD] contains two categories of information, corresponding to the two characteristic features of the franchise arrangement. [The FDD contains] concrete factual information concerning the franchisor and its business, upon which the prospective franchisee will rely in ascertaining the safety and desirability [sic] of the investment. The second category of material required to be disclosed [relates to] the proposed terms of [the franchisor's and franchisee's] contractual undertaking.<sup>144</sup>

To the extent that an FDD contains "concrete factual information concerning the franchisor and its business, it can be argued that it is a factual document, and that it is just as practical for a non-lawyer, such as a paralegal or consultant, to gather and insert the information into the FDD, as it is for a lawyer to do so. On the other hand, it can be argued that even the concrete factual information in an FDD, including the wording used and the order of the information's presentation, is highly regulated by the law and must be prepared by a lawyer, or at least prepared by a non-lawyer under a lawyer's supervision. To the extent that an FDD contains material about the proposed terms of the contractual undertaking and the actual contracts to be used by the parties, an FDD seems clearly to be a legal document.

#### **c. Having In-House Lawyers Do Legal Work for Clients**

See the discussion in Section III.A.1.c.

#### **d. Working Under Inadequate Lawyer Supervision**

Paralegals, whether they are employed by lawyers or are independent contractors working with lawyers, can be found to be engaging in UPL if they are functioning without adequate lawyer supervision. This situation can arise if the lawyers are putting little or no time into their supervision, or if the lawyers have insufficient expertise to supervise the paralegals in the field of law involved. As explained in *In re Opinion No. 24 of the Comm. on the Unauthorized Practice of Law*:

Neither case law nor statutes distinguish paralegals employed by an attorney or law firm from independent paralegals retained by an attorney or a law firm. Nor do we. Rather, the important inquiry is whether the paralegal, whether employed or retained, is working directly for the attorney, under that attorney's supervision. Safeguards against the unauthorized practice of law exist through that supervision. Realistically, a paralegal can engage in the unauthorized practice of law whether he or she is an independent paralegal or employed in a law firm. . . . Although fulfilling [ethical requirements] is primarily the attorney's obligation and responsibility, a paralegal is not relieved from an independent

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<sup>143</sup> 560 N.Y.S.2d 253 (Sup. Ct. 1990).

<sup>144</sup> *Id.* at 256-57. See discussion of the *Francorp* lawsuits in Section III.A.1.a.

obligation to refrain from illegal conduct and to work directly under the supervision of the attorney. A paralegal who recognizes that the attorney is not directly supervising his or her work or that such supervision is illusory because the attorney knows nothing about the field in which the paralegal is working must understand that he or she is engaged in the unauthorized practice of law. In such a situation an independent paralegal must withdraw from representation of the client. The key is supervision, and that supervision must occur regardless of whether the paralegal is employed by the attorney or retained by the attorney.<sup>145</sup>

## **B. Failing to Adequately Supervise Paralegals or Other Non-Lawyers**

We have found one enforcement action in franchising involving the failure of a lawyer to adequately supervise a non-lawyer such as a paralegal. In *Beverly Hills Concepts, Inc. v. Shatz and Shatz, Ribicoff and Kotkin*,<sup>146</sup> the plaintiff fitness club franchisor filed an action against its former law firm and a partner, an associate and a non-lawyer in the law firm. Plaintiff alleged legal malpractice, negligent misrepresentation, breach of fiduciary duty and violation of the Connecticut unfair trade practices act, among other deficiencies. After trial, the trial court awarded plaintiff damages of \$15.9 million. On appeal, the trial court's findings on the legal malpractice-related issues were affirmed, but the damage award was reversed based on the inadequacy of the damages proof. For purposes of this paper, the significance of the action is that the partner in the defendant law firm was criticized by the Supreme Court of Connecticut, and presumably by the trial court, at least in part, for failing to adequately supervise the non-lawyer. The unauthorized practice of law issue regarding the supervision of non-lawyers such as paralegals was not explicitly discussed at the appellate level, but it was there, and it has been explicitly discussed in numerous other enforcement actions.

In the other enforcement actions, the courts have consistently ruled that lawyers may delegate law-related duties to non-lawyers (such as law clerks and paralegals) that the non-lawyers could not handle independently, but that they may handle if adequately supervised by a lawyer.<sup>147</sup> This approach has been applied whether the non-lawyers are employees or independent contractors. In *Attorney Grievance Committee of Maryland v. Hallmon*,<sup>148</sup> for

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<sup>145</sup> 128 N.J. 114, 127, 607 A.2d 962, 969 (1992).

<sup>146</sup> Bus. Franchise Guide (CCH) ¶ 11,488 (Conn. Sept. 15, 1998).

<sup>147</sup> See, e.g., *In re Nassif*, 547 N.W.2d 541 (N.D. 1996) (lawyer was disbarred based on aggravated facts); *Monroe v. Horwitch*, 820 F.Supp. 682 (D. Conn. 1993) (court rejected paralegal's challenge to the requirement of lawyer supervision); *In re Opinion 24 of the Comm. on the Unauthorized Practice of Law*, 128 N.J. 114, 127, 607 A.2d 962, 969 (1992) (on paralegal's petition, and reversing an opinion issued by a bar committee, court ordered that lawyers may delegate legal tasks to paralegals, whether they are employees or independent contractors, as long as the lawyers maintain direct relationships with their clients, supervise the paralegals' work and remain responsible for the paralegals' work product); *La. State Bar Ass'n v. Edwins*, 540 So.2d 294, 299-300 (La. 1989); *Musselman v. Willoughby Corp.*, 230 Va. 337, 337 S.E.2d 724 (1985) (court affirmed judgment for client based on lawyer's failure to supervise an untrained paralegal handling a real estate transaction); *In re Sekerez*, 458 N.E.2d 229 (Ind. 1984) (court disbarred lawyer on aggravated facts based, in part, on his failure to supervise non-lawyers operating his legal clinics). There are limits on the types of tasks that a lawyer may delegate to a paralegal. For example, a lawyer may not delegate "the exercise of the lawyer's professional judgment in behalf of the client or even allow it to be influenced by the non-lawyer's assistance." *La. State Bar Ass'n v. Edwins*, 540 So.2d 294, 300 (La. 1989).

<sup>148</sup> 343 Md. 390, 681 A.2d 510 (1996).

example, the court suspended a lawyer for 90 days because, among other actions, he failed to adequately supervise a lay legal assistant in the representation of a church at a zoning hearing. Reviewing the law in several states "concerning the use by attorneys of laypersons in roles commonly described as 'law clerks,' 'paralegals,' or 'legal assistants'," <sup>149</sup> the court observed:

Those who advocate the expanded use of legal assistants acknowledge that "[a]dequate supervision is an ethical requirement." ... "The level of supervision may vary, depending on the type of work involved and the competence of the legal assistant, but it must always be present." ... Whether paralegals engage in the unauthorized practice of law depends on whether they are adequately supervised by an attorney. <sup>150</sup>

Similarly, in *In re Hrones*, <sup>151</sup> the court suspended a lawyer for one year and one day because he failed to adequately supervise a paralegal employee who was providing employment discrimination legal services to clients.

### C. Accepting Referrals from Non-Lawyers Engaged in UPL

Accepting referrals from non-lawyers can involve ethical pitfalls such as aiding and abetting UPL, compromising professional judgment and sharing fees with non-lawyers. <sup>152</sup>

Three enforcement actions involving living trusts are illustrative. In all three actions, non-lawyer marketers and advisors advertised the benefits of living trusts to potential clients in terms of avoiding probate and reducing costs, met with the potential clients and counseled them about their options, and gathered information for the preparation of trust documents using questionnaires and workbooks. In *In re Mid-America Living Trust Associates, Inc.* <sup>153</sup> and *State v. Laden*, <sup>154</sup> the non-lawyer advisors prepared the trust documents based on forms provided by or acceptable to the lawyer and referred the clients to the lawyer for a review. In *Comm. on Professional Ethics and Conduct of the Iowa State Bar Ass'n v. Baker*, <sup>155</sup> the non-lawyer advisors came to conclusions with the clients on the trust documents that were appropriate, and then referred the clients to the lawyer for preparation of the documents. In all three actions, the courts found that the lawyers accepting the referrals had facilitated UPL by the non-lawyer

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<sup>149</sup> 343 Md. at 397, 681 A.2d at 513.

<sup>150</sup> 343 Md. at 399, 681 A.2d at 514-15.

<sup>151</sup> 457 Mass. 844, 933 N.E.2d 622 (2010). The court found that failing to supervise a non-lawyer also amounted to assisting a non-lawyer in the unauthorized practice of law. 457 Mass. at 852, 933 N.E.2d at 629-30. See also *In re Kaplan*, 47 So.3d 408 (La. 2010)(permanent prohibition from practicing law or seeking readmission for failure to supervise non-lawyer staff); *State v. Martin*, 240 P.3d 690 (Okla. 2010)(lawyer and non-lawyer set up "research center" under lawyer's name through which non-lawyer provided services unsupervised by lawyer).

<sup>152</sup> At least one state, Tennessee, has an ethical rule (RPC 7.6(b)(1)(ii)) that "prohibits a lawyer from accepting referrals or compensation from an intermediary organization if the lawyer knows or reasonably should know that the organization is engaged in the unauthorized practice of law." *Sneed v. Tenn. Board of Prof'l Responsibility*, 301 S.W.3d 603, 610 (Tenn. 2010).

<sup>153</sup> 927 S.W.2d 855 (Mo. 1996).

<sup>154</sup> 893 P.2d 771 (Colo. 1995).

<sup>155</sup> 492 N.W.2d 695 (Iowa 1992).

advisors, ordering injunctions, public censure or reprimand. Clients were not required to use the lawyers accepting the referrals, but clients were strongly encouraged to use those lawyers, and the lawyers knew that they were the only lawyers or among just a few lawyers to whom referrals were being made. Some of the dangers inherent in this type of arrangement were explained by the court in *Mid-American Living Trust* as follows:

Courts have ... consistently held that the drafting and execution of trust documents for a fee by non-lawyers constitutes the unauthorized practice of law. ... Court decisions have not only ruled upon the propriety of non-lawyers engaged in trust marketing efforts, they have also focused upon the role of attorneys. Licensed attorneys participating in such schemes have been disciplined for assisting in the unauthorized practice of law and for creating a conflict of interest.

By accepting referrals to draft trust documents sold or recommended by non-lawyers, courts have found attorneys have aided in the unauthorized practice of law. ... Lawyers that review trust documents drafted by non-lawyers also have aided in the illegal practice. ...

Referral attorneys ... also have been found to suffer from a conflict of interest. Obviously, an attorney's interests are divided by simultaneously working for [the referring company] company and attempting to represent the company's clients. ...An attorney's advice may be tainted by his desire to continue receiving referrals.<sup>156</sup>

The court found that the lawyer's review of the documents prepared for the clients came too late for the lawyer to be able to exercise his independent professional judgment. This essentially made the lawyer "merely a scrivener," in contravention of the following ethical principle quoted in *Baker*:

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, *nor the desires of third persons should be permitted to dilute his loyalty to his client.*<sup>157</sup>

#### **D. Giving Unauthorized Multi-Jurisdictional Legal Advice**

In franchising, it is probably safe to say that many lawyers give legal advice to franchisors or other franchising-oriented clients located in states where the lawyers are not licensed and give advice about the franchise laws of states where the lawyers are not licensed. Fortunately, ABA Model Rule 5.5(c)(4) on the unauthorized practice of law, as interpreted, provides a "safe harbor" for providing these types of multi-jurisdictional legal services.

