

# Avoiding the Unauthorized Practice of Law

(Best Practices in the use of Paralegals and Legal Assistants)

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**“I needed to cut expenses, so I fired our legal department  
and bought *The Best of Judge Judy* on DVD.”**

What is the practice of law anyway?

**IKIWISI**

**“I’LL KNOW IT WHEN I SEE IT”**

# Who determines what constitutes the “practice of law”?

## **Texas Constitution, Art. II, Sec. 1**

Gives the power to regulate the practice of law to the Texas Supreme Court, by giving it the power to regulate judicial affairs and direct the administration of justice in the judicial department.

The practice of law is a privilege, not a right, and non-attorneys have no constitutional right to represent others in litigation. *Thomas v. Estelle*, 603 F.2d 488, 489 (5<sup>th</sup> Cir. 1979)

# Who determines what constitutes the “practice of law”?

## **Texas Supreme Court**

Describes its role as regulating the practice of law “for the benefit of the justice system and the people as a whole.” *In re Nolo Press/Folks Law*, 991 S.W.2d 768, 769-70 (Tex. 1999).

- Further defines the practice of law through its opinions.
- Promulgates the Texas Disciplinary Rules of Professional Conduct.
- Delegates enforcement and discipline to the State Bar of Texas Board of Directors.
- Delegates prevention of UPL to the Unauthorized Practice of Law Committee.



"Don't you think that's an awfully judgemental way to look at things?"

# Who determines what constitutes the “practice of law”?

## **The State Bar of Texas**

### **Tex. Gov’t Code Sec. 81.012. Purposes (the “State Bar Act”)**

In order that the public responsibilities of the legal profession may be more effectively discharged the state bar has the following purposes:

- (1) to aid the courts in carrying on and improving the administration of justice;
- (2) to advance the quality of legal services to the public and to foster the role of the legal profession in serving the public;
- (3) to foster and maintain on the part of those engaged in the practice of law high ideals and integrity, learning, competence in public service, and high standards of conduct...

# What is the “practice of law”?

## TEX. GOVT. CODE Sec. 81.101

“(a) ...the preparation of a pleading or other document *incident to* an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court *as well as a service rendered out of court*, *including* the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.



# What is the “practice of law”?

**TEX. GOVT. CODE Sec. 81.101** (cont.)

“(b) The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.”

# What is the “practice of law”?

## Case Law

The Texas Supreme Court has said that the definition of the practice of law is ultimately a legal question for the courts to decide. *UPLC v. Cortez*, 692 S.W.2d 47, 51 (Tex. 1985), *cert. denied*, 474 U.S. 980, 106 S.Ct. 384 (1985). In *Cortez*, the Texas Supreme Court included all advice to clients, **express or implied**, and all action taken for them in matters connected with the law. *Id.* at 48.

# What is the “practice of law”?

Includes “implied legal advice:”

- *Brown v. UPLC*, 742 S.W. 34, 40 (Tex. App. - Dallas 1987, writ denied) (non-lawyer represented clients on contingent fee basis in personal injury and property damage disputes by negotiating settlements)
- *Green v. UPLC*, 883 S.W.2d 293, 296 (Tex. App. – Dallas 1994, no writ) (passing information about damages between insurance company and client and accepting settlement check payable to both constituted “legal advice”)

# What is the “practice of law”?

Includes “all advice to clients and all action taken for them in matters connected with the law.” *Stewart Abstract Co. v. Judicial Commission*, 131 S.W.2d 686, 689 (Tex. Civ. App. – Beaumont 1939, no writ).

**No compensation need be received** in order to be found to have engaged in the unauthorized practice of law. *Magaha v. Holmes*, 886 S.W.2d 447, 448-49 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1994, no writ).

# Why is the “practice of law” regulated?

“..for the benefit and protection of the people as a whole.” *Hexter Title & Abstract Co. v. Grievance Committee*, 179 S.W.2d 946, 951 (Tex. 1944)

“...in the interest of public welfare and safety.” *Palmer v. UPC of the State Bar of Texas*, 438 S.W.2d 374, 376 (Tex. Civ. App. – Houston [14<sup>th</sup> Dist.] 1969, no writ).

“...[the] need to protect individuals and the public from the mistakes of the untrained and the schemes of the unscrupulous, who are not subject to the judicially imposed disciplinary standards of competence, responsibility, and accountability.” *Garcia v. Comm’n for Lawyer Discipline*, 2007 Tex. App. LEXIS 5944, \*10 (Tex. App. – Austin July 26, 2007).

# How is the “practice of law” regulated?

Texas Penal Code Secs. 38.122, 38.123

It is a third degree felony to falsely hold oneself out as a lawyer, with the intent to obtain an economic benefit, unless licensed and in good standing, in the jurisdiction in which the work is performed. Sec. 38.122

It is a third degree felony (upon more than one conviction) to contract with or advise any person, with the intent to obtain an economic benefit, regarding personal injuries or property damage, including advising whether or not to accept a settlement. Sec. 38.123.

