

REGULATION

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Lawyer Fees Too High? The Case for Repealing Unauthorized Practice of Law Statutes

by George C. Leef

Lawyers are not a popular group among the general public, and the high price of legal services in part accounts for their poor reputation. A principal reason for those high prices is the lawyer's monopoly on providing legal services. Every state except Arizona has an "unauthorized practice of law" (UPL) statute that makes it illegal for anyone who does not meet the requirements set by state bars to render legal assistance. Lawyers invariably argue that UPL statutes serve the public interest. Wrote F. M. Apicella, J. A. Hallbauer, and R. H. Gillespy II in the *American Bar Association Journal* (1995), repealing UPL statutes "would result in the most unwary, guileless members of the public being incompetently represented and advised, if not victimized and defrauded."

But the notion that the best or only way to protect consumers of legal services is to prevent them from hiring people without bar membership is based on fundamental fallacies. First, it assumes that only governments can protect consumers. Second, it assumes that a government-sustained monopoly has no adverse effects that might offset purported benefits. And third, it ignores the mechanism that best protects the interests of all consumers—the free market.

All UPL statutes prohibit individuals from legally practicing law without bar membership. Bar membership, in turn, has four prerequisites for aspiring legal practitioners: (1) they must earn a college degree; (2) they must graduate from an approved law school; (3) they must pass the state's bar exam; and (4) they must convince the bar that they are "of good moral character." Such criteria, however, did not always hold. According to Dietrich Rueschemeyer in *Lawyers and Their Society*, as late as 1951, 20

percent of American lawyers had not graduated from law school and 50 percent had not graduated from college.

Consumer Welfare

Lawyers argue that licensure protects consumers from unqualified or unscrupulous practitioners, but it is more likely that licensure protects lawyers from competition. Many economists and even some lawyers have assailed licensing laws as special interest legislation that is supported by those who want to restrict competition, not protect the public interest. As Professor Walter Gellhorn of Columbia Law School wrote in the *University of Chicago Law Review* (1976):

Licensing has only infrequently been imposed upon an occupation against its wishes. . . . Licensing has been eagerly sought—always on the purported ground that licensure protects the uninformed public against incompetence or dishonesty, but invariably with the consequence that members of the licensed group become protected against competition from newcomers.

Gellhorn's comments apply to members of the legal profession who sought licensing laws. While they argued that licensing was for the public's benefit, no test of competence was imposed on those who were practicing law when the UPL statutes were passed.

Judge Richard Posner likens the legal profession to a medieval guild with an elaborate structure of internal and external controls designed to suppress the kind of marketplace competition that it claims is "unbefitting." In the *Indiana Law Journal* (1993) Posner wrote:

[The legal profession] was an intricately and ingeniously reticulated, though imperfect, cartel. Governmental regulations designed to secure the cartel against competition and new entry from without, and centrifugal, disintegrative competitive pressures from within, held the cartel together against the dangers that beset and ordinarily would destroy a cartel of so many members.

Cartels hold together better when there are fewer members and the cost of

meeting membership requirements is high. Professor Roger Cramton of Cornell Law School wrote in the *Case Western Law Review* (1994), "When the opportunity costs of foregone income are taken into account, the investment in human capital presently required to become a lawyer amounts to at least \$100,000." That cost prices many potential practitioners out of the field and requires those who can afford a legal education to charge high fees.

Licensure is not the sole cartel-protecting device used by the bar. In the past, the bar restricted competition by prohibiting advertising and requiring adherence to bar-established fee schedules. Those restraints, however, have been swept away. In *Goldfarb v. Virginia State Bar* (1975) the Supreme Court struck down bar-imposed fee schedules, and in *Bates v. State Bar of Arizona* (1977) the Court ruled against advertising restrictions; both cases were argued on antitrust grounds. UPL statutes, however, are still a major barrier to competition in legal services.

The English Example

The practical case for permitting a free market in legal services is supported by several case studies. In England, for example, conveyancing services—that is, the legal work associated with transferring real estate titles—had been a legal monopoly for over a century. But in the 1970s, the public complained about the high cost of those services. Like bar associations in the United States, the English Law Society had restrained competition with recommended fee scales and a prohibition against advertising. As Avrom Sherr and Simon Domberger wrote in the *International Review of Law and Economics* (1989), "The conveyancing monopoly came to be viewed with increasing hostility by aspiring homeowners and by a government committed to greater competition."

