



## **Domestic Violence Advocates and the Unauthorized Practice of Law**

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*This document is intended for both volunteer and paid staff of nongovernmental domestic violence programs who work directly with victims of domestic violence currently engaged in one or more legal matters related to their battering.*

### **What is the Unauthorized Practice of Law (UPL)?**

There is much confusion, and little uniformity among the states, as to what constitutes the unauthorized practice of law, mostly because the meaning of “practice of law” varies by jurisdiction. Black’s Law Dictionary defines the “practice of law,” in part, as the rendition of legal advice.<sup>2</sup> The American Bar Association provides only a rather circular definition: “relating to the rendition of services that call for the professional judgment of a lawyer.”<sup>3</sup> In fact, the ABA’s Code of Professional Conduct specifically sidesteps any effort to define the practice of law, authorized or otherwise.<sup>4</sup> At the very least, many states agree that “the practice of law is not limited to the conduct of cases in courts.” However, states are not as uniform in finding UPL in other circumstances.

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<sup>1</sup> This document is intended for both volunteer and paid staff of nongovernmental domestic violence programs who work directly with victims of domestic violence currently engaged in one or more legal matters related to their battering. This document is intended to highlight the possible issues for advocates and provide suggestions for better advocacy practice; it is not intended as, and should not be construed as, the provision of legal advice in any capacity. For specific questions or further assistance, contact the Battered Women’s Justice Project at 800/903-0111, ext. 1.

<sup>2</sup> Black’s Law Dictionary ( “not limited to appearing in court, or advising or assisting in the conduct of litigation, but embracing the preparation of pleadings, and other papers incident to actions and special proceedings, conveyancing, the preparation of legal instruments of all kinds, and the giving of all legal advice to clients. It embraces all advice to all clients and all actions taken for them in matters connected to the law.”)

<sup>3</sup> Model Code of Prof’l Responsibility EC 3-5 (1981).

<sup>4</sup> “[I]t is neither necessary or desirable to attempt the formulation of a single, specific definition of what constitutes the unauthorized practice of law.”

The prohibitions on the unauthorized practice of law regulate the delivery of legal services. But what are legal services? Legal services consist principally of one or more of the following: preparing legal instruments, providing answers to legal problems (legal advice), and appearance in a representational capacity before adjudicatory tribunals. Many often make the distinction between the provision of legal advice and legal information, a distinction which can be of great value to non-lawyer domestic violence advocates. The differentiation between “legal advice” and “legal information” is not precise but, broadly speaking, “legal advice” would encompass recommendations based on an interpretation the law, whereas “legal information” would only provide facts about the law without any recommendation. A distinction might also be made on the degree of application of the law to the facts of a case. Application of the law to the facts of a case – especially if the application was complex – would be “legal advice.” Providing a statement of the law and allowing the parties to draw their own conclusions would be “legal information.” If a legal concept is simple, explanation of that concept is more likely to be considered “legal information.”

## **How are UPL claims enforced?**

Prior to the 20<sup>th</sup> century, a nonlawyer engaged in UPL only when that person represented someone in court. Enforcement was simple because those who made an appearance before the court could be easily identified.<sup>5</sup> The explosion of “non-court” legal services has made enforcement more difficult, especially when tied to the tenuous understanding of what it means to practice law. Today, however, every state and the District of Columbia prohibits the UPL. Enforcement authority varies by state and in several jurisdictions there are two or more authorities authorized to enforce UPL regulations including state attorneys general, private individuals, state bar committees/counsel, supreme court committees/commissions, and local and county attorneys.<sup>6</sup>

Jurisdictions employ different sanctions and strategies to enforce restrictions against UPL. The most common sanctions employed by states include criminal prosecutions, civil injunctions, restitution, disbarment or other ethical sanction, contempt of court, sanctions in the current legal proceedings, and a private cause of action. Alabama, for example, is one of several states that recognize an aggrieved party’s right to sue an attorney for engaging in UPL.<sup>7</sup> Other jurisdictions also recognize this private right of action by an aggrieved party.<sup>8</sup> Illinois specifically acknowledges a right of

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<sup>5</sup> See Roger C. Cramton, “Delivery of Legal Services to Ordinary Americans,” 44 CASE W. RES. L. REV. 531, 567 (1994).

