

## **Freedom of Legal Information: Increasing Court Access for Americans of Limited Means**

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Legal service providers can expand their ability to serve their client communities by aggressively using alternatives to traditional lawyer representation. Unfortunately, in recent years, the legal establishment has erected additional barriers to the full utilization of independent paralegals and other nonlawyer resources in the guise of protecting the public from the “unauthorized practice of law.” We believe innovations that deploy the full spectrum of legal service alternatives should be encouraged, not attacked, by responsible lawyers, and our hope is that the legal services community will join with us in defending its right to fully serve its client communities.

### **The Crisis in Legal Access and Nontraditional Alternatives**

Each year, thirty-eight million low and moderate income households nationwide need legal help, but are denied access to the American civil justice system, according to the American Bar Association.<sup>2</sup> As reported in 1995 by the ABA's Commission on Nonlawyer Practice, part of the crisis in access is due to artificial barriers to nonlawyer legal activity which compound the problems of providing legal services to Americans of limited means.

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<sup>2</sup> See *Agenda for Access: The American People and Civil Justice -- Final Report on the Implications of the Comprehensive Legal Needs Study*, Consortium on Legal Services and the Public, American Bar Association, Chicago, Illinois (1996).

To address this problem, the Commission recommended that the ABA “examine its ethical rules, policies and standards to ensure that they promote the delivery of affordable, competent services and access to justice,” and called on the states to reassess their unauthorized practice statutes, rules and enforcement activities.<sup>3</sup> Ignoring its own Commission, the ABA House of Delegates never even debated these recommendations. While the ABA chose to ignore an opportunity to help increase access to our civil justice system, the vast majority of Americans who require legal assistance continue to have unmet needs because they simply cannot afford to hire a lawyer.

The hostility by bar authorities to nonlawyer reform proposals ignores the reality that millions of Americans are already using inexpensive alternatives to traditional lawyer representation to deal with simple, routine matters such as creating a will, filing for an uncontested divorce, or filing for bankruptcy. Some handle their legal issues *pro se*, using the guidance of self-help legal publications and software, while others turn to nonlawyers such as independent paralegals, accountants or realtors for assistance.<sup>4</sup>

Legal service providers, too, should be able to maximize their ability to meet the

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<sup>3</sup> See *Nonlawyer Activity in Law-Related Situations: A Report with Recommendations*, Commission on Nonlawyer Practice, American Bar Association, Chicago, Illinois (1995).

<sup>4</sup> As a result of the high cost of hiring a lawyer, and the denial of access to the courts that such high costs create, the percentage of people handling their legal matters *pro se*, either with aid of self-help legal publications and software or independent paralegals, is on the rise. Today, in Arizona, California and Florida, the percentage of *pro se* cases far exceeds those with traditional lawyer representation. In fact, in recent years, at least eighty percent of the domestic cases filed in California were filed *pro se*.

sometimes overwhelming needs of their client communities with a variety of nontraditional alternatives to lawyer representation. The promise of diverse legal service delivery mechanisms was highlighted at an April 1999 symposium of legal service providers in Washington, D.C., where Ada Shen-Jaffe, the Director of Legal Services in Washington State, described a typical client population as presenting a pyramid of legal needs that can be served by a variety of providers:

- Fifty percent can be served through very low-cost interventions such as self-help legal publications and software, self-help legal videos, cable-access television, and multi-lingual brochures.
- Thirty-five percent need low-cost intervention involving a trained nonlawyer (for example, a domestic violence shelter worker or a legal forms preparer).
- Ten percent require some help from an attorney, but the legal representation involved is low-cost and may be supplemented with paralegal or nonlawyer support.
- Only five-percent require full-range, high-cost lawyer representation to address their more complex legal needs.

### **The Abuse of Unauthorized Practice Statutes to Deny Consumer Choice**

While over eighty percent of those who need legal help can be adequately and economically served by nonlawyers or self-help materials, there is a continuing effort by state authorities to curtail their availability. Today, state “unauthorized practice of law” statutes and the organizations that enforce them pose a threat to the availability of nonlawyer resources and self-help legal materials for the people who need them most -- low and moderate income Americans.