Consequently, in 1984 Prime Minister Margaret Thatcher's government announced that, beginning in 1987, the market would be opened to "licensed conveyancers" who were not members of the legal profession. That edict began what Sherr and Domberger call "a unique, controlled experiment in the liberalization of the supply of legal services." The result was that the market for conveyancing services was transformed even before licensed conveyancers entered the market. The authors wrote:

Fees started to fall in 1984 . . . a full three years before

licensed conveyancers entered the market. By 1986 the discriminatory element in the combined fees charged for sales and purchases of property had fallen by one-third. . . . The threat of competition has yielded significant welfare benefits. Price discrimination has been reduced, conveyancing costs have fallen in real terms, and there has been a measurable improvement in consumer satisfaction.

The market for legal services clearly responds to economic laws. More competition, brought about by eliminating artificial barriers to market entry, lowers prices and increases the quality of available services.

The Arizona Example

Arizona has also opened up its market for legal services. In 1986, Arizona's UPL statute expired and the legislature declined to reenact it. Since that time, many businesses offering legal assistance by nonlawyers have opened. The benefit to consumers of having the option of contracting with unlicensed practitioners is illustrated in *Arizona Attorney* (1994):

Bob Haves knew he needed help in filing for a divorce when a nine-year search finally turned up his wife in Georgia. But when the air-conditioning and heating mechanic was told by an attorney that he needed to pay an \$800 retainer up front, Haves balked. Instead he turned to one of a growing number of legal document services in Arizona that helped him prepare and file his divorce and even sort through child support, child custody, and spousal maintenance problems. Haves believes that the \$175 he paid for the service was a bargain.

Haves saved \$625 because he was able to shop around for the help he needed.

In California there has been a de facto move away from the lawyer monopoly. The California bar has stopped taking action under the state's UPL statutes against unlicensed practitioners, for example, those offering divorce and other services in low-income neighborhoods. So far there has been no outbreak of customer complaints about unlicensed practitioners providing low-quality service.

Repealing UPL statutes would be particularly beneficial for low-income Americans. A study commissioned by the American Bar Association found that in 1987, 40 percent of Americans near or below the poverty line experienced civil legal problems for which they had no legal assistance. With a free market in legal services, those individuals could patronize an affordable, unlicensed legal practitioner. The success of such businesses in Arizona indicates that many people regard that option as a good alternative to lawyers.

The Bar's Defense

Bar supporters argue that without UPL statutes, incompetent or dishonest practitioners would harm consumers. But that is a case of looking only at the supposed hazards of a free market while ignoring the palpable benefits. For example, the president of the Michigan bar, Thomas G. Kienbaum, wrote in *Michigan Lawyers Weekly* (1995),

[George Leef] would no doubt not allow a member of his family to be operated on by a nurse any more than he would have a will or estate plan prepared by an insurance agent. Yet, he appears to advocate a legal system that would leave the fates of children and families—particularly the poor—to the whims of an unregulated, incompetent or even unscrupulous marketplace.

But most individuals, including those who are poor, are careful decisionmakers. Few individuals would ask a nurse to perform a heart operation, a bookkeeper to perform a difficult accounting analysis, or a patent lawyer to defend against a murder charge even if doing so appeared cheaper than the alternatives.

Moreover, the consumer's self-interest is not the only protection against incompetent practitioners; the provider's self-interest is also important. It is very much in the provider's interest to perform the tasks for which he has contracted and not to leave dissatisfied clients in his wake. A bad reputation will lose customers and money. Professionals who fail through incompetence lose the investments they made in their enterprises and their prospects for future success.

Nonlawyers routinely refer cases that are outside their competence to

lawyers, even though they are not bound by law to do so. In Arizona and California referrals from paralegals to lawyers are common. That indicates that nonlawyers tend not to take cases that they feel are beyond their level of competence. In a leading Michigan unauthorized practice case, *State Bar v. Cramer* (1976), the record disclosed that the defendant had referred over six hundred cases to lawyers. Referrals, another filter against foolish contracting, work to protect consumers from incompetent practitioners.

