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Feature

*32 BARBARIANS AT THE GATE: IMAGE, ETHICS AND THE UNAUTHORIZED PRACTICE OF LAW

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The current controversy surrounding the unauthorized practice of law in Arkansas creates a unique opportunity for attorneys in this state to unify and improve our public image. Though we worry incessantly over our plummeting public image, we are our own worst enemy on that subject because we greatly contribute to the very public perceptions which we decry. Some plaintiffs' attorneys are quick to cast defense attorneys as sinister shysters whose sole purpose is to avoid the truth. Conversely, some defense attorneys cast plaintiffs' attorneys as greedy hustlers who will do or say anything to make a buck. Corporate and tax attorneys are sometimes referred to as leaches on society, taking much and contributing little. These are remarks often heard from attorneys about other attorneys. The public needs little help in drawing these conclusions about us, as we create these images for ourselves when we describe one another with such derogatory language. We don't talk anymore about how a courageous sole-practitioner risked bankruptcy to cause a dangerous product marketed to children to be removed from the shelves. We don't talk about how a determined defense attorney marshaled the forces of a large firm to save a person from financial ruin who has been falsely accused of negligence. We don't talk about the benefit to society when corporate and tax attorneys skillfully negotiate the maze of issues, too complex for most of us to understand, so that a new museum, library or arena is transformed from the drawing board to reality. We don't talk about these things because we have become myopic in our individual perspectives. We want the negative image of attorneys to have been caused by someone else. We seek easy scapegoats. We are far too quick to cast one another as some type of culprit. In order to effectively combat the unauthorized practice of law, it is imperative that we rid ourselves of these false and petty notions and unite as a profession. By recognizing that we must stand together to protect the public and ourselves from the unauthorized practice of law, we have the opportunity to have an impact on the image of attorneys, while reining in a serious and growing threat to the public and our profession.

Most attorneys understandably do not wish to soil their hands by grappling with the tawdry details of unlicensed individuals soliciting personal injury cases. In John Grisham's *The Rainmaker*, such activity was enough to drive the bright, young protagonist from the practice of law. Investigating and dealing with this issue is unpleasant, time-consuming and expensive. As attorneys, we are often unaware of these activities until one of our clients or family is approached in person or by telephone by a non-lawyer seeking legal business. Defense and corporate attorneys oftentimes don't think or don't know that these activities affect them. It is too easy to scoff at the matter as if it is somehow beneath us, or is the problem of someone else. Nothing could be further from the truth. If you are an attorney, it is your problem.

The most salient point, frequently missed by attorneys, is that every unauthorized practitioner of law taints the legal profession directly. The public perceives these unlicensed individuals as lawyers, or as having some role in the legal profession. Even in those cases where a victim knows that the perpetrator is not an attorney, the legal profession still gets the blame. The perpetrator is perceived, at the very least, as being a fringe member of the legal profes-

sion. Consequently, we get the worst of both worlds. The unlicensed person is responsible for causing a bad experience for the victim, and all attorneys are blamed for the mishandling of the matter.

Concern over the unauthorized practice of law has reached new levels now that unlicensed individuals are making inroads into virtually every segment of our profession. Accounting firms are buying law firms and engaging in the practice of law. There are strong arguments that collection agencies have long been practicing law without a license. [FN1] Non-lawyers with a toll free number offer estate planning as if one need only paint by numbers in order to properly protect and distribute one's assets after death. Living trusts are sold by unlicensed individuals with no thought given to the anguish suffered by a family when they learn that it is unenforceable and useless. Non-lawyers offer to do divorce work. Defense attorneys seldom litigate without interference from an adjuster. Insurance companies reportedly are now so bold as to issue written rules to defense firms governing which functions within the firms must be performed by paralegals instead of attorneys. This places defense firms in an untenable ethical dilemma as they attempt to exercise their independent professional judgment and exacerbates the potential conflict between representing the insurer and the insured in the same action. Ethics opinions from around the country reveal that there are intrusions into every area of practice. The harm to the public and to our profession is substantial. However, instead of aggressively attacking the problem, we wring our hands over being perceived as protecting our own and do little or nothing. We have an obligation to ***33** protect ourselves and to protect the public from these intrusions. The fact that these wrongs are being committed within and around our profession intensifies our need to work together to eliminate the unauthorized practice of law wherever we find it.

