

UPL—Challenges and Solutions (Part 2)



Kimberly M. Cahill

In last month's column, I began a discussion of the unauthorized practice of law (UPL), including the current state of the law here in Michigan as it relates to UPL, and some of the challenges facing the State Bar and the profession in dealing with this problem.

The basic UPL framework prohibits the unauthorized practice of law without a specific definition of what that means. The relief available to us is injunctive in nature, and the areas in which UPL is commonly found is spreading (from real estate services to probate and estate planning to family law to immigration). Further, the cost of legal services is rising, making it more difficult for many Michigan residents to afford attorneys because of continued economic pressures. At the same time, the number of unauthorized practitioners is rising, and they have moved from secretarial services and document preparation services to very sophisticated sales and marketing operations primarily designed to sell insurance, annuities, and other financial products. All of that means that the unauthorized practitioners have more money and more sophisticated ways to market to the general public.

What has the State Bar done to protect the public and the profession in light of this onslaught?

Initially, most of our members wanted us to "sue the bastards." Unfortunately, that solution is better as a slogan than as a remedy. Litigation is expensive—and the money we spend comes from our dues. We need to be careful in its expenditure. The statute limiting the State Bar to obtaining injunctive relief means that our members, and only our members, will bear the cost of UPL prosecutions.

Our wonderful State Bar UPL staff (Dawn Evans, Victoria Kremski, and Cath-

erine O'Connell in the Professional Standards Division) have a great deal of experience handling UPL litigation here in Michigan and in other states. They know what will work and what will not. They have reports that requests for stringent definitions of the "practice of law" in other jurisdictions have brought scrutiny from the Department of Justice (DOJ) and the Federal Trade Commission (FTC) for antitrust violations or unfair restraint of trade. Moreover, other bars that have asked the DOJ and FTC for advisory opinions on proposed legislation or court rules defining the practice of law have often received a response that the proposals unfairly restrain trade and may subject the bars to federal investigation.

The State Bar staff's experience is that UPL litigation is most likely to succeed with a victim; therefore, litigation is rarely undertaken without a victim who can substantiate the services offered and received and the damages incurred. (Complaints are taken and recorded with the hope that patterns can be tracked and a victim may relent, find comfort in numbers, and cooperate with prosecution.) Often, victims are reluctant to come forward. In the probate area, victims are often elderly or disabled. They are reluctant to admit they have been duped for fear of being deemed incompetent and losing control of their financial affairs. In the immigration area, victims fear detention or deportation by the Immigration and Naturalization Service. Family law victims worry about being considered too incompetent or naïve to manage custody of children.

So if suing isn't the best option, what is?

When victims are available and willing to assist in the prosecution of these cases, the success rate is much better. Last year, because of Catherine O'Connell's efforts, a repeat violator of an injunction received jail time for contempt of court in Oakland County—with the help of 11 of his victims who attended court proceedings and testified to the damage done to them by this individual.

So if suing isn't the best option, what is?

First, work with the legislature to find solutions. The State Bar worked closely with Rep. Steve Tobocman to pass legislation in the immigration area. In Mexico and Central and South America, the term "notario" indicates someone licensed to practice law, similar to an English solicitor. This far exceeds the powers of a Michigan notary, who is empowered only to witness and verify signatures. Immigrants in Michigan were often taken advantage of by unscrupulous persons who equated the powers of our notaries with "notarios," causing great harm to the Hispanic and migrant worker communities. Rep. Tobocman worked to pass legislation to increase the penalties for notaries engaging in this type of deception. Working with the legislature can be a double-edged sword, however. Legislators are often unfamiliar with the dangers of the unauthorized practice of law, and may be inclined to allow practices that may do more harm than good in this area.

Second, work within the community to identify problems, share resources, and educate the public. The State Bar has worked with immigration law clinics sponsored by the Archdioceses of Detroit and Kalamazoo to educate consumers on the importance of attorneys in the immigration process, to find attorneys qualified to help, and to provide attorneys at pro bono or reduced rates when necessary.

Third, work with the State Bar sections to identify problems and educate the public on the importance of attorney representation. The Probate and Estate Planning Section and the Elder Law and Advocacy Section have assumed a great role in this area. In conjunction with the Attorney General's Office, the Office of Insurance Regulation, AARP, and local seniors groups, members of these sections have made themselves available to educate seniors about their choices and opportunities for estate planning. The program works like this: Each group identifies a speaker, all speakers agree not to pitch services or sales, and a local venue is chosen. Senior citizens' groups are then invited to attend the presentation.

How, you ask, is this different from the dozens of fliers you (or your parents) might receive, soliciting your attendance at "seminars" purporting to tell you how to "AVOID PROBATE" or "AVOID DEATH TAXES" or some other dire fate? Well, we tell folks up front that there will be no sales pitches and no pressure. We offer the program at a familiar location in the community, and we offer refreshments! (As one of the best mediators I know always says, "Never underestimate the value of cookies and coffee in the mediation process.") These programs have been remarkably well received, and as a participant on one of the first panels in St. Clair Shores, Michigan, I can tell you that the level of questions and participation by the audience is really impressive.

So while litigation is one of our tools, we must have others, and education is paramount among them. We must educate the public on the importance of attorneys in all of these areas, and we must continue to work to improve the image of our profession and make our input valuable and credible to consumers of legal services. Lastly, we must realize that for many people who need legal services, attorney fees are not affordable. We must explore different options. We can't afford to nor will we be successful if we use only litigation to combat the unauthorized practice of law.

Thanks to Catherine O'Connell, Victoria Kremski, and Dawn Evans of the State Bar Professional Standards Division for their help in preparing this article. ■