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<sup>156</sup> 927 S.W.2d at 861-62.

<sup>157</sup> 492 N.W.2d at 703 (quoting Model Code of Prof'l Responsibility EC 5-1 of the ABA Model Code of Prof'l Responsibility (1983)) (emphasis added).

As discussed earlier in this paper, ABA Model Rule 5.5(c)(4) states that a lawyer admitted in another state may provide non-litigation legal services "on a temporary basis" in a state where he or she is not admitted, if the services "arise out of or are reasonably related to the lawyer's practice" in the state where the lawyer is admitted.<sup>158</sup> While the foregoing language is not totally comforting on its face, the "safe harbor" it creates has been interpreted broadly to cover services that might be viewed by some as being given on more than a "temporary basis," and that "draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal [or] nationally uniform ... law."<sup>159</sup> A leading treatise, *The Law of Lawyering*, explicitly recognizes that a lawyer with no prior relationship with a client may advise that client if the lawyer can be said "to have special expertise in a body of federal or nationally uniform law that is germane to the transaction, such as ... franchising."<sup>160</sup>

So, assuming that a lawyer with expertise in franchising gives legal advice to a franchisor or other client in a state where the lawyer is not licensed, and assuming that the state has adopted Rule 5.5(c)(4), the giving of the legal advice is unlikely to be the unauthorized practice of law. We have found no enforcement actions arising in this context.

Therefore, the main issues related to giving multi-jurisdictional legal advice appear to be whether the lawyer with expertise in franchising in fact can give competent legal advice on the franchise laws of the other state, whether the matter involves a field of law (such as securities, taxation or zoning law) that is outside of the lawyer's expertise, and whether the lawyer's activities in the other state inadvertently violate some requirement or restriction in that state. *Beverly Hills Concepts*<sup>161</sup> and *State v. Orr*<sup>162</sup> illustrate the adverse consequences of giving incompetent legal advice on the franchise laws of a state. The danger of giving such advice likely is higher if a lawyer is addressing issues under the laws of another state, rather than under the laws of the state where he or she is licensed.<sup>163</sup> Giving legal advice in a field of law outside of the lawyer's expertise takes the advice outside of the "safe harbor" provided by Rule 5.5(c)(4). The *Johnson Law Group*<sup>164</sup> complaint illustrates the danger, when functioning in

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<sup>158</sup> Model Code of Professional Responsibility, [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct). See, e.g., *Superadio Ltd. P'ship v. Winstar Radio Prods., LLC*, 446 Mass. 330, 844 N.E.2d 246 (2006).

<sup>159</sup> *Id.* at cmt.; *Dream Dinners Capital Region, LLC, et al. v. Dream Dinners, Inc., et al.*, No. 08-2-04004.4 (Sup. Ct. Wash., filed December 2, 2008) to Rule 5.5(c)(4). See 2 Geoffrey C. Hazard Jr., W. William Hodes & Peter R. Jarvis, *The Law of Lawyering* § 46.8 (3d ed. Supp. 2010). A 2002 Report of the ABA Commission on Multijurisdictional Practice supported a broad reading of Rule 5.5(c)(4), [http://www.americanbar.org/content/dam/aba/migrated/final\\_mjp\\_rpt\\_6\\_5\\_1.pdf](http://www.americanbar.org/content/dam/aba/migrated/final_mjp_rpt_6_5_1.pdf)-2011-03-14.

<sup>160</sup> *Hazzard, supra* note 35, § 46.9. See *Morrison v. West*, 30 So.3d 561 (Fla. 2010).

<sup>161</sup> *Beverly Hills Concepts, Inc. v. Schatz and Schatz, Ribicoff and Kotkin*, Bus. Franchise Guide (CCH) ¶ 11,488 (Conn. Sept. 15, 1998). See discussion of the case in Section III.B at n.143.

<sup>162</sup> *State v. Orr*, 277 Neb. 102, 759 N.W.2d 702 (2009). See discussion of the case in Section III.E at n.167.

<sup>163</sup> See generally, *Restatement of the Law of Lawyering* § 3, cmt. (e) (2011).

<sup>164</sup> *State v. The Johnson Law Group, PLLC*, No. 2011CV2749 (D. Ct. Denver, filed April 13, 2011). See discussion of case in Section III.A at n.92.

another state, of possibly violating some requirement or restriction in the state, such as a requirement to register or a restriction concerning advertising or being compensated.<sup>165</sup>

If a lawyer engages in UPL by giving legal advice in a state where he or she is not licensed, when there is no "safe harbor," the consequences can be a disciplinary hearing in the lawyer's home state, a disciplinary hearing or an injunction action in the other state, or an action by the client involved.<sup>166</sup> In addition, the client involved could seek to avoid payment of the lawyer's bill on the basis of UPL.<sup>167</sup>

### **E. Giving Inadequate or Improper Legal Advice on Franchise Issues**

In franchising, several enforcement actions have included allegations of lawyers giving inadequate or improper legal advice to franchisors. The actions have been brought by a franchisor who received the advice, by franchisees, in a disciplinary proceeding, and by franchisees. The actions have involved the activities of lawyers allegedly amounting to "incompetent representation" in violation of Model Rule 1.1 and legal malpractice, rather than UPL activities, but the types of activities alleged in the actions are "close cousins" to the types of activities constituting UPL discussed elsewhere in this paper.

The franchisor action, *Beverly Hills Concepts*,<sup>168</sup> is discussed in Section III.B. The law firm and lawyer defendants in that action were found to have committed legal malpractice because they failed to advise the franchisor that it needed to be registered under the Connecticut business opportunity law when it did not have a federally registered trademark. The defendants narrowly escaped paying \$15.9 million in damages awarded by the trial court, because plaintiff's damages evidence was found by the appellate court to be technically inadequate. Strong language about the appellate court's ruling in a dissenting opinion, however, may give encouragement to future potential franchisor plaintiffs and should give pause to lawyers taking comfort in the ruling:

As a matter of principle, the majority opinion subscribes to the position advanced by the defendants that, no matter how egregious and protracted their professional misconduct, it is more appropriate for this court to take an unnecessarily rigorous view of proof of damages than to provide relief for the plaintiff, a client whom the defendants have put out of business. I disagree with so constricted a view of professional and fiduciary responsibility. Clients aggrieved by the misconduct of their attorneys are entitled to rely on courts to recognize that such misconduct may impair not only the clients' business but also the clients' ability to prove, with complete precision, the extent to which their

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<sup>165</sup> Texas law, for example, restricts a lawyer not licensed in the state from collecting a fee for preparing documents affecting title to property. Tex. Gov't Code Ann. § 83.001 (West 2011).

<sup>166</sup> *The Law of Lawyering*, *supra* note 154, § 46.2; see also *Morrison v. West*, 30 So.3d 561 (Fla. 2010).

<sup>167</sup> See *Estate of Condon*, 76 Cal. Rptr.2d 922 (Ct. App. 1998)(Colorado firm was able to collect fees for services provided to executor of estate of California resident where majority of work was performed in Colorado and the matter did not primarily involve California law); *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998)(where New York lawyers had practiced extensively in California they couldn't collect fees).

<sup>168</sup> *Beverly Hills Concepts, Inc. v. Schatz and Schatz, Ribicoff and Kotkin*, Bus. Franchise Guide (CCH) ¶ 11,488 (Conn. Sept. 15, 1998).

business has been impaired. Having substantially created the problem, the defendants now should not be allowed to walk away from all responsibility for its solution.<sup>169</sup>

The disciplinary proceeding, *State v. Orr*,<sup>170</sup> illustrates the dangers inherent in a lawyer without expertise in franchising giving advice on franchise laws. A couple approached the respondent about franchising their BARISTA'S coffee shop business. The respondent had previously reviewed franchise agreements and disclosure documents, but he was not familiar with federal or state franchise laws. When he contacted a trademark lawyer about registering the BARISTA'S trademark, the trademark lawyer warned the respondent that "franchising was a specialized field."<sup>171</sup> Despite this warning, the respondent drafted an FDD based on one he had previously reviewed and some FTC materials. After BARISTA'S had sold several franchises, as a result of litigation with a franchisee and a later FTC investigation, it was determined that the disclosure document had major deficiencies. Formal charges were filed. A referee found that the respondent had not provided competent representation. The Supreme Court of Nebraska supported the referee's finding, explaining:

As a lawyer who has been practicing law for 40 years, Orr should have been aware that he was not competent to represent franchisors, and he was warned by another attorney that franchise law was a specialized area. At the very least, Orr should have done the research necessary to become competent in the area of franchise law. The fact that Orr did little or no research into state or federal franchising law until long after he first received notice that there was a problem with the franchising documents is inexcusable.

We take this opportunity to caution general practitioners against taking on cases in areas of law with which they have no experience, unless they are prepared to do the necessary research to become competent in such areas or associate with an attorney who is competent in such areas. General practitioners must be particularly careful when practicing in specialty areas.<sup>172</sup>

Because the respondent was a long-practicing lawyer with no prior complaints, he received only a public reprimand. He did, however, incur the cost of paying other lawyers to revise the BARISTA'S franchising documents and to remedy other deficiencies resulting from his negligence, and lost a client.

The franchisee actions resulted in mixed results for the plaintiffs, but are not comforting to lawyers who give legal advice to franchisors.

The most recent two actions, *Dream Dinners Capital Region, LLC, et al. v. Dream Dinners, Inc., et al.*<sup>173</sup> and *Turner v. Dream Dinners, Inc., et al.*<sup>174</sup> reportedly were resolved in

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<sup>169</sup> *Id.* 31,136-37 (Peters, Jr., dissenting).

<sup>170</sup> 277 Neb. 102, 759 N.W.2d 702 (2009).

<sup>171</sup> 277 Neb. at 104, 759 N.W.2d at 705.

<sup>172</sup> 277 Neb. at 110, 759 N.W.2d at 709.

<sup>173</sup> Case No. 08-2-04004-4 (Wash. Super. Ct., Snohomish County, filed Dec. 1, 2008). This action originally was filed in New York as Civil Action 08102670 on Feb. 19, 2008,, but was later refiled in Washington.



late 2010 in a settlement requiring a significant payout by the defendant law firms and lawyers to the plaintiffs.<sup>175</sup> In the actions, the plaintiffs sued the franchisor, its law firms, Holland & Knight and Ryan Swanson & Cleveland, and 3 lawyers in the law firms. The complaints in the actions included allegations that the lawyers representing the franchisor permitted the franchisor to conduct first personal meetings with prospects without providing them with disclosure documents, permitted the franchisor to deliver its disclosure document in pieces rather than as a single document, permitted the franchisor to use PowerPoint presentations with prospects containing financial performance representations (estimated numbers of customers, gross revenues, cost of goods, operating expenses, net profits, etc.), cooperated with the accountants to add pages to the franchisor's financial statements containing financial performance representations, personally made some financial performance representations to prospects, and permitted prospects to sign binding contracts before they received the franchisor's disclosure document.