Unauthorized practice statutes generally prohibit nonlawyers from “the practice of law,” but fail to meaningfully define this vague term. Although the stated rationale behind the

unauthorized practice statutes is to protect legal consumers, they have been systematically misused to target publishers of self-help materials, independent paralegals, volunteer advocates and other nonlawyer resources. Consequently, access to accurate legal information and inexpensive alternatives to the traditional legal system continues to be eroded.

One of the most egregious examples occurred in the mid-1980s, when legal secretary Rosemary Furman was charged with unauthorized practice by the Florida Bar for providing assistance in poor and moderate income communities by preparing routine divorce forms and other legal documents. Furman was eventually found guilty and faced incarceration for criminal contempt until pardoned by the Governor. Her legal secretarial service was shut down, however, and a source of low-cost assistance was eliminated for Floridians of limited means.<sup>5</sup>

The threat of this kind of abuse to legal service providers is starkly illustrated in an unauthorized practice proceeding now pending in Delaware. In 1996, the Delaware Disciplinary Counsel filed a lawsuit against Marilyn Arons for providing services, free-of-charge, to parents of disabled children in "due process" educational placement hearings in that state. Incredibly, the complaint against Arons did not come from the parents or children she serves, but from lawyers from the school districts that have lost numerous cases to her.<sup>6</sup>

Equally ominous is a ruling earlier this year by U.S. District Judge Barefoot Sanders

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<sup>5</sup> See *The Florida Bar v. Furman*, 376 So. 2d 378 (Fla. 1979); 451 So. 2d 808 (Fla. 1984).  
<sup>6</sup> R. Schmitt, Advocates Act as Lawyers, and States Cry 'Objection,' Wall St. J., Jan. 14, 1999 at B1.

that *Quicken Family Lawyer* software operates as a "cyberlawyer" by giving consumers tips about writing a will or dealing with other legal problems and thus, violates the Texas unauthorized practice statute. Parsons Technology, which has distributed four million copies of *Quicken Family Lawyer* nationwide and one hundred thousand copies in Texas since 1990, recently filed a motion for reconsideration in an attempt to reverse this unprecedented decision.<sup>7</sup>

Ironically, this kind of abuse of unauthorized practice statutes has been rejected by responsible lawyers and jurists since the late 1960s. In 1967, the New York Bar charged that the publication and sale of Norman Dacey's book, *How to Avoid Probate*, constituted unauthorized practice. The New York Court of Appeals disagreed, ruling that writing and publishing self-help legal materials and forms is not the practice of law.<sup>8</sup> Here are just a few other examples of recent unauthorized practice attacks that reduce access to the civil justice system:

- Last year, Oregon independent paralegal Robin Smith, who served some ten thousand people preparing uncontested divorce papers for nine years without complaint, lost her request for the U.S. Supreme Court to review actions by the Oregon State Bar that shut down her business.<sup>9</sup>
- Last year, the Florida Supreme Court ruled that an advertisement using the phrase "free consultation" by a paralegal constitutes unauthorized practice.<sup>10</sup>
- Currently in Texas, the state's unauthorized practice committee has renewed its attack on self-help legal publications, despite the *Dacey* precedent. In April, Nolo

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<sup>7</sup> Unauthorized Practice of Law Committee v. Parsons Technology, Civil Action No. 3:97-CV-2859-H, Memorandum Opinion and Order, January 22, 1999.

<sup>8</sup> New York County Lawyers Ass'n v. Dacey, 282 N.Y.S.2d 985, reversed, 234 N.E.2d 459 (N.Y. 1967).

<sup>9</sup> See *Smith v. Oregon Bar*, 942 P.2d 793 (9<sup>th</sup> Cir. 1997), *cert. denied*, 118 S. Ct 1055 (1998).

<sup>10</sup> *Florida Bar v. Catarcio*, Florida Supreme Court No. 88850, February 12, 1998.

