

Freedom of Legal Information: The Need to Increase Access to the Courts For America's Impoverished and Working Communities

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Legal service providers can expand their ability to serve their client communities by aggressively using alternatives to lawyer representation. Unfortunately, in recent years, the legal establishment has erected additional barriers to the full utilization of independent paralegals and other nontraditional legal service providers in the guise of protecting the public from ? unauthorized practice of law. We believe that innovations that use the full spectrum of alternatives should be encouraged, not attacked, by responsible lawyers, and our hope is that the legal services community will defend its right to do so.

The Crisis in Legal Access and Nontraditional Alternatives

Thirty-eight million low and moderate income households nationwide need legal help, but are denied access to the American civil justice system every year, according to the American Bar Association. As reported 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. In its 1995 final report, the Commission recommended that the ABA examine its ethical rules, policies and standards to ensure that they promote the delivery of affordable,

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competent services and access to justice, stressing that “a prominent example of what might be examined is the ABA’s own set of ethical rules governing lawyer practice in conjunction with nonlawyers.” Ignoring the Commissions recommendations, the ABA's House of Delegates never debated the issue nor endorsed the recommendations of the Commission.

While the ABA chose to ignore an opportunity to help increase access to our civil justice system for those with low and moderate incomes, most of the millions of Americans in need of legal assistance continue to have unmet legal needs because they simply cannot afford to hire a lawyer. Legal service providers who struggle to fill this gap need to be aware of the access needs of the populations they serve and the variety of nontraditional alternatives to lawyer representation.

For example, at an April 1999 symposium of legal service providers in Washington, D.C., Ada Shen-Jaffe, the Director of Legal Services in Washington State, described a typical client population as a pyramid of legal needs that can be served by a variety of providers:

- X Fifty percent of those who need legal services can have their issue resolved through very low-cost interventions such as self-help legal publications and software, self-help legal videos, cable-access television, and the publication of brochures in multiple languages.
- X Thirty-five percent can have their issue resolved through low-cost intervention involving a trained nonlawyer (for example, a domestic violence shelter worker).
- X Ten percent require the some help from an attorney, but the legal representation involved is low-cost and may be supplemented with paralegal or nonlawyer support.
- X Only five-percent require full-range, high-cost legal representation for a number of reasons (e.g., no one can or will take case; highly complex legal issue; resource intense; or difficult for

emotional reasons).

Outside the legal services community, millions of Americans are already using inexpensive alternatives to the traditional legal system 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.²

The Abuse of Unauthorized Practice of Law Statutes to Deny Consumer Choice

While over eighty percent of people who need legal services can have their matters resolved with the assistance of nonlawyers or through the use of self-help legal publications and software, there is a continuous fight to prevent nonlawyers from providing such assistance to low and moderate income people. Despite the increase in Americans handling their legal matters *pro se*, unauthorized practice of law statutes in every state in the United States except Arizona, and the committees or organizations that enforce them, continue to pose a threat to the availability of nonlawyer 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

² 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 represented by lawyers. In fact, at least eighty percent of the domestic cases filed in California were filed *pro se*.

meaningfully define this vague phrase. Although the stated rationale behind the unauthorized practice statutes is to protect legal consumers from harm, they are systematically misused by the legal establishment to target publishers of self-help legal materials, independent paralegals, volunteer advocates and other nontraditional legal service providers. Consequently, access to accurate legal information and inexpensive alternatives to the traditional legal system continue to be eroded.

In the mid-1980s, Rosemary Furman, a former legal secretary who was operating a secretarial service in Florida, was prosecuted for providing assistance to poor and middle-income people for filling out routine divorce forms and other legal documents. The Florida Bar filed petitions against Furman charging that she engaged in the unauthorized practice of law and violated a Court order. Although the Court's Order was vague and non-specific in defining the practice of law, Furman was found guilty of the unauthorized practice of law and faced incarceration for criminal contempt charges instituted by the bar. Furman sued the Florida Bar arguing that the unauthorized practice of law statutes violate the due process guarantees of the Constitution by denying access to the courts to low- and middle-income people who cannot represent themselves or afford a lawyer. Unfortunately, the Florida Courts rejected her argument and the U.S. Supreme Court declined to hear the appeal. Although Furman was granted a pardon by the governor of Florida and did not serve any jail time, her business of providing assistance to low- and middle-income citizens was shut down.

The threat to legal service providers is dramatically apparent by the Marilyn Arons case. In 1996, the Office of Disciplinary Counsel in Delaware filed a lawsuit against Marilyn Arons for providing services, free-of-charge, to New Jersey, New York, Delaware and Pennsylvania parents of disabled children involved in "due process" hearings before administrative agencies. These advocates had been providing

services to parents since 1977 and were charged with unauthorized practice of law violations in Delaware only. It is key to note in this case that the complaint against the advocates does not come from the parents (or consumers) they provide services to, but from the school board and their lawyers, who have lost numerous cases to the parents that have received services from the charged advocates.

Just this year in Texas, U.S. District Court Judge Barefoot Sanders found that *the Quicken Family Lawyer* software operates as a "cyberlawyer" by giving consumers tips about writing a will or solving other legal problems and thus, violates the unauthorized practice of law statute in Texas. Parsons Technology, the publishers of the software, has filed a motion for reconsideration with Judge Sanders in an attempt to reverse his unprecedented decision. Since 1990, Parsons Technology has distributed four million copies of *Quicken Family Lawyer* nationwide and one hundred thousand copies in Texas alone.

