Nova Law Review

Volume 4, *Issue* 2 1980 *Article* 6

Defining The Unauthorized Practice Of Law: Some New Ways Of Looking At An Old Question

Alan Morrison*

*

Defining The Unauthorized Practice Of Law: Some New Ways Of Looking At An Old Question

Alan Morrison

Abstract

It is my thesis today that we need to reexamine the definition of what constitutes the practice of law.

KEYWORDS: Unauthorized Practice, Educational Experience, Responsibility

Defining the Unauthorized Practice of Law: Some New Ways of Looking at an Old Question

ALAN MORRISON*

It is my thesis today that we need to reexamine the definition of what constitutes the practice of law. The traditional inquiry into what activities constitute the unauthorized practice of law is largely, if not wholly, misguided. What is needed is a whole new mode of analysis. Because we are asking the wrong questions, we are getting answers unacceptable to the way our society operates today.

However, before asking about the unauthorized practice of law, we ought to look into the "authorized" practice of law, commonly known as bar admissions. Why do we have bar admissions? What are we trying to protect? First, we are worried about competence; second, about integrity; and third about the loyalty to the client. Those are the generally perceived components of bar admissions.

For the first component we have examinations and educational experience requirements. For the second we have character investigations. And third, we have an ongoing Code of Professional Responsibility by which lawyers are supposed to guide their actions. The purpose of all of these is to protect the public, not to enable lawyers to protect themselves from competition. This protection of the public is, I think we have to acknowledge, a form of paternalism. We are saying to the public that the cost of having a lawyer is not a relevant consideration. For those areas which we say are exclusively the province of the lawyer, no matter how significant the cost may be, you the public have to have a lawyer if you are going to have someone help you at all.

Are there any limits to what the courts have said about how to *stately* define the practise of law? In the United States Supreme Court case of *Ferguson v. Scrupa*,[1] the Supreme Court said that state deter-

* Director, Public Citizen Litigation Group, Washington, D.C. Presented before the Conference on Public Interest Practice in Florida; "Practicing Law for Love and Money," Nova University Center for the Study of Law, Ft. Lauderdale, Fla., November 16, 1979.

1. 372 U.S. 726 (1963).

minations on these matters are not subject to attack under the due process clause. While that ruling antedates many of the recent first amendment cases under which advertising restrictions were successfully struck down, it seems to me that the first amendment attack on the practice of law will not be a successful one.

A few years ago the Supreme Court in the *Feretta*[2] case said that in the area of criminal law, any person has a constitutional right to defend himself. But the courts have consistently held that a defendant does not have a constitutional right to have someone other than a lawyer defend him/her.[3]

One of the few cases in which the Supreme Court or any other court has held unauthorized practice to be unconstitutional is *Johnson v. Avery*.[4] In that decision the Court ruled that prison authorities could not discipline inmates for acting as writ writers where there were no other facilities available, and where there were no lawyers readily available to handle their grievances. Other than in that narrow area there have been very few successful attacks. The only other one of which I am aware is *Sperry v. Florida*,[5] in which the Supreme Court ruled that where the United States Patent Office, pursuant to a congressional statute, ruled that persons other than lawyers may prepare patent applications, the state of Florida could not, because of the doctrine of federal preemption, exclude that kind of activity under the guise of regulating the unauthorized practice of law. There have also been a few other rulings in the area, where the Internal Revenue authorities have established similar kinds of authorization. But other than those isolated situations, whatever a state does through its courts or its legislature is, by and large, immune from constitutional attack.

There is one other federal challenge to the unauthorized practice of law rules under the anti-trust laws. In *Surety Title Insurance Agency v. Virginia State Bar*[6] the district court ruled that the bar itself, as opposed to a court, cannot define or attempt to define what constitutes the practice of law. Although this decision was reversed on other

2. Faretta v. California, 422 U.S. 806 (1975).

3. *See e.g.* U.S. v. Whitesel, 543 F.2d 1176 (6th Cir. 1976).

4. 395 U.S. 483 (1969).

5. 373 U.S. 379 (1963).

6. 431 F. Supp. 298 (E.D. Va. 1977), *vacated*, 571 F.2d 205 (4th Cir.), *cert denied*, 98 S.Ct. 2838 (1978).

grounds, it is generally conceived to have a sound analytical framework. The court said that kind of activity would be an attempt to monopolize and a group boycott, especially in light of the bar's inclination to define the practice of law as broadly as possible to prevent competition.