In the area of tort law, we have been compiling information concerning who is engaging in the unauthorized practice of law and how they are doing so. Individuals of various employment backgrounds, certain independent paralegal services, and a variety of common street hustlers who seek to profit from tort cases by performing functions reserved by law for licensed attorneys are being identified. Some medical providers are also allegedly part of this problem, although this has yet to be proven.

The typical scenario involves unlicensed individuals accessing public records or monitoring police scanners for information concerning victims of tortious conduct. The unlicensed person or group then engages in direct, in-person or telephone solicitation. Attorneys have long been prohibited from engaging in such solicitation techniques, as it is believed that direct solicitation of this nature constitutes overreaching. Currently it is common for new personal injury clients to complain about individuals appearing at their home or hospital room, or calling them on the telephone. This conduct contributes significantly to the negative image of attorneys and we absolutely must put a stop to it.

Unfortunately, the unlicensed person who engages in direct solicitation sometimes does so on behalf of an unscrupulous attorney. We need to identify each attorney who is a part of this problem and ensure that they are appropriately disciplined. Some unlicensed persons hold themselves out to the public as being brokers for attorneys, or offering a service of finding the right attorney. This means simply that the client will be referred to someone with whom the broker has some form of prior arrangement. Some allegedly attempt to handle the case as if they are attorneys themselves. Those who hold themselves out as helping only to find the right attorney will oftentimes issue self-serving statements that they do not give legal advice. But despite their disclaimers, under the existing statutes and under the traditional concepts of the practice of law, they are giving legal advice.

The list of ways that a personal injury case can be mishandled by a non-lawyer is extensive. If the tortfeasor's insurance policy appears to have lapsed just prior to the accident, the non-lawyer usually does not know that the coverage may have still been in force. Under such circumstances, the victim may be incorrectly advised that there is no coverage, so there is no source of recovery. A non-lawyer often does not understand the importance of protecting subrogation interests of automobile insurance carriers or workers' compensation carriers. When the victim gets sued by the workers' compensation carrier after he or she has spent the funds recovered from the third party it is the legal profession that he will blame for his troubles. A non-lawyer is uninformed regarding the legal significance of medicaid liens and ERISA plans. An unlicensed person cannot protect a victim from improper, irrelevant or leading ques-

tions during a taped interview by the adjuster, and does not know how to ensure the recording is inadmissable if the matter proceeds to trial. The non-lawyer is unaware of developing case law which may directly affect the victim he represents.

The non-lawyer has no ethical obligation whatsoever with respect to the victim. He has no reason to be concerned about the long-term consequences of his actions or inactions with respect to whatever compensation might be obtained for the victim. Since trial must always be avoided, cases are settled for far less than their objective value. Evidence is not preserved. Witnesses are not interviewed. First party coverage is not properly utilized so that the victim is protected from bill collectors. Letters of protection are unavailable to the non-lawyer. Broad insurance company authorizations for the release of medical records get signed which permit adjusters to converse with a victim's doctor without an attorney present. Insurance companies are allowed to gather medical records which have no bearing whatsoever on the case, but which can be used to embarrass or intimidate the victim. Non-lawyers know nothing about venue choices, or why they can be important. Complex cases are not properly funded and developed to ensure a proper recovery. Overcharging by medical providers is left unchallenged. To the contrary, it is encouraged by individuals engaging in the unauthorized practice of law. Since the unauthorized practitioner is not governed by rules of ethics, he may encourage the victim to be dishonest with the insurance adjuster. Some may even go so far as to manufacture witnesses, if the potential reward seems to outweigh the risk of getting arrested for insurance fraud. There are as many risks of harm as there are issues and tasks in a personal injury case and the victims who are harmed are left without even recourse to a legal malpractice carrier.

