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Living Trusts in the Unauthorized Practice of Law: a Good Thing Gone Bad

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LIVING TRUSTS IN THE UNAUTHORIZED PRACTICE OF LAW: A GOOD THING GONE BAD

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INTRODUCTION

An elderly man recently lost his wife and visits the lawyer's office for assistance in the administration of her estate. After the attorney expresses her condolences, she asks if his wife had a will. The client reaches into a brown shopping bag and retrieves a two-and-a-half inch black binder containing several trusts. The elderly gentleman and his deceased wife were told this would eliminate the "expensive legal nightmare" of probate.[1] Unfortunately, like many others, this couple was victimized by a trust mill.[2]

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1. MARYLAND ESTATE PLANNING, INC., THE LIVING TRUST: A WAY TO LIVE AND A WAY TO DIE 3.

2. A trust mill is an entity that employs nonlawyers who lure primarily elderly people to FREE estate planning seminars. The goal is to ensure a one-on-one meeting with the prospective victim. At the seminar, the consumers are warned of incredible expenses, delays, and frustration for their heirs associated with probate and lawyers. The trust-mill

Trust mills are staffed by nonlawyer salespersons who take advantage of a consumer's reluctance to retain attorneys and sell the victim a prepackaged bundle of trusts for a substantial fee.[3] The trusts rarely accomplish the settlor's[4] objectives. In initiating trust sales, the trust mill's primary goal is really to gain access to the person's assets. Once the trust-mill salesperson is privy to the consumer's financial information, the salesperson then recommends that the victim liquidate his or her assets and purchase insurance or annuity contracts.[5] Nonlawyers aggressively market living trusts[6] as the wealth transfer vehicle of

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promoter promises that all problems will be solved with the purchase of their package of trust forms. The trust forms are not tailored to the specific needs of the prospective victim but are mass produced from standard forms. It is the classic "panic them and sell them the panacea" routine. EVANS, LEIMBERG, MILLER & PLOTNICK, NEW BOOK OF TRUSTS (1997). Once the trust-mill employee has access to financial information, he/she then advises victims to liquidate their assets, regardless of the tax ramifications, and instructs them to purchase annuity contracts or life insurance which, in turn, generates large commissions for the trust mill. *Id.*

3. The average cost of the living trust forms is $2000. *See* Angela M. Vallario, *Non-Lawyers' Use of the Revocable Living Trust in UPL*, PRINCE GEORGE'S B.J., June 1999, at 12 ("Two thousand dollars seems to be the general consensus on the going rate for the living trust."); *see also* Agnes C. Powell, *Beware! Living Trust Scams Do Exist*, PRINCE GEORGE'S B.J., Apr. 1999, at 12 (describing a situation where a client was forced to pay roughly $2000 for a living trust).

4. *See generally* GEORGE T. BOGERT, TRUSTS § 29, at 89 (6th ed. 1987) ("By very definition the settlor is the person who selects the trustee, trust property, and beneficiary, and establishes the trust.").

5. The sale of these investment products generates large commissions for the trust mill. Annuity contracts are marketed by the trust mill despite its inappropriateness. *See* Powell, *supra* note 3, at 12 (describing a trust mill that sold a couple in their eighties annuities and recommended that they liquidate their savings bonds to do so, resulting in a $15,000 taxable gain for the couple); *see also* Lori A. Stiegel et al., *On Guard Against Living Trust Scams*, NAT'L BAR ASS'N MAG., Jan.-Feb. 1994, at 20 (demonstrating how an 83-year-old Oklahoma man was persuaded by an insurance agent trust mill to purchase an annuity).

6. *See* BLACK'S LAW DICTIONARY 935 (6th ed. 1990) (defining a living trust as a "[t]rust which is operative during life of settlor; an active or inter vivos trust"). A living trust is a legal document. The living trust is a will substitute which, like a will, is revocable until death or incompetence. *See* BOGERT, *supra* note 4, at 21. This legal document establishes that a trustee will hold legal title to the assets transferred to the trust for the benefit of beneficiaries. *See id.* at 96. Generally, the living trust benefits the settlor during the settlor's life and provides for continuous management or distribution after the settlor's death. *See id.* at 173. The settlor is generally named as trustee and retains the right to alter, amend, or revoke the trust during the settlor's lifetime or until incompetency. *See id.* at 21, 515, 528.

The title of the assets that are transferred to the living trust must be in the trustee's name. *See id.* at 108. This transfer of assets is not subject to the gift tax because of the settlor's ability to revoke. *See* I.R.C. § 2511 (1989); 26 C.F.R. § 25.2511-2(c) (1999). Upon the death of the settlor, the full value of the living trust assets remaining in the trust are subject to the inheritance tax (if imposed) and the federal estate tax (if applicable). *See* I.R.C. § 2036 (1989 & Supp. 1999); *see also* MD. CODE ANN., TAX-GEN § 7-202 (1997).

choice.[7] The living-trust promoters reach consumers by telephone, newspaper advertisements offering "FREE" seminars, and through door-to-door solicitation.[8] The widespread popularity of the living trust is primarily attributed to the vehicle's ability to avoid probate.[9] The living trust is pushed on misinformed consumers as a way to "save" money. Consumers are convinced that the living trust reduces costs associated with probate.[10] Furthermore, consumers rely on

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7. *Cf.* Vallario, *supra* note 3, at 12 ("Now that the living trusts seem to be a popular estate-planning vehicle for the transfer of wealth, non-lawyers are aggressively marketing the living trust with high-pressure sales tactics and exaggerated benefits.").

8. *See, e.g.*, Florida Bar v. American Senior Citizens Alliance, Inc., 689 So. 2d 255, 256-57 (Fla. 1997) (per curiam) (illustrating trust-mill scams through the use of door-to-door solicitation); *see also* E-mail from Bruce Stone, Somerset-Trust-Trustmill Story, to the Estate Planners and Administrators List (Aug. 19, 1999) (on file with author).