In *Courtney v. Waring*,<sup>176</sup> franchisees sued the executives and lawyers of a franchisor, Tools-R-Us, that declared bankruptcy. On appeal from a trial court ruling sustaining the defendants' demurrers to the plaintiffs' legal malpractice claims, the appellate court found that the plaintiffs could make legal malpractice claims against the lawyers based on their negligent preparation of the franchisor's disclosure document. Regarding the disclosure document, the plaintiffs alleged that they were falsely informed regarding the experience and background of the franchisor's personnel, the past performance and reasonable future prospects of the franchisor's franchisees, the franchisor's financial difficulties, deficiencies in the franchisor's ability to provide goods and services to franchisees, and the availability of financial assistance from the SBA. While there was case authority in California to the effect that a lawyer advising a client owed no duty to third persons affected by the advice, the appellate court ruled that this authority did not apply if the lawyer knew that the advice would be relied upon by third persons to the benefit of the client. The appellate court stated:

Plaintiffs allege that defendants negligently prepared a franchise prospectus which failed to disclose material information known to defendants but unknown to plaintiffs. Defendants knew that the prospectus would be shown to prospective franchisees and that the information contained in it would be used to induce these persons to purchase TRU franchises. In simple terms, defendants are alleged to have prepared a false and/or misleading document, the purpose of which was to influence plaintiffs' conduct. It is the attorney's knowledge regarding the purpose of his work-product which [prior cases] hold establishes a duty to those whose conduct has been influenced. The present complaint adequately pleads a breach of that duty, and defendants' demurrer was therefore improperly sustained.<sup>177</sup>

The action apparently was settled after the appellate court's decision.

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<sup>174</sup> Case No. 08-2-02623-8 (Wash. Super. Ct., Snohomish County, filed Oct. 9, 2008).

<sup>175</sup> Janet Sparks, *Dream Dinners, Lawyers Settle Legal Nightmare with Franchises*, Franchise Times, <http://www.franchisetimes.com/content/story.php?article=01932> (Nov.-Dec. 2010).

<sup>176</sup> 191 Cal.App.3d 1434 (Ct. App. 1987).

<sup>177</sup> 191 Cal.App.3d at 1443-44, 237 Cal.Rptr. at 239.

Three other actions did not work out well for the plaintiff franchisees, but should be of concern to lawyers giving legal advice to franchisors. In *Tyszka v. Make and Take Holding*,<sup>178</sup> the franchisees sued the franchisor and its law firm, alleging violations of the New York franchise law. The trial and appellate courts dismissed the complaint against the law firm on the basis that it did not come within the technical definition of a person who could be held liable under the law. In *Colorado Coffee Bean, LLC, et al. v. Peaberry Coffee, Inc., et al.*,<sup>179</sup> the owners of 10 franchised PEABERRY COFFEE stores sued the franchisor and its law firm, Perkins Coie, LLP, alleging deficiencies in the disclosure document prepared by the law firm. The deficiencies allegedly involved concealment of the losses of the franchisor's parent and its stores, and a misleading depiction of the performance of PEABERRY COFFEE stores in an Item 19 earnings claim. The claims were for civil conspiracy, fraudulent concealment, negligent misrepresentation, aiding and abetting fraudulent concealment, and violation of the Colorado consumer protection act. After various claims were dismissed, the remaining claims against the law firm were stayed pending resolution of the remaining claims against the franchisor. A 5-week trial resulted in a finding by the court that the franchisor had concealed facts that were material, but a dismissal of all claims by the court, based on insufficient proof of the fraud elements of "reasonable reliance" and "intent," and also based on a lack of a duty of disclosure beyond that duty standard in the trade (that is, the duty imposed by the FTC franchise rule and applicable state franchise laws).<sup>180</sup> Finally, in *Hanson v. Rudnick & Wolfe*,<sup>181</sup> a TOTAL LIFESTYLE franchisee sued the franchisor's law firm and a former lawyer at the law firm for professional negligence and negligent misrepresentation, based on various alleged deficiencies in the franchisor's disclosure document. The deficiencies related to alleged overstatements of franchisor's financial strength, insufficient disclosure updates, insufficient disclosures about the franchisor's trademark registrations, and inaccurate information about the franchisor's personnel. On summary judgment, the court recognized the franchisees' right under Tennessee law to bring third-person professional malpractice claims against the defendants, but ruled that a 1-year statute of limitations barred the claims.<sup>182</sup>

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<sup>178</sup> 900 N.Y.S.2d 211 (App. Div. 2010).

<sup>179</sup> Finding of Fact and Conclusions of Law, Case No. 2006CV4514 (filed Dec. 31, 2008) (not published by Westlaw or CCH).

<sup>180</sup> On appeal, the Colorado Court of Appeals remanded the matter, instructing the trial court to reconsider whether the defendants had a duty to disclose the financial losses of the franchisor's parent and an intent to defraud, and whether there was reasonable reliance by the plaintiffs. If the trial court rejected the plaintiffs' fraudulent nondisclosure claim, it could reinstate its judgment. If, however, the trial court upheld the claim, the Court of Appeals instructed the trial court to enter judgment for plaintiffs, determine rescission damages, make findings concerning the personal liability of certain defendants, and permit the fraudulent disclosure and aiding and abetting claims against Perkins Coie to proceed. Bus. Franchise Guide (CCH) ¶14,325 (Colo. Ct. App. 2010). The Colorado Supreme Court denied a writ of certiorari. 2010 WL 4400079 (Colo. 2010).

<sup>181</sup> Bus. Franchise Guide (CCH) ¶ 10,212, 992 F.2d 1216 (6th Cir. 1993).

<sup>182</sup> It should be noted that while some states such as Tennessee permit third-person professional malpractice claims, other states, such as Michigan and New York, may prohibit such claims because of a lack of privity. *Hanson, et al. v. Rudnick & Wolfe*, Bus. Franchise Guide (CCH) ¶ 10,212, 992 F.2d 1216 (6th Cir. 1993).

## **F. Giving Inadequate or Improper Legal Advice on Non-Franchise Issues**

A lawyer with expertise in franchising often is asked by clients to give legal advice in other fields of law. Closely related fields include, for example, trademarks, copyrights, corporations and LLCs, non-competition covenants, litigation, and arbitration. Other fields might include, for example, securities and taxation.

If the field is one in which the lawyer, or another lawyer in his or her law firm, does not have expertise, and if the client is located outside the lawyer's home state, to avoid UPL, as discussed in Section III.D, the lawyer likely must refer the matter to a lawyer with expertise or to a lawyer located in the client's state.

If the client is located in the lawyer's home state, and the lawyer can legally handle the matter, while UPL issues may not be involved, there is the danger of legal malpractice. Just as the law firms and lawyers in the enforcement actions discussed in Section III.E were charged with giving inadequate or improper legal advice on franchising matters, a lawyer with expertise in franchising who gives legal advice in a field where he or she does not have expertise faces the same possible charges. Enforcement actions in franchising relevant to this danger include *Warren v. Preti, Flaherty, Beliveau & Pachios, et al.*,<sup>183</sup> in which the RENT-A-HUSBAND franchisor and its owner are suing their lawyers for millions of dollars in damages based on alleged legal malpractice on a securities matter, and *State v. Speedee Oil Systems, Inc.*,<sup>184</sup> in which the franchisor was found to have violated the California franchise law by failing to disclose the lapse of its federal trademark registration in its disclosure document, which exposed the lawyer handling the trademark registration to potential liability to the franchisor.

## **G. Failing to Adequately Supervise Other Lawyers**

Just as a lawyer may be engaged in aiding and abetting UPL by failing to adequately supervise a paralegal or other non-lawyer (discussed in Section III.A), a lawyer may be committing legal malpractice by failing to adequately supervise another lawyer. In *Beverly Hills Concepts*,<sup>185</sup> for example, the partner in a law firm was found to have committed legal malpractice by failing to adequately supervise an inexperienced junior associate to whom franchising matters were delegated.

## **H. Failing to Seek Adequate Supervision from Other Lawyers**

On the flip side of failing to adequately supervise another lawyer, a lawyer being inadequately supervised may be committing legal malpractice by failing to seek adequate supervision. In *Beverly Hills Concepts*,<sup>186</sup> the junior associate who was not being supervised by her experienced partner was found to be professionally negligent. As observed by the appellate court in that action:

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<sup>183</sup> Civil Action No. CIV-11-118, filed March 23, 2011 in Maine Superior Court.

<sup>184</sup> Bus. Franchise Guide (CCH) ¶ 11,548 (Cal. Sup. Ct. 1997).

<sup>185</sup> Bus. Franchise Guide (CCH) ¶ 11,488 (Conn. Sept. 15, 1998). See discussion of the case in Section III.B at n.

<sup>186</sup> *Id.*

The trial court also reasonably could have found that Seidl had engaged in legal malpractice because, in her position as a junior associate, she failed to seek appropriate supervision. ... Having little experience in franchising, Seidl, therefore, could have rendered competent representation by seeking appropriate supervision. She failed to do so. She testified that she had sent both Goldman [the partner] and Dansky [a paralegal] copies of her work product. Seidl's pursuit of supervision, however, went no further. She stated that she had "assume[d] somebody was ... watching, taking care of looking at my work." The trial court reasonably concluded that this passivity departed from the applicable standard of care.<sup>187</sup>

## I. Functioning as a Combination Lawyer-Business Executive

In franchising, a lawyer may have the opportunity to function as both a lawyer and a business executive for a franchisor. Several enforcement actions illustrate some of the dangers inherent in this role.

The lawyer is more exposed to claims under state franchise laws, particularly if he or she is an employee of the franchisor and handles day-to-day management matters. Some state franchise laws, for example, absent primary liability for direct "offer and sell" improprieties with a prospect, limit secondary liability to executives, control persons and employees who materially aid in activities that violate the laws.<sup>188</sup> In the two *Dream Dinners* actions,<sup>189</sup> one lawyer allegedly spent about 2 days per week at the franchisor's office, was a member of the franchisor's "defacto board of directors" and made representations to prospects who were considering the purchase of franchises. He was alleged to have violated the Washington franchise law and numerous other state franchise and business opportunity laws. While the other lawyer defendants in the actions were similarly charged, it seems fair to postulate that the lawyer with greater involvement in the inner workings of the franchisor had greater potential liability as a "materially aiding" executive, control person or employee under the laws. In the *Tyszka* action,<sup>190</sup> the defendant law firm escaped liability under the New York franchise law because it was not an employee of the franchisor.

Communications between the franchisor and the lawyer may not be covered by attorney-client privilege, if the lawyer's role in each communication is not clearly delineated. In the *Dream Dinners* actions,<sup>191</sup> the lawyer allegedly "participated in discussions and decisions involving business decisions that were not subject to attorney-client privilege," and the

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<sup>187</sup> *Id.* at 31,128.

<sup>188</sup> *A.J. Temple Marble & Tile, Inc. v. Union Carbide Marble Care, Inc.*, 87 N.Y.2d 574 (1996) (New York franchise law); *Courtney v. Waring*, 191 Cal.App.3d 1434 (Ct. App. 1987) (California franchise law).

<sup>189</sup> *Dream Dinners Capital Region, LLC, et al. v. Dream Dinners, Inc., et al.*, No. 08-2-04004.4 (Sup. Ct. Wash., filed December 2, 2008); *Turner v. Dream Dinners, Inc.*, No. 08-2-02623-8 (Sup. Ct. Wash., filed October 9, 2008).

<sup>190</sup> *Tyszka v. Make & Take Holding, LLC*, 900 N.Y.S.2d 211 (App. Div. 2010).

