

LAWYERS AND CONSUMERS LOSE WHEN UPL RUNS RAMPANT

THE ANCIENTS told the story of Hercules, who was ordered to kill the Hydra, a multiheaded monster. The hero soon realized that as soon as one head was beaten down or chopped off, two more grew in its place.

UPL is Arizona's Hydra, a multiheaded monster that makes victims of consumers of legal services, eats at the public's faith and trust in the judicial system and gnaws at the practice of each law office in Arizona. Although Supreme Court Rule 31(a)(3) states, "No person shall practice law in this state or hold himself out as one who may practice law in this state unless he is an active member of the state bar," our state is inundated with a variety of nonlawyers who engage in the practice of law. These imposters may appear in the guise of mediators, public adjusters, document preparers, estate

planners, paralegals or *notarios*. In fact, they may be felons, opportunists,

disbarred lawyers or law school graduates who have failed to pass or refused to take the bar exam, have failed the character and fitness screening or have not attended an ABA-certified law school. In addition, there are out-of-state lawyers who elect neither to take the bar exam nor to acquire *pro hac vice* status to perform their legal services in Arizona.

These pretenders and unauthorized practitioners infiltrate every aspect of the practice. Those who engage in UPL may represent the unsophisticated "client" in debtor and family law matters. They may be out-of-state lawyers with expertise in complicated corporate matters who represent multistate corporations. Those who engage in UPL may be felons, or they may be lawyers from other states.

To provide some notion of the range of possible problems created by UPL, here are some real-life examples:

- The Bar's UPL attorney fields a call from an out-of-state corporate counsel who is relocating to Arizona and inquiring about special status for in-house counsel. In Arizona, there is no special provision for admission of in-house counsel; consequently, the attorney should comply with Rule 31 and become a member of the State Bar of Arizona. However, some attorneys elect to practice as in-house counsel without membership in the Bar and in violation of ER 5.5.

- A young mother writes to the Bar about a lawyer she



ILLUSTRATIONS BY DAVE BLACK

BY FRANCES JOHANSEN

The Unauthorized Practice of Law: Arizona Timeline

RED = STATE BAR ACTIONS • BLUE = COURT/LEGISLATIVE ACTIONS

1933

State Bar of Arizona creates standing committee on UPL.
Unauthorized Practice of Law criminal statute enacted.

retained to represent her interests in her divorce action and now has learned that the person is not a lawyer and has performed virtually no legal services for her. *In Arizona, her recourse and remedies are limited. The State Bar of Arizona is not authorized to prosecute a nonlawyer engaged in unauthorized practice of law. State Bar services such as fee arbitration and the Client Protection Fund are not available. If the person has made misrepresentations, the matter is referred to the Consumer Protection Division of the Office of Attorney General for investigation, but the matter probably will not be prosecuted.*

• A caller to the Bar, facing foreclosure, complains that a person claiming to be an attorney was hired to represent the young family, to keep their home for them and to file a bankruptcy action. Within weeks, when the family's home was sold at a trustee's sale, the caller discovered the bankruptcy had never been filed. The caller then learned that the person claiming to be an attorney has never been an attorney and has, in fact, served time in prison for a felony conviction. *The State Bar is not authorized to prosecute the nonlawyer engaged in unauthorized practice of law, but it refers the matter to the appropriate trustee in U.S. Bankruptcy Court, which often finds the "document preparer" has violated the Bankruptcy Code and orders the preparer to disgorge the fees, pay a fine and, in some cases, serve time in federal prison.*

• A victim of an accident complains to the State Bar that an "adjuster" represented him in an accident case, purchased his claim for a minimal amount by informing the victim that the claim is actually worthless and then proceeded to make a claim for an amount far in excess of the minimal amount paid to the victim. — A doctor contacts the Bar because she has not been paid from the proceeds of an accident settlement. The doctor then learns that the person failing to make the payment is not a lawyer but claims to be a "public adjuster." *The Bar contacts the Department of Insurance to review the complaint; however, that department may decline to act if the "adjuster" does not refer to himself as a public adjuster and if he has never been licensed as a public adjuster.*

• A lawyer calls to ask what should be done if the opposing party is represented by a nonlawyer (this could be corporate transaction, a family law matter, a tort case, a contract case or just a transactional matter). *Arizona lawyers are prohibited from assisting the unauthorized practice of law pursuant to ER 5.5 and therefore are directed to negotiate directly with the party rather than the nonlawyer claiming to represent the interests of the party.*

