

# Current Ethical and Unauthorized Practice Issues Relating to Endeavors to Assist Pro Se Litigants

by James M. McCauley, Ethics Counsel

The Virginia Supreme Court states that “the right of individuals to represent themselves is an unalienable right common to all natural persons.” Rules of Court, Part 6, § I (Introduction to Unauthorized Practice Rules and Considerations). Yet, many self-represented litigants find that they cannot obtain even the most basic information about where to file, what forms to use and what procedures apply when they bring their legal matters to court. The increasing trend of unrepresented litigants in the judicial system has been termed a “*pro se* crisis” by legal commentators. Judges, clerks and lawyers all recognize the special problems that *pro se* litigants bring to the judicial system.

Three reasons are often given for why court clerks cannot give legal advice or assist self-represented litigants in filling out court forms or pleadings. The first reason is neutrality—court clerks must remain neutral and cannot promote one party over the other. The second reason—impartiality—is much like the first. Advising a party what to do or how a party might bring a matter before the court advantages one court user over another. The third reason often cited for not assisting *pro se* litigants is the unauthorized practice of law.

Although lawyers are encouraged in the *Rules of Professional Conduct* to assist those who cannot afford a lawyer and to promote access to legal services, these aspirational precepts are in conflict with other ethics rules that make it difficult for lawyers to assist *pro se* litigants. Thus, lawyers willing to participate in *pro se* assistance projects have serious ethical issues to consider.

## Some Ethical Considerations with “Unbundling” Legal Services

Rule 1.2 (b) of the *Virginia Rules of Professional Conduct* expressly authorizes lawyers to provide limited legal assistance or “unbundling.” Assume, for example, that a person cannot afford a “full representation” by a lawyer, but seeks a lawyer’s assistance in drafting a lawsuit, which the person wants to file *pro se*.

Rule 1.2 and its comments indicate that this is permissible. Comment [4] to Rule 1.2 provides:

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer’s services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to

matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

However, the current *Rules of Professional Conduct*, and its predecessor, the *Code of Professional Responsibility*, did not envision the strong movement toward limited legal assistance which the legal profession now experiences. Indeed, the decisions and ethics opinions concerning “ghostwriting” pleadings for *pro se* litigants reflect the bias of the rules toward a “full” or “complete” representation. Ghostwriting is a practice whereby an attorney may prepare, for example, a lawsuit for a *pro se* litigant, but the pleading does not disclose who authored it. Courts and ethics committees have condemned attorneys’ ghostwriting lawsuits or pleadings for *pro se* litigants. See, e.g., *Laremont-Lopez v. Southeastern Tidewater Opportunity Center*, 968 F. Supp. 1075 (E.D. Va. 1997) (it is improper for lawyers to draft or assist in drafting complaints or other documents submitted to the court on behalf of litigants designated as *pro se*); *Clarke v. United States*, 955 F.Supp. 593 (E.D. Va. 1997) (describing attorney’s actions as unethical and contemptuous: a deliberate evasion by the attorney of his obligations under the *Federal Rules of Civil Procedure*, Rule 11 to investigate and determine that the pleading is well grounded in fact and in law); *Johnson v. Bd. of County Commissioners*, 868 F. Supp. 1226 (D. Colo. 1994), *aff’d as modified* 85 F.3d 489 (10th Cir. 1996) (attorney who prepares pleadings for *pro se* litigant without disclosing that attorney prepared them engages in conduct involving deceit and misrepresentation).

The Virginia State Bar Standing Committee on Legal Ethics has opined that the practice of ghostwriting pleadings for *pro se* parties is improper and violative of DR 7-105 (A), DR 7-102 (A)(3) and DR 1-102 (A)(4). Legal Ethics Opinion 1592 (1994). See also ABA Informal Op. 1414 (1978) (undisclosed counsel who renders substantial assistance to *pro se* litigant is participating in the *pro se* litigant’s misrepresentation of his status to the court, thus violating DR 1-102).