Last year, a trust mill was prosecuted by the Florida Attorney General's office. One case involved a trust-mill salesman spending over seven hours in an elderly woman's home. He told her that she could not trust lawyers to give her honest advice. The elderly woman wanted to call her children, but he would not let her do so. He told her that her estate of $200,000 was going to go entirely to the lawyers and to the government in taxes. He told her that his company had a one-day special that would solve all of her problems and would cost nineteen ninety-five. She wrote him a check for $19.95 and he told her no, it was $1995. She did not want to write a check for that much money, so he offered to drive her to her bank so she could withdraw cash. When they got to the bank, he stayed in the car, and she went inside. The bank teller perceived her nervousness and inquired as to the problem. The elderly woman told her that there was a man in the car outside waiting for her to bring out the cash. The bank manager was brought in; the police were called, and an arrest was made. The trust mill consented to entry of an injunction and no longer does business in Florida. The trust-mill salesman is also being prosecuted in a felony action.

9. *See* HENRY W. ABTS, III, THE LIVING TRUST (1989) (describing the living trust as "[t]he failproof way to pass along your estate to your heirs without lawyers, courts, or the Probate System"); *see also* NORMAN F. DACEY, HOW TO AVOID PROBATE (1965) (describing the probate procedure and ways to avoid it). Additionally, the living trust frenzy has caught the interest of consumers to the extent that they seek advice from nonlawyers. *See* Robert J. Bruss, *Real Estate Mailbag*, WASH. POST, Aug. 28, 1999 (addressing Ella K.) (describing the "primary purpose" of putting assets in a living trust as the avoidance of "probate costs and delays after you pass on"). Mr. Bruss goes on to discuss the administration of his mother's Minnesota estate, complaining of the year delay and "about $2,000 in wasted attorney and other probate fees . . . ." *Id.*

Probate is the court-supervised process for the administration of an estate. *See* DACEY, *supra*, at 5. If there is a will, it is proven as valid as the Last Will of the decedent. *Id.* The personal representative (or executor or special administrator if no valid will) collects probate assets (assets in the decedent's sole name or payable to his or her estate), manages those assets, pays debts and taxes, and distributes the remaining balance to will beneficiaries or intestate heirs. *Id.* Assets, transferred during lifetime to a living trust, "avoid" probate because such assets are not probate assets as of the decedent's death. *See* BOGERT, *supra* note 4, at 33-35. Living trust assets are held in the name of the trustee even if the trustee and the decedent are the same person. *Id.* Due to the titling, the trust assets pass outside the court supervised probate system, hence "avoiding" probate. *Id.*

10. *See* DACEY, *supra* note 9, at 6 (noting costs associated with probate, including legal fees, personal representative commissions, court costs, and other administrative fees).

nonlawyers' advice that they will "save" taxes with a living trust.[11] Living trusts, however, do not hold up to these bold claims. Yet these misleading and aggressive marketing techniques[12] are responsible for the documents' popularity among consumers. It is clear that nonlawyers are profiting from the living trust revolution.[13] The unfulfilled promises[14] used by nonlawyer salespersons contribute to the unauthorized practice of law (hereinafter sometimes referred to as UPL) problem surrounding the legal profession in the United States today.[15]

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11. *But see* People *ex rel.* MacFarlane v. Boyls, 591 P.2d 1315, 1315 (Colo. 1979) (en banc) (noting that "[n]either the Internal Revenue Services (IRS) nor any courts . . . have found the trusts to be viable tax saving mechanisms."). *See also infra* note 98 (discussing *MacFarlane*).

12. *See* Jeff Modisett, *Living Trusts: A Consumer Protection Perspective*, RES GESTAE, Sept. 1998, at 19 (discussing the "aggressive marketing and selling tactics" of living trusts); *see also infra* note 19 (noting the various methods of solicitation that marketers of living trusts employ).

13. Living trusts cost approximately $2000. *See* Vallario, *supra* note 3, at 112; *supra* note 8 (describing a situation in which a Florida trust mill attempted to charge $1995); *see also* People v. Laden, 893 P.2d 771, 771 (Colo. 1995) (en banc) (per curiam) (discussing a couple that was charged $1595 for a living trust); Steven G. Nilsson, *Are Living Trusts Void When Commercially Formed Through the Unauthorized Practice of Law?*, FLA. B.J., Apr. 1995, at 24, 30 n.5 ("American Senior Citizens Alliance 'at its peak . . . was selling about 500 trusts a month for anywhere from $995 to $1,495.'" (quoting Jeffrey Schweers, *Attorney General, Bar Crack Down on Trust Company*, FLA. BAR NEWS, June 1, 1994, at 8)); Powell, *supra* note 3, at 12 (describing a situation in which a couple was charged $2000 for a living trust plus $400 in legal fees). *See generally* Stiegel, *supra* note 5, at 20 (describing how trust mills profit from sales of annuities used to fund the trusts).

14. Some promises made by the trust-mill marketers include: (1) Living trusts reduce taxes; (2) Probate must be avoided; (3) Only living trusts can be used to manage affairs and avoid guardianships; (4) Living trusts save time and money; (5) Living trusts can be used to avoid creditors and Medicaid; (6) Living trusts ensure privacy. *See, e.g.*, *MacFarlane*, 591 P.2d at 1316. None of these promises that are heard over and over again at the FREE seminars are accurate. The claims are intended to lure individuals into purchasing the legal document for the wrong reasons.

Living trusts do have some advantages. *See generally* Maryland State Bar Association, *Living Trusts: Get the Facts* (2000) (visited July 13, 2000) <http://www.msba.org/Sections-committees/Estatesandtrust/articles.htm>. Some advantages include that the settlor may be able to avoid an ancillary probate in a jurisdiction where he owns land and is not domiciled as of the date of his or her death. *See id.* Living trusts are also advantageous if the settlor prefers, needs, or desires another individual or institution to manage his or her assets during life. *Id.* A living trust has a better chance of holding up to anticipated will-contest claims. *See id.* Finally, a living trust can be a beneficiary of a qualified retirement plan.