There is perhaps one other application of the anti-trust laws which has not been brought but which I suppose some day the Justice Department will get around to bringing, and that is to the so called principals which the American Bar Association has entered into with various other professions such as the title insurance companies, banks, trust companies, and so forth. I like to refer to those as territorial truces in which the various professions have divided up the world and decided who can compete with whom in what area. It seems to me that if anyone got around to looking at those agreements they would probably be viewed as horizontal territorial divisions, and hence in violation of the anti-trust laws. We in the District of Columbia have abrogated those principal agreements on the grounds that we didn't want to subject ourselves to any liability. I don't know if those agreements are still being enforced elsewhere, but they continue to remain. Nonetheless the bottom line is that states are by and large free to decide what constitutes the practice of law, at least as far as federal law is concerned.

I want to emphasize, however, that even in the few cases in which unauthorized practice rules have been stricken, the courts have not said that lawyers may *not* engage in those activities under review. The only thing they have said is that you can't keep others from engaging in such activities. For example, no one would contend that writing a fire code is a matter which only lawyers can do. On the other hand, no one would suggest that lawyers ought to be excluded from those allowed to write such codes. The real question before us is the question of exclusivity. That is, what belongs to the lawyers and only to the lawyers, or how has the practice of law been defined?

One definition is that the practice of law is anything usually done by lawyers. As Chesterfield Smith once said to me, "The practice of law is anything my client will pay me to do." I suppose that in my case, that would include riding on airplanes, sitting in court, doing my own filing, my own xeroxing, things that Chesterfield probably doesn't have to do in his practice, but which we have to do in ours. But even that is, of course, a little broad. Somebody has said, "it is anything that lawyers and only lawyers usually do." I don't think you have to be

very astute to see the question begging nature of that kind of definition. It does, however, seem to me that the cases and the definitions such as they are, have broken down into three separate areas. I intend to look at each area; representation in court, drafting of legal documents, and giving legal advice; and see when the questions asked make sense and when they don't.

Perhaps the classic example of lawyer's work is representing someone in a courtroom because that is how the public perceives the lawyer. Yet there are many exceptions to this. The most common, of course, is the right of *pro se* representation, which is, by and large, guaranteed by the constitutions of most states. In the few states where it is not guaranteed by constitution, it has grown up in practice without recent challenge. However, this right doesn't apply if you happen to be a corporation. Corporations are not generally entitled to *pro se* representation. Attempted equal protection challenges to this rule have usually failed. The courts have almost universally said that a corporation is different from an individual. While there is general concurrence with this distinction, no one quite agrees why that should make any difference in this particular context. And when we are dealing with corporations that are little more than legal fictions under which mom and pop run their grocery store, one wonders why they should not be entitled to represent themselves in court.

The Virginia State Bar went so far as to attempt to say that corporations could not even use their own house counsel to represent them in court because that would violate the rule on corporate representation. They have since backed down on that, even as a proposal. Moreover the Virginia rules changed in response to the *Surety Title* case I mentioned earlier, and now the Virginia bar can no longer issue negative opinions as to what constitutes the unauthorized practice of law; that is, they cannot prohibit questionable activities pending approval by the Supreme Court of Virginia. They have to go through fairly complicated procedures to get to the Supreme Court. As a matter of fact, the procedures have been in effect for about a year and a half now and they haven't got the first set of opinions up to the Supreme Court yet. I'm not so sure that the Supreme Court of Virginia is going to like the idea of having to review all these opinions when they come up, but that is quite another matter.

In any event, these equal protection claims on behalf of corporations, have not succeeded thus far. There is one small ray of hope, at

least where the corporations are non-profit organizations that are, like the American Civil Liberties Union or like our organization, exercising their first amendment associational rights. We believe in this area the unauthorized practice of law rules may run afoul, not of the equal protection clause so much, as the First Amendment freedom of association clause.

Beyond courtroom representation, there are a series of cases involving representation in administrative agency proceedings. Courts took the traditional view that litigation is litigation whether you are in the courthouse or before an administrative agency. The cases first arose in the area of workmen's compensation, and I think it is not unfair to suggest that many of the motives of the bar were pecuniary rather than protective in nature. Lawyers saw that they were losing business to lay persons who were representing workers in compensation cases and they didn't like it. I might also say that the courts didn't much like it either. They said that it is irrelevant that the legislature tried to get these cases out of court. The locus of the service, said the court in one case, is irrelevant. I suggest that that kind of response is irrelevant too and that the question ought to be whether having a lawyer is necessary for the protection of the public; and I remain unconvinced that it is.