***34** The tactics being employed to practice tort law without a license vary, depending on who is involved. One of the tactics used by unlicensed persons who are not brokers for attorneys is to tell victims that they don't need an attorney. Anti-lawyer rhetoric is used, as well as inflated promises of financial gain and other exaggerations and misstatements. Nothing is out of bounds. Brokers for attorneys will extoll the virtues of the attorneys involved, and speak ill of any other attorney. Since there are no ethical rules to govern them these people may say anything which might help persuade the potential client to sign a contract, without regard to what is or is not the truth.

Attorneys who practice in collections, tax, domestic relations, probate and other areas of practice where unlicensed individuals are making inroads into our profession are all too familiar with the harm to the public when non-lawyers practice in those areas. Presumably, the harms that can befall the public and the profession are equally extensive in those areas of practice as well.

Aggressive enforcement of the prohibition against in-person solicitation must be applied on both sides of the Bar. The tactics of plaintiffs' and defense counsel should be reviewed to ensure compliance with the Model Rules of Professional Conduct. Defense firms allegedly use direct, in-person and telephone solicitation to seek out insurance companies as the source of personal injury business. One customary approach reportedly involves calling an insurance executive known to be in need of legal services, and issuing a social invitation or arranging a business meeting. The attorney then engages in direct solicitation of that business.

The only difference between this behavior and that of the plaintiffs' attorneys who approach potential clients in person is that it sometimes takes place in a semi-social setting among more affluent individuals. There is no legitimate ethical distinction. If we are committed to prohibiting in-person solicitation, we are obligated to enforce the prohibition in all instances. Selective enforcement of the prohibition against this type of solicitation fails to accomplish the purpose of the rule.

The abuses in the area of tort law are not limited to tactics by people seeking to represent potential litigants. One insurance company, claiming to be concerned for the well-being of its potential adversaries, dramatically overstepped the boundaries. This company initiated a practice of sending letters and other documents to people injured by policyholders which were designed to persuade potential claimants that they should not seek legal counsel. New York, West Virginia, and Connecticut have taken different actions against this practice, declaring it to be the unauthorized practice of law. Pennsylvania, Virginia, New Mexico, Illinois, Texas and New Jersey currently have action

under consideration. West Virginia ended the practice by enjoining the company from sending these documents and Pennsylvania has endorsed the position taken by West Virginia. A class action lawsuit has been filed in Illinois alleging fraud and the unauthorized practice of law. A consumer fraud action is pending in New Mexico. New Jersey is proceeding along the same lines as West Virginia and in Connecticut, the legislature has passed a new law prohibiting any insurer from advising a potential claimant, either orally or in writing, that they do not need an attorney. The penalties include fines and forfeiture of insurance licenses. [FN2] Surely if a major insurance company can be held accountable for the unauthorized practice of law in so many different jurisdictions, we can put a stop to the activities of a group of individuals in Arkansas who are going well beyond anything this insurance company tried to do.

The larger, more disturbing issue with respect to insurance companies is the extent to which they seek to control and manipulate the legal profession, just as they have succeeded in doing in the medical profession. There we have seen control seized over decision-making, wherein the judgment of bean counters has been substituted for the professional, medical judgment of treating physicians. Having been successful in transforming tort reform (an oxymoron also known as tort deform) into a common political phrase, insurance companies now seek to practice law on both sides of the Bar. Having witnessed the once-unimaginable constraints that are now exercised over medical professionals and the subsequently negative impact on their patients, we will have no one to blame but ourselves if we do not come together as a profession and confront the fact that the same sights which were effectively trained on the medical profession are now trained on us as law practitioners.