<sup>6</sup> STANDING COMM. ON CLIENT PROTECTION, AM. BAR ASS’N, 2004 SURVEY OF UNLICENSED PRACTICE OF LAW COMMITTEES (2004), available at <http://www.abanet.org/cpr/clientpro/2004INTRO.DOC>.

<sup>7</sup> *Fogarty v. Parker, Poe, Adams and Bernstein LLP*, 2006 WL 2383376 (Ala. Aug 18, 2006).

<sup>8</sup> Arkansas (*Am. Abstract & Title Co. v. Rice*, 186 S.W.3d 705 (Ark. 2004)); District of Columbia (*J.H. Marshall & Assocs. Inc., v. Burlison*, 313 A.2d 587 (D.C. 1973)); Texas (*Touchy v. Houston Legal Found.*, 432 S.W.2d 690, 694 (Tex. 1968)); Washington (*Kim v. Desert Document Servs. Inc.*, No. 44451-4-1, 2000

licensed attorneys to sue those engaged in the UPL.<sup>9</sup> Since the 1970s, however, there has been a marked decline in efforts to enforce UPL prohibitions despite what some identify as extensive and apparent noncompliance. Criminal prosecutions for UPL violations have been almost nonexistent, and in every state, civil actions against violators have been rare.<sup>10</sup>

An additional complicating factor is that challenges to the practice of law are often conducted privately. Rather than filing a formal charge of UPL, it is more likely that bar associations will issue “cease and desist” letters to lay practitioners or send letters threatening prosecution. Advocates receiving a warning letter from the bar are more likely to terminate their work rather than challenge or test the bar’s theory that they are practicing law. In addition to complaints filed with the relevant state bar associations, disgruntled respondents accused of domestic violence sometimes challenge advocate activities by bringing legal action.<sup>11</sup> While such challenges are very rare, such cases can have enormous consequences for individual advocates and their programs, and defending against claims certainly diverts financial resources from helping victims.

## Justifying the Prohibitions

The reasoning behind such prohibitions of the UPL are numerous and varied, ranging from the idealistic to the cynical. Comment two to Model Rule 5.5 states that the purpose of the rule is to protect the public against rendition of legal services by unqualified persons.<sup>12</sup> Prohibitions against UPL serve several purposes beyond those stated in the comment to the Model Rules. Such restrictions help maintain the legal order by creating a context in which the profession can ensure that attorneys comply with basic rules of professional conduct. Each jurisdiction tests and reviews attorney competence, character and trustworthiness as a prerequisite to bar admission. Without UPL restrictions, jurisdictions will no longer have the authority to ensure that those practicing law are qualified. Any such restriction or exemption, however, is likely to have one or

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WL 987005 (Wash. Ct. App. July 17, 2000)); and West Virginia (*McMahon v. Advanced Title Servs. Co. of W. Va.*, 607 S.E.2d 519, 524 (W.Va. 2004)).

<sup>9</sup> *Richard F. Mallen & Assoc., Ltd. v. Myinjuryclaim.com Corp.*, 769 N.E.2d 74, 76 (Ill. App. Ct. 2002).

<sup>10</sup> The Florida Bar leads the country in funding UPL enforcement, spending approximately \$1.4 billion annually. ABA STANDING COMMITTEE ON CLIENT PROTECTION, 2004 Survey of Unlicensed Practice of Law Committees, Dec. 2004.

<sup>11</sup> An advocate in Houston, Texas reported that her agency was forced to discontinue assisting a DV victim because the agency lacked the resources to defend the repeated lawsuits instituted against it by the alleged abuser. (See Sarah M. Buel, Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay, 28 – OCT Colo. Law. 19, 19 n. 7 (1999)). In North Dakota, the husband in a divorce proceeding brought third-party complaints alleging unauthorized practice of law against the DV advocates who had assisted his wife in a prior abuse proceeding. (See *Selland v. Selland*, 519 N.W.2d 21 (N.D. 1994)). Additionally, the attorney for an alleged abuser filed a complaint claiming UPL against a DV advocate with the North Carolina State Bar. (See Natalie P. McNeal, Suit: Woman Acted as Lawyer, THE NEWS AND OBSERVER (Raleigh, N.C.), Aug. 7, 1999, at B1. and Natalie P. McNeal, State Bar Votes to Caution Advocate, THE NEWS AND OBSERVER (Raleigh, N.C.), Oct. 22, 1999, at B4.)