One reason counsel may be reluctant to include his or her name on a pleading prepared for a *pro se* litigant is that they risk being deemed as “counsel of record” in a case—which is clearly not the intent of the attorney or client. It is not uncommon for courts to insist on continuing representation of a client on whose behalf the lawyer intended only to prepare a court pleading or other legal document. Moreover, counsel risks being identified and sanctioned under Rule 11 of the *Federal Rules of Civil Procedure or Va. Code* § 8.01-271.1 if the court should find that the lawsuit prepared by the lawyer and filed by the *pro se* litigant is frivolous. An attorney who is approached by a client at or near the running of the

statute of limitations, and asked to prepare a protective lawsuit to toll the running of the statute, may not have enough time to conduct a reasonable inquiry to determine if the suit is well grounded in law and fact. Should the attorney turn the client away? Is this consistent with the lawyer's ethical duty to provide legal services to those unable to pay for a complete representation? See Rule 6.1, Comment [1]. Is some legal representation better than none at all?

Rule 1.2 (b), however, still remains useful in other contexts. Lawyers in legal aid offices, staff attorneys for non-profits and *pro bono* lawyers can provide forms of limited legal assistance to parties, including brief specific legal advice or a diagnostic interview. Even these limited forms of assistance, however, may trigger ethical requirements which some lawyers may find burdensome, and which may have a "chilling effect" on lawyers' incentives to participate in such programs. See *e.g.*, Virginia Legal Ethics Op. 1642 (legal advice phone network offered by bar association required participating attorneys to preserve confidences and secrets and screen for conflicts with clients represented by participating attorneys' private law firms). But see Virginia Legal Ethics Op. 1633 (intake/eligibility interview of spouse adverse to current client of legal aid office did not disqualify legal aid office from continuing representation of client provided that there was an immediate referral of spouse to *pro bono* lawyer and legal aid lawyers are screened from information obtained by intake staff). See also Virginia Legal Ethics Op. 1546 (initial interview of wife for a divorce disqualifies entire firm from representing husband even though no formal representation of wife ensued after initial interview); and UPL Op. 119 (*pro bono* services offered by foreign attorney not admitted in Virginia to church-related organization is the unauthorized practice of law).

Lawyers are also concerned about their ethical duty of diligence and thoroughness in preparation in providing even limited services to a client under Rule 1.3. If a lawyer wants to assist a client in preparing a legal document or pleading, must he or she conduct an in-depth interview and thoroughly research all possible issues before undertaking such a task? Malpractice exposure for providing less than adequate representation cannot be overlooked. See, *e.g.*, *Nichols v. Keller*, 19 Cal. Rptr. 2d 601 (Cal. App. 1993) (despite the limited contract between lawyer and client on a workers' compensation claim, the lawyer had a duty to advise the client of the availability of other remedies).

Rule 1.2, which permits "unbundling" on the one hand, cautions that a lawyer cannot limit the representation so much that it violates the requirement of Rule 1.1 that a lawyer provide competent legal services. Lawyers fear that it may be unethical and a disservice to a client to perform only part of functionally indivisible legal representation. In addition, what if the client's opponent is represented by counsel? Rule 4.2 prohibits an attorney from communication with a party which the lawyer knows to be represented by counsel. May a lawyer who is advising a *pro se* litigant coach the litigant to directly negotiate with the represented party without violating Rule 4.2? Rule 8.4 (a) states that a lawyer cannot circumvent a rule of professional conduct through the agency of another.

Critics of the current regulatory framework assert that if the profession is to fulfill its ethical obligation to increase access to the legal system for those who cannot afford the traditional full

engagement of a lawyer, some safe harbors under the rules need to be created so that lawyers providing brief, limited legal assistance can avoid the ethical pitfalls described above. One possible solution to the conflicts/confidentiality problem is to allow the disqualified lawyer (who provided limited legal assistance) to be "screened" so that the conflict is not imputed to other partners or associates in the lawyer's firm as required under Rule 1.10. A lawyer who offers brief, limited assistance on a *pro bono* basis to a low income litigant on how to seek a declaratory judgment on an insurance policy should not see his entire firm disqualified from representing the insurance company in court. Unfortunately, this is exactly what the lawyer faces under the current rules. Another approach is to change the rules so that a lawyer providing limited *pro bono* assistance to low income clients should not be subject to Rules 1.7 and 1.9. This would at least take some pressure off of those who provide only limited brief advice to *pro se* litigants or other low income clients. A rule stating that the attorney-client relationship ends when the attorney completes the limited task or service might also be helpful, so that lawyers working in *pro se* clinics or on hotlines would not need to consider termination or disengagement letters.