Enforcement of UPL Today

Today in Arizona, there is virtually no enforcement or restrictions on the unauthorized practice of law. Arizona shares the

The Unauthorized Practice of Law by Licensed Attorneys: A Perilous Paradox

A LAWYER IN MANY STATES, including Arizona, cannot practice law without a license issued by the state where she is practicing. That is not a problem for a resident in a purely local practice, but most of us are not so localized, because the practice of law and the world of our clients have long been multijurisdictional. Ethical rules make it risky for even a fully competent lawyer to fail to take bar exams and get licensed in all states where she provides legal advice, even if the matter is isolated and the lawyer does not reside in the state where she performed the work. Reforms are under review in state bar associations, the legislatures and the ABA. The wave, however, hasn't reached shore yet, and it is useful to review the ethical traps.

In Arizona, for example, it is a violation of the ethical rules to practice here without an Arizona license (UPL) and to "assist" another person "in the performance of activity that constitutes" UPL. ER 5.5; see also Rule 31, ARIZ.R.S.Ct. Suppose in-house counsel of an international corporation headquartered in New York moves here as general counsel to the company's multibillion-dollar Phoenix-based subsidiary. She may be licensed and of good standing in New York, but that may not be good enough to protect Arizona from unqualified legal work. As I had to when I moved here from the District of Columbia, the general counsel arguably might have to take the full-blown Arizona bar exam. The rules of this game are convoluted. What, for example, is "the practice of law"? Where is it? Does cyberspace change the scenario? Do states really care to enforce a rule that disables multijurisdictional practice?

The American Corporate Counsel Association (ACCA) is tilting a lance at this problem, especially in the wake of the California Supreme Court decision in *Birbrower, Montalbano, Condon & Rank, P.C., et al. v. The Superior Court of Santa Clara County*, 949 P.2d 304 (Cal. 1998). In *Birbrower*, a New York law firm was deemed to have committed UPL and its contingency fee contract therefore became unenforceable because the two lawyers in the firm who did the legal work were not licensed in California, where the work occurred, even though the client was in New York. The client was a parent company incorporated in New York, and the work was accomplished for its California subsidiary, which had entered into a software distribution agreement with a California company subject to California law. The California court held that conferences and preparations for arbitration in California to resolve a contract dispute constituted practicing law and could not be undertaken by New York-licensed attorneys.

ACCA has a proposal, and it is ambitious given that *Birbrower* probably represents the majority rule among the states. ACCA recently submitted a position paper titled *Multijurisdictional Practice Issues* to the ABA's Commission on Multijurisdictional Practice in which it asked for a three-pronged reform.

► First, once a lawyer is licensed in any state, that state becomes her "Home State" and, if she moves, other states would admit her without a bar exam upon a showing of good standing in the Home State and a character check.

Continues on pg. 30

BY GERARD E. WIMBERLY, JR.

1945

Arizona Supreme Court found, "A litigant may be her own attorney, but layman cannot by being appointed attorney in fact be given privilege to practice law." *Mosher v. Hiner*, 154 P.2d 372, 374 (Ariz. 1945), cert. denied, *Lount v. Hiner*, 325 U.S. 874 (1946).

1961

State Bar filed for declaratory judgment defining practice of law. Supreme Court held, "Those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries constitute the practice of law." *State Bar of Ariz. v. Ariz. Land Title & Trust Co.*, 366 P.2d 1 (Ariz. 1961).

CONTINUES ON PG. 30

A Perilous Paradox Continued from pg. 29

► The second prong covers the *Birbrower* lawyers: All U.S. lawyers would enjoy a “driver’s license” to practice occasionally and temporarily outside their Home States upon their agreement to submit to local rules and jurisdiction.

► Finally, ACCA addresses the political problem of enactment of uniform coverage throughout the nation by calling for a model “compact” that would serve as the standard for the envisioned system. The states could act through the Compact Clause of the U.S. Constitution, which provides that states may enter into agreements and compacts with one another, but only with “the Consent of Congress.”

Fees are not the only thing at stake. UPL is a significant ethical violation, and lawyers trying to maintain a multijurisdictional practice have to be very careful that they do not lose their licenses in their home jurisdictions because they didn’t have a license in the jurisdiction where they gave the advice. An Arizona lawyer could violate ER 5.5 by committing UPL in California. Arizona outside counsel, in an interpretive stretch, could be seen as violating ER 5.5(b) by supporting in-house counsel who does not have a license to practice in the locus of the advice. What about knowingly working with or on opposite sides of an unlicensed lawyer in a firm who resides and practices in Arizona? What about in-house counsel hiring unlicensed outside counsel who travels to Arizona to give legal advice? To add sting to this conundrum, ER 8.3 requires that lawyers report violations of the ethical rules under certain circumstances.

