LEGISLATIVE TASK FORCE
TO DEFINE THE PRACTICE OF LAW
IN NEW HAMPSHIRE

HB 1420, Chapter 218:1, Laws of 2002

MINORITY REPORT

RSA 311:1 sets forth the statutory right of litigants to be represented "by **any** citizen of good character" (emphasis added). RSA 311:7 then provides that "(n)o person shall be permitted commonly to practice as an attorney in court unless he has been admitted by the court and taken the oath prescribed in RSA 311: 6." At first it would appear that RSA 311: 1 and RSA 311: 7 are in conflict. However, I do not believe that the Legislature intended to create conflicting provisions or to limit the right of any citizen to have representation of his or her choice.

RSA 311:7 establishes two types of attorneys who may appear in court on behalf of others. The first is persons who may practice as attorneys in the courts of the State because they have been admitted by the court. They have met the minimum criteria necessary to become licensed to practice law, have taken the required oath, and have become a member of the New Hampshire Bar Association. The second is persons who are unlicensed attorneys for whom there is no minimum qualification, and no required organizational membership. They may represent others in court, as long as they do not do so "commonly." RSA 311: 7. An unlicensed attorney who appears commonly on behalf of others is deemed to be engaged in the unauthorized practice of law. See New England Capital Corporation v. The Finlay Company, Inc. 137 NH 226, 227 (1993). Unfortunately, the Legislature has never defined the word "commonly" as applied in RSA 311: 7, nor has it ever set forth affirmatively a basis for determining what constitutes the practice of law.

The issue of representation by unlicensed attorneys came to the forefront

in cases currently being heard in New Hampshire courts in which "commonly" has been viewed in terms of the number of times an unlicensed attorney has appeared in court. These cases generated HB 1420, sponsored by Representative Phyllis Woods, which sought to define the word "commonly" as found in RSA 311: 7, as no more than six times per year. The proposed legislation passed the New Hampshire House of Representatives and was subsequently heard by the Senate Judiciary Committee, which I chaired at the time. While it appeared to me that a convincing case was made for clarifying the ambiguity created by the word "commonly," establishing the meaning of "commonly" as six times per year appeared completely arbitrary. From my perspective, there should be some rational basis for determining when the representation of litigants in court by unlicensed attorneys constitutes the unauthorized practice of law. Because of this concern, I offered the amendment to HB 1420 which created the Task Force to Define the Practice of Law in the hope that interested parties could assist the Legislature in formulating a reasoned and appropriate public policy.

After reviewing the evidence received by the Task Force, I have concluded that "commonly" cannot be rationally defined as a number of events. Furthermore, if the Legislature had intended that outcome, it could have easily done so when RSA 311: 7 was first enacted. Instead, I believe the Legislature used the word "commonly" to distinguish those who represent others professionally from those who simply lend their personal skills to assist others. A professional is someone who engages in an occupation, mainly to earn one's livelihood. A professional attorney must be licensed, otherwise he or she is engaging in the unauthorized practice of law.

"Commonly" cannot be logically defined by the amount of conduct, rather it must be viewed by the character of the conduct. RSA 311:7 should be amended to provide that "commonly" means representation of another for any valuable consideration. In other words, when an unlicensed attorney provides services in exchange for compensation, he or she is engaging in the unauthorized practice of law. If RSA 311: 1 and RSA 311: 7 are construed in this

manner, they are not in conflict.

In my opinion, an individual should be able to pick whomever he or she wants as his or her attorney in court. But, if the attorney intends to charge for the service, then the attorney must be licensed. I disagree with the Minority Report offered by other members of the task force, in which they seek to limit the number of appearances of unlicensed attorneys to twice in any calendar year. It seems to me that that number is just as illogical as the six times which appeared in the original proposed legislation. RSA 311:1 establishes the right to be represented by any person of good character. This cannot be accomplished if there is an arbitrary restriction on the number of times an unlicensed attorney may appear in court.

After reviewing the evidence received, and after lengthy discussion among task force members, it seems clear to me that there is a role for unlicensed attorneys in the court process. Without passing judgment on the legitimacy of the concerns expressed, there appears to be a substantial mistrust of the legal profession in general, and a simmering lack of confidence in the objectivity of the court system, especially when it comes to addressing cases in which members of the legal community are parties. Individuals have an undeniable right to represent themselves, *pro se*, in the courts of this State. The number of *pro se* litigants is growing dramatically. I do not believe that the court system or the members of the Bar Association have any reason to fear having individuals choose an unlicensed attorney to speak on their behalf before the courts of the State, so long as that unlicensed attorney does not charge for his or her services. Under these circumstances, I see no need to limit the number of times an unlicensed attorney may represent others in court. I think that such a public policy would help renew confidence in the legal process and, to some extent, may even make legal assistance more available to people who cannot otherwise afford it.

Clearly, there is an unmet need for legal services, despite the dramatic increase in the number of attorneys within the State of New Hampshire within the last two decades. Many individuals, including those who are employed, are

simply unable to afford legal services. New Hampshire Legal Assistance is limited in funding and can only assist those with the greatest need. While the Bar Association actively coordinates *pro bono* services, the number and percentage of *pro se* litigants in New Hampshire courts continues to grow at a rapid rate.

There are cases in which paralegals could appear on behalf of clients in New Hampshire courts. Some cases may not necessarily require the expertise of a fully trained licensed attorney. I believe this is particularly true in landlord / tenant matters, small claims, and certain family law proceedings. I hope the legal community will recognize the need for change and consider enabling qualified paralegals to be licensed to represent clients in court in limited circumstances. If the legal community fails to see the need to take action, then I would advocate for the Legislature to address this issue as a matter of public policy and take action accordingly.

In conclusion, I believe that the task force established by House Bill 1420 to define the practice of law had the potential to clarify an important public policy. The task force could succeed only as long as its members were willing to come to a middle ground. Most members attended the meetings and participated thoughtfully in the debate. From my perspective, some members were uncompromising in their advocacy for particular points of view. In the end, no one point of view prevailed and no consensus was reached. This left the task force with a final report indicating a failure of agreement. Unfortunately, it was the people of the State who lost.

Respectfully submitted,

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