

# Legislative Task Force on Defining the Practice of Law

## Minority Report

The Legislative Task Force on Defining the Practice of Law was created by legislation resulting from a proposal to amend R.S.A. Chapter 311 regarding the rights of non-lawyers to appear in court. Natural and inherent tension exists between R.S.A. 311:1 regarding the right of a person to appear pro se or represented by a person of good character and R.S.A. 311:7 regarding the statutory right<sup>1</sup> of the Supreme Court to regulate those who commonly appear before the courts. This issue came to the forefront after a ruling in the N.H. Superior Court by Lynn, J. in the *Holmes* case (Hillsborough North #00-M-815) in which Theodore Kamasinski was prevented from representing Mrs. Holmes, having been found to be “commonly” practicing law and not admitted to the bar. See, RSA 311:7.

The Task Force, ably chaired by Senator Roberge, through the course of discussions and public hearings, first explored, in its original mandate, defining the “practice of law.” It was legitimately thought that by defining the “practice of law”, and thereby then determining what would not be considered the “practice of law” by defining exceptions to the same, issues in rewriting RSA Chapter 311 may be avoided or clarified. It was generally agreed that the definition of the “practice of law”, as established by rule of the Washington Supreme Court, appeared to reflect what was understood in the State of New Hampshire as being the “practice of law”. Attempting to define what would be the exceptions became a highly complex issue particularly given specific suggestions being made in non-litigation areas by the banking and real estate industries. Significant resources, legislative staff time, and the like, would be required to fully explore and develop such legislation. As such the efforts of the task force became focused on other issues.

After two public hearings, and the discussion resulting from the same, three issues appear to be involved with the increase in non-lawyer representation within the judicial system (the litigation setting); (1) access to affordable, legal services by lawyers, (2) distrust of the system; and (3) the individuals right of choice balanced with the need to protect the public and public resources.

Regarding the access issue, the undersigned found that a great unmet need for low cost or free legal services, and encourages the General Court to take steps to develop solutions<sup>2</sup> to provide quality legal services to all who need them including adequately funding the current legal services programs in the state and expanding the use of adequately trained and supervised para-professionals. This is a joint responsibility for many sectors of society, including the courts and the organized bar. There should be a continuous dialogue on this issue, but amending RSA Chapter 311 isn't going to solve this issue. While one avenue of addressing this problem may be the licensing of non-lawyers, in the first instance the undersigned would advocate that this is better addressed by the N.H. Supreme Court under RSA 311:7 in a method similar to the Washington Supreme Court through its establishment of a Practice of Law Board.

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<sup>1</sup>See, *Ricker's Petition*, 66 N.H. 207 (1890), regarding the inherent right of the third branch of government to regulate those who practice before it.

<sup>2</sup> See, *Engler, Justice for All - Including the Unrepresented Poor - Require New Roles for Judges, Clerks, Mediators*, p. 5, *N.H. Bar News*, Vol 13, No. 9, (10/18/2002). Does the solution include a systemic change away from the adversarial system, as well, as providing greater access to quality legal services.

Regarding the issue of distrust, given the nature of the testimony that was offered to support the actual existence of a problem, we believe that this is more perception than reality. It is of importance, however, to recognize that to those who are perceiving, perception is reality, and thus a distrust of the system exists. In order to address some of those concerns, we suggest a stronger legislative statement regarding the right to a jury trial in most civil matters, including equity cases. This right would be very similar to the federal system. If litigants had a statutory right to a factual finding by a jury, the claim of judicial impropriety would have little influence on those results, and meaningful appellate review of legal error could occur without the unfounded claim of manipulation of fact finding to justify certain results. It should be noted, however, that additional jury trials will place additional burdens on the judicial system.

Lastly, with respect to balancing choice with public protection, the debate centered around legislative amendments to RSA Chapter 311. Those proposing either abolishing RSA 311:7, or defining liberally the term "commonly", presume that no legitimate issues exist with respect to either protecting consumers, or protecting judicial resources, and that the right of an individual to hire who he or she desires is supreme. We do not agree.

In the first instance we would suggest waiting for the Supreme Court to rule on the interpretation of RSA 311 before changing it. Mr. Kamasinski's status in the *Holmes* case is on appeal, and presently pending before the Superior Court is *Theodore Kamasinski v. New Hampshire Bar Association et al*, Merrimack County, #01-E-0316. These cases include issues regarding the judicial interpretation of both RSA 311:1 and RSA 311:7. While still before the Superior Court, it is highly probable, given the nature of the litigations, that the issues being raised will eventually be heard by the N.H. Supreme Court, placing squarely before it, for judicial interpretation, relevant portions of R.S.A. Chapter 311. Prudence would dictate not to legislate until necessary.

In the second instance, however, if the General Court deems it necessary to preemptively address the term commonly we would offer the following:

AMEND RSA 311:7 to add the following:

- (a) Insert the current language of RSA 311:7
- (b) "Commonly" as used in Section (a) above shall mean either:
  - 1. Representation of another for valuable consideration; or
  - 2. Representation, even without the exchange of valuable consideration, if said person appears more than twice in any calendar year.
- (c) The limitation of two (2) appearances per calendar year contained Section (b) above shall not include representation of the person's spouse or the following relatives: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece.

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