

**TASK FORCE TO DEFINE THE PRACTICE OF LAW  
STATE OF NEW HAMPSHIRE**

**A MINORITY REPORT**

Submitted by

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## LEGISLATIVE MANDATE : HB1420

A. **The business of the Task Force as set forth by the legislature:**  
**“to define the practice of law in the state of New Hampshire”**

The initial act of the Task Force was to:

I. Adopt the **Washington State Definition of the Practice of Law** as a “working draft” to begin discussion by Task Force members.

Discussions regarding the working draft eventually evolved to the point whereby it was evident that the insertion of wording into:

### **Washington State Definition of the Practice of Law**

*(b) Exceptions and Exclusions*, paragraph 11, was to be the defining script of the definition as it related to practice by, *non-lawyer /attorney- advocates*, in the context of the entire definition of the practice of law.

Besides the numerous parties advocating the non-lawyer attorney exclusion in testimony; there were other parties asking for such exception and exclusion from the definition of the practice of law. The Realtor’s Association, represented by Mr. Patriquin; and the Banking Association, represented by attorney John Funk, submitted proposals regarding exceptions and exclusions. These proposals brought into play whole sections of potential law practice not involved in any way with the non-lawyer appearance related questions already in play with the committee.

It was also mentioned by Rep. Tony Soltani, that under the Federal System, non-lawyer representation is allowed in unemployment, social security, Medicare and Veterans Administration matters, these would also be listed as exceptions.

Later into the process the suggestion arose among several Task Force members, that the focus and direction which was begun with the adoption of the Washington State Definition as a working draft was heading the Task Force in the wrong direction. Rather, the opposite tact or strategy might well have been the study of states in which the definition of the practice of law was absent as statutory law.

- **This would have effected an entirely different approach by the Task Force committee and I believe would have most likely lead to an entirely different set of probabilities and outcome with regard to recommendations to the legislature.**

## **B. Public Testimony**

The Task Force set two meetings aside as hearings for the inclusion of public testimony regarding the Practice of Law in New Hampshire. The meetings, August 21, and September 4, 2002; were open and publicized.

Public participation at the meetings was substantial and of those testifying many were sharing experiences that indicate and describe irregularities seemingly endemic in the present legal and judicial system. It became evident early on that there was overwhelming dissatisfaction with legal representation in the court system provided by lawyers, by a lack of accessible legal and affordable representation, and with the attitude of the judicial itself toward *pro se* and non-lawyer representation in general.

### **Some excerpts and suggestions from testimony:**

Mr. Carl Scheidegg:

- RSA 311-7 should be repealed.
- Non lawyers appearing in court should:
  1. File an appearance.
  2. Have a Power of Attorney
  3. Take the Oath required of attorneys.
- Suggested that a definition of the practice of law is not necessary.

Ms. Caroline Douglas Esq.:

- Stressed that the unencumbered right to representation in court is predicated on the basis of Common Law Precedent going back to the Acts and Laws of the Province of New Hampshire, of which she offered a publication dating back to 1690 - 1725. No Definition of law is necessary in her opinion.

Mr. John Baldi:

- That the current existence of “attorneys” not being members of the BAR and their continued practice is guaranteed by the NH Constitution Part 1; Article 23; and the United States Constitution Article 1, Section 10; as *vested rights* . That any retroactive or retrospective legislative act or any law denying such *vested rights* would, in fact of law, be considered unconstitutional.

Mr. Charles F. Rogers:

- Recommended: Exclude from the definition those non-attorney advocates whom the client recognizes as non-licensed, non-attorneys while still seeking their advocacy.
- There is no merit in licensing non licensed attorney-advocates since by doing so we would simply be inducting them into the BAR elite.

Ms. Judith O'Brien-Thayer:

- Against the Task Force defining the practice of law. Suggested the legislature can not only bestow the right for citizens to choose a non-attorney to represent them, but could also bestow attorney-client privilege to an attorney-in-fact.