<sup>191</sup> *Dream Dinners Capital Region, LLC, et al. v. Dream Dinners, Inc., et al.*, No. 08-2-04004.4 (Sup. Ct. Wash., filed December 2, 2008); *Turner v. Dream Dinners, Inc.*, No. 08-2-02623-8 (Sup. Ct. Wash., filed October 9, 2008).

franchisor and the lawyer allegedly "made [no] reasonable effort to segregate privileged conversations from non-privileged conversations."

The lawyer is more exposed to potential conflicts of interest. For example, in *Rowland v. Monroe*,<sup>192</sup> an investor sued a lawyer of the law firm, Krass, Monroe & Moxness, for legal malpractice, breach of fiduciary duty and negligent misrepresentation. The lawyer was an investor in a franchisor, Clean Duds, Inc., which was a client of the law firm, and was CEO of an investment firm which was offering interests in partnerships associated with the franchisor. The plaintiff invested in a partnership brought to his attention by the lawyer. Although the plaintiff did not prevail because of his knowledge of the risks involved in the investment and lack of proximate cause, the lawyer was in a compromised position because of the conflicts of interest involved, and expended substantial resources to extricate himself from liability in the action.<sup>193</sup>

#### IV. QUESTIONS AND BEST PRACTICES

In this Section IV, we raise questions and offer suggested best practices for lawyers, consultants and paralegals, and for managing the often complicated relationship between them, with regard to the unauthorized practice of law and related issues. The suggested best practices take into account many considerations, such as economic pressures, competition and education, but the weightiest consideration ultimately is what is best for the client. We explore the ethical responsibilities of lawyers pertaining to providing business advice and not assisting the unauthorized practice of law, and the responsibility of all advisors to thoroughly explain the complexities of franchising to the client.

A "best practice," according to [www.businessdictionary.com](http://www.businessdictionary.com), is a "method or technique that has consistently shown results superior to those achieved with other means, and that is used as a benchmark.." Wikipedia expands further on the "best practices" concept:

[B]est practices are generally-accepted, informally-standardized techniques, methods or processes that have proven themselves over time to accomplish given tasks. Often based upon common sense, these practices are commonly used where no specific formal methodology is in place or the existing methodology does not sufficiently address the issue. The idea is that with proper processes, checks and testing, a desired outcome can be delivered more effectively with fewer problems and unforeseen complications.

Within the Wikipedia definition is likely a window into the murkiness of trying to define the respective appropriate roles of lawyers, consultants and paralegals in franchising. With regard to formulating and maintaining franchise systems, are there "generally-accepted, informally standardized techniques, methods or processes that have proven themselves"? We believe it is safe to say that polling franchisors, lawyers, consultants and paralegals regarding best practices would result in an endless myriad of variations on techniques, methods and processes applied in franchise systems. Other writings on the subject of best practices, UPL

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<sup>192</sup> Bus. Franchise Guide (CCH) ¶ 11,039 (Minn. Ct. App. 1996).

<sup>193</sup> As an officer or director of a franchisor, a combination lawyer-business executive may have fiduciary duties to the franchisor that conflict with other duties and expose him or her to greater potential liability. See, e.g., *Musselman v. Willoughby Corp.*, 230 Va. 337, 343, 337 S.E.2d 724, 727 (1985).

and the roles of professionals pertaining to the subject of franchising acknowledge the existence of blurred lines.<sup>194</sup> Clearer definitions of best practices need to be at the very least attempted. Important verbiage within the definition from Wikipedia is “often based on common sense.” This common sense may provide the roadmap to clearer definitions of best practices, less ethical ambiguity, fewer issues pertaining to the unauthorized practice of law, and ultimately higher quality service for the client.

## **A. Industry Associations**

When a business owner begins to consider franchising, a first step in the process is often an internet search. Search results will vary depending on the search engine, pay per click advertising, and the specific terms used when performing the search. While researching “how to franchise my business,” a prospective franchisor will often be led to results discussing the necessary legal components of franchising, and will in turn seek out legal counsel. However, the prospective franchisor is unlikely to find one portal that provides information about how best to proceed with his or her franchising efforts. Two websites that the aspiring franchisor may find on the internet are the websites of the ABA Forum on Franchising and the International Franchise Association (“IFA”).

The ABA’s mission is “[t]o serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.” However, the ABA is primarily a resource for lawyers. It provides numerous articles and other for-fee items pertaining to franchising through various links and search functions. The information regarding franchising on the ABA website allows for education on topics as varied as franchise compliance, the Amended FTC Franchise Rule, franchise law basics, franchise and dealership terminations, and international franchising. However, the information is primarily geared to lawyers who wish to educate themselves. Providing criteria or general best practices for a prospective franchisor when launching a franchise system is beyond the scope of the ABA website. The ABA website does not provide detailed information regarding the complexities of franchising. While the ABA generally encourages the public to seek legal representation when necessary, the benefits of engaging skilled, experienced counsel or any practical steps for launching a franchise system are not discussed. Any recommendations in this regard are left to individual lawyers and lay persons to include within books, articles, websites, blogs and advertising materials.

The IFA is the world’s largest association in the franchise industry. Its website provides a plethora of information on franchising. The IFA website does a good job in providing general resources, but it does not guide the emerging franchisor in creating a suggested path of steps required to launch a quality franchise system, or in understanding the skill set or experience to look for when choosing a qualified professionals to assist in the complex startup of a franchise system. In addition, although franchise lawyers and consultants are listed in the supplier database on the IFA website, the website does not discuss how a lawyer and consultant may work in unison for the betterment of an emerging or existing franchisor, or the reasons for and benefits of working with a qualified lawyer or consultant.

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<sup>194</sup> See Michael H. Seid and Leonard D. Vines, *The Respective Roles of the Franchise Consultant and the Franchise Lawyer in Structuring the Franchise System*, 30<sup>th</sup> Annual Forum on Franchising, § IIA, p. 2 (2007); Rupert M. Barkoff and Andrew C. Selden, *Ethical Issues for Attorneys and Other Professionals in Franchise Counseling*, 33<sup>rd</sup> Annual Forum on Franchising, § 3C, p. 11 (engagement), § VA, p.20 (consultants) (2010).

There are standards by which a prospective franchisor can begin to evaluate the experience of professionals in franchising. For lawyers, consultants or paralegals, membership in the ABA Forum on Franchising and the IFA are starting points. Also, lawyers, consultants or paralegals may be accredited under the IFA's Certified Franchise Executive ("CFE") program.<sup>195</sup> Lawyers in California may be certified under that state's Standards for Certification and Recertification in Franchise and Distribution Law.<sup>196</sup>

In terms of ethical standards applicable to professionals in franchising, as discussed in Section II, the ABA establishes model rules for lawyers that are then used and often modified by the state supreme courts in adopting ethics rules that apply to all lawyers operating within their jurisdictions. There are no organizations or government agencies equivalent to the ABA and the state supreme courts that regulate all consultants or all paralegals.<sup>197</sup>

## **B. Driving Forces of the Issues**

Whether a businessperson considering franchising ends up perusing the ABA or IFA websites, or any of the numerous other websites focused on franchising maintained by lawyers, consultants and paralegals, eventually the businessperson, possibly also after obtaining referrals and other validating information, will seek assistance from a lawyer, consultant or paralegal to begin the process designing a franchise system and creating the needed documentation. If the client first engages an experienced franchise lawyer, but soon begins inquiring about issues more closely related to business advice, what best practices should the lawyer follow? What obligation does the lawyer have to refer the client to a qualified consultant? Or, if the client first engages a lawyer who has little or no franchising experience, under the lawyer's ethics rules, what obligation does the lawyer have to refer the client to an experienced franchise lawyer? Or, if the client first engages a consultant or paralegal, the consultant or paralegal presumably will attempt to provide the client with a comprehensive understanding of all the services and costs needed to launch, manage and maintain a quality franchise system, even if those services and costs are outside the scope of the consultant's or paralegal's expertise. Should the consultant or paralegal refer the client to other competent professionals,

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<sup>195</sup> International Franchise Association, <http://www.franchise.org/certification.aspx> (last visited July 22, 2011).

<sup>196</sup> The State Bar of Cal., <http://ls.calbar.ca.gov/LegalSpecialization/LegalSpecialtyAreas/FranchiseDistributionLaw.aspx> (last visited July 22, 2011).

<sup>197</sup> For consultants, ethical standards have been promulgated by organizations such as the American Institute of Certified Public Accounts ("AICPA"), the Institute of Management Consultants ("IMC") and the Midwest Society of Professional Consultants ("MSPC"). See *AICPA Statement on Standards for Consulting Services No. 1* (1992), <http://www.aicpa.org/InterestAreas/ForensicAndValuation/Resources/Standards/Pages/Statement%20on%20Standards%20for%20Consulting%20Services%20No.aspx>; *IMC USA Code of Ethics* (2005), <http://www.imcusa.org/?page=ethicscode> (last visited July 22, 2011); *MSPC Statement on Standards for Management Consulting Services (2004)*, [www.mspc.org/SSMCS.pdf](http://www.mspc.org/SSMCS.pdf). For paralegals, ethical standards have been promulgated by organizations such as the Alliance of Legal Document Assistant Professionals ("ALDAP"), the National Association of Legal Assistants ("NALA"), the National Federation of Paralegal Associations ("NFPA"), and the American Alliance of Paralegals, Inc. ("AAPI"). See *ALDAP Code of Ethics and Professional Responsibility* (2007), <http://www.aldap.org/ethics.htm> (last visited July 22, 2011); *NALA Code of Ethics and Professional Responsibility* (2007), <http://www.nala.org/code.aspx> (last visited July 22, 2011); *NFPA Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement* (2006), <http://wnyparalegals.org/docs/NFPA%20Code%20of%20Ethics.pdf>; *AAPI Code of Ethics* (2009), <http://www.aapipara.org/Ethicalstandards.htm> (last visited Aug. 23, 2011). These ethical standards are voluntary, and are applicable only to members of the organizations.

including an experienced franchise lawyer? Even without any industry rules, standards or guidelines, most of the scenarios above should easily fall under the umbrella of what is consistent with common sense and the interests of the client.

So, why do some lawyers who have never held positions in franchise sales, franchise operations, owned a franchise system or had any significant experience in the day-to-day activities of a franchise system often draft documents requiring many key decisions regarding these topics? Why do some lawyers attempt to dabble in franchising when they have little or no experience? Why do some consultants and paralegals attempt to draft FDDs and other legal documents for a client when this might constitute the unauthorized practice of law? The answers to these questions may lie in one or a combination of the following pressures:

- Lack of respect for the legal discipline
- Entrepreneurs' perception of their businesses
- Legal and consulting services not seen as a necessity
- Economic pressures

### **1. Lack of Respect For the Legal Discipline**

Certain disciplines, such as securities law and tax law, are much older than franchise law; so there are volumes of cases, rulings, models and common sense solutions related to practice in these specialties. No ethically sensitive lawyer crosses the line and purports to be an expert or even competent within these specialties unless the majority of his or her practice is dedicated to the discipline and the lawyer feels entirely comfortable with the subject matter.

Beyond experienced franchise lawyers, there seems to be a lack of respect within the legal community for the complexities of franchise law, which too often leads lawyers with little or no experience in franchising to feel comfortable using templates to develop FDDs and related legal agreements.<sup>198</sup> In the consulting and paralegal communities, some consultants and paralegals also do not seem to recognize or respect the legal discipline involved in preparing FDDs and related legal agreements.

