

UPL—Challenges and Solutions (Part 1)



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I have found in my travels to date that one of the issues that members are most interested in is the unauthorized practice of law (UPL)—and what the State Bar of Michigan is doing to stop it! This is an area in which the State Bar and the profession as a whole face many challenges.

Many ordinary citizens perceive attorneys' interest in UPL as merely a matter of economic self-protection—that we want to prohibit any unlicensed person from doing anything regarding the practice of law to maximize the sources of potential revenue for our members. Nothing could be further from the truth.

While it is true that our members have an economic interest in preserving the practice of law for attorneys, there are at least two other overriding concerns. The first, and most important, is the harm to the public from the unauthorized practice of law. Every one of us has seen or heard the horror stories of a client who needed to have the work of a document preparer, uninformed title company, or will and trust kit company undone. Sometimes, the damage is irreparable: estate planning that cannot be undone due to the death or disability of the client, custody and property settlement decisions that are nearly impossible to undo, or bad advice given in immigration cases that results in detention or deportation. Often, the victims are among the most vulnerable members of our society.

The second concern is the damage that is done to the reputation of attorneys and the legal profession by the relentless advertising by these unauthorized practitioners. They tend to rely heavily on scare tactics—asserting that the probate process is an evil to be avoided at all costs, or claiming that attorneys are overly expensive and provide no

value in the process. This is wrong and damaging to the profession.

So why doesn't the State Bar charge in and shut down all this nonsense? (I know that's what a lot of members would like!) Well, we need to talk about the challenges that face the profession in dealing with UPL.

First, we have to recognize that in Michigan, we do not have a statute or court rule that defines what the practice of law is. That makes this a moving target, and we all know how difficult those can be to pin down and hit. The relevant statute is MCL 600.916, which states in part that:

A person shall not practice law or engage in the law business, shall not in any manner whatsoever lead others to believe that he or she is authorized to practice law or to engage in the law business, and shall not in any manner whatsoever represent or designate himself or herself as an attorney and counselor, attorney at law, or lawyer, unless the person is regularly licensed and authorized to practice law in this state.

The most recent Supreme Court decision that deals with the unauthorized practice of law is *Dressel v Ameribank*, 467 Mich 557 (2003). In that case, the bank charged the plaintiff a \$400 document preparation fee

for preparation of an adjustable rate note and mortgage used in a loan transaction. Plaintiff argued that this was the practice of law. The Court disagreed, saying that since the bank did not draft the note and mortgage in question, but used a standard form, its work completing the terms of the note and mortgage was a mere secretarial function. The Court held in *Dressel* that “a person engages in the practice of law when he counsels or assists another in matters that require the use of legal discretion or profound legal knowledge.”

Second, when other states or bar associations have attempted to draft legislation or court rules that clearly define what the practice of law is, they have met with resistance—some from legislators, but more importantly, the United States Justice Department and the Federal Trade Commission have both initiated investigations in other states, claiming that such statutes or court rules are unfair restraints of trade or a violation of antitrust laws. Clearly, the trend is away from restrictive statutes in this area.

Third, the State Bar's remedy under the existing statute provides for injunctive relief and for criminal contempt of court sanctions, not for any other type of sanctions or monetary relief. What that means is that we can go after unauthorized practitioners in

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county X, and when we get the injunction there, the group shuts down and moves to county Y. After we get another injunction in county X to prohibit them from operating in county Y, we stop them in county Y. They then move to the next adjacent county, and we're back to court in county X for a third injunction. If we're really lucky, and they're close to the state line, they move to Illinois, Indiana, Wisconsin, or Ohio. We send our files to the bar associations in those states, and the cycle continues.

Fourth, the victims of the unauthorized practice of law are often vulnerable persons who are reluctant or unable to assist in prosecution after the fact. While the most obvious example of this is the elderly person who is preyed upon by a will and trust kit company or an annuity sales company

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and is reluctant or unable to assist in prosecution for fear of being deemed incompetent or senile, we are seeing more UPL complaints in the area of family law and immigration. Complainants in these areas tend to be vulnerable (in the case of many non-English speaking persons needing immigration services who are very concerned about detention or deportation) or without resources (has anyone ever seen a family law client who was better off financially immediately after a divorce?) and seeking the promises of great savings on legal fees.

So these are some of the challenges. Next month, I'll talk about some of the State Bar's solutions and the partnerships it has formed to combat UPL.

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