Mr. John Tobin Esq., NH Legal Assistance:

- Be very practical in recommendations and be sure that systems of both accountability and supervision are established .
- The present system does an imperfect job of making sure that people have access to the legal system of justice.

Paula Werme Esq.:

- A paralegal can help with briefs, in administrative hearings and can tell someone what the law says, but not advise them.

Rep. Harriet Cady:

- “Case after case says you cannot limit counsel.”
- Stated that if the Task Force comes up with anything that limits the ability to have someone represent someone else, then there will be a challenge to the New Hampshire Supreme Court.

Judicial Accountability Initiative Law (JAIL) proponents:

- Questioned why attorneys must go to the court for licensure while every other profession is licensed by the state.
- Shared a test study done in New York State where advocates could come in and assist friends in court, many of whom could not afford legal representation.
- Use plain English.
- Citizenship should not be a requirement, understanding the law should be.
- We must keep the doors open to non- lawyer representation in court.
- Advocate that 73-a be eliminated

Richard McNamara Esq.:

- Look at the practice of law from the perspective of what it means to the state and consumer protection.
- Warned against frivolous pleadings and uncontrolled costs.

## CONCLUSIONS

### **A. Inferred conclusions indicated by testimony given:**

That the present state of affairs in the judicial / legal system is unsatisfactory.

That equality of access has to be significantly improved, especially to pro se litigants .

That the financial resources of many litigants in need of legal services are inadequate to acquire the necessary legal representation to pursue an adjudicated outcome.

That the charges for legal services are all too often too high for the average litigant's financial resources in even simple legal procedures.

That intra-judicial influences are, or are perceived to be determining litigant outcomes.

That litigants feel virtually helpless in the vortex of the legal and judicial juggernaut.

That the judicial system is seen as unresponsive and without empathy toward the financially disenfranchised litigant.

The integrity of the entire judicial branch is being increasingly held in question.

That the lawyers, as officers of the court, and the unified BAR are increasingly seen as both facilitators and abettors of unethical behavior.

That the unified BAR is an unlawful monopoly.

That effective recourse to injustices and incompetent professional behaviors are unavailable to the average litigant despite the often repeated assurances that they are.

That facilitated and unimpeded access to the judicial system and legal representation is pivotal in re-establishing and maintaining the integrity of the present judicial and legal systems.

That at times, parties in court require representation independent of, or not in affiliation with the BAR or judicial branch. This becomes necessary to obtain an untainted and non-prejudicial outcome.

That caveats expressed were concerned with: the protection of the public in non-lawyer attorney representation, the ability to hold responsible non-lawyer attorneys, reimbursement concerning non-lawyer attorney services.

## **B. Personal Conclusions :**

The Task Force began its mandated task by instituting a direction dictated by the input of the State of Washington Definition of the Practice of Law. This was the incorrect template to present in the State of New Hampshire. Several in public testimony gave such a view. And it was, that this state need not be a surrogate template in Washington State's image. Rather the opposite should be followed. The prototype could be established in the opposite. That is, using states not already locked into such a regimented definition.

The practice of law is in rapid evolution. As Professor Simon had remarked, the ability of the present undefined practice of law to bend with the many rapidly expanding areas of banking, accounting and real estate as examples, probably allowed for the most effective evolution of the practice of law, in contrast to the defined template as provided in the Washington version. I heartily agree with this observation.

The general condition of the practice of law in New Hampshire is lacking in providing access to the courts and effective legal counsel and representation to the citizens of this state. Although we seemingly need more funding for the lower end of the socio-economic spectrum there seems to be a large area of growing dissatisfaction in the middle of the spectrum.

A definite lack of initiative in the legal profession to pursue the "high road" in representing their clients is also becoming evident. The inability of parties to obtain legal representation in their case even with the financial resources necessary is an indication of deep undercurrents that seem to pervade the legal practice of New Hampshire. Cases that have merit are not pursued because of influences obviously present, yet unable to be defined.