### **2. Entrepreneurs' Perception of Their Businesses**

When a business owner decides to enter the world of franchising, short of having previous franchise experience, the only key component the business owner has any knowledge of is the original concept. Many entrepreneurs often place a premium on the concept, assuming that the quality of their services or products will catapult the new franchise to the top of the franchise mountaintop, disregarding legal issues, structuring franchise operations and franchise development. Entrepreneurs often feel empowered to create much of the systems and collateral needed, without guidance or expertise from experienced professionals. Many entrepreneurs do not recognize the importance of the legal framework and documentation to the

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<sup>198</sup> Even experienced franchise lawyers have on occasion expressed that franchise law is not as complex as other areas of law: "Franchising may not be as complex as other areas of the law, like securities law, on which the franchise sales regulatory scheme was modeled, but, like any area of the law, it has published authorities: statutes, regulations, and case law, and what we refer to as 'folklore.'" Rupert Barkoff and Gerald Wells, *So Your Client Wants to Franchise Its Business?*, [http://www.dlapiper.com/files/Publication/711c7403-0184-4405-9219-b4c1a2011616/Presentation/PublicationAttachment/716e360c-5810-4fd3-a704-b77e5b38f7c3/BLT\\_ma10v19n4\\_barkoff.pdf](http://www.dlapiper.com/files/Publication/711c7403-0184-4405-9219-b4c1a2011616/Presentation/PublicationAttachment/716e360c-5810-4fd3-a704-b77e5b38f7c3/BLT_ma10v19n4_barkoff.pdf), (Mar./Apr. 2010).



long-term success of the franchise system, possibly leading them to place less emphasis and care on choosing franchise counsel and at times settling for documentation drafted by consultants or paralegals.

### **3. Not a Necessity**

Lawyers often express concern about the quality of legal documentation prepared by consultants, paralegals or franchisors themselves. However, consultants, paralegals and franchisors "playing lawyer" likely is much less prevalent than franchisors "playing consultant" by performing franchise sales, drafting franchise manuals, and creating franchise operations systems. In essence, consultants are considered to be a luxury and not a requirement when designing and operating franchise systems. As strange as it may seem for a business owner to enter a completely new industry such as franchising without any training or experience, it is not uncommon. Franchisors often risk the success of their franchise system while never seeking professional, outside guidance. Of course, experienced franchise lawyers certainly understand the complexities and varied experience needed to operate a profitable, successful franchise system. So why are franchise lawyers not strongly recommending consultants to every new franchisor client? Is the addition of experienced individuals not always in the client's best interests? Maybe not all lawyers have confidence in a particular consultant referral, maybe lawyers do not understand the complexities of franchise sales, franchise training and franchise relations; so engaging a consultant falls again to a luxury not a necessity.

### **4. Economic Pressures**

With the potential for overlap between services rendered by lawyers, consultants and paralegals, the economic realities of business play a large role in the tension between lawyers and non-lawyers. With the dramatic downturn in the economy over the past few years, pressures are heightened and may lead to less than desirable decision making. Many consultants refer a client to a lawyer with trepidation, knowing that the lawyer may offer services overlapping with their consulting services, thereby causing them to lose revenue. If there is any question about the client relationship or conflicting advice a lawyer may provide, a consultant may consider drafting legal documents to avoid losing a client completely. Consultants may choose not to refer to a lawyer who views their services as a luxury not a necessity, and may set out to create hybrid solutions such as drafting documents in-house, drafting documents through third-party paralegals, or encouraging the client to engage a lawyer only when documents are complete, wherein the lawyer provides a review and blessing when there is no risk of losing the client or any associated revenues. Consultants are not alone in making decisions driven by their own economic interests. A lawyer with little or no experience in franchising, who in the past may have referred a client to another firm or internally to another lawyer, may now choose to attempt the project. The same lawyer in the past may have been inundated with clients more suited to his or her area of expertise; but in today's market the combination of needing to drive revenue and the perception of franchising as less than a complex legal discipline may lead to poor decision-making. Experienced franchise lawyers who are qualified to draft FDDs and related franchise agreements also need to drive revenue, while meeting ethical obligations to the client, but where do the obligations begin and end? When a franchise lawyer is describing legal documentation requirements to a prospective franchisor client, is he or she ethically obligated to provide the client with all of the other services and costs typically associated with franchising and risk the client not proceeding with the legal

documentation? While providing such information may be beyond the lawyer's ethical duties under most circumstances, it can be argued that sharing the information with the client should be followed as a best practice. However, if the lawyer shares the information, the client, either through a referral or through its own investigation, may move to a consultant or paralegal who provides the other services and also engages in drafting legal documentation and processing state registrations.

## **C. Lawyers**

### **1. Experienced Franchise Lawyers**

An experienced franchise lawyer certainly has dramatically less risk than inexperienced lawyers, consultants and paralegals relating to unauthorized practice of law and similar issues. Some suggested best practices include: understand and be sensitive to your ethical obligations under your own state's UPL regulatory scheme, as well as the UPL regulatory schemes of states in which clients are located or services will be performed; remain independent of any consultant or paralegal, because of the UPL and advertising issues involved, even if you are receiving referrals from and have confidence in the consultant or paralegal; disassociate from any consultant or paralegal who you believe is engaging in UPL; avoid delegating law-related responsibilities or providing legal forms to another lawyer, or to a consultant or paralegal, unless you intend to properly supervise the other lawyer, or the consultant or paralegal, while the responsibilities are being performed or the forms are being used; avoid functioning as a combination lawyer-business executive, because of the lawyer-client confidentiality and conflict of interest issues involved, unless you can maintain clear boundaries between your legal and business functions and communications.

On the business side, considering the entirety of needs required to properly execute a comprehensive franchise model, an experienced franchise lawyer often is drawn into helping a franchisor client make strategic business decisions. For instance, if a franchisor client does not have franchise operations, sales or relations experience, the client may look to the experienced franchise lawyer for extensive business advice and guidance. If the lawyer does not have hands-on practical experience in these fields, in the best interests of the client, it may be a best practice to advise the client of this gap in experience and possibly refer the client to another industry professional.<sup>199</sup>

### **2. Lawyers With Little or No Franchise Experience**

While it is simple to say and less simple to execute, if a lawyer has little or no experience in franchise law, the lawyer should avoid taking on a client in any capacity pertaining to forming or maintaining a franchise system, unless the lawyer first associates himself or herself with an experienced franchise lawyer or obtains the requisite knowledge and skill to handle the legal issues involved. In determining whether a lawyer has the requisite knowledge and skill to handle a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, and the lawyer's specialized training and

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<sup>199</sup> Even if the lawyer has hands-on practical experience in a relevant business field, the lawyer still may not want to give extensive business advice in that field because of the ethical and practical issues discussed in Section III.I related to functioning as a combination lawyer-business executive.

experience. Unless the lawyer is confident that it is in the best interest of the client for him or her to handle a matter, either alone or in association with an experienced franchise lawyer, the lawyer should refer the matter.

#### **D. Consultants**

It is possible for consultants to provide tremendous value to franchisor clients, operate successful consulting businesses and refrain from engaging in the unauthorized practice of law.

Consultants can offer clients a wide array of services, including but not limited to: education on the franchising industry, franchise system design, national conference planning, lead generation assistance, preparation of operations manuals, franchise training, creation of franchisor marketing materials, assistance with social media systems, and referral of quality vendors including competent franchise lawyers. Certainly the business aspects of a franchise system intersect with the legal framework of franchising, and some consultants have a thorough understanding of legal franchise documentation. To best serve the client and in turn themselves, consultants may lend expertise and aid in the creation of more comprehensive, accurate legal documentation by providing insights to competent legal counsel about business strategies, so those strategies may be clearly and accurately communicated in the legal documentation.

As addressed in Sections II and III, consultants must carefully examine the UPL regulatory schemes in the states in which they operate to ensure that they are in compliance with appropriate rules, court decisions and statutes. Generally, consultants should be engaged with legal counsel during the drafting, review and information-gathering process pertaining to legal documentation, but should stop short of drafting legal language and advising the client directly as to legal language or other legal issues. This does not lessen the value of the consultant, but actually enhances the overall value of the consultant to the client. With the client, lawyer and consultant working in unison to create the overall best franchise system, the combined efforts will likely be greater than the individual parts. Many clients do not understand the interconnecting systems within their own franchise model, and consultants can help them to more clearly unify their systems and also can serve as *de facto* compliance officers. Since consultants typically have knowledge of many different aspects of a client's franchise system, they can be extremely helpful in ensuring that the legal approaches embedded in a franchisor's FDD and other franchise agreements are reflected in a franchisor's operations manuals, day-to-day operations, franchise sales processes and culture. Consultants are able to provide feedback to both the client and legal counsel, helping to ensure consistency across the entire franchise system.

#### **E. Paralegals**

Under all state UPL regulatory schemes, and under all standards promulgated by paralegal organizations,<sup>200</sup> paralegals providing law-related services should not operate independently, unless they are permitted to do so by a specific federal or state statute. If providing franchising-related services, paralegals should be employed or engaged by, or should be associated with, experienced franchise lawyers who properly supervise their work as it is

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<sup>200</sup> *Supra* note 192.

being performed. It is not enough for paralegals merely to have lawyers on call, or to require their clients to engage lawyers, to "bless" their work after it is completed.

## **F. Cooperation Among Lawyers, Consultants and Paralegals**

Above all, it is imperative for lawyers, consultants and paralegals to maintain the highest standards and provide the best possible service for clients. If it is agreed that paralegals should not be operating independently, in addressing cooperation, lawyers and paralegals should be considered one entity, cooperating with consultants, on behalf of clients.

Franchisor clients choose lawyers, consultants and other professionals based on many factors, such as location, fee structure, competence, experience and personality. Lawyers and consultants need to identify other competent franchise professionals in various areas domestically and internationally, thereby putting themselves in the position of being able to help clients to choose based other professionals based on the clients' needs and criteria. When consultants are engaged by clients without legal counsel, it would be advisable to refrain from drafting legal documents of any kind. While processing state registrations is often viewed through a less clear lens, common sense would dictate it to be in the best interest of the client to have the client engage competent legal counsel to create, maintain and process all immediate and ancillary legal documentation. A large opportunity for lawyers and consultants to serve the client's best interest, while each receives fees, is to provide expertise during the collection of information for and the drafting of the FDD, related franchise agreements and operations manuals.

Many clients are overwhelmed by the legal requirements of franchising that are oftentimes much more cumbersome than the requirements on their current businesses. In addition, clients often have never previously documented many of the business procedures associated with a new franchise system. The mining of information to complete the FDD and operations manuals often involves overlapping processes and the information gathered is often very similar. To alleviate the burden on clients of engaging in separate meetings, completing lengthy duplicative questionnaires and managing communications, it is advisable for either the lawyer or the consultant to manage the information gathering, discuss the results with the other party and then coordinate the drafting of symbiotic documents. Since operations manuals go beyond and also affect much of what is in the FDD, in some instances, it may be best for the client and consultant to gather the information and then disseminate the needed data to the lawyer to complete a draft of the FDD and related franchise agreements and then provide the documentation to the client and consultant for review.

Lawyers sometimes face the dilemma wherein entrepreneurs do not see the need for someone to consult with them on what they perceive as the business they built and understand very well. So, other than using an outside lawyer to draft an FDD, many businesspeople attempt the remainder of the formation and execution of the franchise system themselves. To best serve their clients, lawyers may want to advise the clients of the needs and intricacies of franchising and the services consultants may provide to help design the business. Lawyers can directly refer, suggest or simply educate clients on the benefits of using outside vendor services to solidify and accelerate the client's success.

