

REPORT OF THE SPECIAL COMMITTEE ON DEFINING THE PRACTICE OF LAW TO THE STATE BAR OF MICHIGAN BOARD OF COMMISSIONERS

Introduction

Michigan statutes outlaw the unauthorized practice of law, but do not make it a crime. The sole enforcement officer is the State Bar of Michigan; the only remedy is that of an injunction. What is, and is not, the practice of law is presently entrusted to the common law, but the common law of the State of Michigan is not an efficient mechanism to communicate to the layperson what the “practice of law” is or is not. A uniform definition of the practice of law may reduce litigation and enhance compliance and will assist with the enforcement by the State Bar of Michigan.

Michigan and her citizens continue to suffer economic hardship, and while the demand for non-lawyer help with legal problems grows, so does the supply of unqualified persons, economically motivated and willing to prey. This increases the threat both to the integrity of the legal profession and to the well-being of Michigan citizens. It also makes it more important than ever to provide guidance to non-lawyers in nonprofit programs providing appropriate assistance and information to the public.

Attached hereto under Appendix I is the Special Committee on Defining the Practice of Law’s (Committee)¹ proposed definition of the practice of law. To emphasize the intent of the proposed definition, the Committee has included a preamble describing its purpose.

The proposed definition of the practice of law codifies and highlights existing common law. The definitive rulings of the Michigan Supreme Court and other appellate cases are re-affirmed. The proposed definition achieves two salutary purposes:

1. It provides clear and accessible guidance to those persons who might venture in to proscribed territory about what they may and may not do; and

¹ The Committee consists of distinguished practitioners across a broad constituency:

Stephen Gobbo (Chair), Representative Assembly
Danny Inquilla, Justice Initiatives Committee
Jerome Pesick, Real Property Law Section
Amy Tripp, Probate and Estate Planning Section (also represented Elder Law and Disability Rights)
James Harrington III, Family Law Council, Family Law Section
Judge Elwood Brown, Judicial Conference Section
Anthony Bellanca, Macomb County Bar Association
Hon. Susan Dobrich, State Bar of Michigan Judicial Crossroads Task Force
Linda Rexer, Michigan State Bar Foundation, Solutions on Self-Help Task Force
Christopher Hastings, Standing Committee on the Unauthorized Practice of Law

Committee members were charged with soliciting input from their constituencies, which was considered by the Committee in doing its work. Biographical summaries for Committee members are attached hereto under Appendix II.

2. It establishes parameters for the various and growing number of public service organizations, such as Kent County's Legal Assistance Center, working to assist the growing number of persons who cannot afford lawyers access to legal information and resources in an appropriate manner, by expressly permitting their good work to continue.

Overview

The State Bar Standing Committee on the Unauthorized Practice of Law ("Standing Committee") first drafted a proposed definition of the practice of law after Washington adopted the first modern rule-based definition in 2001, but the effort was tabled for lack of interest. Since then, Arizona, the District of Columbia, Utah, and Hawaii have each adopted similar rules. These rules are each, to some extent, a model for the proposed definition submitted with this Report.

Interest in codifying the definition of the practice of law in Michigan grew in the wake of the Michigan Supreme Court's decision in *Dressel v Ameribank*, 468 Mich 557, 664 NW2d 151 (2002), a decision which included the following holding:

"We hold that a person engages in the practice of law when he counsels or assists another in matters that require the use of legal discretion and profound legal knowledge." *Dressel*, 468 Mich at 569.

The Standing Committee understood these words to articulate a position that the exercise of legal discretion and profound legal knowledge was a sufficient condition for an actor to be practicing law. Unlicensed persons, however, would argue that the Michigan Supreme Court's holding describes a necessary condition, thus making the performance of many tasks that have for centuries been in the sole domain of licensed practitioners now within the public domain. Lawyers perform many tasks which could be accomplished without the exercise of profound legal knowledge. The key is that lawyers have the training and experience to recognize those situations where a form document, or boilerplate language, will not work. When non-lawyers can hold themselves out as qualified to perform these tasks, the public is at risk, not necessarily because the lawyer would have used profound legal knowledge, but because the lawyer has it available, and can recognize when it is needed.²

In 2009, the Standing Committee resumed its efforts to draft and promote a definition of the practice of law, with the specific goal of clarifying the language discussed above as a sufficient, but not a necessary component of the practice of law. Since then, the economic collapse and the growth in unauthorized legal practices have lent additional urgency to the effort as the State Bar struggles to marshal scant resources to cover a growing problem.

² For example, trust mills sell expensive standard form "living trusts" as a part of a standard estate plan, not understanding that placing the family home and other assets into a living trust will cause them to lose their exemption in the calculus for Medicaid benefits, depriving otherwise eligible Michigan citizens of this critical benefit at a time of their lives when they are least able to address the issue.