The ability of the non-lawyer to advocate and be an attorney-of-fact must be preserved if this legal system is to properly evolve. It is only through the ability to be detached from the inbred legal collegia that true independence of thought and practice can prevail in a closed system. As in other professions, many of the crucial innovations of medical practice and pharmaceutical practice serving the patient have their beginnings from participant sources not inbred to their practice regimen. Such infusion of fresh thought and practice have been crucial to their consumer friendly innovations, and will be in future legal innovations whether wanted or not, facilitating "protection of the public".

Freedom of choice is the ultimate guarantor of any profession's standards of practice. The ability to restrict choice is the guarantor of unacceptable standards of practice. The choice of the client to intelligently select representation should be a goal of primary importance. The present system does not allow such selection.

Secrecy in the legal profession's practice is breeding distrust of both the legal profession and the judicial branch of government. Both are seen as abettors of tainted justice and facilitators of inequity in the courts of this state. Both the legal profession and the Courts are seen in accomplice as a system in chronic denial of their own inadequacies and shortcomings.

## RECOMMENDATIONS

A. **The legislature must preserve the inherent right of any citizen to choose whomever they want to represent them in the courts, tribunals or administrative bodies.**

Dating back to Common Law precedent from the beginnings of the Province of New Hampshire it has been and is accepted that the right to represent oneself and seek advocacy or counsel in that process has been undeniable. Every citizen has that right.

The constitutional fact is that the laws of the State of New Hampshire are created by the people, through their legislature, by means of statute. The fact that administrative laws, judicial laws or any regulatory laws exist and compliance demanded does not change the fact that legislative statute is the controlling and presiding factor of all such laws.

If lawyers were the only factors in the interpretation and implementation of laws then the citizens need not be involved with lawmaking, as the lawyers would be the only parties to them from inception, interpretation to implementation.

To say that only lawyers are competent enough to represent citizens of the state of New Hampshire in courts, tribunals or administrative agencies is to say that they alone have the ability to interpret the laws.

To say that every citizen must choose the advocate / counsel from this pool of lawyers is to deny them their right of choice in granting their power of attorney. This would create a “monopoly of law”, and would be contrary to every purpose thus set to equal access and equal protection of the individual citizen under both state and federal constitutions.

To restrict accessibility to the courts to all but a privileged few, through the funnel of the “unified BAR” is a multiple denial of the fact that all citizens have the right to grant a power of attorney, which they inherently possess, to anyone they so choose. To say that only lawyers are able to competently interpret the laws, be they statutory, administrative or otherwise, is a mythically conjured theorem not based in the reality of the republican form of government or a democracy.

***Protection of the individual citizen begins with the unimpeded right of that citizen to freely choose advocacy or counsel in all matters relating to such citizen, even though such choice will at times be contrary to the “accepted rationalities” of the established unified BAR and Judicial Branch members. All other protections of the public are secondary to, and derived from, the ability to freely choose, and are contingent to such freedom of choice.***

**B. Defining of the practice of law must recognize the inherent right of each citizen to freely choose advocacy or counsel and grant a power of attorney. However, it is seemingly impossible to reconcile freedom of choice in matters of non-lawyer counsel, and at the same time further define the practice of law without “protection of the public” becoming the primary and defining argument .**

Preserving freedom of choice and defining the practice of law are two vectors of different character essentially at odds with each other. When the freedom of choice proponents present their case they are immediately opposed by those demanding more control in the process, and always utilizing the “protection of the public” mantra. They point out that proper recourse or material responsibility is not available as remedy in the non-lawyer advocate attorney.

Although there have been no complaints presently lodged or prosecuted with the Attorney General’s office regarding representation by non-lawyer attorneys, the present Professional Conduct Committee has been deluged with complaints regarding lawyer’s professional behaviors.

It should be pointed out that the Professional Conduct Committee is solely involved with allowing the further practice of a lawyer, and is not proper recourse or remedy in any ill fated lawyer / client relationship to which the client has suffered substantial loss monetary or otherwise.