Now, however, I think that the cases and practices are more accepting that lay persons can represent others before administrative agencies, in the labor area in arbitrations, and in the governmental employee area in connection with grievances. Many contracts, indeed some statutes, specifically provide for representation by persons who are not lawyers. Furthermore, when the lay person is appearing on behalf of a non-profit association, the constitutional arguments I mentioned earlier are even stronger in the context of an administrative agency, particularly where the proceeding is more legislative than judicial in both of functions and format.

The last area where representation is often pressed by lawyers is the legislative area. Yet no authority of which I am aware says that because you are "representing" a client of one kind or another before a legislative body, you must be a member of the bar. Indeed, the opposite is usually the case. Ironically, the legislative representation may be far more important to the client than any court case that will ever arise, and yet it is perfectly all right for non-lawyers to provide such representation.

Speaking of the term, "non-lawyer," every time I use it I ask myself about it. If you go home at night and find your house full of water, you call a plumber. But if you wanted to call somebody else who is not a plumber, would you ever refer to him or her as a non-plumber? Or would you refer to someone else as a non-doctor, or a non-dentist? The only people who manage to divide the world into their profession and everbody else's by putting a "non" in front of them, are lawyers. So I will try, although I don't know that I can succeed, not to use that term here today.

The rationale behind these representation exclusions extends beyond the protection of the client. It is said that we need to insure that lawyers are doing the representing because that's the way to assure that we have orderly and speedy proceedings and thereby protect the independent interests of the courts. I suggest to you that that reasoning, if not wholly specious, is at least vastly overrated. In my view, we ought to start with the premise that the courts exist for the benefit of the people and not vice versa. Only if we can show that allowing persons other than lawyers to represent clients in court would, in fact, impede significantly the interest of other litigants, should we say that the interests of the courts are important. Since we already allow *pro se* representation, the question to be asked is, "will it be any worse if we allow persons who may be knowledgeable, although not trained as lawyers, to help out people who are *pro se*?" As far as I know, there has been no showing anyplace that allowing friends to come in and help out persons in courtroom proceedings is going to produce any sort of significant delay. I should think that those who are urging this proposition ought to have the burden of showing that that kind of delay will occur.

A second point about lay representation is that these cases, by and large, are simple cases. We're not talking about patent litigation, construction litigation, anti-trust suits, or securities fraud cases. We are talking about very simple cases which don't usually require the skills of a lawyer. We aren't talking about situations with complex motions, a plethora of discovery, and detailed procedural maneuvering. To say that lay persons can't conduct anti-trust class action litigation, doesn't answer the question of whether, in most of the cases we are talking about, it makes any sense to say that lay persons cannot be of assistance.

Finally, if we are really concerned about insuring that the client is making a rational choice in being represented by a lay person, the

judge can say to the client, "Do you understand that you have the right to a lawyer? Whether you can afford one or not is a matter for you to determine, but you should know that this person is not an attorney." The judge can say, in a neutral setting, "Think about it." But despite this alternative for dealing with lay assistance, the courts have simply looked the other way.

The consequence of all this is, in general, twofold. Either the case is not brought at all because the person is simply frightened of the courts and won't go in by himself, or he brings the case and loses. Of corse, lay representation won't guarantee a different result, but it may help.

In realistic terms the option is not whether it is desirable to hire an attorney, because most people recognize that in most situations lawyers will provide better representation. The problem is they simply can't afford one. It is rather like the familiar famous saying of Anatole France: "the rich and poor alike are equally forbidden to sleep under the bridges of Paris." That's the problem here.

I don't mean to suggest that the courts and other litigants don't have an interest in seeing that the procedures are orderly and conducted in a fair matter. My point is that this interest is often vastly overstated. What is needed is a re-evaluation of the rules regarding lay representation, particularly at the administrative level, where the theoretical goal is to provide a speedy, inexpensive remedy. It simply makes no sense to impose a requirement adding lawyers who will be neither inexpensive nor speedy.

The second general area in which the practice of law has been held to be exclusive is the preparation of legal documents, such as wills, trusts, deeds and merger agreements. The line seems to be drawn, not at drafting of model or sample documents, but at particularization; that is, trying to draft a particular document for a particular situation. The problem with this analysis is that it proves too much. Because everything we do has legal consequences, every document can be seen as a legal document with legal significance and effects. When you file a credit card application, certain rights are established and waived. Hospital admission forms typically purport to establish legal rights and remedies. When a tenant writes a landlord about repairs, it is a document with legal significance. Acceptance of a check from an insurance company by signing it may constitute a waiver of all kinds of rights that you thought you had. The result is that the lines on legal docu-

ments have been drawn in irrational ways.

