

“Unauthorized” Practice of Law in Iowa — Protection for Whom?

by George C. Leef, J.D.

Like every state except Arizona, Iowa declares that the “practice of law” is restricted to licensed attorneys. Under Court Rule 118A, the State Bar’s Unauthorized Practice of Law (UPL) Committee is empowered to investigate and register complaints against people engaging in legal practice without a license and those so accused must show cause why they should not be enjoined from continuing to do so. This is supposedly justified by the public’s need for “integrity and competence.” I call it turf protection.

It is deeply ingrained in the legal profession that only bar members can be competent to do what lawyers do. Without UPL statutes, wrote the President of the State Bar of Michigan in 1996, the public would be at the mercy of “incompetent pretenders who hold themselves out as able to give legal advice.” That sounds terrible — but is it true?

In my view, it is not. The proponents of UPL (and licensing statutes generally) vastly overestimate the extent of consumer harm that would occur in a free market backed up with remedies for breach of contract, misfeasance, or fraud. At the same time, they underestimate — or, more often, entirely ignore — the harm that licensing does in driving up costs and reducing availability. They provide little if any added deterrence to incompetent performance and resulting consumer harm, but they block a great number of beneficial transactions from occurring — a bad trade-off.

In a competitive market, building a reputation for successful service is extremely important. Going into any kind of business means a personal commitment of time and money, a commitment that is put at risk by failure. People try to make sure that they are good enough to meet the competition and satisfy consumer expectations before they go into a business or profession. That’s why you find very few “duds” in any free market. Self-interest and the high cost of failure prospectively filters out most incompetence. Just as licensed attorneys nearly always stick to the areas of the law they know, so do unlicensed practitioners where they are free to operate. The cost of giving bad service is a powerful incentive not to do so.

The consumer’s self-interest also plays a role here. The more is at stake, the more carefully he shops. He gathers information to assess the likelihood that a service provider will do a good job. Referrals, business location, longevity — consumers consider these and other indicators of competence. Rich or poor, consumers are usually pretty careful to see that they get maximum value for their money.

The self-interest of both buyers and sellers works to filter out most harmful transactions. It is noteworthy that in the era before lawyer licensing, there was no public outcry against incompetent attorneys. The bar sought the UPL statute, not the public.

Licensing imposes an arbitrary and very costly barrier to entry into legal practice. No one is allowed to “practice law” (a phrase with no clear definition) unless he becomes a member of the bar. Doing that requires a law degree (three years of study in an American Bar Association “approved” school) and passing the bar exam (months of cramming). When you consider the implicit and explicit costs, becoming an attorney means an investment in excess of \$100,000. That keeps a lot of people out and raises the cost of hiring those who do become “authorized” to practice.

All that studying is neither necessary nor sufficient to make a person competent to assist others with legal problems. Law school gives the would-be lawyer a wide, but shallow, introduction to the law. The bar exam tests to see if he has memorized a lot of minutiae. Putting these two together, however, is no assurance that the newly-minted lawyer knows how to handle any real-world problem. Most lawyers readily admit that the real business of learning lawyering begins after admittance to the bar.

And it is also true that people can learn a lot about fields of the law without going to law school. A tax accountant can know the IRS Code every bit as well as a lawyer can. A company’s unemployment-compensation specialist can know the state’s law on that subject inside and out. There is nothing magical about law school. In the 19th century, when people had a choice, most aspiring lawyers did not go to law school, but rather learned as apprentices. (Law school, incidentally, was never more than two years; often less.)

Where lawyers face competition, fees are lower. In 1995, the State Bar of New Jersey attempted to have real estate closings declared the “practice of law” and thereby change the longstanding practice of allowing laymen to do closing work in the southern part of the state. The Supreme Court of New Jersey, in refusing to grant the bar’s wishes, found that settlement costs were significantly lower in southern New Jersey compared to northern New Jersey where a lawyers-only rule was followed. Furthermore, there was no evidence of consumer harm from allowing people to compete freely.

In Arizona, which has had no UPL statute since 1986, people can choose between attorneys and unlicensed legal practitioners for their needs. For difficult legal problems they nearly always go to an attorney, but if they mistakenly go to a non-attorney who can’t handle the matter, he refers the individual to an attorney. In fact, referrals in both directions are common. Many consumers have saved money because of competition; others have obtained help they might not otherwise have been able to afford. Arizona’s free legal services market works well, despite the bar’s predictions of disaster back in 1986.

Ultimately, though, this isn’t just a dollars and cents issue — it’s an issue of liberty. Why should the government decide who is to be allowed to serve you? Why should an individual face the prospect of punishment just for contracting to perform a service for another willing person? Freedom and economic efficiency would both be enhanced by the repeal of the state’s UPL prohibition.

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