## **1. Open Door**

If consultants do not engage in the unauthorized practice of law, and if lawyers refrain from providing business advice where they do not have expertise, the relationship between them should be symbiotic. One of the most effective ways consultants and lawyers can cooperate is to create an open door policy wherein consultants lean on lawyers for quality legal advice and direction, and lawyers engage consultants on matters relating to business advice. In the best interest of clients, consultants and lawyers should engage in spirited discussions regarding strategic decisions, client options and possible new developments within franchising.

## **2. Technology**

With the advancement of cloud-based and other technologies, there are many options such as Microsoft SharePoint, Google Applications and Drop Box, which allow lawyers, consultants and clients to collaborate easily and with transparency in real time on any type of matter. These technologies create unique opportunities for cooperation. While information is gathered and placed “on the cloud,” it is viewable by all parties; in addition, when changes are made by any member of the project group, alerts can be automatically sent to ease communication among the group members.

## **V. CONCLUSION**

Lawyers, consultant and paralegals all must be aware of the federal and state rules, court opinions and statutes that delineate and regulate the practice of law, and that prohibit anyone from engaging in the unauthorized practice of law. In addition, lawyers must be careful to steer clear of aiding and abetting non-lawyers or other lawyers who are engaged in the unauthorized practice of law.

While there is no uniform definition of the “practice of law,” and while the patchwork of differing state UPL regulatory schemes is complicated and sometimes bewildering, UPL enforcement is ongoing and apparently increasing. Almost 200 court opinions each year, involving both lawyers and non-lawyers, address UPL-related issues and activities.<sup>201</sup> Although most of the reported enforcement actions have involved lawyers or non-lawyers who were providing services to consumer clients, as opposed to business clients such as franchisors, a significant number of court opinions have addressed UPL or UPL-related issues in the franchising context. Because of the lack of a uniform definition of the practice of law, and because of the possibility of enforcement actions, lawyers and non-lawyers alike need to be aware of and concerned about the scope of UPL rules, court opinions and statutes in the states where they and their clients are located, or where they provide services.

While there may be significant tension among lawyers, consultants, paralegals and other professionals on the appropriate division of work when serving franchisor clients, all parties should keep in mind that their primary concern must be what is best for the client, which may best be achieved if there is increased cooperation among those professionals.

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<sup>201</sup> See our analysis of UPL enforcement actions in the introduction to Section III.

## MARIO ALTIERY, CFE

Mario J. Altiery, Founder and President of Upside Group Franchise Consulting, began his franchising career with a large franchise conglomerate in 1995. Working in all aspects of franchising, Mario progressed through the ranks, and in 1997 he was promoted to Vice President.

It was as Vice President that Mario pioneered new sales and marketing processes, creating a number of landmark programs including a nationally implemented franchise resale program, institutionalized royalty maximization training seminars and international expansion. Also during this time, Mario authored an industry recognized Head Start program designed to jump start revenue for new business owners.

In 2000, Mario founded Upside Group Franchise Consulting, a full service, boutique franchise consultancy. Upside Group provides franchisors with comprehensive solutions including marketing, sales, development, day-to-day operations, strategic planning and crisis control.

As a previous owner of multiple franchises and President of a successful franchise system, Mario has helped many franchisors develop their systems in numerous industries. Mario is a published author and has been a sought after as a guest speaker for various organizations including the IFA and NOVA University, among others. Mario was recently honored as one of "Arizona's Finest" by the Cystic Fibrosis Foundation.

Mario's company, Upside Group, co-founded the acclaimed Franchising for Athletes Seminar Series. In addition, Upside Group was recently honored with three *Davey Design* awards for marketing and advertising through a nation-wide competition of 4,000 entries.

Mario has set up franchise systems throughout the United States, Australia, Europe, and the Middle East. Mario often lectures on the art of the sale as well as franchise operations, franchisee relations and strategic planning.

Mario serves as a steering committee member for Lift Up America, an empowerment charity group designed with the goal of stamping out hunger domestically.

## BEATA KRAKUS

Beata Krakus is a lawyer in the Chicago office of Greensfelder, Hemker & Gale, P.C., and part of the firm's Franchising & Distribution Practice Group. She works with franchisor clients in domestic and international franchise transactional matters, as well as related areas such as distribution and sales representative arrangements, and other commercial contracts. She has advised, structured, and prepared franchise programs for many different franchise concepts including real estate brokerages, hotels, restaurants, and fitness and personal health systems.

Prior to joining Greensfelder, Ms. Krakus was associated with Sonnenschein Nath & Rosenthal LLP. She also practiced in Warsaw, Poland with the Swedish law firm of Magnusson Wahlin.

Ms. Krakus is an Associate Editor for *The Franchise Lawyer*, has herself written articles for the *Franchise Law Journal*, and other franchise law publications, and spoken at the ABA Forum on Franchising and International Franchise Association Legal Symposium. She is recognized by International's Who's Who of Franchise Lawyers, Chambers USA (Franchising, Associates to Watch), and as a Rising Star by the Illinois Super Lawyers.

## WARREN LEE LEWIS

Warren Lee Lewis is Co-Chair of the Franchise & Licensing Practice Group of Akerman Senterfitt LLP. For over 25 years, he has represented hundreds of franchisors, subfranchisors and other businesses in franchising. His practice has concentrated on domestic and international franchising, licensing, trademark, unfair competition and antitrust matters involving disclosure, registration, transactions, counseling and dispute resolution.

For many years, Mr. Lewis has been recognized by *International Who's Who of Franchise Lawyers*, *Franchise Times Legal Eagles*, *Super Lawyers Magazine*, *The Best Lawyers in America*, and *Washington SmartCEO Legal Elite*. He is the author of two books, *The Franchise Seller's Handbook* and *FRANCHISES: Dollars & Sense*; and of various articles, papers and studies on franchising. He is the author of a chapter in *The FTC Franchise Rule*, a publication of the American Bar Association Forum on Franchising. He has been a speaker at American Bar Association Forum on Franchising and International Franchise Association Legal Symposium programs, and at Congressional and federal agency hearings on franchising. He is a member of the Advisory Committee to the North American Securities Administrators Association (NASAA) Franchise Project Group, and is General Counsel of the Capital Area Franchise Association.

Mr. Lewis graduated from the University of Maryland in 1967 with a B.S. degree in journalism with high honors, and from the George Washington University Law School in 1972 with a J.D. degree with honors. He was Notes Editor of the George Washington University Law Review.



## Exhibit A

### Examples of State Definitions of the “Practice of Law” and the “Unauthorized Practice of Law”

*This chart is a summary of some of the state definitions of the “Practice of Law” (“PL”) and the “Unauthorized Practice of Law” (“UPL”) and is intended to serve as a starting point for state-specific research. As the paper, it focuses on the general UPL definitions drawing the line between what non-lawyers can and cannot do. However, some states have several different UPL or PL definitions which apply in different situations. For example, some states have separate definitions that apply to suspended lawyers or in administrative proceedings, and many states have separate UPL definitions in criminal statutes prohibiting UPL. Those definitions are not included in this chart. For states without a statutory or rule-based UPL definition case law is cited instead. The cases cited are only examples. Many states have very rich bodies of case law that greatly elaborate on the summary definitions included below.*

State	“Practice of Law”
<p><b>Alabama</b></p> <p>(Alabama Code Sec. 34-3-6)</p>	<ul style="list-style-type: none"> <li>• Proceedings before legal body</li> <li>• Counseling on the law, drawing up documents affecting rights (for consideration)</li> <li>• Act as representative to prevent or redress a wrong or enforce a right (for consideration)</li> </ul> <p><b>Exceptions:</b></p> <ul style="list-style-type: none"> <li>• Self-representation</li> <li>• Preparing title abstracts, title insurance</li> </ul>
<p><b>Alaska</b></p> <p>(PL: Alaska Statutes Sec. 08.08.230; UPL: Rule 65)</p>	<ul style="list-style-type: none"> <li>• Holding oneself out as an attorney if not authorized to practice law</li> <li>• Representing another before court or government body</li> <li>• Providing advice or preparing documents which effect legal rights or duties (for consideration)</li> </ul> <p><b>Definition of Unauthorized Practice of Law:</b></p> <ul style="list-style-type: none"> <li>• Holding oneself out as an attorney if not authorized to practice law</li> <li>• Legal consultation or advice to client</li> <li>• Appearing as representative before judicial officer, arbitrator, mediator, court, public agency</li> <li>• Appearing as representative at deposition or other discovery matter</li> <li>• Negotiating or transaction a matter on behalf of a client with third parties</li> </ul>

State	“Practice of Law”
	<ul style="list-style-type: none"> <li>• Handling client funds</li> </ul>
<p><b>Arizona</b></p> <p>(Arizona Supreme Court Rule 31 contains both definitions)</p>	<ul style="list-style-type: none"> <li>• Preparing documents intended to affect legal rights of specific person</li> <li>• Preparing/expressing legal opinion</li> <li>• Representing another in judicial, quasi-judicial, or administrative proceeding, or other formal dispute resolution</li> <li>• Preparing documents for filing in court, administrative agency or tribunal for specific person</li> <li>• Negotiating legal rights.</li> </ul> <p><b>Unauthorized Practice of law:</b></p> <ul style="list-style-type: none"> <li>• Engaging in “practice of law” without authorization.</li> <li>• Using designations such as lawyer, attorney at law, JD, or Esq.</li> </ul> <p><b>Exceptions:</b></p> <ul style="list-style-type: none"> <li>• Proceedings before the Department of Economic Security</li> <li>• Employee representatives in board hearing or quasi-judicial hearings dealing with personnel matters</li> <li>• Officer of a corporation may represent corporation</li> <li>• Small claims procedures in Tax Court</li> <li>• Other miscellaneous exceptions</li> </ul>
<p><b>Arkansas</b></p> <p>(<u>Judicial Discipline and Disability Com'n v. Simes</u>, --- S.W.3d ----, 2009 WL 5449214 (Ark.,2009))</p>	<p>“It is quite true that the practice of law is not confined to services by an attorney in a court of justice; it also includes any service of a legal nature rendered outside of courts and unrelated to matters pending in the courts. (Citations omitted.) It is uniformly held that writing and interpreting wills, contracts, trust agreements, and the giving of legal advice in general constitute practicing law.”</p>
<p><b>California</b></p> <p>(<u>Birbower, Montalban, Condo &amp; Frank, P.C. v. Superior Court</u>, 17</p>	<p>“[L]egal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation.”</p>