15. Jurisdictions are taking a close look at the trust-mill UPL problem. In 1999, Maryland State Bar Association (MSBA) Past-President James L. Thompson established a practice of law task force. MSBA President, Richard H. Sothoron, Jr., has appointed a new Special Committee on Practice of Law. *See* Janet Stidman Eveleth, *New President Prepares MSBA for* Next Millennium, BAR BULLETIN (MD. ST. B. ASS'N NEWSL., Annapolis, MD), July 15, 1999, at 1. The Practice of Law Committee is taking a close look at shutting down trust mills in Maryland. *See id.* Additionally, "[t]he State Bar of California Estate Planning, Trust, and Probate Law Section established a 'truth squad' to educate the public about the

Trust mills have benefitted from the negative stereotype associated with lawyers.[16] Nonlawyers have used the increasing cost of legal services[17] as leverage in advertising[18] and marketing[19] the living trust. Although nonlawyers are intruding into many areas of the legal profession,[20] this Article will focus on the use of the revocable living trust in the unauthorized practice of law. First, this Article will identify the steps involved in implementing the living trust as the practice of law. Second, this Article will address the hurdles of prohibiting nonlawyers from preparing living trusts. Third, this Article will address the consequence of nonlawyers drafting the living trusts. In the final section, this author suggests that the legal profession must clean up its definitions of the practice of law, alleviate fears of consumers, actively prosecute trust mills, and impose tougher penalties on violators to conquer today's UPL problem.

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advantages and disadvantages of living trusts." Stiegel, *supra* note 5, at 21. Similarly, "[t]he Illinois State Bar Association created a living trust task force, which combines existing working groups from eight separate bar entities." *Id.*

16. *Cf. infra* note 77 (discussing consumers' reluctance to seek the assistance of lawyers).

17. *See infra* note 78 (discussing the costs of litigation).

18. *See* Maryland Estate Planning, Inc., *supra* note 1, at 1, 3 ("It's the Foolproof Way to Pass Along Your Estate to Heirs WITHOUT Lawyers, Courts or the Probate System."). Maryland Estate Planning, Inc. claims that probate "has been transformed into an expensive legal nightmare in which lawyers . . . help themselves to a substantial portion of your estate." *Id.*; *see also* PRESTONWOOD PRESS, WHAT LAWYERS DON'T WANT YOU TO KNOW 3 (1995) ("The process of probate was designed to serve lawyers almost as much as the owner and beneficiaries of the will.").

19. *See generally* Modisett, *supra* note 12, at 19 (discussing the marketing of living trusts). Modisett noted that the marketers of living trusts employ a number of methods from advertisements in retirement magazines to direct mail solicitation promising to "save thousands of hard-earned dollars by avoiding probate" to FREE seminars and lunch or dinner at reputable restaurants and hotels. *Id.* (internal quotation marks omitted). The sales tactics are aggressive and strive for a one-on-one meeting in which high-pressure sales tactics are used to persuade the consumer to purchase a living trust. *See id.*

20. *See, e.g.*, Allstate Ins. Co. v. West Va. State Bar, 998 F. Supp. 690, 690 (S.D.W.Va. 1998) (discussing an insurance company's attempt to settle personal injury claims without lawyers); *In re* Campanella, 207 B.R. 435, 450 (Bankr. E.D. Pa. 1997) (enjoining the distribution of misleading do-it-yourself bankruptcy kits); *see also* AMERICAN BAR ASS'N, COMM'N ON NONLAWYER PRACTICE, NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS (1995) (discussing the history and the present state of the unauthorized practice of law); Anthony Bertelli, *Should Social Workers Engage in the Unauthorized Practice of Law?*, 8 B.U. PUB. INT. L.J. 15, 16 (1998) (arguing that social workers provide a necessary supplement to the practice of law for those who cannot afford costly legal services); Andrew S. Morrison, Comment, *Is Divorce Mediation the Practice of Law? A Matter of Perspective*, 75 CAL. L. REV. 1093, 1096 (1987) (arguing that "divorce mediation by non-lawyers should not be considered the practice of law, while such mediation practiced by lawyers should").

I. THE LIVING TRUST AND THE PRACTICE OF LAW

It is unclear exactly what constitutes the practice of law or the unauthorized practice of law. With the exception of court representation, there is no general consensus on what constitutes the practice of law.[21] The steps necessary to implement a living trust are not known or accepted by nonlawyers to constitute the practice of law.

A. The Practice of Law

Individuals rendering legal services are required to be licensed by the state in which the legal service is rendered.[22] The practice of law is a learned profession[23] and a "special field reserved to lawyers duly licensed by the court."[24] There are, however, special situations in which nonlawyers are permitted to practice law.[25]

A clear definition of what constitutes the practice of law does not exist and is long overdue. No uniform provision has been adopted throughout jurisdictions. Instead, each state creates its own definition

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21. *See, e.g.*, American Bar Ass'n, Standing Comm'n On Lawyers' Responsibility for Client Protection, SURVEY AND RELATED MATERIALS ON THE UNAUTHORIZED PRACTICE OF LAW/ NONLAWYER PRACTICE (1994) [hereinafter 1994 SURVEY ON UPL] (surveying each jurisdiction's definition of the practice of law and overviewing each jurisdiction's activity regarding UPL).

22. *See* Dereck A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2587 (1999) ("All States have statutes that restrict the practice of law to licensed attorneys.").

23. Thomas O. Rice, *How Bar Can Respond to Proponents of Multiple-Disciplinary Practices*, N.Y. L.J., Jan. 27, 1999 ("Individual attorneys and the organized bar do well to recall that classically, there are but three professions, theology, medicine *and law*.").

24. *See* Rhode Island Bar Ass'n v. Automobile Serv. Ass'n, 179 A. 139, 140 (R.I. 1935). The Rhode Island Bar Association case involved lay proprietors of an automobile service association contracting with customers to furnish legal advice and assistance relating to the operation of automobiles. *See id.* Members of the state bar and members of the Committee on Illegal Practice of Law of the Rhode Island Bar Association brought suit against the Automobile Service Association (ASA) for the illegal practice of law. *See id.* ASA provided legal advice and consultation to consumers regarding matters of driver's license and registration. *See id.* The court found that ASA's activity constituted "practicing law." *Id.* at 145.