For those of you who are either home owners or in the real estate business, you know that the single key document in the purchase of a house is the contract to buy. Yet virtually every state allows that document to be prepared by a real estate broker, or by anybody else. Yet the deed to the property, about which you may be able to do almost nothing because you've lost or waived all your rights in the contract, can only be drawn by a lawyer. Similarly, insurance companies or independent agents prepare the most complicated contracts with all kinds of waivers on this and that. But when it comes to filling in a release form to settle a two hundred dollar automobile accident claim, there are cases which have held that only a lawyer can prepare that document because its much too important to be left in the hands of mere laymen.

Now, in part, this pattern is a concession to the shortness of life. Contrary to popular assumption, lawyers are not ubiquitous, or if they are, the average citizen can't afford to have one looking over his or her shoulder everytime they sign a piece of paper. It is not bad that lawyers are not involved in all these situations. The problem is that the lines are not drawn on the grounds of complexities, as evidenced by the deed which an attorney (or a secretary) must do even if it means simply filling in the blanks. To say that that kind of work must come from a lawyer's office, as opposed to a bank, a title insurance office, or a real estate broker's office, simply doesn't make any sense.

The cases have taken another approach in response to this problem: if the drawing of the legal document is incidental to another line of business, then it will be permitted. Therefore, the real estate broker can draw the contract for the house, in part because that's the way he is going to get his fee, and the title insurance company is sometimes allowed to draw some of the settlement documents because that's what the title company is insuring against, and it wants to be sure they are drawn properly.

Yet, these cases, as I see them, seem to constitute little more than a rationalization for territorial truces between the warring professions. One can hardly discern any sensible pattern in them, particularly in terms of the complexity of the work undertaken or the risk involved. Indeed in most of these cases, we have situations in which complexities seem to be the opposing factor rather than the supporting factor; particularly when deciding whether a title company can do something or a

real estate broker can do something, both of whom are, by and large, knowledgeable in the area.

Now, once again, I don't contend that there are not some documents which should be drawn only by attorneys. What I am saying is that the way we decide which ones are solely the province of lawyers is, in a phrase, intellectually bankrupt.

In a wonderful case in the Virginia Supreme Court in 1947, *Commonwealth v. Jones & Robins, Inc.*,[7] Chief Judge Holt, in his dissent to an opinion which said that only lawyers can prepare deeds, quoted Humpty Dumpty in *Alice In Wonderland* and said "anything I say it is, it is." He then went on to observe that, no matter how hard the Supreme Court tried to make it so, to shuck corn is not to practice law. I don't know if we have any opinions in which the shucking of corn has been held to be the practice of law, but we are coming close. And I suggest to you that the time is now to start looking realistically, and not legalistically, at the question of who may draft what kinds of documents.

Now then, let me turn to the third area: the giving of legal advice. Before I do that, let me raise another question, which arises most frequently in this part of the definition of the practice of law. Do you have to be paid for what you have done in order to be guilty of the unauthorized practice of law? While the element of compensation is present in most other areas, it is most prominent in the giving of legal advice. Compensation alone is not enough to trigger guilt, as the selling of legal forms in the five and dime store demonstrates. Of course, there is an old adage that there is no such thing as a free lunch and that is true in the giving of legal advice. Yet, if compensation is an element, it is often very hard to prove and would pose inordinate burdens in many cases. For this reason, in most jurisdictions, the fact that compensation is given or not given is legally irrelevant. It obviates problems of proof, and, I must confess, it is consistent with the notion that we are protecting the person from getting bad advice, not saving the profession from competition.

Yet I have an uneasy feeling that there is an element of overkill here. What the rules of unauthorized practice of law are primarily trying to prohibit is the charlatan who is preying upon innocent people, not the neighbor who simply wants to give you some friendly advice.

---

7. 186 Va. 30, 41 S.E.2d 720 (1947).

The compensation problem seems to me to be further proof of the irrational rigidity of the present rules.