In regard to the ghostwriting prohibition, one solution may be to adopt the approach implemented by rule of court in Colorado, which requires disclosure of the name of the attorney preparing the pleading, but states that such disclosure does not constitute an appearance by the attorney unless the attorney is in fact appearing as counsel of record for that client. A rule of court similar to Colorado's might allow the unbundling lawyer to alert the judge on the face of the document "prepared by Attorney X, pursuant to Court Rule Y." In the absence of such a statement, the court may be justified in insisting that the attorney serve as counsel of record, or reprimand the attorney for unethical ghostwriting.

## Unauthorized Practice of Law Considerations *What Constitutes the "Practice of Law?"*

Frustrated with the expense of lawyers, self-represented parties often turn to non-lawyers for assistance, who in turn may be engaged in the unauthorized practice of law when they endeavor to assist such persons. Critical to this discussion is the definition of the "practice of law." Part 6, Section I of the *Rules of the Virginia Supreme Court* defines the "practice of law": Generally, the relation of attorney and client exists, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill. Specifically, the relation of attorney and client exists, and one is deemed to be practicing law whenever:

- One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.
- One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instrument of any character, other than notices or contracts incident to the regular course of conducting a licensed business.

- One undertakes, with or without compensation, to represent the interest of another before any tribunal—judicial, administrative, or executive—otherwise than in the presentation of facts, figures, or factual conclusions, as distinguished from legal conclusions, by an employee regularly and bona fide employed on a salary basis, or by one specially employed as an expert in respect to such facts and figures when such representation by such employee or expert does not involve the examination of witnesses or preparation of pleadings.

The most problematic component of the definition is giving legal advice. Under the above definition, generally, an attorney-client relationship is created and a person is giving legal advice if he or she “furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.” Under this broad definition, what if a police officer gives an arrestee his *Miranda* warning? Isn’t he or she advising the arrestee of his legal rights under the law? What about the legal secretary or paralegal who explains to clients how to fill out a motion for judgment for filing in general district court? Is it the practice of law if a bank loan officer tells a customer that under federal law, information about his financial history may not be disclosed without his consent?

## Legal Advice vs. Legal Information

Unrepresented users of court services often have questions or seek information from non-lawyer court personnel that often require at least some legal expertise or experience. Non-lawyer court personnel are frequently trained and directed that they cannot provide legal advice to *pro se* litigants. Unfortunately, over-cautious adherence to the UPL prohibition results in court clerks and personnel withholding useful information from the *pro se* litigant. In addition, this deprives the court personnel of an opportunity to provide meaningful public service to the unrepresented litigant. Courts and clerk personnel are also concerned about meeting the demands and workloads created by the ever-increasing numbers of unrepresented litigants. Not only do litigants feel deprived of access to justice when clerks fail to respond to their requests for information on how to use the courts, but in many instances they are without practical means to access justice because of their unfamiliarity with the court system, procedures, terminology and forms. Moreover, members of the public view the court clerk as a public servant, compensated by them as taxpayers and from the filing fees paid for using the court.

Providing legal advice is the primary function of lawyers. While there are certainly “gray areas” some distinctions can and must be drawn. Legal information is generic. Such information applies to all or a class of people in a particular situation. A police officer who reads an arrestee his *Miranda* rights is providing legal information, not legal advice to the person he has arrested. No reasonable person would assert that the arresting officer is “giving legal advice” when reading the *Miranda* warnings to a person under custodial interrogation.

The Virginia State Bar’s Standing Committee on Unauthorized Practice of Law has distinguished between legal advice and legal

information in some of its written advisory opinions. For example, in UPL Opinion 131 (1989), the committee opined that non-attorneys may provide general information about legal matters, in this case religious freedom, to members of the general public through seminars, publications and replies to written and telephone inquiries. In UPL Opinion 104 (1987) the UPL Committee approved of an attorney licensed in a foreign jurisdiction (and therefore a “non-lawyer” for purposes of activity in Virginia) publishing articles containing general legal information in a Virginia newspaper. The committee stated that “general legal information is to be distinguished from specific legal advice to specific clients with regard to their respective problems.”