25. *See, e.g.*, MD. CODE ANN., BUS. OCC. & PROF. § 10-102, 10-206(b)-(e) (1995) (noting the few exceptions in which an individual who has not been admitted to the bar can practice law); IOWA SUP. CT. R. 114 (Supp. 1999) (allowing law students to engage in the practice of law provided certain conditions are met); *In re* Darlene C., 717 A.2d 1242, 1247 (Conn. 1998) (holding that the drafting, signing, and filing of termination petitions by nonlawyer representatives of the Commissioner of the Department of Children and Families were expressly permitted by CONN. GEN. STAT. ANN. § 17a-112 (1998) and, therefore, did not constitute the unauthorized practice of law); VA. CODE LEGAL ETHICS & UNAUTH. PRAC. OPIN. NO. 1077 (1991) (allowing nonlawyer accountants to engage in the practice of law under the supervision of an attorney).

by statute, rule, and/or case law.[26] Variations among jurisdictions have resulted in unauthorized practice of law issues being resolved on a case-by-case basis.[27] Some jurisdictions believe that the legal profession is best served by a vague definition of the practice of law.[28] Furthermore, our existing "practice of law" dilemma is attributed to the Model Code of Professional Responsibility Ethical Consideration 3-5, which determined that it was "neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law."[29] However, some guidance is gained by the following:

> Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his [or her] educated ability to relate the general body and philosophy of law to a specific legal problem of a client. . . .[30]

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26. *See generally* 1994 SURVEY ON UPL, *supra* note 21 (analyzing statutory provisions in all fifty states).

27. For example, the "Do You Need An Attorney?" pamphlet had different results against the same violator. *Compare* Commonwealth *ex rel.* Fisher v. Allstate Ins. Co., 729 A.2d 135, 141 (Pa. 1999) (holding that the Commonwealth's "complaint fail[ed] to state a claim that Allstate [was] engaging in the practice of law"), *with* Allstate Ins. Co. v. West Va. State Bar, 998 F. Supp. 690, 691 (S.D. W. Va. 1998) (approving "an opinion holding distribution of [a] pamphlet by Allstate constituted the unauthorized practice of law"). Allstate "contact[ed] individuals (claimants) who . . . [had] claims against Allstate policyholders [and] attempt[ed] to have them settle their claims quickly by telling them they [would] offer them a fair amount, that they [did not] need an attorney and obtain[ed] authorization from claimants to obtain their medical and employment records." *Fisher*, 729 A.2d at 137. Allstate gave the claimants the following three documents: "Quality Service Pledge (Pledge), a letter titled 'Do I Need an Attorney?' and a form entitled 'Authorization to Furnish Medical/Employment Information' (Authorization)." *Id.* The Pennsylvania court held that Allstate did not engage in the UPL. *See id.* at 141. The averments could not be construed in a manner such that Allstate was "offering legal advice to claimants or is rendering legal judgment regarding the merits of any claim. At best, the complaint . . . alleg[ed] that . . . Allstate misrepresent[ed] that it [would] perform an unbiased review of the case and . . . discourag[ed] claimants from hiring attorneys." *Id.*

28. *See, e.g., In re* Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 422 S.E.2d 123, 124 (S.C. 1992). The South Carolina Bar, through a special subcommittee on the Unauthorized Practice of Law Committee, submitted a set of proposed rules governing the UPL. *See id.* The comprehensive set of rules attempted to define and to delineate the practice of law and to establish clear guidelines for nonlawyers. *See id.* The court stated that "it is neither practicable nor wise to attempt a comprehensive definition [of the practice of law] by way of a set of rules . . . . [T]he better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy." *Id.*; *see also* Denckla, *supra* note 22, at 2588 n.43 (discussing the South Carolina UPL case).

29. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-5 (1980) (footnote omitted).

30. *Id.*; *see also* BARLOW F. CRISTENSEN, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—Or Even Good Sense?*, AM. B. FOUND. RES. J. 159, 169-75 (1980)

Uncertainty in the definition of what lawyers do has received heightened attention from the American Bar Association (ABA) in light of the multidisciplinary practice issue facing the legal profession.[31] In August 1998, ABA President Philip S. Anderson appointed a twelve-person Commission (Commission) to study the multidisciplinary practice.[32] In June 1999, the Commission made a recommendation in favor of multidisciplinary practice.[33] The Recommendation authorizes lawyers and nonlawyers to share fees.[34] Lawyers and nonlawyers would be permitted to work in the same firm where the lawyer could practice law and the nonlawyer could provide a different service.[35] For example, the nonlawyer service could be accounting or financial planning or social work or any other discipline. Currently, the District of Columbia is the only American jurisdiction permitting such a working arrangement.[36]

In August 1999, the ABA House of Delegates deferred resolution of the multidisciplinary practice "unless and until additional study demonstrates that such changes will further public interest without sacrificing or compromising lawyer independence and the legal profession's tradition of loyalty to clients."[37] The Recommendation recognized the existing vague definition of the practice of law.[38] The

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(reviewing the history of the legal profession and standards for admission to various state bars).

31. AMERICAN BAR ASSOCIATION, COMM'N ON MULTIDISCIPLINARY PRACTICE, BACKGROUND PAPER ON MULTIDISCIPLINARY PRACTICE: ISSUES AND DEVELOPMENTS 2 n.1 (1999) [hereinafter BACKGROUND PAPER]. A multidisciplinary practice is one in which a lawyer is associated with one or more professionals from a different discipline (e.g., accounting, financial planning, social work, gerontology, etc.). *See id.*

32. *See id.* at App. A. The Commission members include a cross section of the legal profession. The Commission is to examine the trend of international accounting firms purchasing law firms from the public's perspective. *See* American Bar Association, Commission on Multidisciplinary Practice, *MDP Final Report* (visited Aug. 23, 2000) <http://www.abanet.org/cpr/mdpappendixa.html>.

33. American Bar Association, *Commission on Multidisciplinary Practice Report to the House of Repres.* (visited Sept. 14, 1999) <http://www.abanet.org/cpr/mdprecommendation.html> [hereinafter *Recommendation*]. The Committee found that "[t]he legal profession should adopt and maintain rules of professional conduct that protect its core values, independence of professional judgment, protection of confidential client information, and loyalty to the client through avoidance of conflicts of interest." *Id.*

34. *Id.*

35. *See id.*

36. *See* D.C. RULES OF PROFESSIONAL CONDUCT 5.4 (1999) (allowing lawyers and nonlawyers to work together in a partnership or other type of organization as long as certain requirements are met).

37. *No Multidisciplinary Practice for Now*, A.B.A. J., Sept. 1999, at 23.