In March of 2011, State Bar President Tony Jenkins appointed this Committee, with the following mandate:

- Examine a proposed rule-based definition of the practice of law prepared by the Unauthorized Practice of Law Committee and to provide constructive guidance regarding enhancements, potential benefits to the public and the legal community and potential areas of concern;
- Examine alternative approaches to address the unauthorized practice of law and to consider mechanisms to protect persons needing legal assistance from unauthorized legal practices; and
- Provide a report of conclusions reached by the Ad Hoc Committee and its recommendations to the Board of Commissioners.

This document is that report.

Findings and Conclusions

The Michigan Supreme Court's opinion in *Dressel* revises its prior conclusion that defining the practice of law is "impossible," to find the task merely "formidable." *Dressel*, 468 Mich at 562. The Committee agrees, and commends the Standing Committee for undertaking this challenge, which has involved scores of hours of legislative and judicial analysis, including exhaustive analysis of the practices of all 50 United States, as well as Puerto Rico and Washington D.C.

The Committee unanimously endorses the proposed definition, and recommends it for inclusion into the Rules Concerning the State Bar of Michigan as Rule 16.1, Definition of the Practice of Law. We believe the proposed definition codifies and clarifies Michigan common law, provides *transparency* into issues arising out of the "practice of law," furnishes necessary guidance to lawyers and others, and will enhance the enforcement efforts of the Standing Committee.

There is no magic bullet. Problems arise out of enforcement imperatives. The resources of the State Bar of Michigan are limited.³ Additional enforcement is within the purview of the Legislature; however, these are separate and distinct issues from "defining" the practice of law. Advancing and marshalling support for relevant legislative opportunities are within the purview of the capable hands of the Standing Committee.

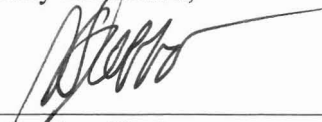
Funding issues and resources for protecting the citizens of the State of Michigan from predatory unauthorized legal practice attacks are properly deferred to future strategic planning or other appropriate State Bar committees, as they are not within the scope of this Committee's jurisdictional mandate.

³ Related issues abound. For example, title companies, who have long been at odds with the Standing Committee, routinely prepare deeds without the benefit of legal counsel, and, presumably in an effort to immunize themselves from fault in the event the deed is defectively drafted, "comply" with the recording requirement of MCL 565.201a by falsely identifying the buyer or the seller of the property as the drafter of the deed.

This Committee urges the Board of Commissioners and the Representative Assembly to recognize the *consensus* efforts of the participants on this Committee and the Standing Committee, and consider the proposed definition in *whole cloth fashion*. The proposed definition is the product of a wide range of perspectives, bringing experience from multiple parts of the legal profession, and incredible effort has been exerted to assure that no language in any particular section of the proposed definition is inconsistent with existing case law or other sections.

This Committee is aware that there is among our membership disappointment, sometimes profound or even anger, with the current status of the common law on unauthorized legal practices, particularly in light of *Dressel*, but has resisted suggestions to remake the law into what we wish it were, as that is the province of the Michigan Supreme Court. Instead, the proposed definition acknowledges the Michigan Supreme Court's authority in this regard, including its authority to further interpret the law. The Committee believes that this approach is necessary to gain serious consideration of the Michigan Supreme Court of the proposed rule-based definition of the practice of law.

Respectfully submitted,



Stephen Gobbo, Chair

Anthony Bellanca
Hon. Elwood Brown
Hon. Susan Dobrich
Christopher Hastings
James Harrington III
Danny Inquilla
Jerome Pesick
Amy Tripp
Linda Rexer

APPENDIX I

[PROPOSED]
DEFINITION OF THE PRACTICE OF LAW

PREAMBLE

This preamble is part of the comment to this Rule, and provides a general introduction regarding its purpose. Every jurisdiction in the United States recognizes the inherent right of individuals to represent themselves in legal matters. In contrast, the privilege of representing others in our system is regulated by law for the protection of the public, to ensure that those who provide legal services to others are qualified to do so by education, training, and experience and that they are held accountable for errors, misrepresentations, and unethical practices. The following rule defining what constitutes the practice of law in Michigan is promulgated by the Michigan Supreme Court pursuant to its inherent authority to define and regulate the practice of law in this state. The purpose of the rule is to protect the public from potential harm caused by the actions of nonlawyers engaging in the unauthorized practice of law.

RULE 16.1 DEFINITION OF THE PRACTICE OF LAW

(A) General Definition: The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person which require the knowledge and skill of a person trained in the law. This includes, but is not limited to:

(1) Counseling or assisting another in matters that require the use of legal discretion and profound legal knowledge.