Experience shows that the vast majority of UPL cases are brought by bar organizations, not injured consumers. Actual cases of harm to clients due to incompetent or dishonest nonattorney assistance are rare. Professor Deborah Rhode wrote in the *Stanford Law Review* (1981) that of all UPL inquiries, investigations, and complaints in 1979, only 2 percent arose from consumer complaints and involved injury.

The Canadian experience is similar. In particular, the province of Ontario reserves most legal services for bar-approved attorneys. The *Report of the Task Force on Paralegals*, prepared for Ontario's Ministry of the Attorney General in 1990, analyzed the 155 cases of unauthorized practice brought from 1986 to 1989. The task force found that 87 percent of the cases had been brought by lawyers, governmental agencies, or the Law Society. Moreover, the report stated, "Those few complaints of incompetence or fraud related to one independent paralegal business [that is] no longer in operation." The report concluded:

The great majority of clients of independent paralegals feel that they have received satisfactory legal services. In fact, the information assembled by the task force suggests that any intimation of large scale incompetence or fraudulent activity by independent paralegals is incorrect and misleading.

Consumers and Information

Supporters argue that UPL statutes help the public assess the competence of service providers. Supposedly, in a free market consumers of legal services generally would be unable to judge the quality of prospective unlicensed practitioners.

There is an element of truth in that argument. It is difficult for consumers to obtain information on the quality and reliability of one-time purchases of

certain goods and services. How does one know who is a good architect, accountant, or lawyer?

But the market for legal services is no different from markets for other services when it comes to the problem of uncertainty, and consumers would approach the problem in the same way. Consumers would ask friends, relatives, and associates to recommend a service provider. They might also be aided by various indicators of success, such as business location. Consumers might also contact agencies, governmental and nongovernmental, that maintain records of complaints against businesses. Finally, consumers might choose to use certification as a screening device if they have reason to believe that possession of a certain certificate shows a level of competence relevant to their needs. In a free market for legal services, consumers would use the same information-gathering techniques to assess the competence of unlicensed practitioners that they now use to assess the competence of licensed ones. The only difference is that they would have a wider field of choice than they do now.

Competence and Credentials

Supporters of UPL statutes contend that only practitioners who have the right credentials can properly assist people with legal problems. "Members of the bar are required to pass a state bar examination which insures a minimum level of legal competency," contends Ryan Talamante in the *Arizona Law Review* (1992). And the Michigan Supreme Court decision in *State Bar v. Cramer* wrote:

Those persons offering advice on legal matters regarding child custody, contract and property rights, inheritance, separate property, and support, to name the more significant, must possess a measure of competency and judgment to insure proper representation.

The implicit assumption behind those statements is that the *only* way a person can demonstrate the degree of knowledge and judgment needed to render legal assistance is by taking all of the steps required for bar membership. That assumption does not withstand critical examination.

Law school provides a broad but shallow education. Would-be lawyers learn a smattering of many subjects but none in depth. In-depth training usually does not begin until graduates land a job and enter an area of specialization. In the *Georgetown Journal of Legal Ethics* (1990) Rhode

notes:

An increasing specialization in legal work, coupled with a growing reliance on paralegals and routinized case-processing systems, undercuts some of the traditional competence-related justifications for banning lay competitors. Law school and bar exam requirements provide no guarantee of expertise in areas where the need for low-cost services is greatest: divorce, landlord/tenant disputes, bankruptcy, immigration, welfare claims, tax preparation, and real estate transactions. In many of these contexts, secretaries or paralegals working for a lawyer already perform a large share of routine services, and this experience has equipped a growing number of employees to branch out on their own.

A law school education, while valuable, does not guarantee competence. For example, a fresh-out-of-law-school attorney is incapable of handling many complex legal matters. A newly admitted bar member is almost never equipped to handle, for example, worker's compensation litigation, but there is no law against "unauthorized worker's compensation practice." Such a law is unnecessary. The legal profession and the public rely on market incentives and disincentives to see that attorneys who claim to have worker's compensation or any other type of expertise have acquired it.