In Maryland, “legal information” is characterized as knowledge “about the existence of legal rights and remedies” and “about the manner in which judicial proceedings are conducted,” but not “advice” about whether one person’s “particular circumstances suggest that she should pursue a particular remedy.” Providing legal information includes helping one “prepare a legal pleading or other legal document on her own behalf by defining unfamiliar terms on a form, explaining where on a form the victim is to provide certain information, and if necessary, transcribing or recording the victim’s own words verbatim.” Md. AG Op. No. 95-056 (1995) (discussing the rights of, and restrictions on, lay advocates who provide services to victims of domestic violence).

Much of the concern about court staff providing assistance to *pro se* litigants is based on the perception that, in so doing, they may be engaging in the *unauthorized* practice of law. One reform proposal is simply to adopt a court rule stating that advice given by court clerks to members of the public using the court system is not the unauthorized practice of law, because the new court rule authorizes the giving of limited legal advice in such circumstances. Since the Virginia Supreme Court has the power to promulgate rules stating whether certain activity is the unauthorized practice of law, the court can exempt assistance given by court personnel to *pro se* litigants, whether or not such activity constitutes the practice of law. The Supreme Court of Florida recognized this concept in its family court rule governing self-help programs. *See* Fla. S. Ct. R. 12.750 (e). A committee of the Washington Bar Association reached the same conclusion. The committee, charged with the task of developing a comprehensive definition of the “practice of law,” excluded from its proposed rule the activity of “serving as a court house facilitator pursuant to court rule . . . whether or not such [activity] constitute[s] the practice of law.” Washington State Bar Association Committee to Define the Practice of Law, Final Report at 5 (1999).

There has been significant literature and interest on the subject of reforming UPL rules and expanding the permissible scope of law-related activity by non-lawyers. However, even modest reform of these rules is slow and deliberate. In fact, due in part to backlash against proposals for multidisciplinary practice, the ABA and many states are calling for increased enforcement of the prohibitions against unauthorized practice of law. Consequently, many proposals to change the UPL rules or the definition of the practice of law are likely to be resisted by the organized bar. Therefore, assuming there is a “*pro se* crisis” in Virginia, the judiciary will have an active role to play in this area. The bench and the bar must work together to address this problem, including whether it is fea-

sible to reform the roles that court clerks and trained lay advocates may play in the judicial process. In addition, the judiciary needs to educate the organized bar about the “*pro se* crisis” as many lawyers do not appreciate the significance of the problems facing the courts by the increasing numbers of unrepresented litigants.

Some progress in this area will have been made if the Virginia Supreme Court approves new Rule 6.5 proposed by the Virginia State Bar’s Standing Committee on Legal Ethics,<sup>1</sup> which relaxes the imputed conflicts rules for attorneys providing limited pro bono legal services on behalf of non-profit and court annexed legal services organizations. The committee adopted this specific conflicts of interest rule in recognition of the distinctive nature of services provided in this context. By minimizing imputed conflicts of interest, the proposed rule is intended to encourage private practitioners to serve on pro bono hotlines and assist legal aid clients on a short term basis, i.e., telephone consultation or document preparation.

## Conclusion

Courts must provide self-represented litigants with the information they need to bring their cases before the court. If the courts are to maintain the public trust and confidence, and serve as the primary forum for resolving legal disputes, they must be user-friendly and, as much as possible, accommodate those who cannot afford to hire a lawyer to handle their case. There must, of course, be limits on how much advice a court clerk may give to a *pro se* litigant. A number of courts have developed guidelines for court clerks indicating the types of questions they may answer and what information and assistance they can provide. Court clerks and lay advocates may be capable of assisting unrepresented litigants in routine and simple legal matters but are no substitute for lawyers in complex or novel cases. Involving local or organized bar associations will likely require reform of current ethics and UPL rules to encourage their participation. The professional conduct rules must allow lawyers ethically to provide limited, discrete advice or services to persons who cannot afford full or complete representation in court or in other non-litigation transactions. Several states have already revised their court rules to explicitly permit discrete task representation or “unbundling.”<sup>2</sup>