Simply put, most everything we do as lawyers is the “practice of law,” according to the Arizona Supreme Court: “acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries.” *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 366 P2d 1, 14 (Ariz. 1961).

Lest one think that’s a mushy concept like “pornography,” keep in mind that lawyers and judges are the privileged interpreters, and they know what they do as lawyers day to day. Thus, advising a company in negotiating a contract is the practice of law. See *In Re Fleischman*, 933 P2d 563, 568 (Ariz. 1997). “A person need not appear in a judicial proceeding to engage in the unauthorized practice of law,” *In Re Creasy*, 12 P.3d 214, which is often overlooked by out-of-state law firms and corporations. Similarly, the practice of law includes “one person assisting or advising another in the preparation of documents or writings which affect, alter or define legal rights; the direct or indirect giving of advice relative to legal rights or liabilities.” *Arizona Land Title & Trust*, 366 P2d at 38. Association with Arizona lawyers does not necessarily provide an exception, because the rules are designed to protect the public from the unauthorized practice of the violator herself. Nor does work for no compensation get one around this bend. *Id.* at 18.

When I think about this problem, I am reminded of the familiar line from *Hard Times* by Charles Dickens: “The law says that? Well I say the law is a ass.” That’s as close to profanity as Dickens ever got. The ACCA proposal deserves our support. 🗳️

Gerard Wimberly is a partner in the business and finance law group at Snell & Wilmer. He practices commercial and government contracting law, counseling as well as litigation. He was Senior Counsel to Motorola from 1995 to 1999, with a focus on government contracts and space communications law.

problem of unauthorized practice of law with other states, as well. Like many states, Arizona enacted UPL legislation by passing a law in 1933 that only persons admitted to practice in Arizona could practice law and made the violation of that law a misdemeanor. That law was sunsetted on January 1, 1985. During the nearly 50 years of the law’s existence, the reality is that few if any prosecutions were brought; the cases were resolved by agreement. States other than Arizona that have the means to limit and enforce UPL violations disclose that very few prosecutions are brought due to limited resources and the difficulty of establishing proof.

The judicial branch and its lawyers are faced with a Herculean task. One of the purposes for establishing a State Bar was set out in Supreme Court Rule 31(a): “to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence, and public service, and high standards of conduct.” As the Hon. Thomas A. Zlaket declared in his State of the Judiciary speech in January, “We can only earn the public’s trust and confidence by providing the very best mechanisms for delivering efficient, impartial and economical justice to each and every one of our citizens.”

Those who try to justify permitting nonlawyers to engage in the practice of law refer to the high costs of retaining the services of a lawyer and further note that UPL rules or statutes are perceived as lawyers protecting their own private interests. Yet, Arizona lawyers and courts have been pioneers in providing inexpensive or free options to those who need legal services. Self-service forms are available on the Web sites of the Supreme Court, the Maricopa County Superior Court and justice courts. The federal courts also offer self-service help on their sites. Attorneys throughout the state offer their services as volunteer lawyers and provide funds for programs offering legal services to those who cannot afford them. The State Bar of Arizona’s brochure titled *I Need Legal Advice—What Should I Do?* provides an extensive list of organizations that provide legal assistance for free or at a reduced cost.

UPL Is Big Business in Arizona

Arizona residents faced with legal questions are bombarded and overwhelmed by nonlawyers offering their legal services. Nonlawyers and disbarred lawyers proclaim their ability to provide legal services at a cost far lower than that of lawyers. Their ads appear on television, radio, billboards, direct mail solicitation and the Internet.

The nonlawyer legal service industry is big business in Arizona. Neal Richard (Rick) Gordon stated in a recent news article that his business, The Divorce Store, has handled 9,000 cases since 1993 and has gross sales in excess of \$1 million a year. Another nonlawyer has testified under oath that his retainer falls between \$750 and \$5,000. These nonlawyers are account-



The proposal of the American Corporate Counsel Association to the American Bar Association can be read at the ACCA’s Web site: <http://www.acca.com/>

UPL: Arizona Timeline

CONTINUED FROM PG. 29

1962

CONTINUES ON PG. 32

Article 26 of the Arizona Constitution became law by general election permitting real estate brokers and salesmen to prepare certain real estate instruments.

able to no agency or the Bar. They do not appear for clients in court. They are precluded from negotiating with opposing counsel. The UPL cases reported to the Bar indicate that the costs of using the services of nonlawyers is often as much as or more than the same services offered by the lawyer who is accountable for his behavior, who can appear in court and who is able to negotiate with opposing counsel.