The unauthorized practice of law has long been prohibited, [FN3] but there was a lack of clarity in terms of specifically what does and does not constitute the practice of law. Act 1301 of 1997, now codified as A.C.A. § 16-22-501, defines the unauthorized practice of law in personal injury cases and sets penalties for such conduct. [FN4] Drafted by the Arkansas Trial Lawyers Association's Legislation Committee and closely monitored by the Tort Law Committee of the Arkansas Bar Association, the statute classifies a first offense as a Class A misdemeanor and a second offense as a Class D felony. If a non-lawyer contracts a personal injury case with intent to obtain a direct economic benefit, the statute has been violated. Legal advice and direct solicitation, in person or by telephone, are prohibited under the statute if there is intent to obtain a direct economic benefit. [FN5]

While protection of the public is our primary concern, we are also obligated to protect ourselves and our colleagues from intrusions in the legal profession and our legal businesses. Again, we can be our own worst enemy on this subject when we are embarrassed to admit that our businesses and the income they generate is important to us, along with the myriad of other issues engendered***35** by the unauthorized practice of law.

We are hampered in our efforts to protect ourselves when we succumb to antiquated perspectives on the practice of law which are no longer applicable in the modern age. The idea that there is some conflict between the profession of law and the business of law is outdated and incorrect. Denying the importance of the business of law along with the profession of law is tantamount to burying our collective heads in the sand. Try telling your associates or staff members that salaries and benefits are not important. Try telling the government that regulation of business should not apply to us. The fact is, we are engaged in business and there is no reason to be apologetic.

The notion that there is some inherent ethical conflict between law as a business and law as a profession is simply not true. That perspective is a holdover from the 18th century English legal system where barristers were trained at the Inns of Court and had little financial need to work. They were often times disdainful of approaching law as a source of income, and remnants of that philosophical outlook are still with us. But today our society is vastly different, as is the profession of law. We are not among the privileged aristocracy. We need health insurance like everyone else. We want to send our children to good schools. We want our families to grow and we want life insurance to protect them when we are gone. We want to be able to retire without burdening our children. We accomplish these things by engaging in both the business and the profession of law.

We hear much about there being too many attorneys. This popular idea ignores the fact that the duty falls upon us to resolve virtually every dispute in our society, from the smallest matter solved by a quick letter or short meet-

ing, to matters of life and death. Without attorneys, the parameters of our civilized society would disintegrate. It is essential that we maintain our voice in the halls of Congress so that our judicial institutions and access to them are protected for our clients and for our profession. This can only be accomplished by ensuring the continued vibrance of our legal businesses by reigning in the proliferation of the unauthorized practice of law.

As practicing attorneys, if we are observant of the Model Rules of Professional Conduct, as we must be, there can be no conflict between the business of law and the profession of law. They are one and the same. If, as a practitioner, one has more legal business than can be handled competently, there are only two choices: expand the business or reduce the case load. Doing so keeps us within the ethical boundaries which govern us. In the legal profession, we are confronted each day with thorny new problems. As we address each new issue, the rules of ethics prevent us from placing the interests of our business ahead of the interests of our clients. The great beauty of our profession is that in placing our clients' interests and our ethical obligations ahead of all other considerations, the end result is the continued growth and success of our businesses. When a client seeks to have us do or say something which is not within the constraints of the ethical rules, we have to draw the line. Just as plaintiffs' attorneys must refuse a client who wishes to make false claims, defense attorneys must refuse to bow to the demands of insurance companies who insist on compromising the attorney's independent professional judgment. Any potential conflict between our business and our profession is easily resolved through commitment to the rules which govern us.

Maintaining our clients' and our own legislative voice is extremely important if we are to survive the anti-lawyer sentiment which pervades the current social climate. To voluntarily relinquish any aspect of our profession to those who are unauthorized law practitioners is the height of timidity and foolishness. We cannot allow erosion of our profession. It is often said that businesses which are not busy growing are busy dying and thus, the legal profession finds itself at a crossroads. Do we want attorneys to be able to work in the legal profession or to be forced from it? Do we want jobs for paralegals and other support staff? We are going to have to act together when we see intrusions into our profession by those who would harm our clients and our businesses by performing legal functions that only a licensed attorney should perform.