A special task force created by the Virginia Supreme Court has been studying ways to improve access to court services for *pro se* litigants. This task force, composed of judges, court clerks and lawyers has issued a report<sup>3</sup> with specific recommendations, including: adopting a rule of court that specifically enables clerks and staff to provide information to persons interested in the courts and judicial system without engaging in the unauthorized practice of law; developing guidelines, protocols and training for clerks’ offices and magistrates in assisting self-represented litigants; provide training, protocols and scripts for judges to use in managing cases involving self-represented litigants; expand the use of dispute resolution coordinators and mediators on site in the trial courts to screen cases for mediation and early neutral evaluation; advocate increased funding of legal aid offices; expand and improve collaborative projects between legal aid offices and the private bar such as legal hotlines and pro bono panels; establish a study committee to consider the feasibility of unbundling legal services; consider the adoption of uniform discovery forms for

civil cases; study limitations on fee arrangements in domestic relations cases and consider options that may be more flexible and inexpensive to clients; review court forms for content and appearance to consider revisions that would enhance “user friendliness; develop a grant application to pilot the development of a Web-based kiosk or information system for use by all litigants; establish resources statewide such as pamphlets, videos, brochures, etc., on the legal system, court processes and procedures; develop a code of conduct for self-represented litigants; study, develop and pilot models for providing pre-trial services in civil cases; establish pilot court services centers for self-represented litigants; study whether the use of commissioners in chancery should be abolished or restricted due to costs to litigants; and convene a standing advisory committee on self-represented litigation.

The American Bar Association has also created a special task force which is charged with rewriting the definition of the practice of law. This task force is soliciting written comments and holding public hearings as it goes about its mission. It is hoped that the draft definition which the ABA task force will use for its public hearings, though far from perfect, will generate productive discussion and comment.<sup>4</sup>

### Endnotes

1 Council of the Virginia State Bar approved proposed Rule 6.5 at its most recent meeting in Roanoke on October 18, 2002:

#### RULE 6.5 Nonprofit and Court-Annexed Limited Legal Services Programs

- (a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:
- (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
  - (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.
- (b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

#### Comment

- [1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services—such as advice or the completion of legal forms—that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer’s representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. *See, e.g.*, Rules 1.7, 1.9 and 1.10.
- [2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client’s informed consent to the limited scope of the representation. *See* Rule 1.2(b). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.
- [3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer’s firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

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# Fairfax Bar Honors Pro Bono Award Winners and Chief Justice Carrico

The Fairfax Bar Association held a tribute to the Honorable Harry Lee Carrico and the annual *pro bono* award winners on November 13, 2002, at the Fairview Park Marriott.

The Pro Bono Lawyer of the Year award was presented to Leslie Weber Hoffman. Hoffman handled a complex custody matter involving a child orphaned by the terrorist attack on the Pentagon. She was a volunteer for various bar and community projects, including serving as a circuit and juvenile court mediator and acting as a guide for students touring the courthouse.

Shoun & Bach, P.C. won the Pro Bono Law Firm of the Year award for its commitment to the representation of poverty and low-income clients in contested family law matters through the Pro Bono Program's Family Legal Assistance Project., Shoun & Bach took on domestic relations cases, and agreed to continue accepting them.

The Pro Bono Paralegal of the Year honor was awarded to Zoila Morales-Minan, for her devotion and commitment to the Pro Bono Program's Neighborhood Outreach Program at the Herndon Neighborhood Resource Center. For two years, Morales-Minan used her bilingual skills to put the clients at ease and to assist them in presenting their legal issues to a volunteer attorney.

Calvin Larson was recognized for his contributions to the underserved by receiving the James Keith Public Service Award. In addition to his volunteer efforts at the Whitman-Walker Clinic, Larson helped poverty clients in homeless shelters, and served the Reston community in various civic endeavors.



At the awards dinner were (left to right): Leslie Weber Hoffman, Edward Walinsky (for Shoun & Bach, P.C.), Zoila Morales-Minan and Calvin Larson.