Lawyers and UPL

UPL not only causes harm for consumers of legal services. The pervasive infiltration of UPL in our legal system cautions each lawyer in Arizona to be alert to his or her obligations with respect to the unauthorized practice of law.

Lawyers have an ethical obligation to supervise the nonlawyers with whom they work. Under the principles of agency law and ethical rules, lawyers are responsible for the actions and work product of the nonlawyers they employ. ER 5.3 requires that partners and supervising attorneys ensure that the conduct of nonlawyer assistants is compatible with the

Tales of UPL Victims

The difficulties and tragedies that befall victims of UPL are featured in stories produced by the Phoenix CBS affiliate KPHO. Stories in their continuing series are available on the Web at www.kpho.com. Click on the banner "Ask 5 Investigates" and then read "Residents Say Man They Hired Cost Them Their Homes."

lawyer's professional obligation. There is an implicit duty to select, train, delegate and review the work of nonlawyers and to ensure that nonlawyers are not engaging in conduct that violates ethics rules.

Lawyers are prohibited from assisting the unauthorized practice of law. Even negotiating with nonlawyers who represent "pro per litigants" may violate ER 5.5. *See Ariz. Op. 99-07*.

UPL: Arizona Timeline

CONTINUED FROM PG. 30

1965-67


Family of cases that affirm only persons admitted to State Bar may practice law in Arizona: *Bloch v. Bentfield*, 403 P.2d 559 (Ariz. Ct. App. 1965)
Ramada Inn, Inc. v. Lane & Bird Advertising, Inc., 426 P.2d 395 (Ariz. 1967)
Haberhorn v. Sears, Roebuck & Co., 427 P.2d 378 (Ariz. Ct. App. 1967)
Hackin v. State, 427 P.2d 910 (Ariz. 1967), *appeal dismissed*, 589 U.S. 143 (1967).

Progress Is Being Made

The Consumer Protection Committee of the State Bar has accepted the challenge to protect consumers from the harm and damage attendant to unauthorized practice of law.

1. The Consumer Protection Committee's Report and Recommendations have been approved by the Board of Governors.
2. The committee is moving forward with the recommendations. It is circulating drafts of specific definitions for the practice of law and unauthorized practice of law to add to Supreme Court Rule 31.
3. The committee, through the Bar's unauthorized practice of law attorney, facilitates the investigation and prosecution of those who engage in UPL by working with prosecutors, the Office of the Attorney General and Trustees of the U.S. Bankruptcy Court.
4. The committee, through the Bar's UPL attorney, assists Arizona attorneys when they encounter unauthorized practice of law by discussing their ethical obligations and providing examples of pleadings and pertinent case law.
5. The committee's brochure *I Need Legal Advice—What*

Should I Do? has been distributed throughout the state.

6. The Bar continues to put on seminars and presentations to consumer groups concerning UPL.
7. The U.S. Bankruptcy Court sanctions document preparers who engage in UPL.
8. The Office of the Attorney General has filed an action against an out-of-state attorney for engaging in the unauthorized practice of law while he was subject to an Assurance to Discontinue Order.
9. The State Bar successfully brought an Order to Show Cause action against a disbarred attorney who continued to practice law.
10. A disbarred attorney is facing a sentence in federal prison for engaging in UPL; however, the sentence is stayed pending a ruling from the U.S. Supreme Court. 

If you have questions and requests for information regarding the unauthorized practice of law, contact Frances Johansen, the Unauthorized Practice of Law Counsel at the State Bar; 602-340-7292 or via e-mail to Frances.Johansen@staff.azbar.org.

1975

Bridegroom v. State Bar concerned the tension between the legislature and the judiciary. The Supreme Court concluded, "The Supreme Court has inherent power to integrate the bar."

1980

Hunt v. Maricopa County held practice of law is within the exclusive authority of the judiciary. 619 P.2d 1036 (Ariz. 1980).

1984

Supreme Court revised Rules that replaced statutes related to practice of law, except there was no replacement for UPL misdemeanor statute. Supreme Court included Exceptions A, B and C to Rule 31.

CONTINUES ON PG. 34