# How is the “practice of law” regulated?

## Unauthorized Practice of Law Committee

Appointed by the Supreme Court and charged with preventing the unauthorized practice of law. Composed of nine members, three of whom are not lawyers. Meets several times a year to look at referrals and decide whether suit needs to be filed to enjoin the practice. Hires volunteer lawyers to pursue claims by filing suit and seeking an injunction. There is no other remedy available to the UPL Committee, but it can file grievances with the State Bar of Texas, like anyone else.

# How is the “practice of law” regulated?

## **The State Bar of Texas Commission for Lawyer Discipline**

- Chief Disciplinary Counsel
- Grievance Committees are formed within Disciplinary Districts that coincide with districts of elected Directors of the State Bar
  - Members are appointed by the State Bar of Texas President
  - At least nine members sit on each committee of which three are non-lawyers
  - Committee chairs assign panels from the committee for summary disposition dockets and evidentiary hearings
- Inquiry and Complaint processes



# Lawyer's Duty to Supervise Paralegals

## Texas Disciplinary Rule of Professional Conduct 5.03

- 1) Supervisory lawyers must ensure the conduct of nonlawyers is compatible with the professional obligations of the lawyer;
- 2) Supervisory lawyers may not order, encourage or permit conduct that would violate the disciplinary rules if engaged in by a lawyer;
- 3) Lawyers must not fail to take reasonable remedial action to avoid or mitigate consequences, **if** conduct does violate the rules, **and** if the lawyer is in a supervisory position over the nonlawyer or is a partner of the firm and the lawyer has knowledge of the misconduct.

# Use of Paralegals – ABA Model Guidelines

“A legal assistant or paralegal is a person qualified by education, training or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency or other entity who performs specifically delegated substantive legal work for which a lawyer is responsible.”

- ABA Board of Governors, 1997

# Use of Paralegals – ABA Model Guidelines

## Guideline 1 –

A lawyer must give appropriate instruction to paralegals about the rules governing the lawyer's professional conduct and require paralegals to act in accordance with those rules.

# Use of Paralegals – ABA Model Guidelines

Guideline 1 (Cont.) –

Delegation is only proper if the lawyer maintains a direct relationship to his client, supervises the delegated work, and has complete professional responsibility for the work product.

*See also* Texas DR 5.03 and 5.05, cmt. 4 (the attorney must maintain a direct relationship with the client)



Dave Coverly

"MISS WILCOX, SEND IN SOMEONE TO BLAME."

# Use of Paralegals – ABA Model Guidelines

## Guideline 1 (Cont.) –

A lawyer must directly supervise paralegals to ensure that, in every circumstance, the paralegal is acting in a manner consistent with the lawyer's ethical and professional obligations.

# Use of Paralegals – ABA Model Guidelines

## Guideline 2 –

A lawyer must determine what tasks are delegable to a paralegal under state law and applicable disciplinary rules, and should ensure the paralegal is capable of handling the task assigned.

# Use of Paralegals – ABA Model Guidelines

Guideline 2 (Cont.) –

The lawyer should provide adequate instruction when assigning projects, monitor their progress, and review the completed work product.

[Review everything before it is efiled]



# Use of Paralegals – ABA Model Guidelines

## Guideline 3 –

Non-delegable duties of a lawyer include: (1) establishing the attorney-client relationship; (2) establishing the amount of the fee to be charged for a legal service; and (3) rendering a legal opinion to a client.

Recall that conduct can constitute the UPL if construed as involving legal judgment (e.g., is this a case that has merit?).

# Use of Paralegals – ABA Model Guidelines

Guideline 3 (cont.) –

*UPLC v. Cortez*, 692 S.W.2d 47, 50 (Tex. 1985), *cert. denied*, 474 U.S. 980, 106 S.Ct. 384 (1985) (while filling out an immigration form with data does not involve legal skill or knowledge, determining which form should be used does constitute the practice of law because it requires special legal skills).

[Paralegals may relay attorney legal advice to the client; and may assist in establishing the relationship, communicating the fee or preparing a legal opinion.]

# Use of Paralegals – ABA Model Guidelines

## Guideline 4 –

A paralegal's status must be disclosed to those with whom they communicate. Designations of "paralegal" and "legal assistant" are appropriate.

# Use of Paralegals – ABA Model Guidelines

## Guideline 9 –

A lawyer may not split legal fees with a paralegal, nor pay a paralegal for a referral or legal business.

[Discretionary bonuses are permissible.]

# Lawyer's Duty to Prevent UPL

DR 5.05 (b)

A lawyer shall not “assist a person who is not a member of the bar in the unauthorized practice of law.”

