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## Unauthorized Practice

### ABA Conducts First 'School' on Policing Unauthorized Practice of Law



By Alan Obye

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When one attorney discipline prosecutor was assigned his first unauthorized practice of law (UPL) case, he was less than thrilled. He was used to prosecuting lawyers for ethical violations. In comparison, prosecuting nonlawyers for practicing law without a license seemed boring.

That changed, however, when the prosecutor came to understand the seriousness of the harm UPL can cause. In that first case, the nonlawyer respondent had offered to represent several clients in immigration matters. The respondent told the clients he was an immigration attorney with ties to the Immigration and Naturalization Service and collected thousands of dollars in fees.

When the clients complained about receiving bad legal advice or receiving no services at all, the respondent refused to refund their fees and threatened them with criminal prosecution and deportation. The prosecutor succeeded in procuring an order from the Colorado Supreme Court enjoining the respondent from the unauthorized practice of law and disgorging his fees.<sup>1</sup>

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<sup>1</sup> *People v. Duran*, No. 01SA342 (Colo. Mar. 4, 2002) (order granting injunction).

### A Call for Collaboration

As in many states, regulation of the unauthorized practice of law is an important but little-understood component of Colorado's attorney regulation system. Since 1999, regulation of UPL has fallen under the purview of the Colorado Supreme Court Office of Attorney Regulation Counsel (OARC), on the theory that the state supreme court has the exclusive jurisdiction to decide who may practice law as well as who may not. OARC's mission in both attorney regulation and UPL prosecution is protection of the public. The unauthorized practice of law places the public at risk because those who engage in UPL often take fees from "clients" and perform subpar work—or no work at all.

In other jurisdictions, responsibility for UPL regulation may fall to attorney discipline prosecutors, state attorneys general, or other agencies, or it may not exist at all. Where UPL is a crime under state law, district attorneys are often reluctant to prosecute low-level cases. Many jurisdictions face the related problems of a lack of resources and a lack of awareness of the importance of regulating UPL by those holding the purse strings.

UPL investigation and prosecution can pose procedural and strategic challenges for agencies tasked primarily with attorney regulation or other consumer protection goals. Nationally, there has been a general awareness among UPL prosecutors of the potential benefits of education and collaboration among jurisdictions.

The American Bar Association Standing Committee on Client Protection recognized the significant need and organized the first annual ABA Unauthorized Practice of Law School. UPL prosecutors from around the country convened at the University of Denver Sturm College of Law Aug. 16-17. Panelists and participants discussed the important issues facing UPL prosecutors and what can be done to protect the public from UPL.

### UPL in the Immigration Context

The two-day UPL school consisted of nine plenary and breakout panel discussions about the major issues facing UPL prosecutors in the United States. The program paid particular attention to what in many states is the most pressing problem prosecutors face: unlicensed immigration practitioners who prey on vulnerable immigrant populations.

These unlicensed practitioners often call themselves "notarios" and offer help filling out immigration forms or guiding

immigrants through the complex immigration process. The title “notario” is misleading because in many Latin American countries a “notario publico” is a lawyer or high-ranking public official with legal training, while in the United States a notary public is simply a person authorized by the state to administer oaths and witness signatures.

Notarios find clients by advertising in publications and at locations catering to specific foreign populations. They frequently pose as lawyers or government agencies or claim to work with lawyers. Notarios then take an up-front fee—sometimes equal to up to six months' wages for a client—and often perform little or no work. Clients are reluctant to complain to authorities due to the fear of removal from the United States.

The work notarios do perform, such as selecting and preparing immigration forms, often comprises the unauthorized practice of law. Further, notarios may charge clients for the forms themselves, which are available for free on the U.S. Citizenship and Immigration Services (USCIS) website.

The harm notarios can cause is difficult to overstate. Clients given incompetent advice may face deportation or a loss of legal rights to which they would otherwise have been entitled.

The problem of notarios is widespread and likely to get worse as a comprehensive immigration reform bill works its way through Congress. If passed, an immigration reform law will effect complex changes in federal law. Notarios will then prey upon immigrant populations, promising help under the new laws. This is already happening: according to several UPL school panelists, unlicensed immigration practitioners are taking money from clients to “get them on the list” for preferential treatment under the new laws.

Panelists who discussed these issues at the inaugural UPL school included Catherine O'Connell, disciplinary counsel at U.S. Citizenship and Immigration Services; Joseph L. Dunn, CEO of the California State Bar and former California state senator; the Honorable Mimi Tsankov, immigration judge, appearing in her personal capacity; Kenneth H. Abbe, staff attorney at the Western Region—San Francisco office of the Federal Trade Commission; Cori Alonso-Yoder, staff attorney at Ayuda Legal Services; Christina A. Fiflis, an immigration practitioner and chair of the ABA Commission on Immigration; and Tracy Tarango, acting district director at USCIS.