Returning to the question of what is legal advice, one finds that it is rather like the question of what is a legal document. It's too broad. So the question has been refined somewhat. Legal advice is advice as to the legal consequences of a course of action on which the recipient relies to determine his or her course of conduct. Now I suppose one could say that when law professors, or perhaps bar review teachers, are giving advice as to what constitutes the law, they are giving legal advice too. But no one has suggested that to be a law professor you have to be admitted to the bar of your state. Indeed, I know one esteemed law school in which there are members of the faculty who are not admitted to practice anyplace, even though they are graduate lawyers. And there are some members of the faculty who aren't even law school graduates. So, the general giving of opinions on the state of the law is not sufficient.

What has been deemed unauthorized practice has been giving particular advice about particular legal consequence. To test that approach, let's pose a problem. I am driving down the highway doing 55 mph and there's a large truck in front of me doing 54 mph. I'm riding with my wife, and she says to me, "Pass that truck." I say to her "I can't, I am now at the legal speed limit." She says to me "Oh yes you can. You may exceed the speed limit to pass the truck as long as you resume the speed limit once you have passed the truck and gone back into your lane." Is she practicing law? After all, she has given me particularlized advice as to the legal consequences of a transaction on which I am relying to determine my conduct and for which I may go to jail or lose my driver's license if she is wrong.

Or take a comparable situation in the medical area. I go home at Thanksgiving to visit my parents and my Aunt Gertrude is there. I feel just rotten. My Aunt Gertrude says to me, "What you need to do is to go to bed and take lots of fruit juice and aspirin, and sleep it off." If my doctor would tell me exactly the same thing, does that mean my Aunt Gertrude is practicing medicine without a license? And is that any different from my wife practicing law without a license in the other case, and if so, why?

Take a look at the tax area, and I don't mean simply filling in income tax returns. I'm talking about tax advice and planning. Accountants give tax advice. Life insurance agents give tax advice. Stock

brokers advise you on the tax ramifications of transactions. Your banker may tell you the tax consequences of certain transactions. Surely, the vast industry of pension advisers is giving lots of tax advice. What they are telling you is, if you do it this way you get the benefits of the law, and if you do it that way, you don't get the benefits. Are these people practicing law without a license? Well, maybe yes and maybe no.

Take the *Rosemary Furman*[8] case, for instance. Leaving aside the question of whether Ms. Furman, in typing divorce papers, was preparing legal documents, let's just take the easier situation before she types anything where people come into her office, and say to her, "I would like a dissolution of my marriage." The first question she asks, and the first question on the form she now uses is, "How long have you been a resident of Florida." Now, does she give a legal opinion when she decides what constitutes residence and is that the same as domicile? Is she giving legal advice when she tells someone she or he may or may not get a divorce at that time?

I suggest to you that when we're trying to ask questions about what constitutes legal advice under these circumstances, we cannot come up with any sensible answers. We tried, in Ms. Furman's case, to get the court to back off a little bit from where it had come from in the past. We made a constitutional argument which, both in the original brief, and on rehearing, the court decided by refusing to respond at all. We argued that for indigents and others who cannot afford lawyers, for a dissolution of marriage which is a state controlled monopoly, the decisions in *Boddie v Connecticut*[9] (saying you can't require filing fees for divorces), and *Johnson v. Avery*[10] (the prisoner unauthorized practice case), do not permit a state to require an unaffordable lawyer instead of an affordable legal secretary. In our view the state can no more preclude Rosemary Furman and others from providing that legal assistance than it can preclude prisoners from providing writ writing assistance to their inmates. We lost that case, and we are now going to take it on to the Supreme Court.[11]

Last, let me suggest one other area where legal advice is given all

8. *Florida Bar v. Furman*, 376 So.2d 378 (Fla. 1979).
9. 401 U.S. 371 (1971).
10. 393 U.S. 483 (1969).
11. On Feb. 19, 1980, the Supreme Court dismissed the appeal.

the time. Ann Landers has a column. Undoubtedly you have seen it. She probably practices medicine but on this occasion she was in the legal business. She received a letter in which the writer said "My husband and I fly around together a lot on airplanes. We don't have a will. We got to thinking the other day when we got in the middle of a bad windstorm, what would happen if the plane went down and we were both killed? Are the godparents of our child legally responsible for bringing her up? And if they aren't, what would happen?" Ann Landers replied "No, the godparents are not legally responsible. If you die intestate, the child will probably be brought up by relatives. But you ought to have a will." Is she giving legal advice? She has certainly told people what she thinks the law is. Is she practicing law without a license? And if so, in what jurisdiction? Well, the problem lies not with the answers but with the questions. What we need are new questions that relate to the reasons that we license attorneys in the first place.