<sup>12</sup> MODEL RULES R. 5.5 cmt. 2

both of these goals: protecting consumers from incompetent or unethical legal service providers and/or assuring a market for legal services that will provide services of sufficient quality at a reasonable price.

However, it is increasingly common in the public sector for “lay advocates” to offer limited legal assistance to poor and middle-class consumers, individuals who might otherwise lack access to legal services altogether. In fact, in 1995, the ABA Commission on Nonlawyer Practice specifically endorsed the practice of lay advocates in various legal areas, including domestic violence.

## **Issues for DV Advocates and Victims**

Victims of DV need legal assistance if they are to be effective in accessing the protections of the legal system. Lay legal advocates have proven themselves to be invaluable resources to victims as they navigate the civil and criminal legal systems. Such practice, however, does come with risks.

As mentioned earlier, batterers have also used UPL restrictions to take legal action against DV advocates and their programs. Additionally, advocates are often supervised by attorneys who provide answers to questions beyond the scope of a lay advocate’s knowledge or expertise and make referrals in cases where lawyer representation is needed. It is those attorneys who are vulnerable to professional discipline for assisting in the UPL by the lay advocates under their supervision.<sup>13</sup>

Sanctions aside, domestic violence programs must also consider the harm that could result from engaging in activities that constitute the unauthorized practice of law, including but not limited to: 1) compromising a battered woman’s case and creating grounds for appeal by her batterer; 2) instigating a permanent ban of domestic violence organization from the courtroom; and 3) risking the organization’s funding and financing.

Therefore, it is vital that nonlawyer advocates know what specifically they are permitted to do in their jurisdictions, and these practices may be defined at the state level or even vary among individual judges in their jurisdictions. As the definition of the practice of law varies, so does permitted activities for lay advocates. Some advocates provide legal information and education to victims about the possible legal protections;<sup>14</sup> others assist victims in preparation of petitions for protection orders or other court proceedings;<sup>15</sup> some advocates may accompany victims to hearings, depositions or other

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<sup>13</sup> Supervising attorneys, however, are currently vulnerable to legal sanction for “assisting a person who is not a member of the bar in the performance of activity that constitutes the UPL” in violation of the Model Rules of Professional Conduct. (Model Rules of Prof’l Conduct R. 5.5(b) (1998)).

<sup>14</sup> See, e.g., In re Domestic Abuse Advocates, No. C@-87-1089, 1991 Minn. LEXIS 34 (Minn. Feb 5, 1991).

<sup>15</sup> See, e.g., Illinois Domestic Violence Act of 1986, 750 Ill. Comp. Stat. 60/205(b)(3) (2003); N.D. Sup. Ct. Admin. R. 34 § 4(a) (2003).

proceedings;<sup>16</sup> other advocates may even be permitted to address the court on a victim's behalf.<sup>17</sup>

There are, however, limitations on what lay advocates can do or what they can be effective in doing. For example, lay advocates are unlikely to be truly effective in hearings where the respondent is represented by counsel, as they lack the training in hearing procedures and evidentiary requirements. Further, lay advocates may not appreciate the impact of the petition for a protective order on other matters such as divorce or custody proceedings, especially if they are not routinely involved in such courts or proceedings. Lay advocates, particularly those with less practical experience, may have a limited ability to recognize the interrelationship of issues or to appreciate the occasional unusual situation that requires careful legal attention and interpretation. Nor can lay advocates represent the victim in other related legal matters such as divorce proceedings, paternity and child support enforcement proceedings, or applications for benefits. At a minimum, all advocacy programs need to have a means of referring complicated cases to attorneys.