**Current Client Consumer Protection and Proper Recourse, “*protection of the public*”:**

**1. Consumer Protection.**

Lawyers have just recently been included in the Consumer Protection jurisdiction. This would put them to the same standards as the non-lawyer advocate attorney, already subject to the Consumer Protection standards.

**2. Proper Recourse.**

The legal malpractice action as recourse in the abstract is almost non-existent in reality. There are only a few legal malpractice attorneys in this state. Contrast this with the proliferation of medical malpractice attorneys in the state. One would conclude that physicians are totally bumbling professionals when contrasted to the legal profession. I must suggest otherwise. A major reason is that no legal malpractice action will proceed without a lawyer as expert witness in testimony, and the few lawyers who concern themselves with legal malpractice don’t want to proceed unless they have one. An almost impossible feat.

Therefore, although the lawyer has malpractice insurance, the plaintiff has to surmount the formidable expert witness hurdle, and then faces the lawyers for the attorney who are paid by the insurance company for the defendant lawyer.

**3. Insurance.**

Insurance is an often quoted yet empty protection. As is seen with the legal malpractice action, the insurance premiums and the insurance industry are actually used against the plaintiff. In a clear cut case where mediation is the mandated remedy, the lawyers are omnipresent and are a key factor stacked

against fair and proper reimbursement for losses that are so blatant that anyone would be hard pressed to disavow. The average client has not the financial stamina nor legal knowledge to proceed without an attorney.

4. Standards of Behavior: *lawyer / non-lawyer.*

The recently proposed Rules of Court as presented by the New Hampshire Supreme Court with regard to the non-lawyer attorney are the same as the standards of behavior to which the lawyer attorneys are now subjected to. The court has controlling powers in its rules.

As can be seen with this abbreviated summation, the perception of consumer protection is not the reality of consumer protection. Arguments are of the academic nature, not of the actualities of the provided mechanization of such “protections”. In actuality, the non-lawyer attorney, being granted a power of attorney, and then proceeding with such, would find himself less protected than a lawyer when confronted with a client’s legal action against him! The lawyer is provided every protection the judicial, insurance and legal system can provide.

**C. Avoid Defining the Practice of Law**

The present impasse of the Task Force is the sum total of input from two opposing views of law and the methods facilitating consumer protection. They are paradoxically problematic in the realm of “protection of the public”.

**D. Accord by RSA the non-lawyer attorney, attorney in fact, as many privileges, such as confidentiality, as possible.**

Equality of representation must be preserved as much as possible. The lawyer has vast resources at his disposal, and is assured the collegiate courtesies of his practiced profession. The non-lawyer attorney will survive in any action by sheer determination and real knowledge. Privileges accorded a lawyer must be accorded the non-lawyer in any representation, where such privilege is presently recognized, if the balance and fairness of representation is to be maintained.

**E. Redefine RSA 311.1 Right to Appear etc.**

As I submitted to the Task Force at our last meeting the definition I proposed for RSA 311.1:

*Every citizen has the inherent and unconditional right to appear, plead, prosecute or defend in his or her proper person, that is, pro se, and may grant that right to any party of choice by Power of Attorney, and such party having subscribed to the Oath, may represent the grantor in any court, tribunal or administrative body.*

**F. Revise the Oath RSA 311.6**

Drop the last portion of the present oath.

*You solemnly swear or affirm that you will do no falsehood, nor consent that any be done in court, and if you know of any, that you will give knowledge thereof to the justices of the court,, or some of them, that it may be reformed. So help you God under the pains and penalty of perjury.*

**G. Repeal RSA 311.7**

This RSA has the potential of limiting protection of the public, through restriction of the individuals freedom of choice, by severely restricting or effectively eliminating the inherent right of choosing counsel, with full force of the state's Attorney General and Justice Department, by allowing prosecution of any potential non-lawyer attorneys, thereby eliminating availability of such representation under any circumstances.