In a world where too many people want something for nothing it should surprise no one that the practice of law would be enticing to someone who wants the benefits without paying the dues and completing the lengthy training. If we believe that the practice of law is a worthy endeavor which should only be practiced by those who are properly licensed, we must all be part of the continuing struggle to eliminate these dangerous and destructive intrusions into our profession.

The problem of the unauthorized practice***37** of law can be solved by attacking on several fronts:

1. we should begin by moving away from expressions of cynicism and sarcasm toward our fellow members of the Bar, in favor of mutual respect, unity and cooperation;
2. we need to gather credible evidence of violations of the law and present it to our local prosecutors;
3. we need to properly fund the Supreme Court Committee on the Unauthorized Practice of Law and actively pursue complaints against those who we believe have violated the rules;
4. we can develop recommended guidelines for the disciplining of attorneys;
5. we can utilize the resources of our state and local bar associations to fully investigate and expose inappropriate practices in the areas of in-person solicitation and the unauthorized practice of law;
6. we need to seek cooperation not only from attorneys on both sides of the Bar, but also from the insurance industry, which must cease efforts to exercise control over the legal profession. The problem of unlicensed individuals negotiating claims on behalf of injured victims will end if insurance companies refuse to negotiate with non-lawyers. (It has been suggested that doing so constitutes aiding and abetting the commission of a crime as set forth in §16-22-501.) Some of the more reputable insurance companies have already begun to refuse to talk with non-lawyer representatives.
7. And finally, it has been suggested that the Arkansas Insurance Commission promulgate and enforce a regulation mandating that tort claims be negotiated only with the claimant, a claimant's family member, or an

attorney. If we follow through with these suggestions, we will substantially resolve the problem of the unauthorized practice of law as it relates to tort law. The situation demands a concentrated effort by every attorney to eradicate the inappropriate activities of non-lawyers in all areas of law. By coming together and fighting for and with one another as colleagues, we can drive a stake through the heart of this problem.

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[FN1]. Maggio, Michael A. and Maggio, Stephen J., Criminal and Civil Liability Under Recent Amendments to the Fair Debt Collections Practices Act, The Arkansas Code and R.I.C.O., THE ARKANSAS HEALTH-CARE FINANCIAL MANAGEMENT ASSOCIATION, August 14, 1997.

[FN2]. Wencl, Annette, More States Act Against Allstate, ATLA Advocate, Vol. 24, No.3, 1-2 (April, 1998).

[FN3]. See A.C.A. §16-22-208.

[FN4]. See A.C.A. §16-22-501. Prohibited Activities.

(a) A person commits an offense if, with intent to obtain a direct economic benefit for himself or herself, the person:

(1) Contracts with any person to represent that person with regard to personal causes of action for property damages or personal injury;

(2) Advises any person as to the person's rights and the advisability of making claims for personal injuries or property damages;

(3) Advises any person as to whether or not to accept an offered sum of money in settlement of claims for personal injuries or property damages;

(4) Enters into any contract with another person to represent that person in personal injury or property damage matters on a contingent fee basis with an attempted assignment of a portion of the person's cause of action;

(5) Enters into any contract, except a contract of insurance, with a third person which purports to grant the exclusive right to select and retain legal counsel to represent the individual in any legal proceeding; or

(6) Contacts any person by telephone or in person for the purpose of soliciting business which is legal in nature, as set forth above.

(b) This section does not apply to a person currently licensed to practice law in this state, another state, or a foreign country and in good standing with the State Bar of Arkansas and the state bar or licensing authority of any and all other states and foreign countries where licensed.

(c) Except as provided by subsection (d) of this section, an offense under subsection (a) of this section is a Class A misdemeanor.

(d) An offense under subsection (a) of this section is a Class D felony if it is shown on the trial of the offense that the defendant has previously been convicted under subsection (a) of this section.

(e) This section shall not apply to a person who is licensed as an adjuster or employed as an adjuster by an insurer as authorized by §23-64-101.

[FN5]. Id. at §16-22-501.