38. *See* RECOMMENDATION, *supra* note 33 (providing a list of possible rules of professional conduct for the legal profession). The lawyer's code of professional conduct traditionally has not defined the practice of law. The definition has been left to individual

Recommendation includes a definition of the practice of law that would specifically include the preparation of trusts and a wide range of other legal documents.[39] Revisions to the definition of the practice is now at the forefront of the state bars' agenda for the 21st Century.[40] Clarification of the definition of the practice of law is a welcomed change brought about by the multidisciplinary practice issue.[41]

UPL enforcement is a difficult task under the current structure.[42] Multidisciplinary practice would complicate the existing UPL problem. The Recommendation states that nonlawyers "should not be permitted to deliver legal services."[43] The Recommendation recognizes that additional care must be taken to assure that lawyer members or

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states, and the states have taken different approaches. To facilitate consideration of practice of law issues that may arise in a multidisciplinary context, the D.C. Court of Appeals defined the practice of law as "the provision of professional legal advice or services where there is a client relationship of trust or reliance." D.C. CT. APP. R. 49(b)(2). The proposed definition further sets out a presumption of rendering legal services when any of the following services are performed on behalf of another:

> (a) preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, trust instruments or any other instruments intended to affect the disposition of property of decedents' estates, document related to business and corporate transactions, other instruments intended to affect or secure legal right and contracts except routine agreements incidental to a regular course of business; (b) preparing or expressing legal opinions; (c) appearing or acting as an attorney in any tribunal; (d) preparing any claims, demands, or pleadings of any kind, or any written documents containing legal arguments or interpretation of law, for filing in any court, administrative agency or other tribunal; (e) providing advice or counsel as to how any of the activities described in paragraph (a) through (d) might be done, or whether they were done, in accordance with applicable law; and (f) furnishing any attorney or attorneys, or other persons to endure the services described in subparagraphs (a) through (e) above.

Id. But see John S. Dzienkowski & Robert J. Peroni, *ABA's Definition of Practice Flawed*, NAT'L L. J., July 26, 1999, at A27 (arguing that the Committee broadens the definition of the practice of law thereby creating the possibility of unnecessary litigation).

39. *See* RECOMMENDATION, *supra* note 33; *see also* JOHN GIBEAUT, *Share the Wealth*, A.B.A. J., July 1999, at 16 (noting that "the [Multidisciplinary Practice] Commission's suggestion specifically include[d] preparation of a wide range of [legal] documents" by nonlawyers).

40. *See* Eveleth, *supra* note 15 (explaining the practice of the law task force). The MSBA Past-President "appoint[ed] special task forces [Multidisciplinary Practice and Practice of Law task force] to define the practice of law and determine the proper course to protect the public." *Id.* at 17. The Practice of Law Committee was re-appointed by MSBA President Sothoron. The Multidisciplinary Practice task force was discharged after the Maryland Board of Governors voted against MDP. *See* American Bar Association, Commission on Multidisciplinary Practices, *Revised Recommendation* (visited July 27, 2000) <http://www.abanet.org/cpr/mdprecom10F.html>, in which the ABA voted against MDP and discharged the Commission.

41. *But see* Dzienkowski & Peroni, *supra* note 38, at A27 (discussing the problems that could arise if this new definition is put into practice).

42. *See infra* Part II.C (discussing the problems in satisfying the necessary requirements for effective UPL enforcement).

43. RECOMMENDATION, *supra* note 33, at n.4.

employees of the organization are not aiding in the UPL. Emphasis is added in the Recommendation noting that the Recommendation does not permit nonlawyers to deliver legal services.[44] A more-detailed definition of the practice of law is critical but unlikely to eliminate the risk of additional UPL problems that may arise in a multidisciplinary environment.[45] Monitoring the activities of nonlawyers in a multidisciplinary environment will be impossible. Despite the accelerated UPL concern caused by the multidisciplinary environment, supporters of the multidisciplinary practice claim that there is "no

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44. *See id.* at n.10 (emphasizing that the MDP have protective measures in effect to prevent the UPL). Advocates of multidisciplinary practice have taken the "if you can't beat them join them approach" in their acceptance of the multidisciplinary environment. Proponents claim that multidisciplinary practice is here, let us learn to live with it. In his testimony before the Commission on Multidisciplinary Practice, Philip S. Anderson, as President of the American Bar Association, stated, "[I]t [multidisciplinary practice] is here. And it's going to stay here." This author disagrees. Our existing structure is absorbing a tremendous amount of unprosecuted UPL occurrences. The so-called "consulting services" rendered by the Big Five accounting firms constitute UPL. *See* Gibeaut, *supra* note 39, at 16 ("The commission's proposal came partly in answer to the Big Five accounting firms' expansion into areas that lawyers historically have regarded as their province, such as advising clients on tax strategies instead of just filling out returns."). The question is why aren't these UPL cases being prosecuted? The UPL cases are going unprosecuted because the UPL enforcement agencies lack complainants and financial support necessary to prosecute. *See infra* Part II.C (discussing the problems in prosecuting UPL in more detail). The multidisciplinary advocates claim that such an environment is good for the public. *See id.* at 14 ("Commission members said in late May that the recommendations maintain traditional protections for clients while opening new business avenues for lawyers."). Jamie Goreleck, Delegate from the D.C. Bar, testified before the Commission on Multidisciplinary Practice that "there are many, many problems now that benefit tremendously from a multidisciplinary approach." (visited Sept. 14, 1999) <http://www.abanet.org/cpr/mdphouse.html>. However, the only evidence of the position is a lack of complainants needed to prosecute. To the contrary, Cheryl Niro of the Illinois State Bar testified before the Commission that "there's simply no evidence that consumers at any level desire that legal services be delivered in this way. There is no evidence that legal services will be less costly, more efficient or create any greater quality in a MDP." American Bar Association (visited Sept. 14, 1999) <http://www.abanet.org/cpr/mdphouse.html>. This author intends to further examine the multidisciplinary practice issues in a future article, and any further discussion is beyond the scope of this Article.