(2) Selection and/or preparation of any legal document in written or electronic form, including but not limited to deeds, mortgages, assignments, discharges, leases, contracts, releases, trust instruments, wills, codicils, agreements, pleadings, papers, proposed court orders, and other documents purporting to affect or secure legal rights. This does not include preparation of routine forms incidental to a regular course of business.

(3) Representation of another entity or person, including but not limited to representation of entities by officers, directors or agents thereof:¹

(a) in a court;

(b) in a formal administrative adjudicative proceeding or other formal dispute resolution process; or

¹ See MCL 450.681

(c) in any proceeding in which a record is established as the basis for appellate, judicial or administrative review.

(4) Negotiation of legal rights or responsibilities on behalf of another entity or person.

(5) Holding oneself out as authorized or competent to practice law in the State of Michigan, including the use of designations or characterizations such as “esquire,” “esq.,” “attorney at law,” “counselor at law,” “legal representative,” “legal advocate,” or “judge.”

(6) Giving advice or counsel to others about their legal rights or responsibilities, or the legal rights or responsibilities of others.

(B) Exceptions and Exclusions: Whether or not they constitute the practice of law, the following are permitted:

(1) Practicing law authorized by a limited license to practice pursuant to admissions to practice rules, including but not limited to MCR 8.120, MCR 8.126, W.D. Mich. L.R. Civ. 83.1(h), W.D. Mich. L.R. Crim. 57.1 and E.D. Mich. L.R. 83.21.

(2) Acting as a lay representative in an administrative agency or tribunal, when specifically authorized by statute.

(3) Serving in a neutral capacity, for example as a mediator, arbitrator, conciliator, or facilitator in a proceeding that is not subject to judicial review, or, in a proceeding that is subject to judicial review, as provided by statute or court rule.

(4) Participation in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements.

(5) Providing assistance to another to complete a form provided by a court for protection under MCL 600.2950; MSA 27A.2950 or MCL 600.2950a; MSA 27A.2950(1) (domestic violence prevention) when no fee is charged to do so.

(6) Acting as a legislative lobbyist.

(7) Providing through a government or tax-exempt legal self help center or program, neutral information and assistance to the public (including making available legal forms or general legal information about procedural or substantive legal topics) without giving legal advice or legal counsel and without other than a nominal charge.

(8) Activities which are preempted by Federal law.

(9) Such other activities that the Supreme Court has determined by published opinion do not constitute the unlicensed or unauthorized practice of law.

(C) Nonlawyer Assistance: Nothing in this Rule shall affect the ability of nonlawyers to act under the supervision of a lawyer in compliance with Rule 5.3 of the Michigan Rules of Professional Conduct.

(D) Definitions: The term “pleading” refers to documents as defined by MCR 2.110(A). The term “paper” refers to all other legal documents submitted in court and administrative proceedings.

(E) General Information: Nothing in this Rule shall affect the ability of a person or entity to provide information of a general nature about the law and legal procedures to members of the public. Nothing in this Rule shall be taken to define or affect standards for civil liability or professional responsibility.

APPENDIX II

BIOGRAPHIES
Special Committee on Defining the Practice of law

Anthony J. Bellanca, Esq.

Bellanca, Beattie & DeLisle, P.C., Harper Woods, MI

Anthony J. Bellanca was admitted to SBM in 1964. His practice has concentrated on real estate, business organizations, transactional law, and related fields. Mr. Bellanca served as the 81st President of the Macomb County Bar Association (MCBA), the second largest volunteer bar association in Michigan. He has been an active committee chair, director, and officer of the MCBA for more than 30 years and represents the interests of the general practice lawyer in Southeast Michigan.

Hon. Elwood L. Brown

St. Clair County Probate Court, Port Huron, MI

Judge Elwood L. Brown was admitted to the SBM in 1979. He has served as a St. Clair County Probate Judge since 1999 focusing on Juvenile and Family law. He previously held the position of County Prosecuting Attorney from 1993 to 1999 and Assistant Prosecuting Attorney from 1981 to 1991. Judge Brown has served as chair of the Judicial Ethics Committee since 2009 and will serve as the President-Elect of the Michigan Probate Judges Association (MPJA) for the 2011-2012 bar year. Other leadership positions include past president of the Prosecuting Attorney's Association of Michigan and past co-chair of the Professional and Judicial Ethics Committee.

Hon. Susan L. Dobrich

Cass County Circuit Court Family Division, Cassopolis, MI

Judge Dobrich has served as the Chief Probate Judge of Cass County since 1995 and is also assigned to the Family Division of the Cass County Circuit Court. Her service includes: the MPJA Executive Board, the MPJA past President, the Governor's Task Force for Juvenile Justice, the Court Improvement Project, the MPJA representative on the Judicial Crossroads Task Force, the Solutions on Self-Help (SOS) Task Force, and the MPJA representative on the Judicial Conference Section. She has been a member of the SBM since November 1980.