## CALL FOR NOMINATIONS

### 2003 LEWIS F. POWELL, JR., PRO BONO AWARD

The Lewis F. Powell, Jr., Pro Bono Award was established by the Special Committee on Access to Legal Services of the Virginia State Bar to honor those attorneys and attorney groups that have made outstanding pro bono contributions. The Access Committee annually reviews all nominations and decides upon the recipient. **The deadline for receipt of nominations is January 10, 2003.** The award, a framed, limited edition print of the painting "Patrick Henry Arguing the Parson's Cause," will be presented at a ceremony during the Thirteenth Annual Pro Bono Conference. See [www.vsb.org/probono/powell03\\_nominations.pdf](http://www.vsb.org/probono/powell03_nominations.pdf)

Visit the Pro Bono page on the VSB Web site for **free and low-cost pro bono trainings and opportunities** listed at [www.vsb.org/probono/](http://www.vsb.org/probono/).

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- [4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.
- [5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.
- 2 See note 3, *infra*, at page 35.
- 3 Supreme Court of Virginia *Pro Se* Litigation Planning Committee, *Self-Represented Litigants in the Virginia Court System* (September 2002).
- 4 The ABA task force is using the following draft definition of the "practice of law":
- (a) The practice of law shall be performed only by those authorized by the highest court of this jurisdiction.
- (b) Definitions:
- (1) The "practice of law" is the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law.
- (2) "Person" includes the plural as well as the singular and denotes an individual or any legal or commercial entity.
- (3) "Adjudicative body" includes a court, a mediator, an arbitrator or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.
- (c) A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another:
- (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;
- (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;
- (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or
- (4) Negotiating legal rights or responsibilities on behalf of a person.
- (d) 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;
- (2) *Pro se* representation;
- (3) Serving as a mediator, arbitrator, conciliator or facilitator; and
- (4) Providing services under the supervision of a lawyer in compliance with the Rules of Professional Conduct.
- (e) Any person engaged in the practice of law shall be held to the same standard of care and duty of loyalty to the client independent of whether the person is authorized to practice law in this jurisdiction. With regard to the exceptions and exclusions listed in paragraph (d), if the person providing the services is a nonlawyer, the person shall disclose that fact in writing. In the case of an entity engaged in the practice of law, the liability of the entity is unlimited and the liability of its constituent members is limited to those persons participating in such conduct and those persons who had knowledge of the conduct and failed to take remedial action immediately upon discovery of same.
- (f) If a person who is not authorized to practice law is engaged in the practice of law, that person shall be subject to the civil and criminal penalties of this jurisdiction.

#### Comment

- [1] The primary consideration in defining the practice of law is the protection of the public. Thus, for a person's conduct to be considered the practice of law, there must be another person toward whom the benefit of that conduct is directed. That explains the exception for *pro se* representation. The conduct also must be targeted toward the circumstances or objectives of a specific person. Thus, courts have held that the publication of legal self-help books is not the practice of law.
- [2] The exception for *pro se* representation in paragraph (d)(2) contemplates not only self-representation by an individual, but also representation of an entity by an authorized nonlawyer agent of the entity in those jurisdictions that permit such representation.

## Community Service Expands at Appalachian School of Law

Students at the Appalachian School of Law will contribute more than 10,000 hours of community service this year in Buchanan and nearby counties, according to the law school's interim Dean Paul Lund.

"From the inception of the Appalachian School of Law, the mission has been to develop professionals who serve as community leaders and community advocates. This responsibility starts when students begin classes at the law school," Lund said.

Students must perform 25 hours of public service each semester during their three years at the law school. Because of the larger enrollment this year, more than 60 area projects are benefiting from the student volunteers, said Lu Ellsworth, president of

Appalachian. Students are involved in tutoring in the schools, helping residents at nursing homes and hospices, working at the Humane Society and advocating for abused and neglected children.

Three law students are providing 300 hours of nationally acclaimed service as participants in the Bonner Leaders Program—using work-study funds. Upon completion of this service, students will qualify for an Americorps educational grant.

For more information, contact Lu Ellsworth at (276) 935-4349.

Other similar programs at Virginia law schools were profiled in the February and June/July *Virginia Lawyer* magazines.