State	“Practice of Law”
Cal. 4 <sup>th</sup> 119 (1998))	
<b>Colorado</b>  ( <u>Koscove v. Bolte</u> , 30 P.3d 784 (Colo. App. 2001))	<p>“[G]enerally one who acts in a representative capacity in protecting, enforcing, or defending legal rights and duties of another and in counseling, advising and assisting him in connection with these rights and duties is engaged in the practice of law.”</p> <p>The Colorado Court Rules Governing Admission to the Bar, Chapter 18, Rule 201.3(2) also defines the practice of law by the type of employment a lawyer would have.</p>
<b>Connecticut</b>  ( <u>State Bar Association of Connecticut v. Connecticut Bank &amp; Trust Co.</u> , 140 A.2d 863, 870 (1958))	<p>“The practice of law consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces the giving of legal advice on a large variety of subjects and the preparation of legal instruments covering an extensive field.”</p>
<b>Delaware</b>  ( <u>Marshall-Steele v. Nanticoke Memorial Hospital, Inc.</u> , 1999 WL 458724 (Del. Super. 1999))	<p>“In general, one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply the possession and use of legal knowledge and skill. The practice of law includes ‘all advice to clients, and all actions taken for them in matters connected with the law’ ... and the exercise of such professional skill certainly includes the pursuit, as an advocate for another, of a legal remedy within the jurisdiction of a quasi judicial tribunal.”</p>
<b>District of Columbia</b>  (Court Rule of the D.C. Court of Appeals, Title VI., Rule 49)	<ul style="list-style-type: none"> <li>• Provision of legal advice or services where there is a client relationship, including:</li> <li>• Preparing of legal documents</li> <li>• Preparing/expressing legal opinions</li> <li>• Appearing as an attorney in any tribunal</li> <li>• Preparing any claims, demands pleadings, other documents containing legal argument, for filing in any court, administrative agency or other tribunal</li> <li>• Furnishing an attorney to render the above mentioned services.</li> </ul> <p><b>Exceptions:</b></p> <p>The rule is only intended to cover situations where the person is rendering legal advice or services; and there is a client relationship of trust or reliance.</p>
<b>Florida</b>	The court found that a broad definition of the practice is law is “nigh onto impossible,” but found that

State	“Practice of Law”
<p>(<u>State ex rel. The Florida Bar v. Sperry</u>, 140 So.2d 587, 591 (1962))</p>	<p>representing another before a court, as well as giving legal advice and counsel to others of their legal rights and obligations, including contract rights and obligations, is generally understood as the practice of law.</p>
<p><b>Georgia</b>  (O.C.G.A. §5-19-50)</p>	<ul style="list-style-type: none"> <li>• Representing litigants in court and preparing papers incident to any action before a court or other judicial body</li> <li>• Conveyancing</li> <li>• Preparing legal instruments securing legal rights</li> <li>• Rendering title opinions for real estate or personal property</li> <li>• Giving legal advice</li> <li>• Any action taken for others in a matter connected with the law</li> </ul>
<p><b>Hawaii</b>  (<u>Fought &amp; Co., Inc. v. Steel Engineering and Erection, Inc.</u>, 951 P.2d 487 (Hawaii 1998))</p>	<p>“[T]he practice of law is not limited to appearing before the courts. It consists, among other things of giving of advice, the preparation of any document or rendition of any service to a third party affecting the legal rights of such party, where such advice, drafting or rendition of service requires the use of any degree of legal knowledge, skill or advocacy.”</p>
<p><b>Idaho</b>  (<u>Idaho State Bar v. Villegas</u>, 879 P.2d 1124 (Idaho 1994))</p>	<p>“The doing or performing services in a court of justice, in any matter depending [sic] therein, throughout its various stages, and in conformity with adopted rules of procedure. <i>But in a larger sense, it includes legal advice and counsel, and the preparation of instruments and contracts by which legal rights are secured, although such matter may or may not be depending [sic] in a court.</i>”</p>
<p><b>Illinois</b>  (<u>Continental Cas. Co. v. Cuda</u>, 715 N.E.2d (Ill. App 1999))</p>	<p>“[T]he giving of advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge or skill.”</p>
<p><b>Indiana</b>  (<u>Fink v. Peden</u>, 17 N.E.2d 95 (1938))</p>	<p>Identical quote to that in <u>Idaho State Bar v. Villegas</u>. “To ‘practice law’ is to carry on the business of an attorney at law.”</p>
<p><b>Iowa</b></p>	<p>“[T]he practice of law includes, but is not limited to, representing another before the courts; giving of legal</p>

State	“Practice of Law”
<p>(Iowa Supreme Court Com’n on Unauthorized Practice of Law v. Sturgeon, 635 N.W.2d 679 (Iowa 2001))</p>	<p>advice and counsel to others relating to their rights and obligations under the law; and preparation or approval of the use of legal instruments by which legal rights of others are either obtained, secured or transferred even if such matters never become the subject of a court proceeding. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client ...”</p> <p><b>Exceptions:</b></p> <p>“Where this professional judgment is not involved, nonlawyers, such as court clerks, police officers, abstracters, and many other governmental employees, may engage in occupations that requires a special knowledge of law in certain areas.”</p>
<p><b>Kansas</b></p> <p>(State v. Schumacher, 519 P.2d 1116 (1974))</p>	<p>Identical quote to that in <u>Idaho State Bar v. Villegas</u>. “the rendition of services requiring the knowledge and application of legal principles and techniques to serve the interest of another with his consent.”</p>
<p><b>Kentucky</b></p> <p>(Rules of Supreme Court of Kentucky, Rule 3.020)</p>	<p>“[a]ny service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocate in or out of court, rendered in respect to the rights, duties, obligations, liabilities or business relations of one requiring the services.</p> <p><b>Exceptions:</b></p> <ul style="list-style-type: none"> <li>• Self-representation</li> <li>• Small claims court representation by officer of company</li> </ul>
<p><b>Louisiana</b></p> <p>(PL: 2009 Louisiana Code TITLE 37 Professions and occupations Sec. 37:212;</p> <p>UPL: Louisiana Rules of Professional</p>	<ul style="list-style-type: none"> <li>• Proceedings before legal body</li> <li>• Counseling on the law, drawing up documents affecting rights</li> <li>• Act as representative to prevent or redress a wrong or enforce a right</li> </ul> <p>(very similar to Alabama rule)</p> <p><b>Exceptions:</b></p> <ul style="list-style-type: none"> <li>• Self-representation</li> <li>• Preparing title abstracts, title insurance</li> </ul>

State	“Practice of Law”
Conduct 5.5)	<p><b>Unauthorized Practice of Law Definition:</b></p> <ul style="list-style-type: none"> <li>• Holding oneself out as an attorney if not authorized to practice law</li> <li>• Legal consultation or advice to client</li> <li>• Appearing as representative before judicial officer, arbitrator, mediator, court, public agency</li> <li>• Appearing as representative at deposition or other discovery matter</li> <li>• Negotiating or transaction a matter on behalf of a client with third parties</li> </ul> <p>(very similar to Alaska rule)</p>
<p><b>Maine</b></p> <p>(<u>Board of Overseers of the Bar v. Mangan</u>, 763 A.2d 1189 (Me. 2001))</p>	<p>“[a] term of art connoting much more than merely working with legally-related matters.”</p> <p>“The focus of the inquiry is ... ‘whether the activity in question required legal knowledge and skill in order to apply legal principles and precedent.’”</p>
<p><b>Maryland</b></p> <p>(Code of MD Business Occupations and Professions Sec. 10-101(h))</p>	<ul style="list-style-type: none"> <li>• Giving legal advice</li> <li>• Representing another before a state governmental or political body</li> <li>• Performing any other service that the Court of Appeals defines as practicing law</li> </ul> <p><b>Exceptions:</b></p> <ul style="list-style-type: none"> <li>• Officer representing company in civil action.</li> <li>• Other miscellaneous exceptions.</li> </ul>
<p><b>Massachusetts</b></p> <p><u>Matter of an Application for Admission to the Bar of the Commonwealth</u>, 822 N.E.2d 1206 (2005), quoting <u>Matter of the Shoe Mfrs. Protective Ass’n</u>, 3</p>	<p>The practice of law includes “directing and managing the enforcement of legal claims and the establishment of the legal rights of others, where it is necessary to form and to act upon opinions as to what those rights are and as to the legal methods which must be adopted to enforce them, the practice of giving or furnishing legal advice as to such rights and methods and the practice, as an occupation, of drafting documents by which such rights are created, modified, surrendered or secured.”</p>

State	“Practice of Law”
N.E.2d 746 (1936).	
<b>Michigan</b>  <u>(Dressel v. Ameribank,</u> 635 N.W.2d 328 (Mich. App. 2001)	Charging a fee can take an otherwise incidental act into the realm of the unauthorized practice of law.
<b>Minnesota</b>  <u>(Cardinal v. Merrill</u> <u>Lynch Realty/Burnet,</u> <u>Inc.,</u> 433 N.W.2d 864 (Minn. 1988)	“The line between what is and what is not the practice of law cannot be drawn with precision. Lawyers should be the first to recognized that between the two there is a region wherein much of what lawyers do every day in their practice may also be done by others without wrongful invasion of the lawyers’ field.”
<b>Mississippi</b>  <u>(Mississippi Com’n on</u> <u>Judicial Performance</u> <u>v. Jenkins,</u> 725 So.2d 162 (Miss. 1998)  (Miss. Code Ann. Sec. 73-3-55)	Drafting or selection of documents, giving advise in regard to them, and the using of an informed or trained discretion in the drafting of documents to meet the needs of the person being served. Any exercise of intelligent choice in advising another of his legal rights and duties bring the activity within the practice of the legal profession.  It is a misdemeanor for someone who isn’t licensed to write any document for filing in a state court, give any advice therein, write bills of sale, conveyances, deeds of trust, mortgage contracts, or wills.
<b>Missouri</b>  (2005 Missouri Code Sec. 484.010)	Practice of law: Appearance as an advocate in a representative capacity, drawing documents, performance of any act in connection with proceedings before any court, commissioner, referee or any body constituted by law or having authority to settle controversies  Law business: advising or counseling for consideration anybody as to law or drawing or procuring documents affecting rights; doing any act in a representative capacity, securing property rights for anybody (for consideration).
<b>Montana</b>  <u>Pulse v. North</u> <u>American Land Title</u> <u>Co. of Montana,</u> 707 P.2d 1105 (Mont.	“The line between what is and what is not the practice of law cannot be drawn with precision.”

State	“Practice of Law”
1985)	
<p><b>Nebraska</b></p> <p>Neb. Ct. R. § 3-1001</p>	<p>The application of legal principles and judgment with regard to the circumstances or objectives of another entity or person which require the knowledge, judgment, and skill of a person trained as a lawyer.</p> <p>This includes:</p> <ul style="list-style-type: none"> <li>• Giving advice or counsel to another as to their legal rights for compensation if a relationship of trust or reliance exists</li> <li>• Selection or drafting for another of legal documents affecting their legal rights</li> <li>• Representation of another in a court, formal administrative adjudicative proceeding or other formal dispute resolution process</li> <li>• Negotiation of legal rights or responsibilities on behalf of another.</li> <li>• Holding oneself out as being entitled to practice law.</li> </ul>
<p><b>Nevada</b></p> <p><u>Pioneer Title Ins. &amp; Trust Co. v. State Bar of Nev.</u>, 326 P.2d 408 (Nev. 1958)</p>	<p>“The public interest therefore requires that in the securing of professional advice and assistance upon matters affecting one’s legal rights one must have assurance of competence and integrity and must enjoy freedom of full disclosure with complete confidence in the undivided allegiance of one’s counselor [sic.] in the definition and assertion of the rights in question.”</p> <p>“These principles must remain constant. The circumstances which call for creation of the attorney-client relationship are, however, subject to continuing change. As civilization becomes more complex we find that counseling becomes important in more and more new fields involving legal rights. Conversely we find that the public becomes accustomed to certain areas of transaction and that as transactions in those areas become standardized, legal counseling is no longer generally regarded as a practical necessity or a reasonable precaution”</p> <p>“It may be conceded that professional advice or exercise of judgment upon matters of law by one neither a party to the transaction nor an attorney, does not in every case constitute unauthorized practice of the law. There are recognized exceptions which are themselves founded upon the public interest. These exceptions are confined to cases of simple rather than complex legal services rendered in connection with a lay business and in all such cases the key to the public interest is practical necessity.”</p>
<p><b>New Hampshire</b></p> <p>(Sup. Ct. Rules, Rule 35, Rule 1</p>	<p>There is no satisfactory, all-inclusive definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client ...”</p>