# True Stories in UPL Jurisprudence

*In re Torres*, 2015 Bankr. LEXIS 221 (Bankr. S.D. Tex. January 23, 2015)

A court has inherent authority to determine what constitutes the practice of law and to inhibit persons from engaging in the practice of law without a license.

A bankruptcy petition preparer may not render any guidance or advice including (1) whether to file a bankruptcy petition; (2) whether filing a bankruptcy case is appropriate; (3) whether the debtor will be able to retain a home, car or other property; and (4) advising on procedures and rights of a debtor in bankruptcy. 11 U.S.C. Sec. 110 (3) (2) (A). **[\$9,600 sanction and referral to State Bar and UPL Committee]**

# True Stories in UPL Jurisprudence

*Bolen v. Crowe (In re Holmes)*, 304 B.R. 292 (Bankr. N.D. Miss. 2004)

Paying \$5 bonuses to non-attorney staff when clients complete and return bankruptcy questionnaires, complete and return retainer agreements, or sign living wills/powers of attorney violates Disciplinary Rules **(similar to Texas)** and 11 U.S.C.S. Sec. 504 (a) (barring fee splitting).

[Remedy may be disgorgement of fees.]

# True Stories in UPL Jurisprudence

*State Bar of Texas v. Faubion*, 821 S.W.2d 203, 207-208 (Tex. App. – Houston [14<sup>th</sup>] 1991, writ denied) (percentage of fees earned on cases was paid to paralegal/investigator).

“Thus, the payment of an annual or other bonus does not constitute the sharing of legal fees *if the bonus is neither based on a percentage of the law firm's profits or on a percentage of particular legal fees* nor is given as a reward for conduct forbidden to lawyers.”



# True Stories in UPL Jurisprudence

*Reich & Binstock, LLP v. Scates*, 455 S.W.3d 178, 182-183 (Tex. App. – Houston [14<sup>th</sup>] 2014, pet. denied) (percentage of fees earned on winning contingency fee cases was paid to consulting expert).

“Although the payments at issue under the Agreement here are couched both as a "bonus" and as an hourly amount, Scates was paid an additional \$30 per hour for each hour he worked out of the particular legal fees that R&B earned when R&B settled for a profit. We agree this amount is not a sum-certain "percentage" of R&B's fees. We do not agree that this amount is not based upon a percentage of the law firm's profits.

“Scates's additional payment is for a sum certain and is based upon a percentage of R&B's profits; that is, the payment is made only if R&B makes a profit: fees above zero percent. And, thus, the payment is shared from a portion—or percentage—of the firm's fees from particular cases.”

# True Stories in UPL Jurisprudence

*Barnes v. W&L*, 1990 Tex. App. LEXIS 2969 (Tex. App. – Houston [14<sup>th</sup> Dist.] 1990).

Following eviction of himself and his roommate from their apartment, a paralegal filed a wrongful eviction lawsuit in county court. Although the pleadings identified him as *pro se* and omitted the use of a bar number, he filed pleadings, appeared in court, and asserted arguments on behalf of both himself *and* his roommate, thus representing both. He also sent letters on his law firm's stationery.

The Court found that there was UPL.

## Closing Notes Regarding Use of Staff:

- Only an attorney can sign a pleading.
- Only an attorney can sign a certificate of service.
- A legal assistant or paralegal may sign correspondence if no legal advice is given and the paralegal's name and title, and the firm name or name of the supervising attorney are clearly identified.
- Paralegals may have business cards but they must clearly identify their title as legal assistant or paralegal, and must be pre-approved by a supervising lawyer.
- Only an attorney may negotiate a settlement.
- A legal assistant or paralegal can appear at docket call, so long as they limit communication to, "the attorney asked me to inform the court that..."



“What if we don’t change at all ...  
and something magical just happens?”

# Who is a lawyer “in the firm?”

## **Tex. Disc. R. Prof. Conduct 7.01 (a)**

7.01 (a) – “[a] lawyer shall not hold himself or herself out as a being a partner, shareholder, or associate with one or more other lawyers unless they are in fact partners, shareholders, or associates.”

## **Tex. Disc. R. Prof. Conduct 1.04 (f)**

1.04 (f) – when a law firm and a lawyer who is not “in” the firm divide legal fees or agree to do so, the division must meet several requirements: (1) either the billing is in proportion to services performed or the lawyers involved assume joint responsibility for the matter, (2) the client consents in writing to the terms of the fee division arrangement, and (3) the total fee complies with the requirement of Rule 1.04 (a) that a fee for legal services not be unconscionable.

# Who is a lawyer “in the firm?”

## **Texas Ethics Opinion No. 577 (March 2007)**

Factors that weigh in favor of a lawyer being “in the firm”:

- Receipt of firm communications
- Inclusion in firm events
- Work location
- Length & history of association with the firm
- Lawyer’s access to firm resources including client files, confidential information, computer data and applications
- Whether the firm and lawyer identify and hold out the lawyer as being in the firm to clients and the public