Responsive Law
The Consumer's Voice in the Legal System

Comments of Tom Gordon, Legal and Policy Director, Consumers for a Responsive Legal System on Proposed Amendments to Rule 46 of the Mississippi Rules of Appellate Procedure

Consumers for a Responsive Legal System ("Responsive Law") thanks the Rules Committee on Civil Practice and Procedure and the Rules Committee on the Legal Profession for the opportunity to present its comments on their proposed changes to Rule 46 of the Rules of Appellate Procedure. Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible and accountable to the people.

Unauthorized Practice Restrictions Limit Consumer Access to the Legal System

The regulatory scheme in the proposed Rule 46 has a number of specific flaws, enumerated in the "Analysis of the Proposed Rule" section below. More important, however, are the systemic problems that broad definitions of the practice of law create by denying access to the legal system to the average person.

The legal profession often asserts it is acting in the best interests of consumers when it restricts who may offer legal services. However, this reasoning is based on the faulty premise that those who are prevented from using non-lawyer assistance will then hire a lawyer instead. However, hiring a lawyer is simply not economically feasible for most Mississippians. The average Mississippian, who makes about $31,000[1], has to work nearly a whole week just to pay for one hour of a lawyer's time at $300 per hour. When this person is not allowed to seek assistance from anyone but a lawyer, he will attempt to handle his legal matter without any assistance at all. This is, of course, not in the best interests of these individuals. Additionally, unprepared *pro se* litigants place a burden on courts that are already facing resource cuts.

By defining the practice of law so broadly, Mississippi would ultimately be deciding to fine or even imprison those who are helping people access the legal system

[1] U.S. Department of Commerce, Bureau of Economic Analysis, News Release, "State Personal Income: Second Quarter 2011", Table, 7, September 22, 2011 (http://www.bea.gov/newsreleases/regional/spi/2011/pdf/spi0911.pdf)

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where others have failed to do so. While the enforcement of this Rule under Miss. Code Ann. § 73-51-1 is civil, failure to comply with an injunction issued under this law could lead to imprisonment for the service provider. In Florida, Katie Vickers, a 70-year old Florida retiree, was sued by the bar for helping a member of her church fill out a petition for workers' compensation benefits and a court entered a judgment against her for $1,000.[2] Those who are trying to help others gain access to the legal system should be praised, not made criminals, especially when they are doing so as good Samaritans.

Rather than preventing consumers from using non-lawyer service providers, the legal establishment should pave the way innovative, affordable non-lawyer service providers that can help people navigate the labyrinthine legal system. Broad definitions of the practice of law limit the availability of such service providers, leaving consumers without realistic access to the legal system.

Analysis of the Proposed Rule

Aside from the general denial of access to justice that broad UPL restrictions create, the proposed Rule 46 has a number of specific flaws. First, the general definition of the practice of law in Section 2 encompasses a great deal of activity that other professionals, or even ordinary people, engage in on a regular basis. "Applying legal principles and judgment to the circumstances and objectives" of another person could include the advice one friend gives another on whether or not to sign an employment contract, get a divorce, or buy the extended warranty on a new television.

The specific examples of the practice of law given in Sections 2(b) and 2(c) are similarly over-inclusive. Section 2(b) includes as the practice of law "advising or counseling another … with regard to any matter involving the application of legal principles…." This definition encompasses the work performed by financial advisors, family counselors, and social workers, among others. Section 2(c), prohibiting the preparation of various legal documents for another, could outlaw even the use of scriveners and typists, who merely complete blank forms under the instruction of a customer. It could also limit the use of automated forms of the type provided by companies such as LegalZoom, or even printed forms such as those available in self-help books.

Section 2(a), while describing conduct that should be prohibited, is also redundant, as misrepresenting oneself as a lawyer is already prohibited under the Mississippi Consumer Protection Act (Miss. Code Ann. § 75-24-5), specifically sections 2(b), (c) and (e), prohibiting misrepresentation of the certification of services and

[2] *Wall Street Journal*, July 22, 2010.

misrepresentation of a service provider's status or affiliation. There are problems with people fraudulently representing themselves as lawyers, particularly in immigration matters. However, there is no need to create a new cause of action to punish such misconduct, as existing fraud prohibitions are already sufficient to do so.

The enumerated exceptions in Section 3 to the generally applicable restrictions in Section 2 provide some relief to consumers who need affordable non-lawyer services. However, they also highlight the problems with the general definition in Section 2.

Section 3(b) allows non-lawyer clerical assistance in completing forms for protective orders. Certainly this is a welcome exception, as there's no reason that a victim of domestic abuse should have to face the additional hurdle of finding and paying for a lawyer. But if such assistance is acceptable in this emergency situation, why is it not acceptable for other emergency situations? For example, shouldn't a tenant being threatened with eviction, who is unlikely to be able to afford a lawyer, have access to non-lawyer help? There are a large number of people with dire legal problems who may not qualify for a legal aid attorney but who still can't afford legal representation. At a minimum, these people should be allowed to seek non-lawyer assistance in filling out forms that will be submitted to the courts. Doing so is not merely humane to the less fortunate, but it also can help the courts by improving the quality of *pro se* fili

Section 3(i) allows non-lawyers to represent parties in negotiations under collective bargaining agreements. Again, this is a valuable provision, as a worker without a law license may be more familiar with the issues in his employment negotiations than any lawyer would be. However, why is this right limited to negotiations under a CBA? Shouldn't an employee familiar with issues in his workplace be allowed to negotiate on behalf of his fellow employees whether or not they are unionized? In a similar vein, why shouldn't a member of a tenant's association be allowed to negotiate with her landlord on behalf of her fellow tenants?

Sections 3(i) through 3(y) list exceptions for various professions for activities within the scope of their usual work. These professions include real estate sales and underwriting, car dealers, bankers, CPAs, architects, engineers, surveyors, Certified Petroleum Landmen, and Registered Foresters. It is not surprising that all of these professions regularly engage in activities that would otherwise fall under the definition of the practice of law. Furthermore, there's no doubt that these professions provide valuable services that shouldn't be prohibited by declaring those services to be the practice of law. However, the existence and enumeration of these professions that need an exception to

the UPL laws suggests that others may exist that have not been enumerated here.[3] If there is a standard under which these professions were granted an exception, it is likely because they have expertise in their area of work that makes their services as valuable to consumers as the services of a lawyer. If that is the case, shouldn't the Court replace these specific exceptions with a general rule to that effect?

Such a general rule would, of course, open up the practice of law to greater competition from non-lawyers. It would also greatly benefit consumers, as they would be able to choose the service provider that they found most appropriate for their situation, based on a combination of competence and affordability.

Conclusion

While fixing the problems enumerated in the previous section would ameliorate some of the problems with the proposed Rule, the main problem with the proposed Rule is systemic. Access to justice is a growing problem in this country. The American Bar Association has acknowledged that over 80 percent of Americans cannot afford a lawyer, and that some lawyers cannot even afford themselves.[4] Rather than accepting the definition proposed by a Mississippi Bar UPL Task Force consisting entirely of lawyers, we recommend that the court undertake a broader look at the need for such a statute, including input from the consumers that the Bar Task Force claims to be protecting. Pending such a review, we urge the Court to reject the proposed amendments to Rule 46 in their entirety.

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[3] For example, I have been following issues related to UPL since 2000. I had not, until this proposal, heard of UPL restrictions affecting Certified Petroleum Landmen or Registered Foresters. There are quite likely other professions for which the Court was unaware of the potential effect of this proposal.

[4] "Take Five: ABA president Stephen Zack, who escaped from Cuba", St. Louis Beacon, June 15, 2011.