Ironically, this approach has been rejected by responsible lawyers 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 the unauthorized practice of law. The New York Court of Appeals disagreed with the Bar and ruled that the publication of self-help legal materials and legal forms by nonlawyers is not the practice of law. Although the issue of whether self-help legal materials constitute the unauthorized practice of law was addressed back in 1967 in New York, it is still an unresolved issue today in Texas.

Here are just a few examples of some recent unauthorized practice of law attacks designed to prohibit citizens from participating in their legal system:

- X An independent paralegal in Oregon who served close to ten thousand people over nine years lost her fight to reopen a paralegal service when the U.S. Supreme Court declined to hear the appeal. The Oregon State Bar shut down the paralegal's business in 1995 after succeeding in

a lawsuit charging that the paralegal engaged in the unauthorized practice of law.

- X In Texas, the Unauthorized Practice of Law Committee is considering whether self-help legal publications are “the unauthorized practice of law.” In April, while the Unauthorized Practice of Law Committee completes its investigation, Nolo Press, a California-based publisher of self-help legal publications and software, filed a petition in District Court seeking a declaratory judgment that self-help legal publications are not “the unauthorized practice of law.” The lawsuit was filed along with The Texas Library Association, The American Association of Law Libraries, and a number of Texas citizens. In the petition, Nolo argues that self-help publications do not constitute the “unauthorized practice of law” and that such a declaration would be a violation of the Constitutional rights of Texans to free speech and press.
- X In 1997, a lawsuit was filed in California by a lawyer against forty independent paralegals charging them with the unauthorized practice of law, false advertising and unfair competition with attorneys.
- X In 1996, a U.S. Bankruptcy Court in northern California found that a nonlawyer bankruptcy petition preparer did not engage in the practice of law by advising a debtor about which exemption to select on her bankruptcy papers.
- X Last February, the Florida Supreme Court found that an advertisement using the phrase “free consultation” coupled with the legal advice a paralegal gave to a divorced couple filing for bankruptcy constituted the unauthorized practice of law.
- X In Nevada, a bill has been passed by the House which increases the penalties for the unauthorized practice. The bill proposes to make a first offense a misdemeanor and a second

offense a category D felony. The bill would also allow the state bar to report “anyone it suspects of violating provisions of” the unauthorized practice statute. In addition, the bill would allow the state bar to “bring a civil action to secure an injunction and any other appropriate relief against any person in violation of the unauthorized practice of law statute.”

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 including independent paralegals, self-help legal information and volunteers. The bar associations often claim that individuals will be harmed by nonlawyers who engage in what they call the unauthorized practice, usually vaguely defined as “providing legal advice.” In actuality, unauthorized practice statutes are often enforced simply to protect the lawyer monopoly by eliminating competition. More often than not, the unauthorized practice committees and bar associations that enforce unauthorized practice statutes are comprised of lawyers who have very broad enforcement powers and no meaningful supervision. Little is known about how these committees operate or how they make their decisions to launch an investigation. What is known is that the attacks on nonlawyers and publishers of self-help legal publications and software often do not rise from consumer complaints. Complaints against nonlawyers often come directly from competing attorneys, state bar associations or the unauthorized practice committees themselves. The unauthorized practice statutes that form the basis for these complaints cause independent paralegals and nontraditional legal service providers to be continuously faced with the threat of being investigated or sued by competing lawyers or unauthorized practice committees. Consequently, some nontraditional legal service providers are forced to close thereby reducing access to inexpensive alternatives for legal assistance for Americans of limited means.

Opening up the Civil Justice System to All Americans

As the simple and routine legal needs of millions of Americans are unmet each year, it is critical for legal service providers to increase their ability to provide greater access to the civil justice system by utilizing independent paralegal and nontraditional legal service providers in meeting the needs of their client population. By taking full advantage of nontraditional alternatives to providing legal services, legal service providers can better address the needs of their client population.

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 reform effort to strengthen protections that assure consumers access to accurate and timely legal information in addition to assistance from nontraditional alternatives to the legal system. Legal service providers should be encouraged to use independent paralegals and nontraditional legal service providers to handle the simple and routine legal matters of their clients, despite the legal establishment's lack of support for such activity.

At the core HALT's policy position are these three principles: (1) the unauthorized practice of law means saying you are a lawyer when you are not; (2) innovative partnering is permissible with client consent after full disclosure of work and fee arrangements between lawyers and nonlawyers; and (3) a client or customer complaint should be required before unauthorized practice of law proceedings can be initiated. Based on those principles, we are devising a strategy to defend the rights of all Americans that are denied access to the civil justice system and to legal service providers by providing technical assistance and a defense against groundless unauthorized practice of law attacks. Further, we are developing an

unauthorized practice of law information clearinghouse to include a network of attorneys who will litigate on behalf of unauthorized practice of law victims on a pro bono basis, where needed.

It is time to open up the legal system so that the promise of justice is within the economic reach of all Americans. By developing innovative ways to increase access to the civil justice system for more Americans, legal service providers can help to accomplish that goal.