45. It will be much too difficult for UPL prosecution to be effective if lawyers and nonlawyers are working in the same office. There will be no clear understanding of what was the lawyer's work product. *See* Gibeaut, *supra* note 39, at 16 ("[T]he legal community cites concerns that involving nonlawyers in decision-making and finances may hinder the professional judgment and independence a lawyer needs to effectively serve a client."). The Big Five accounting firms are an example, because they initiated the multidisciplinary practice issue for lawyers. Where did the lawyer's advice start and where did the CPA's work end? How will trust funds be handled? How will privileges be handled? *See* MD. CODE ANN., CTS. & JUD. PROC. §§ 9-108, -110 (1998) (defining attorney/client and accountant/client privileges). A detailed analysis of the problems presented by the multidisciplinary practice is beyond the scope of this Article.

intention of letting nonlawyers practice law."[46] Multidisciplinary practice will certainly make UPL enforcement more difficult, more costly,[47] and ultimately nonexistent. If UPL enforcement becomes nonexistent in a multidisciplinary practice environment, the use of the living trust and the provision of other legal services in the UPL will have a tremendous impact on the legal profession.[48]

B. Unauthorized Practice of Law

Many jurisdictions supplement their definition of the practice of law with statutes, rules, and/or cases addressing what is the unauthorized practice of law.[49] Model conduct rules or rules of professional code of conduct currently allow each jurisdiction to define the unauthorized practice of law.[50] It is recognized that:

> The unauthorized practice of law is among the most complex, controversial problems facing the legal profession. Few issues have received such varied treatment from jurisdiction to jurisdiction. Strict rules in some jurisdictions delimit the activities in which nonlawyers may engage and are accompanied by a full panoply of enforcement sanctions, including: injunctive relief, civil liability and criminal penalties. Other jurisdictions impose less restrictions and provide fewer remedies. Still others currently have no mechanism to investigate or to restrict the unauthorized practice of law . . . , allowing nonlawyer delivery of legal services to the public to run rampant.[51]

UPL provisions do not provide much clarity in determining whether nonlawyers cross the line. The law has developed on a case-by-case basis and provides a wide variety of principles.[52] Case law has established that UPL exists if the activities performed by a nonlawyer

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46. Gibeaut, *supra* note 39, at 14 (quoting an interview excerpt with Joanne M. Garvey of San Francisco, a Board of Governors liaison to the panel).

47. *See infra* Part II.C.2 (discussing the high costs associated with trust-mill prosecution).

48. *See infra* note 152 (noting the variations in the standard of care owed by lawyers versus nonlawyers and the potential consequences these variations might cause).

49. *See* 1994 SURVEY ON UPL, *supra* note 21, at 5 (indicating that 19 states have a statute defining the practice of law, nine states have a Rule that does so, and 28 states have case law that does so).

50. *See id.* at 1 (explaining that "[i]n order to determine what constitutes the unauthorized practice of law, it is essential to define the practice of law"). Most jurisdictions (34) rely on case law, statutes, or rules to provide a definition for UPL. *See id.*

51. *Id.* at vii.

52. *See* Denckla, *supra* note 22, at 2588-89 (citing cases that provide "certain methods" for defining the practice of law (citations omitted)).

require familiarity with legal principles, "knowledge, training, skill, and ability beyond those possessed by the average man."[53] On the other hand, lawyers may interact with nonlawyers such as secretaries, investigators, detectives, researchers, accountants, draftsmen, paralegals, and others.[54] As long as lawyers remain responsible to the client, they may also "employ nonlawyers to do any task . . . except counsel clients about law matters, engage directly in the practice of law, appear in court . . . as part of the judicial process."[55]

A clear definition of the unauthorized practice of law is equally overdue. In light of the multidisciplinary practice, a uniform definition of the practice of law will likely provide guidance in evaluating activities from a UPL perspective. Until the multidisciplinary practice is resolved,[56] it is doubtful that uniform guidance will be provided as to what constitutes the practice of law.[57]

C. *Implementation of the Living Trust Is the Practice of Law.*

No jurisdiction has codified that the preparation of a living trust constitutes the practice of law.[58] More often, the practice of law is not

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53. *In re* Campanella, 207 B.R. 435, 444 (Bankr. E.D. Pa. 1997) (quoting *In re* Arthur, 15 B.R. 541, 546 (Bankr. E.D. Pa. 1981)). In *Campanella*, a corporation of nonlawyers sold a "DO IT YOURSELF-PRO SE BANKRUPTCY KIT" to the plaintiff. *Id.* at 437. The district court was unable to ascertain with certainty whether Pennsylvania courts would hold that the corporation was engaged in the unauthorized practice of law. *Id.* at 449.

54. For example, Maryland Rule of Professional Conduct 5.5 does "not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work." MARYLAND RULES OF PROFESSIONAL CONDUCT 5.5 cmt.; *see also* Attorney Grievance Comm'n v. Hallmon, 681 A.2d 510, 514 (Md. 1996) (quoting the comment to rule 5.5(b)).

55. Louisiana State Bar Ass'n v. Edwins, 540 So. 2d 294, 299 (La. 1989).

56. The ABA adopted a Revised Recommendation for now bringing MDP to closure. The ABA's revised recommendation urged each jurisdiction to revise its laws governing laws to preserve the core values of the legal profession. In its final recommendation, which discharged the Commission on Multidisciplinary Practice, the ABA instructed that "[e]ach jurisdiction should reevaluate and refine to the extent necessary the definition of the 'practice of law.'" American Bar Commission on Multidisciplinary Practice, *Revised Recommendation, supra* note 40.

57. *But see* Eveleth, *supra* note 15, at 1 (indicating that James L. Thompson, Maryland State Bar Association President, appointed a special task force to define the practice of law).

