THE COLUMN OF THE LEGAL EDUCATION COMMITTEE

By Josh Ard

Staying In Bounds

Preparing law students to recognize the unauthorized practice of law

Practicing attorneys and legal associations are understandably interested in what the boundaries of the practice of law are. The American Bar Association and state bars have wrestled with whether lawyers should be allowed to participate in multi-disciplinary partnerships and with the proper rules for multi-jurisdictional practice. As more and more professionals enter into areas once dominated by lawyers, such as accountants and financial planners into estate planning, practicing attorneys and bar associations have become more focused on prohibitions against the unauthorized practice of law (UPL).

This column investigates the effects of this UPL focus on legal education. The vast majority of students in law schools contemplate passing the bar exam and becoming licensed attorneys. Do law schools devote significant and sufficient attention towards educating them in exactly what they could then do that their friends and neighbors who are not licensed attorneys could not? Based on an informal survey of the faculty at Thomas M. Cooley Law School, they do not. I have no reason to believe that Cooley diverges from national norms in this matter.

That is not to say that UPL issues are ignored. In fact, professional responsibility (ethics) courses devote considerable attention to UPL. Case books and problem books address the issue head on, detailing the sanctions imposed for the unauthorized practice. The major shortcoming is that little attention is devoted to UPL issues in core courses. A fundamental risk is that ethical instruction can all too easily be compartmentalized. Enron probably had a business ethicist on staff or at least hired consultants on business ethics to engage with executives and employees from time to time. Nonetheless, in hindsight we could say that ethics never became a significant part of the ethos of that corporation. Moreover, law students presumably know that the unauthorized practice of law carries sanctions. What is more difficult is to determine what the boundaries are and to tell when someone else has stepped over the line. This lesson can be learned most easily in concrete cases, taken from substantive areas of the law.

UPL is clearly relevant to substantive areas of the law. In many states, UPL activity is a crime. A Michigan statute makes the practice of law by a corporation a crime. Obviously, practicing law would be an ultra vires activity. UPL activity generally involves tortuous conduct, perhaps fraud if the lack of licensure is not disclosed, perhaps negligence if the person does not perform well. Generally, people holding themselves out as members of a licensed profession are held to the standard of that profession, and if they fall short they become liable for malpractice. How many of the poorly drafted wills, trusts, deeds, and contracts that lead to cases reported in the case books were created by people not authorized legally to draft them? A student in a legal writing class might well wonder which of the documents they produce would in the real world have to be approved by an attorney.

Legal educators cannot cover everything in a class. Nevertheless, the uniform response to my query was that UPL was not addressed in criminal law, tort, contracts, business organizations, wills, legal drafting, and most other substantive classes. A quick overview of standard hornbooks found the same dearth of discussion on the subject.

The silence, however, was not completely outside of professional responsibility classes. Don LeDuc, a Cooley professor, said that he

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addresses the issue in state administrative law classes. In several instances, the state does not provide attorneys for administrative agency hearings. The only alternative is for employees to represent the agencies.

Unauthorized practice of law issues also arise in consumer law, a class I teach. They are particularly important in Fair Debt Collection Practices Act (FDCPA) claims. Debt collectors often engage in several different types of UPL activities. It is a violation of the act to threaten or to carry out an action that cannot legally be done. Nonattorneys or attorneys not licensed in the state of the debtor often threaten legal action. In some instances debt collectors, who have no standing to bring suit on a debt unless it has been assigned to them, in fact do file suit. Sometimes as a way of protecting assets, creditors form entities that actually have rights to the debt, but another entity brings the suit. All of this amounts to the unauthorized practice of law in addition to FDCPA violations.

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A recent Michigan case dealing with lending abuses also raised UPL issues. Real estate settlement forms have various lines for fees. The defendant banks charged several hundred dollars for "document fees" but kept the money for themselves. The holding was that only attorneys could charge fees for the preparation of legal documents and thus the bank's fees were unlawful.

Where UPL issues are most highly emphasized at Cooley, however, are in clinical settings. Michigan Court Rule 8.120 allows law students to practice law under supervision in law school clinics in certain circumstances. Hence, a major training and supervision concern is to teach students which of the activities they do as an intern involve the practice of law and require supervision. The issue is obvious for most court documents. Clinic policy requires supervisor approval for all writing, whether to courts, other attorneys, third parties, or clients. This may tend to obscure which of these communications really involve the practice of law.

The major issues involve oral communication. Case law and court rules from other states indicate that offering legal advice tailored to a particular situation (not just general statements of opinion) constitutes the practice of law. Interns speaking with clients during interviews or over the phone or when questioned by an audience member at a speaking engagement are often asked questions whose answers would necessitate legal advice. Interns need to be diligent not to fall into the trap of offering such legal advice on the spot. Faculty address these concerns both through general instruction and through debriefings during individualized supervisory sessions. The end result is that a student who has participated in a clinical program should have a much better understanding of what is and is not the practice of law.

The attention bar associations and practicing attorneys give to UPL concerns is not reflected centrally in substantive courses. Some elective courses of the law school curricula, such as administrative law and consumer law, may give the subject relatively more emphasis. In general, the law students who are best prepared to discern what is and is not the practice of law are those who have participated in clinical programs. ✦

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