Stephen J. Gobbo, Esq.

State of Michigan, Lansing, MI

Stephen Gobbo is chair-elect of the Representative Assembly and is in his second term as a member of the Standing Committee on the Unauthorized Practice of Law (UPL Committee). He is the Legal Affairs Division Director, Bureau of Commercial Services, Michigan Department of Licensing and Regulatory Affairs. He has been involved with civil, criminal, quasi-judicial, administrative law proceedings, and regulatory matters of public bodies for over 30 years. He is a graduate of the Thomas M. Cooley Law School and was admitted to the SBM in 1997.

James J. Harrington, III, Esq.

Law Offices of James J. Harrington III, PLC, Novi, MI

James J. Harrington, III was admitted to the SBM in 1973 and has focused his practice on Family law matters. He has established appellate records in Family law, including the landmark *Kowalesky v Kowalesky* case, regularly cited by many appellate Courts deciding a business valuation claim. He has presented at Family Law Section seminars about appeals and discovery in divorce cases, authored several published articles in his area of practice, lectured at the University of Detroit Mercy Law School, and served as a ICLE faculty member, including the Family Law Institute.

Christopher G. Hastings, Esq.

Thomas M. Cooley Law School. Grand Rapids, MI

Christopher G. Hastings has served as chair of the UPL Committee since 2008 and been a member since 2000. He practiced complex civil litigation from 1987 through 2006 at Miller Canfield and Drew Cooper and Anding, before leaving private practice to teach civil procedure at the Grand Rapids campus of Thomas M. Cooley Law School. Mr. Hastings serves on the board of trustees of the Kent County Legal Assistance Center and served on the Local Rules Committee of the U.S. District Court (WD Mich). His most recent publication is “Judging in West Michigan: Celebrating the Community Impact of Effective Judges and Courts,” (2011) with Nelson Miller, Kara Zech Thelen, and Devin Schindler. Mr. Hastings is a graduate of the University of Michigan Law School and was admitted to the SBM in 1987.

B. Daniel Inquilla, Esq.

Farmworker Legal Services of Michigan, Kalamazoo, MI

B. Daniel Inquilla is co-managing attorney of Farmworker Legal Services, a statewide division of Legal Services of South Central Michigan that serves migrant and seasonal farmworkers. He represents clients in matters involving immigration law, employment disputes, and access to government benefits. Mr. Inquilla also serves as a Commissioner on the Hispanic/Latino Commission of Michigan. He is a graduate of the University of Notre Dame Law School and Michigan State University, and was admitted to the SBM in 2000.

Jerome P. Pesick, Esq.

Steinhardt Pesick & Cohen PC, Birmingham, MI

Jerome P. Pesick is the managing shareholder of Steinhardt Pesick & Cohen, P.C. where he practices in the areas of eminent domain, condemnation, and property tax appeals. During his 33 years in practice, he has represented clients in major condemnation projects and in property tax appeal cases involving business properties. Mr. Pesick is a member of the Litigation Section and immediate past chair of the Real Property Law Section. As a member of the Oakland County Bar Association, he served as Chair of the Circuit Court Committee. Mr. Pesick is the author of several articles on eminent domain, and is also a frequent speaker, instructor, and lecturer at state and national eminent domain conferences.

Linda K. Rexer, Esq.

Michigan State Bar Foundation, Lansing, MI

Linda K. Rexer has been the Executive Director of the Michigan State Bar Foundation (MSBF) since 1987 and has provided leadership to improve access to justice, especially for civil legal aid for the poor. The MSBF awards about \$10 million annually in grants. Ms. Rexer was a founding member of the Access to Justice Task Force in 1997 and serves on its successor entity, the Justice Initiatives Committee and is a member of its Pro Bono Initiative. She has also provided expertise to other state and national workgroups and task forces working to advance civil and criminal legal aid for the poor. Ms. Rexer received the State Bar’s Michael Franck Award in 2005. She served on the Judicial Crossroads Task Force Access to Justice Subcommittee and co-chairs the statewide Solutions on Self-Help Task Force. She is a graduate of the University of Notre Dame Law School and was admitted to the SBM in 1978.

Amy R. Tripp, Esq.

Chalgian & Tripp Law Offices PLLC, Jackson, MI

Amy R. Tripp was admitted to the SBM in 1998 and is the former Chair of the Elder Law and Disability Rights Section. She is the author of the Chapter on Special Needs Planning, which appears in the ICLE publication: Advising the Older Client or Client with a Disability. She is a frequent speaker on issues of Elder Law and Special Needs, a member of the prestigious Special Needs Alliance and the Academy of Special Needs Planners as well as an active member of the Probate and Estate Planning Section and the National Academy of Elder Law Attorneys. Ms. Tripp received the Nadene Mitcham Courage and Heart Award (2009) from the Michigan Campaign for Quality Care.