58. *But see* D.C. APP. R. 49(b)(2) (in pertinent part defining the practice of law as "the provision of professional legal advice or services where there is a client relationship of trust or reliance"). Under the District of Columbia rule, "[o]ne is presumed to be practicing law when engaging in any of the following conduct on behalf of another" and:

> (A) Preparing any legal document, including any deeds, mortgages, assignments, discharges, leases, TRUST INSTRUMENTS or any other instruments intended to affect interests in real or personal property, wills, codicils, instruments intended to affect the disposition of property of decedents' estates, other instruments intended

clearly defined or leaves clarification to a court.[59] Furthermore, courts have identified the practice of law as "prepar[ing] legal instruments affecting the rights of others."[60] The Supreme Court of Florida determined that assembling, drafting, executing, and funding a living trust document was the practice of law.[61] Examined in their entirety, case law, statutes, and/or rules provide that the preparation of living trusts constitutes the practice of law. Furthermore, the living trust is a legal document "affecting the . . . [settlor's and beneficiaries' legal] rights."[62] When a nonlawyer undertakes this activity it is illegal.[63]

Court decisions from a number of states have addressed trust-marketing endeavors by nonlawyers and consistently have found such activities to constitute the unauthorized practice of law.[64] The draft-

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to affect or secure legal rights, and contracts except routine agreements incidental to a regular course of business;

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(E) Providing advice or counsel as to how any of the activities described in subparagraph (A) through (D) might be done, or whether they were done, in accordance with applicable law . . . .

Id. (emphasis added); *cf.* RECOMMENDATION, *supra* note 33, at App. A (providing the proposed ABA definition that was modeled after the D.C. Rule and includes a presumption in favor of the practice of law when engaging in the "preparation of trust instruments").

59. *See, e.g.*, MD. CODE ANN., BUS. OCC. & PROF. § 10-101(h)(iii) (1995) (defining, in part, the practice of law as "performing any other service that the Court of Appeals defines as practicing law").

60. Committee on Prof'l Ethics and Conduct v. Baker, 492 N.W.2d 695, 701 (Iowa 1992); *see also* Stark County Bar Ass'n v. Beaman, 574 N.E.2d 599, 600 (Ohio Bd. of Commissioners on the Unauthorized Practice of Law 1990) (applying the rule that the preparation of legal instruments affecting the legal rights of others constitutes the practice of law).

61. Florida Bar Re: Advisory Opinion—Non-Lawyer Preparation of Living Trusts, 613 So. 2d 426, 427 (Fla. 1992) (per curiam). A petition was brought for an advisory opinion on whether nonlawyer preparation of a living trust constituted the unauthorized practice of law. *See id.* The Court identified the five following steps in the process of creating a living trust: "(1) gathering the necessary information; (2) assembling the document; (3) reviewing the document with the client; (4) properly executing the document; and (5) funding the trust document." *Id.* The Court held that only "gathering the necessary information" was appropriate for nonlawyers. *Id.* at 428.

62. *Baker*, 492 N.W.2d at 701.

63. *See supra* Part I.A (explaining how various jurisdictions define the practice of law). *See generally* Florida Bar v. American Senior Citizens Alliance, Inc., 689 So. 2d 255, 259 (Fla. 1997) (per curiam) (holding that a nonlawyer's preparation of living trusts constituted UPL); 1994 SURVEY ON UPL, *supra* note 21 (reporting the manner in which each state defines the practice of law and how they address UPL).

64. *See, e.g.*, People *ex rel.* MacFarlane v. Boyls, 591 P.2d 1315, 1316 (Colo. 1979) (suspending a lawyer for aiding nonlawyers in the marketing of trusts); *American Senior Citizens Alliance, Inc.*, 689 So. 2d at 259 (holding that a corporation engaged in UPL because its nonlawyer employees' participation in setting up living trusts exceeded "mere gathering of necessary information"); *Advisory Opinion*, 613 So. 2d at 428 (holding that the "assembly, drafting, execution, and funding of a living trust document constitute[s] the practice of law"); *Baker*, 492 N.W.2d at 703 (stating that a nonlawyer's advising of clients with respect to living trusts constituted UPL); *In re* Mid-America Living Trust, 927 S.W.2d 855, 856 (Mo.

ing and assistance in the execution of trust documents for a fee by nonlawyers constitutes the unauthorized practice of law.[65] Creating and selling complex estate planning documents by nonlawyers constitutes illegal law practices. Nonlawyers who answer legal questions and determine the appropriateness of a living trust based on a customer's particular needs are violating UPL provisions.[66] Nonlawyers engaged in trust-marketing efforts are clearly improper. Ohio's Board of Commissioners on the Unauthorized Practice of Law has forbidden unlicensed lay persons from drafting trust documents.[67] Subsequently, nonlawyer representatives of a corporation engaged in UPL when they gathered information from customers, advised them of legal rights and responsibilities in trust, estate, and tax matters, determined whether the customer needed a living trust, and participated in the preparation of living trust documents.[68]

An attorney is prohibited from assisting a nonlawyer in the performance of an activity that constitutes the unauthorized practice of law.[69] Attorneys who facilitate UPL are subject to discipline.[70] Granting an injunction against the American Seniors Citizens Alliance, the

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1996) (en banc) (holding that a corporation engaged in UPL when its nonlawyer employees rendered advice on the need for living trusts, gathered information used to determine the appropriate type of trust, prepared trust documents, and charged fees); Cleveland Bar Ass'n v. Yurich, 642 N.E.2d 79, 85 (Ohio Bd. Unauth. Prac. 1994) (holding that a corporation's nonlawyer representatives engaged in UPL when they advised customers about living trusts and independently determined whether certain customers should have a living trust); Stark County Bar Ass'n v. Beaman, 574 N.E.2d 599, 601 (Ohio Bd. Unauth. Prac. 1990) (holding that a nonlawyer who drafted trust agreements had engaged in UPL).

65. *See Advisory Opinion*, 613 So. 2d at 427.

66. *See American Senior Citizens Alliance, Inc.*, 689 So. 2d at 257 (citing the answering of specific legal questions and giving of tailored legal advice by a nonlawyer as conduct that the court later concluded constituted as UPL). American Senior Citizens Alliance, Inc. (ASCA) was a corporation owned and managed exclusively by nonlawyers. *See id.* at 256. ASCA engaged in the business of creating and of selling revocable living trusts. *See id.* The company employed licensed attorneys as in-house counsel but relied upon paralegals, customer service representatives, and salespeople to contact customers and sell them estate-planning devices. *See id.* The customers paid for legal advice that was never received. *See id.* at 257. The ASCA practices resulted in great harm to elderly members of the public. *See id.* The court held that ASCA had engaged in UPL. *Id.* at 259.