### Education and Outreach

The consensus among panelists and participants was that the solution to the immigration UPL problem lies in education and collaboration. Education is key to warning vulnerable immigrant populations about the dangers of UPL. This can be accomplished through outreach to reputable community-based organizations and churches, libraries, and the internet. (Conversely, unlicensed practitioners sometimes associate with community-based organizations and churches to lend themselves an air of legitimacy.) Collaboration among government agencies and UPL prosecutors is key to prosecuting these cases.

Ms. O'Connell explained that USCIS has limited enforcement powers in the UPL context, but that a primary goal of USCIS is to educate potential clients through community organizations. USCIS field offices employ public engagement officers. USCIS can also help state UPL prosecutors by supplying documents and other information.

Similarly, Ms. Fiflis explained that the ABA works to educate and assist the public and lawyers, partners with the American Immigration Lawyers Association on its “Stop Notario Fraud” program in addition to promoting the ABA's own “Fight Notario Fraud” project, and refers victim complaints to the FTC for investigation.

Mr. Dunn noted that the California State Bar has external liaison officers with the judicial, law enforcement, and consulate communities, and has a close working relationship with other state and federal agencies. According to Ms. Fiflis, “it takes a holistic effort” to combat these problems.

***UPL places the public at risk because those who engage in it often take fees for subpar work—or no work at all.***

As for prosecution of UPL cases, Mr. Abbe described the FTC's role. As a consumer-protection agency, the FTC is responsible for prosecuting civil violations of the Federal Trade Commission Act, including deceptive trade practices and the provision of unauthorized legal services.

Among other remedies, the FTC can pursue a temporary restraining order, place a company into receivership, freeze assets, reach consent decrees, and win money judgments. FTC prosecutions have been successful in cases where UPL practitioners posed as government websites and charged money for services that were never provided.

Ms. Alonso-Yoder explained that other options for aggrieved consumers can include civil suits under common law tort or contract claims, criminal prosecution, or referral to prosecution under state “mini-FTC acts.”

Of course, regulation of most UPL cases falls to states' individual attorney regulation authorities. One panel of the UPL school offered advice on strengthening bars' UPL programs given all-too-common budgetary constraints. Former Colorado Office of Attorney Regulation Counsel attorney Nancy Cohen said state bars should frame UPL prosecution as the “flip side” of attorney regulation and a necessary component of protection of the public.

Ms. Cohen and New Mexico Chief Disciplinary Counsel William Slease also stressed the importance of keeping statistics—the ability to demonstrate the number of UPL complaints and the number of successful prosecutions can help convince a state's high court, or whoever controls the budget, of the importance of regulating UPL.

A separate panel, composed of Illinois Attorney Registration and Disciplinary Commission Senior Counsel Scott Kozlov, Utah State Bar General Counsel Katherine Fox, and Arizona State Bar UPL/Special Services Counsel Ward Parker, discussed disciplinary counsel's role in the fight against UPL.

## Loan Modification/Debt Relief Scams

A second pressing issue in UPL is scams by companies and individuals offering loan or mortgage modification help and other debt relief. Like immigration scams, these scams prey on a vulnerable population—those desperate for relief from debt and possibly in danger of losing their homes.

Many loan modification and debt relief companies take fees up front and then perform little or no work on behalf of debtor clients. Work that is done, such as reviewing loan paperwork for legal issues and negotiating with lenders, might constitute UPL.

Of course, promises to obtain debt relief are usually false or misleading because the only way to obtain relief is typically through bankruptcy, which has disastrous effects on a debtor's credit. In many cases clients pay these companies thousands of dollars and lose their homes anyway, sometimes after relying on bad legal advice to stop making mortgage payments.

Panelist Kenneth Abbe of the FTC explained that mortgage assistance relief service providers are prohibited from taking up-front fees by FTC regulations,<sup>2</sup> but many companies continue to take them anyway, sometimes under an attorney exemption to the rule.<sup>3</sup> Companies might solicit attorneys by promising fees for little work or for the ability to use the attorney's name in connection with the business. By partnering with attorneys, companies can continue to take up-front fees. This potentially endangers both "clients" and the lawyers. The FTC sues both lawyers and nonlawyers for these scams, and it refers the lawyers to state attorney discipline authorities.

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<sup>2</sup> 12 C.F.R. §1015.5 (2011).

<sup>3</sup> 12 C.F.R. §1015.7 (2011).

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According to panelist Andrew P. McCallin, a first assistant attorney general in the Consumer Protection Division of the Colorado Attorney General's Office, the key to combating these scams is education and collaboration.