State	“Practice of Law”
	The task force established in 2002 to define the practice of law couldn’t reach a consensus on a definition.
<b>New Jersey</b>  <u>In Re Jackman</u> , 761 A.2d 1103 (N.J. 2000)	“One is engaged in the practice of law whenever legal knowledge, training, skill, and ability are required.
<b>New Mexico</b>  (Rules Governing Legal Assistant Services Rules Governing the Bar, Rule 20-102)	<ul style="list-style-type: none"> <li>• Representation of parties before judicial or administrative bodies</li> <li>• Preparation of pleadings/other documents incident to actions/proceedings</li> <li>• Management of actions/proceedings</li> <li>• Giving legal advice/counsel; rendering services which requires use of legal knowledge or skill; preparing instruments/contracts by which legal rights are secured.</li> </ul>
<b>New York</b>  <u>(El Gemayel v. Seaman</u> , 72 N.Y.2d 701, 706, 533 N.E.2d 245, 248 (1988))	<p>The “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 (Spivak v. Sachs, 16 N.Y.2d, at 166, 263 N.Y.S.2d 953, 211 N.E.2d 329, supra; People v. Alfani, 227 N.Y. 334, 125 N.E. 671). Additionally, such advice or services must be rendered to particular clients (Matter of New York County Lawyers Assn. v. Dacey, 21 N.Y.2d 694, 287 N.Y.S.2d 422, 234 N.E.2d 459, revg. on dissenting opn. below 28 A.D.2d 161, 283 N.Y.S.2d 984 [publishing a book on “How to Avoid Probate” does not constitute the unlawful “practice” of law] ) and services rendered to a single client can constitute the practice of law (Spivak v. Sachs, 16 N.Y.2d 163, 263 N.Y.S.2d 953, 211 N.E.2d 329, supra ).</p> <p>22 NYCRR 118.1 (g): With respect to retired attorneys: “For purposes of this section, the "practice of law" shall mean the giving of legal advice or counsel to, or providing legal representation for, particular body or individual in a particular situation in either the public or private sector in the State of New York or elsewhere, it shall include the appearance as an attorney before any court or administrative agency.”</p>
<b>North Carolina</b>  (NC Gen. Stat. Sec. 84-2.1)	Performing any legal service for any other person, with or without compensation, including the preparation or aiding in the preparation of deeds, mortgages, wills trust instruments, inventories, accounts or reports of guardians, or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies, or assisting by advice, counsel or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person.
<b>North Dakota</b>  <u>Ranta v. McCarney</u> ,	“... ‘Practice of law under modern conditions consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces conveyancing, the giving of legal advice on a large variety of subjects, and the preparation and execution of legal instruments covering

State	“Practice of Law”
<p>391 N.W.2d 161 (N.D.1986)</p>	<p>an extensive field of business and trust relations and other affairs. Although these transactions may have no direct connection with court proceedings, they are always subject to become involved in litigation. They require in many aspects a high degree of legal skill, a wide experience with men and affairs, and great capacity for adaptation to difficult and complex situations. These ‘customary functions of an attorney or counsellor at law’ * * * bear an intimate relation to the administration of justice by the courts. No valid distinction, ... can be drawn between that part which involves appearance in court and that part which involves advice and drafting of instruments in his office. The work of the office lawyer is the ground work for future possible contests in courts. It has profound effect on the whole scheme of the administration of justice. It is performed with that possibility in mind, and otherwise would hardly be needed. * * * It is of importance to the welfare of the public that these manifold customary functions be performed by persons possessed of adequate learning and skill, of sound moral character, and acting at all times under the heavy trust obligation to clients which rests upon all attorneys. The underlying reasons which prevent corporations, associations and individuals other than members of the bar from appearing before the courts apply with equal force to the performance of these customary functions of attorneys and counsellors at law outside of courts.’ ...”</p>
<p><b>Ohio</b>  <u>Land Title Abstract &amp; Trust Co. v. Dworken,</u> 193 N.E. 650 (1934)</p>	<p>“[T]he doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, in conformity with the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured.”</p>
<p><b>Oklahoma</b>  <u>R.J. Edwards, Inc. v. Hert,</u> 504 P.2d 407 (1972)</p>	<p>“[T]he concept of the practice of law: the rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with his consent.”</p>
<p><b>Oregon</b>  <u>Oregon State Bar v. Security Escrows, Inc.,</u> 377 P.2d 334 (Or. 1962)</p>	<p>“[A]ny exercise of an intelligent choice, or an informed discretion in advising another of his legal rights and duties will bring the activity within the practice of the profession. We reject such artificial or haphazard tests as custom, payment, or the quality of being ‘incidental.’”</p>
<p><b>Pennsylvania</b>  <u>Gmerek v. State Ethics Com’n,</u> 751</p>	<p>Instruction and advice of clients in regard to the law, so that they may properly pursue their affairs and be informed as to their rights and obligations; preparation of documents requiring familiarity with legal principles beyond the knowledge of a layman; appearing for clients before public tribunals.</p>

State	“Practice of Law”
A.2d 1241 (Pa. 2000)	
<b>Rhode Island</b>  (Rhode Island Code Title 11, Chapter 27, Sec. 2)	Doing any act for another person usually done by attorneys in the course of their profession, including court appearances, giving legal advice (for compensation), represent another in the settlement of an action, and drafting wills and other instruments that requires legal knowledge and capacity and is usually prepared by attorneys.
<b>South Carolina</b>  <u>In Re Duncan</u> , 65 S.E. 210 (1909)	Preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts, and, in addition conveyancing, the preparation of legal instruments of all kinds, and, in general, all advice to clients to clients, and all actions taken for them in matters connected with the law.
<b>South Dakota</b>  <u>Persche v. Jones</u> , 387 N.W.2d 32 (S.D.1986)	“Practicing law “is not limited to conducting litigation, but includes giving legal advice and counsel, and *37 rendering services that require the use of legal knowledge or skill and the preparing of instruments and contracts by which legal rights are secured, whether or not the matter is pending in a court.” (citing Annot., 22 A.L.R.3d 1112, § 2, at 1114 (1968))
<b>Tennessee</b>  (Tenn. Code Ann. 23-3-101)	<p>Practice of law: Appearance as an advocate in a representative capacity, drawing documents, performance of any act in connection with proceedings before any court, commissioner, referee or any body constituted by law or having authority to settle controversies</p> <p>Law business: advising or counseling for consideration anybody as to law or drawing or procuring documents affecting rights; doing any act in a representative capacity, securing property rights for anybody (for consideration).</p>
<b>Texas</b>  (Tx. Government Code, Title 2, Chapter 81, Subchapter G, Section 101)	<ul style="list-style-type: none"> <li>• Preparation of pleadings/documents incident to actions on behalf of client</li> <li>• Rendering any service requiring use of legal skill or knowledge (i.e. drafting wills or contracts)</li> </ul> <p><b>Exceptions:</b></p> <p>Design, creation, publication, distribution, display or sale (including on the Internet) of written materials, books, forms, computer software or other products that conspicuously state that they are not a substitute for the advice of an attorney.</p>
<b>Utah</b>  Utah Supreme Court	The “practice of law” is the representation of the interests of another person by informing, counseling, advising, assisting, advocating for or drafting documents for that person through application of the law and associated legal principles to that person’s facts and circumstances.

State	“Practice of Law”
<p>Rules of Professional Practice Rule 14-802</p>	<p><b>Exceptions:</b></p> <ul style="list-style-type: none"> <li>• Making legal forms available to the general public by print or electronic media.</li> <li>• Providing general legal information, opinions or recommendations about possible legal rights, remedies, defenses, procedures, options or strategies.</li> <li>• Providing clerical assistance to another to complete a form provided by a court for no fee.</li> <li>• Assisting one’s minor child or ward in a juvenile court proceeding, if permitted by the court.</li> <li>• Representing a party in small claims court.</li> <li>• Employee representing without compensation his/her employer in an arbitration proceeding, where the amount in controversy does not exceed the jurisdictional limit of the small claims court.</li> <li>• Representing a party in any mediation proceeding.</li> <li>• Acting as a representative before administrative tribunals or agencies as authorized by tribunal or agency.</li> <li>• Serving as a mediator, arbitrator or conciliator.</li> <li>• Participating in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements or as otherwise allowed by law.</li> <li>• Lobbying.</li> <li>• Advising or preparing documents for others under certain circumstances: state-approved real estate related forms and contracts by real estate agents; issuing real estate title opinions and title reports and prepare deeds by abstractor or title insurance agent; informing customers about their securities related options by financial institutions and securities brokers; insurance related recommendations outside litigation by insurance companies; help filling out health care powers of attorney and natural death declarations by healthcare providers; preparation of tax returns by CPAs, IRS agents, public accountants, public bookkeepers, and tax preparers.</li> </ul>
<p><b>Vermont</b>  <u>In Re Welch</u>, 185 A.2d 458 (1962)</p>	<p>Furnishing advice to another person or services under circumstances that imply the possession of legal knowledge and skill. It includes all advice to clients and actions taken for them in matters connected with the law.</p>
<p><b>Virginia</b>  (Rules of the Supreme Court, Part 6, Sec. 1)</p>	<p>It is from the attorney-client relationship that the practice of law is derived and includes: advise of another in a matter involving legal principles; prepares legal documents for another; represent another before a tribunal.</p>
<p><b>Washington</b></p>	<p>The application of legal principles and judgment with regard to the circumstances and objectives of another person which require the knowledge and skill of somebody trained in the law, including: providing advice</p>

State	“Practice of Law”
(Washington Court Rule, Part 1, GR 24)	<p>regarding legal rights; drafting legal documents; representing a third party in court; negotiating legal rights.</p> <p><b>Exceptions:</b></p> <ul style="list-style-type: none"> <li>• Special admission</li> <li>• Serving as court house facilitator</li> <li>• Mediators, arbitrators</li> <li>• Participation in labor/CBA negotiations</li> <li>• Miscellaneous exceptions</li> </ul>
<p><b>West Virginia</b></p> <p><u>Brammer v. Taylor</u>, 338 S.E.2d 207 (W. Va. 1985)</p>	<p>Furnishing to another advice or service under circumstances which imply the possession or use of legal knowledge and skill, including: advise of another in a matter involving the application of legal principles to facts; preparation of legal; representation of another before a judicial tribunal.</p>
<p><b>Wisconsin</b></p> <p>(Wis. Stat. Ch. 757, Sec. 30)</p>	<p>Appearing as an agent in action before any court.</p> <p>Providing legal advice not incidental to one’s usual business.</p>
<p><b>Wyoming</b></p> <p>(Rules of the Supreme Courts, Rule 11)</p>	<p>Practice of law” means providing any legal service for any other person, firm or corporation, with or without compensation, or providing professional legal advice or services where there is a client relationship of trust or reliance, including appearing as an advocate in a representative capacity; drafting pleadings or other documents; or performing any act in such capacity in connection with a prospective or pending proceeding before any court, court commissioner, or referee.</p>