The Federal Example

Another indication that individuals without bar approval can adequately render legal services is that most federal administrative agencies permit unlicensed practitioners to represent parties in cases before them, both adversarial and nonadversarial. According to the *Results of the 1984 Survey of Non-Lawyer Practice Before Federal Administrative Agencies*, published jointly in 1985 by the ABA Standing Committee on Lawyers' Responsibility for Client Protection and the Center for Professional Responsibility, there have been few reports of problems with lay advocates.

The U.S. Patent Office administers a competency test that both attorneys and nonattorneys must pass before they can bring cases before the office. There is no evidence to suggest that the nonattorneys are any less capable than the attorneys in dealing with the complexities of patent law and procedure. And in the case of *Sperry v. Florida Bar* (1963), the Supreme

Court rebuffed an attempt by the Florida bar to prevent a non-bar member from representing Florida clients in patent applications.

Accountants, who are usually not bar members, frequently advise their clients on tax matters, and "enrolled agents" are permitted to appear before the U.S. Tax Court on behalf of their clients in disputes with the Internal Revenue Service. Accountants usually understand tax law as well as or better than many lawyers. As Barlow Christensen argues in the *American Bar Foundation Research Journal* (1980):

The accountant who lives every day in the field of tax law almost surely has an understanding of that field comparable to a lawyer's understanding. Indeed, a proficient accountant probably knows and understands the tax laws far better than does the general practice lawyer.

In Michigan, nonlawyers are permitted to represent parties in proceedings before the Michigan Employment Security Commission (MESC). That requires considerable knowledge of the relevant law, but there is no evidence that claimants or employers have been ill-served by nonlawyers. The Michigan bar in 1985 fought to have a slight ambiguity in the wording of the Michigan Employment Security Act interpreted in a way that would place MESC cases under Michigan's UPL statute, but failed.

In many states, nonlawyer real estate agents have been successfully preparing legal conveyancing documents for years. In Arizona, for example, a state supreme court decision in 1961 ruled that such work constituted the "practice of law" and was therefore illegal (*State Bar of Arizona v. Arizona Land Title & Trust Co.*). The realtors mounted a campaign, vigorously opposed by the state bar, to overturn that decision by amending Arizona's constitution. The public voted in favor of the amendment by almost four to one. Since the adoption of that amendment, no evidence of consumer harm from incompetent document preparation has come to light.

The Discipline Argument

Defenders of UPL statutes make much of the fact that licensed attorneys are subject to disciplinary actions, such as disbarment or sanctions. One objection to this argument is that the bar's disciplinary system is an inadequate consumer protection mechanism. In the *Loyola Consumer Law*

Reporter (1991) attorney Deborah Chalfie wrote:

Nationwide, more than 90 percent of all discipline complaints are dismissed. The bulk of these complaints are dismissed at the screening stage because they are considered outside the agency's jurisdiction, which is confined to enforcing the ethical rules that govern lawyers. Thus, even if all the complaints about over-charging, neglect, and incompetence are true, they state no violation of the ethical rules and are therefore dismissed.

The bar's discipline system does little to deter poor service because sanctions are almost never levied for anything less than criminal behavior, gross and repeated negligence, or unconscionable overcharging.

Supporters of UPL statutes also argue that bar membership is a seal of approval that guarantees quality for consumers. That argument is belied by the fact that when the bar administers sanctions, it often does so secretly; thus, the public gains no valuable information on the reliability of the attorney who has been the subject of disciplinary action. Moreover, bar sanctions seldom redress the financial loss to the client. The alleged efficacy of the bar's disciplinary system to protect consumers is a very slender reed upon which to base the prohibition of legal practice by non-bar members.

Moreover, the absence of a formal system for disciplining unlicensed legal practitioners does not mean they are not subject to disciplinary forces. The competitive marketplace has powerful, built-in incentives for providers to supply high-quality goods and services, which minimizes the need for a formal disciplinary apparatus. As Professor Richard Epstein of the University of Chicago Law School wrote in *Simple Rules for a Complex World* (1995):

There's a regrettable tendency among lawyers to say that if there is no legal remedy, there is no constraint on human behavior at all. Social sanctions cannot be ignored in determining the institutional value of any legal arrangement. No one is socially a free agent where others depend on him, and customers should not be treated as strangers whose preferences are to be disregarded simply because they are unable to win a lawsuit. . . . Virtually everybody involved in business recognizes the enormous importance in business affairs of preserving a reputation for fair and honest

dealing. . . . Where the reputational bond is strong, the legal bonds may be weak, because the incentives for good conduct can be secured without having to incur the extensive administrative costs of any system of liability.