### **Areas of “Safe” Legal Advocacy**

As noted earlier, every domestic violence program must ascertain exactly what definition of “practicing law” might exist in their state and whether their state has specifically defined the activities that constitute the unauthorized practice of law. Many states have separate statutes outlining activities permissible to domestic violence advocates specifically, and domestic violence programs are encouraged to explore whether their state has codified such a statute. A nonexclusive compendium of these statutes is included in Appendices B and C.<sup>18</sup>

Activities by nonlawyer advocates *likely to be permitted* in most jurisdictions include:

- Providing information to battered women about resources and services in their communities;
- Providing information about their jurisdiction's laws (as distinct from interpreting those laws or applying them to an individual's specific situation);
- Sharing general information about court processes, including necessary forms and paperwork; and
- Notifying battered women of hearings, case status and release data pertaining to their abuser.

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<sup>16</sup> See, e.g., Wis. Stat. §895.73(2) (2003).

<sup>17</sup> *Id.*

<sup>18</sup> Appendices B & C should not be presumed to be exhaustive, and are merely meant to supplement your own individual research.

## **Areas of “Cautious” Legal Advocacy**

Depending on whether and how a state’s laws speak to permissible activities by nonlawyers and/or specifically domestic violence advocates (including what individual judges may permit), some *activities are cautiously undertaken* by nonlawyer advocates including:

- Sitting with a battered woman in the courtroom;
- Conferring with a battered woman before and during legal proceedings;
- Assisting battered women in preparing legal documents;
- Addressing the court on behalf of a battered woman (as distinct from holding oneself out as her representative);
- Collecting evidence; and
- Gathering facts for the purposes of trial/litigation.

## **Prohibited Areas of Legal Advocacy**

While no concrete list of activities suffices for every jurisdiction, some of the more commonly *precluded activities* include:

- Advising or providing advice to a battered woman on a legal matter that interprets the law’s application to her situation;
- Speaking in court on behalf of a battered woman in a representative capacity, or in any way representing a battered woman, in a judicial, quasi-judicial or administrative setting;
- Drafting/writing legal documents and pleadings for a battered woman, as distinguished from mere transcription;
- Engaging in legal negotiations on behalf of a battered woman;
- Examining witnesses before or during trial; and
- Receiving compensation for providing any of the above.

## **Best Practice Recommendations**

- Be very clear with domestic violence victims that advocates are not attorneys, that there is no attorney-client privilege (although confidentiality protections may exist), and clarify the limits of available assistance and under what circumstances an attorney should be consulted.
- Avoid giving legal advice, or what can be construed as situation-specific answers, to victims. It is better to refer to patterns or common/historical practices observed of court/judge in the specific jurisdiction, rather than telling a victim what to expect given the facts of her particular situation.

- Limit your *active* legal advocacy to protection order cases and accompaniment or other similar assistance in criminal cases. Avoid providing any such “representation-like” advocacy in more complex matters like custody/divorce or child protection cases.
- Partner with local attorney, legal services office, or state coalition to provide oversight of advocates’ work (but beware UPL claims for supervision of a nonlawyer doing legal work) or have supervising attorney on staff to oversee legal advocacy efforts.
- Know the actors in the various local courts (the reputation of the domestic violence program is key) – judges and clerks/reporters, prosecutors, private attorneys who do protection order work.
- Conduct regular and thorough training for legal advocates, with training materials endorsed by state bar association, state attorney general staff, state supreme court or even local judges/local chief judge.
- If a specific state does not already have one, consider a statutory or regulatory permission for the work of legal advocates in the domestic violence arena. Some legislatures have carved out exceptions for domestic violence advocates, and have stated that when acting within these prescribed limits, they are not considered to be “practicing law.”<sup>19</sup> In other states, supreme courts or attorneys general have issued rulings or opinions that specify the types of permissible advocacy activities on behalf of domestic violence victims.<sup>20</sup>

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<sup>19</sup> See, e.g., Wash. Rev. Cod §26.50.030(3) (1993); GA. Code Ann. §19-13-3(d) (1991); Nev. Rev. Stat. §33.050(3) (1986).

<sup>20</sup> See, In re Domestic Abuse Advocates, No. C2-87-1089 (Minn. 1991); Op. Md. Att’y Gen., No. 95-056, 1995 Md. AG LEXIS 64 (Dec. 19, 1995).