The Colorado Attorney General's Office has set up a foreclosure hotline, with the ultimate goal of keeping people in their homes. And in 2009, the Attorney General partnered with the FTC and other state attorneys general and regulatory agencies to conduct coordinated sweeps targeting loan modification scammers. Agencies shared information about the biggest offenders. Those sweeps resulted in the FTC alone filing more than 50 lawsuits against loan modification companies.

Likewise, the California State Bar regularly attends summits on foreclosure fraud with the U.S. Department of Justice, the state Attorney General's Office, the FTC, the Consumer Financial Protection Bureau, and other agencies, with the goal of reducing duplication of effort and catching new scams quickly.

As of June 2013, the California State Bar had received over 12,500 complaints about loan modification scams, resulting in disciplinary charges in more than 1,500 cases involving 195 licensed California attorneys.

Loan modification scams proliferated in the wake of the current recession. Unfortunately, these scams are unlikely to go away unless the economy improves and more people are able to pay their mortgages. In the meantime, the message to both clients and lawyers is to avoid them altogether.

### The 'Fringe' Problem

Immigration and loan modification scams are not the only issues facing UPL prosecutors. In one UPL school panel, FBI Special Agent Brad Swim of the Denver Joint Terrorism Task Force discussed "the problem of the fringe": a movement by individuals who do not recognize the laws of the United States or any state and practice law in their own sovereign jurisdictions.

These individuals, sometimes labeled "sovereign citizens" or constitutionalists, hold a wide variety of differing beliefs, united by a desire to operate outside the jurisdiction of traditional government. Some believe the United States became a corporation upon abandoning the gold standard. Some claim all individuals have a corporate, straw-man personhood, distinct from their true person, represented by a secret bank account held by the United States, and that individuals are entitled to the money in that account upon renouncing their corporate personhood and United States citizenship. Many believe the United States is a corporation bent on collecting money from its citizens.

***The problem of unlicensed "notarios" is likely to get worse as a comprehensive immigration reform bill works its way through Congress.***

The largest organized antigovernment sovereign movement, the Republic for the United States of America (no capital "u," based on the understanding that the original U.S. Constitution envisioned the individual states to have more power than the federal government that later became the United States), consists of secretive governments-in-waiting, complete with leadership structures, prepared for the collapse

of the current government system. However, most sovereign citizens are individuals or loosely organized small groups influenced by information on the internet or by traveling speakers.

Adherents to these movements—which in some cases arose out of far-right militias and involve extreme notions of personal liberty—do not recognize the power of UPL prosecutors to prevent them from practicing law, nor do they recognize the power of the traditional legal system to constrain them. The Southern Poverty Law Center estimates there may be some 300,000 "sovereign citizens" in the United States, with varying commitments to the cause.

A related example is the case of Navin C. Naidu. Mr. Naidu, a nonlawyer, promised a "client" that in exchange for \$5,000 he would order the client's foreclosure case removed from the Colorado Court of Appeals to the Ecclesiastical Court of Justice, a Colorado nonprofit corporation that employs Mr. Naidu as a "judge." The client paid, and Mr. Naidu filed a notice of removal to the ecclesiastical court in the foreclosure case.

Of course, the court of appeals struck Mr. Naidu's notice of removal. Mr. Naidu stopped returning the client's calls. The client was never able to get a refund of his fee. The Colorado Office of Attorney Regulation Counsel has filed a petition for injunction against Mr. Naidu and his ecclesiastical court, and the case is pending. <sup>4</sup>

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<sup>4</sup> *People v. Naidu*, No. 12SA271 (Colo. filed Sept. 18, 2012).

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Mr. Naidu does not recognize the power of the Colorado Supreme Court to act against him. He believes he can adjudicate traditional legal matters in his ecclesiastical court based on the separation of church and state. In fact, he has "sued" Colorado attorney regulation officers and other public officials in his ecclesiastical court.

Individuals who do not recognize the authority of traditional governments can pose unique dangers to authorities, including UPL prosecutors. To a sovereign citizen, detention by the police is kidnapping, impoundment of a car is theft, and so on. Since 2000, at least six police officers have been killed by known sovereigns.

The majority of UPL school attendees reported having interactions with sovereign citizens. Special Agent Swim offered advice for interacting with sovereign citizens, and confirmed that some of the same individuals being prosecuted for UPL violations are on the FBI's radar as well.

### Looking Forward

Despite the best efforts of prosecutors, the problem of the unauthorized practice of law is not going away anytime soon. Education and cooperation are the first steps toward combating it.

UPL school organizers and participants are hopeful that the school can continue to provide a forum for collaboration in the future.

### For More Information

Course materials for many of the UPL programs are available at [http://www.americanbar.org/calendar/2013/08/aba\\_standing\\_committeeonclientprotectionuplschool/coursematerials.html](http://www.americanbar.org/calendar/2013/08/aba_standing_committeeonclientprotectionuplschool/coursematerials.html).

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