Finally, even if the bar's system of attorney discipline were effective, it would not follow that people should be deprived of the option of contracting for legal services with unlicensed practitioners. The bar's discipline system is arguably one reason why consumers may prefer to deal with licensed attorneys. But just because one product has a superior feature does not mean that consumers should be prohibited from choosing other products.

Local bars presumably will attempt to convince consumers that they will be served better by highly educated, licensed attorneys who are subject to professional disciplinary action for malfeasance. In that way, bar membership could serve as a seal of approval similar to the Underwriters Laboratories label for electrical appliances. If consumers regard the "protection" afforded by the bar's disciplinary system as worth the added cost, they will act accordingly. They should not, however, be deprived of freedom of choice merely because the bar has an established disciplinary system.

An Alternative to UPL Statutes

Certification is a sound alternative to licensing that does not restrict consumer choice. It is a means of informing consumers that a service provider possesses one or more specific qualifications, and it need not involve the government. For example, the Certified Public Accountant designation is earned by those who can pass a rigorous accounting examination, but the exam is voluntary. There is no "unauthorized practice of accountancy" statute. Consumers of accounting services are free to hire accountants who come with the private seal of approval and a higher price tag, or they may use a non-CPA who they believe will meet their needs at a lower cost. Certification provides information without restricting consumer options. In *Capitalism and Freedom* (1962) Milton Friedman wrote:

The usual arguments for licensure, and in particular the paternalistic arguments, are satisfied almost entirely by certification alone. If the argument is that we are too ignorant

to judge good practitioners, all that is needed is to make the relevant information available. If, in full knowledge, we still want to go to someone who is not certified, that is our business; we cannot complain that we did not have the information. . . . I personally find it difficult to see any case for which licensure rather than certification can be justified.

Bar membership too is a form of certification. Without UPL statutes, bars might make this informational device more useful to consumers by certifying attorneys in various subfields of law.

The great advantage of certification is that it is subject to the test of the market. Consumers decide whether the higher fees that typically accompany contracts with certified practitioners are worth the service. Without UPL statutes, the bar's steps to certification would be put to the test of the market as well. Are three years of law school really necessary? Are two years sufficient? If one can pass the bar exam, is graduation from law school necessary? The need to serve consumers should force bars to review and probably refine their requirements and rating systems.

Restoring Freedom

Whatever the purposes of UPL statutes, their principal effect is to limit the freedom of individuals to engage in voluntary transactions. UPL statutes restrict free exchange against the will of those who would sell legal services without bar certification and the customers who would purchase those services.

The nineteenth century French political and economic thinker Frederic Bastiat proposed this test for bad laws: "See if the law benefits one citizen at the expense of another by doing what the citizen himself cannot do without committing a crime." UPL statutes certainly fall into this category.

Consumers are better-off if they can shop for the goods and services they want in a free market. By imposing a very high and costly barrier to entry, the state makes consumers worse off. The case for repealing UPL statutes was summarized well by W. Clark Durant, former chairman of the Legal Services Corporation, in a speech before the ABA in 1987:

We should encourage at every turn the ability of

entrepreneurs, para-professionals and lay people to be a part of the delivery of legal services to the poor and for all people. I've met many eligible clients around the country who can quite capably be advocates in resolving disputes if barriers to practice did not exist. How can doors be opened to others to participate in this profession? In serving others, a private sector deregulated legal profession can deliver a good quality product in much the same way that a good commercial enterprise does. . . . We let the free competitive energies of creative and energetic people in the private sector provide and deliver for us. . . . Such people exist for the delivery of legal services but are blocked by UPL statutes and aggressive bar efforts to halt them.

UPL statutes are inconsistent with the optimal price of legal services, and they are inconsistent with the freedom of individuals to peacefully interact. For those compelling reasons, all UPL statutes should be repealed.

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