

Inside Oregon Ethics: The Law of Unauthorized Practice - Some Straight Talk on a Twisted Issue

Peter R. Jarvis, Esq

June 2001

Unfortunately, there is no one "unauthorized practice" problem. There are at least five:

The impostor problem. This problem involves nonlawyers—that is, people who have never been lawyers anywhere, who hold themselves out to be lawyers. This might be thought of as a standard fraud or consumer-protection issue in which the case for prohibition and punishment is clear. Nonlawyers should not be able to hold themselves out as lawyers any more than nondoctors should be able to hold themselves out as doctors.

The bona fide profession problem. Many others employed in lawful professions—including, but not limited to, federal patent agents, tax accountants and remodeling contractors who are expected to advise homeowners about what is and is not "code"—necessarily wind up advising their customers/clients about legal issues. The question here is not one of total permission or total prohibition. It is where to draw the line on a profession-by-profession, if not case-by-case, basis. For example, the law allows realtors to help their clients fill in the blanks on preprinted form agreements but does not allow realtors to draft custom forms for their clients. Of necessity, the public policy issues here vary from situation to situation.

The courthouse facilitator/administrative practice problem. One could argue that this is just an instance of future bona fide professions at an early stage of development. Some courts have authorized some courthouse personnel to help pro se individuals with basic legal questions. Similarly, some administrative agencies allow nonlawyers to represent lawyers in administrative proceedings. In both instances, the key question again is where to draw the line, and the answer may vary from situation to situation.

The independent paralegal problem. Oregon does not presently have a licensing system for independent legal assistants who wish to "represent" clients directly and without the involvement of lawyers. Nonetheless, there are members of the public, and probably some lawyers, who believe that in a market economy, individuals who wish to obtain nonlawyer help on legal issues that do not involve court appearances should be able to do so. This is the law in England, for example. I personally think that independent paralegals should be allowed to practice if, but only if, the state first adopts a suitable regulatory and licensing system that would, among other things, cover such issues as minimum education and continuing education requirements, disclosure and insurance.

The out-of-state lawyer problem. Licenses to practice law are issued on a state-by-state basis and, as a general proposition, each state gets to decide what constitutes the authorized or unauthorized practice of law in that state. Thus an Oregon lawyer sitting in Oregon can advise an Oregon client about a contract with a New York party that will be governed by New York law. So can a New York lawyer sitting in New York. On the other hand, a New York lawyer could not open up a legal office in Oregon even if he or she would limit his or her practice to issues

governed by New York law. Whether this makes any sense when there is also a rule that allows a lawyer from another country to set up an office in Oregon limited to the practice of the foreign country's law is not at all clear. (Note: A rule change is presently pending before the Oregon Supreme Court that would allow a limited license for in-house counsel who are bar members in good standing in states other than Oregon but who are officed in Oregon.)

I mention these five categories to point out the futility of our current "one size fits all" approach to unauthorized-practice issues. If we are to make any progress on these issues, and it is absolutely essential that we do, we must divide and domesticate them. One size fits almost nobody.

End of article...../

If you would like to suggest one or more issues for future topics, please contact me at: Peter Jarvis via e-mail.

About the author: Peter R. Jarvis, Stoel Rives LLP (503) 294-9456 e-mail: prjarvis@stoel.com
An ethics article by attorney Peter R. Jarvis appears each month in the Oregon Law Journal .
Peter gives advice to and represents lawyers who have matters of discipline before the Oregon State Bar. E-mail your questions directly to Peter R. Jarvis. Prior articles by Peter can be seen by going to the Archives navigation button on the left, above.