Press, a California-based publisher that has been targeted by the Committee, filed a declaratory judgment action along with the Texas Library Association, the American Association of Law Libraries and a group of private Texas citizens, seeking a state court ruling that the Texas Constitution protects them from such an infringement on free speech.<sup>11</sup>

- In 1997, a California solo-practitioner filed a lawsuit against forty independent paralegals charging them with the unauthorized practice of law, false advertising and unfair competition with attorneys.<sup>12</sup>
- In Nevada, a bill sponsored by the state Bar Association which has passed the House of Representatives, would impose criminal penalties for unauthorized practice, making an initial offense a misdemeanor and a second offense a category D felony. The bill would also allow the state bar to refer “anyone it suspects of violating” the unauthorized practice prohibitions to the county district attorney for criminal prosecution.<sup>13</sup>

As these examples demonstrate, even though millions of low and moderate income Americans are priced out of the civil justice system each year, many state bar associations are currently taking actions aimed at eliminating inexpensive alternatives to hiring a lawyer.

State bar associations often claim that the public will be harmed by nonlawyers who engage in what they call unauthorized practice, usually vaguely defined as “providing legal advice.” At best, this paternalistic approach greatly underestimates the ability of American consumers to make informed judgments on their own behalf. More realistically, using unauthorized practice statutes to attack economic competition by nonlawyers, or to silence an adversary who cannot afford a lawyer, demonstrates that this public service rationale is being grossly perverted.

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<sup>11</sup> *Nolo Press, et al. v. Unauthorized Practice of Law Committee*, Plaintiff’s Original Petition for Declaratory Judgment, District Court of Travis County, Texas, No. 99-03252, March 17, 1999.

<sup>12</sup> *Davis v. Woolridge, et al.*, Superior Court, San Bernardino County, California, Case No. RCV 29284 (1998).

Another troubling feature is the secrecy that surrounds the unauthorized practice committees which exercise very broad enforcement powers with no meaningful supervision. Little is made public about how these committees operate, how they decide to launch an investigation, or even their membership.

What is known is that the attacks on nonlawyers and publishers of self-help materials often do not rise from consumer complaints. Complaints against nonlawyers usually come directly from competing attorneys, state bar associations or the unauthorized practice committees themselves. In fact, Stanford University legal historian and past president of the American Association of Law Schools, Deborah Rhode, found that only two percent of complaints against non-lawyer practice involved any claim of injury.<sup>14</sup>

Together these elements of economic abuse, secrecy, and fabricated complaints combine to form a fundamentally unfair and uncontrolled system that continually threatens the availability of independent paralegals and other nonlawyer resources, thereby reducing access to inexpensive alternatives for legal assistance.

### **Opening the Civil Justice System to All Americans**

As the simple and routine legal needs of millions of Americans continue to go unmet each year, it is critical for legal service providers to increase their ability to serve their clients by utilizing independent paralegals and other nonlawyer resources. We believe that legal

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<sup>13</sup> Nevada Assembly Bill 18, 1999 Legislative Session.

<sup>14</sup> Deborah Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1 (1981).

service providers should be able to do so despite the strident and misguided opposition to these innovations voiced by many state and local bar authorities.

At HALT, we are pursuing a set of legal reform initiatives to improve access to the civil justice system for citizens of limited means. One such initiative, the Freedom of Legal Information Project, is a major effort to strengthen protections that assure consumers access both to accurate and timely legal information and to assistance from nonlawyers. At the core of this reform effort are three principles:

1. The unauthorized practice of law means saying you are a lawyer when you are not;
2. Innovative partnering between lawyers and nonlawyers is permissible with client consent after full disclosure of work and fee arrangements; and
3. A client or customer complaint should be required before unauthorized practice of law proceedings can be initiated.

Based on these principles, we are devising a strategy to help protect the rights of all Americans to choose the kind of legal assistance that best meets their needs. In addition to advocating reforms to state unauthorized practice statutes and enforcement activities, we are committed to developing a technical assistance package and an unauthorized practice information clearinghouse, including a network of attorneys who will help litigate on behalf of unauthorized practice targets on a *pro bono* basis, where needed. We believe that the Freedom of Legal Information Project can help open the legal system so that the promise of justice is within the economic reach of all Americans, and look forward to working with the legal services community to accomplish this goal.