Consider the electrician who comes to your home. Do we require an electrician to change a light bulb? No. Do we require an electrician to do the somewhat more complicated operation of changing a fuse? No. How about if you want to put a new fixture in your dining room? Do we require an electrician to do that? No. How about if you want to rewire your house? The answer is, in most cases, that you cannot do it yourself. The state says that's against the law. No matter how much you want to, you cannot do it, and that rule plainly overrides your free choice and your economic considerations. It overrides it because there is an implicit judgment in it, that the risks of harm, in terms of a major fire, are so great, and the likelihood of success by most lay persons is so small, that cost and free choice are simply no longer relevant.

Take my Aunt Gertrude again. If instead of prescribing rest, chicken soup, aspirin and fruit juice, she said, "What you need is open heart surgery performed by me." We would all recoil because the likelihood of her succeeding is so small and the risk of harm to me is so great, that my free choice in that case, even if I consented before everyone in the world, is irrelevant. The state would say no, Aunt Gertrude may not perform that operation on me.

Now even these questions, of course, eliminate the important element of cost. Cost is related to, but in a way different from, questions of free choice. For instance, driving across the country, you are surely more likely to arrive safely in a 1979 Rolls Royce than you would in a

1940 Studebaker. Yet no one has suggested that everyone has to have a Rolls Royce to drive across country. Even if lawyers are the equivalent of Rolls Royces (and I think most people think they are more equivalent to Studebakers), there are some situations in which society should let people drive Studebakers. In my view, an individual should be able to choose secretaries, real estate brokers, accountants or whatever, instead of having to use lawyers, unless there is a very good reason why free choice and added cost must be imposed for the protection of the individual.

This question of when to limit free choice and when to impose additional cost on individuals is, I think, a rather subjective question. It involves a policy orientated question that is very heavily value laden. It is not the kind of question which courts normally address by applying the law to the facts, and it surely is not a legal question in the sense of interpreting the meaning of a statute, contract or other document. It is the type of judgment which is typically made by legislatures and not by courts. Leaving aside the question of whether the legislature in a particular state has the power to change the rules defining the practice of law, I suggest to you that the judgment is much more legislative than judicial in nature. In fact, the legislatures do this kind of judging in a number of areas involving the legal profession, but it generally has been to add to those areas which are the exclusive province of the lawyer. The problem, of course, is that the legislature cannot, or will not, look at these problems on a unified and widespread basis.

What is needed, I suggest, is a quasi legislative agency, and in fact, the courts may now be acting as such. I think this is what the Supreme Court of Florida did in the *Brumbaugh*[12] case when it drew the lines in the area of assisting persons seeking to attain dissolution of marriage in the form of allowing written but not oral communications between clients and secretaries trying to help them.

The problem is that these issues are arising with increasing frequency and are imposing great burdens upon the courts. Judges are by and large not selected because they are representative of broad spectrums of interest, or because they are trained or otherwise qualified to make policy judgments. The courts are, moreover, not set up to issue rules that have wide ranging effects, in part because there is little public input into the process. Indeed, in the *Brumbaugh* case the Florida Bar

12. Florida Bar v. Brumbaugh, 355 So.2d 1186 (1978).

never had an opportunity to really address the issue, because Ms. Brumbaugh was appearing *pro se* and yet, in that very narrow context, the court issued an extremely broad rule that effected virtually everybody in Florida.

As I indicated earlier, the bar plainly cannot take on this task because of its own conflicts of interest and economic self-interest in the area. What we need, I suggest, is a new body, established by the legislature, which has as its component parts three separate institutional interests. One is the interest of the bar, which has a major role to play; second, is the interest of consumers of legal services, who have a very important say in the matter; and third, is a group that I broadly refer to as competitors—title insurance companies, real estate brokers, accountants—who would be performing alternative services, if allowed, in competition with services offered by the bar. This mini-legislature would, I suggest, be able to take into account all of the relevant factors, and to issue rules which would ultimately be subject to judicial review. It would be directed to balance the competing interests under a general standard that would call for a balancing of the risk of harm and the likelihood of success on the one hand, against the right of free choice and the added cost on the other. This question is ultimately a practical or policy question, not a "legal" one that the courts are readily able to handle. Moreover, what is needed is flexibility and not rigidity, a further reason for taking this function away from courts who rely so heavily on precedent.

On first thought the answers to the questions in particular cases will not be easy. They will not be automatic simply because we are asking the right questions of an appropriate constitutional body. On the other hand, we will never come up with sensible answers, until at least we start asking sensible questions.