67. *Beaman*, 574 N.E.2d at 601. When a nonlawyer operated an estate-planning service and issued a revocable living trust that he prepared and funded through the sale of life insurance and annuities, the court ruled that "the trust agreements prepared . . . for a fee, significantly affect[ed] the legal rights of their clients" and therefore respondents' actions constituted the unauthorized practice of law. *Id.* at 600.

68. *See Cleveland Bar Ass'n*, 642 N.E.2d at 85 (finding that the conduct of defendant's nonlawyer representatives constituted UPL).

69. *See, e.g.*, MARYLAND RULES OF PROFESSIONAL CONDUCT 5.5(b) (1997); *see also* People v. Laden, 893 P.2d 771, 773 (Colo. 1995) (en banc) (per curiam) (imposing sanctions on an attorney for aiding a nonlawyer in the sale of living trust document packages); Attorney Grievance Comm'n v. Hallmon, 681 A.2d 510, 520 (Md. 1996) (sanctioning an attorney for

Supreme Court of Florida ruled in 1997 that the corporation was engaged in the unauthorized practice of law when nonlawyer employees answered customers' specific legal questions, determined the appropriateness of a living trust based on the customer's particular needs and circumstances, and assembled, drafted, executed, and funded living trusts.[71] Although attorneys reviewed trust documents, employees' conduct went beyond the mere gathering of necessary information.[72]

In Iowa, two businessmen agreed to cosponsor seminars on living trusts.[73] The marketers advised clients about what type of estate planning they needed, including what documents they would require and how to tailor it to meet their particular situation, and then referred these clients to counsel.[74] The court held that "one who prepares legal instruments affecting the rights of others is practicing law."[75]

Preparation of a living trust constitutes the practice of law and preparation by a nonlawyer is prohibited. Courts have consistently found the activity to be within the realm of the practice of law. Nonlawyers who venture into this activity violate UPL provisions. Lawyers must strive for an effective way to prevent trust-mill UPL.

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failing to supervise nonlawyer in the preparation of a zoning application for special exception).

In *Hallmon*, the attorney represented a church before the Zoning Hearing Examiner. *Hallmon*, 681 A.2d at 513. After the hearing, the Examiner filed a complaint with Bar Counsel raising the issue of UPL. *See id.* The office manager/paralegal attempted to represent the client. *See id.* When the Examiner asked a question of Hallmon, he deferred to his paralegal. *See id.* at 516. The paralegal met with the client and prepared the application for special exceptions, signing the attorney's name and placing her initials behind that signature. *See id.* at 517-18. She prepared the statement of justifications of the special exception, and she prepared and signed the attorney's name to a letter requesting expedited handling of the application. *See id.* at 513.

70. *See, e.g., id.* at 520 (suspending Hallmon for 90 days); People *ex rel.* MacFarlane v. Boyls, 591 P.2d 1315, 1316 (Colo. 1979) (en banc) (suspending an attorney for one year after finding that he had aided a nonlawyer in marketing living trusts); Louisiana State Bar Ass'n v. Edwins, 540 So. 2d 294, 304 (La. 1989) (disbarring an attorney for, among other things, aiding a paralegal in the unauthorized practice of law).

71. *See* Florida Bar v. American Senior Citizens Alliance, Inc., 689 So. 2d 255, 259 (Fla. 1997) (per curiam).

72. *See id.*

73. *See* Committee on Prof'l Ethics and Conduct v. Baker, 492 N.W.2d 695, 696 (Iowa 1992).

74. *See id.* at 698.

75. *Id.* at 701.

II. UPL PREVENTION

Over time, the legal profession has been criticized by many.[76] The legal profession's reputation causes some individuals to avoid lawyers. Furthermore, many consumers "are afraid of lawyers" or retain a lawyer only "when they are in trouble."[77] With today's cost of legal services,[78] it is not surprising that consumers seek alternatives.

A. The Unauthorized Practice of Law Problem

The heart of the UPL problem is a vague and unclear definition of the practice of law. Additionally, anti-lawyer rhetoric, increasing costs of legal services, and exaggerated benefits of the living trust are to blame for the trust mills. The legal profession, however, must accept responsibility for the reasons that consumers retain nonlawyers to perform legal services. For example, consumers may be seeking an alternative to an attorney-client relationship because lawyers "don't have the time" to provide the needed legal services.[79] Perhaps the consumer is under the mistaken belief that she is dealing with a law-

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76. *See, e.g.*, Denckla, *supra* note 22, at 2599 (arguing that the "lawyer monopoly" and UPL restrictions prevent low—and moderate—income persons from access to adequate legal services).

77. *See* Gibeaut, *supra* note 39, at 16 (quoting Seth Rosner, former chair of the ABA General Practice, Solo, and Small Firm Section as saying "[p]eople are afraid of lawyers . . . . They go see lawyers when they are in trouble."). One view is that:

> lawyers are scary to the average person. Most people only visit a lawyer in a hostile, adversarial situation—they find themselves in some legal entanglement and they need help. Often, consulting a lawyer is an individual's last resort. The average person is intimidated by lawyers, worries about being taken advantage of, is concerned about the expense of just talking to a lawyer, and generally can't see the positive benefits of having any kind of a relationship with a lawyer.

Lora H. Weber, Remarks to the Comm'n on Multidisciplinary Practice, A.B.A. (Mar. 11, 1999) <http://www.abanet.org/cpr/weber1.html>.

78. Derek Denckla stated that "[w]ithout UPL, the fear is that lawyers will behave competitively for clients like any other business. . . . UPL restrictions appear to be the main barrier blocking development of affordable legal services." Denckla, *supra* note 22, at 2598-99; *see also* Eveleth, *supra* note 15, at 17 (stating that MSBA Past-President James L. Thompson is "committed to providing quality and cost-effective legal services" to Maryland citizens and that "[h]e believes litigation costs are too high and out of reach for most people").

79. Debra Baker, *Is This Woman a Threat to Lawyers?*, A.B.A. J., June 1999, 54, 55. Marilyn Arons stated that "[t]he practice of law is really the implementation of justice. Why do you have to be an attorney to implement justice?" Arons claimed that she has become a "lightning rod for terror in the legal profession over affordable competition." *Id.*

yer.[80] More often, the consumers retain nonlawyers because of their fear of lawyers.[81]

The unauthorized practice of law is an outright prohibition against nonlawyers providing legal services. Qualifications other than those required of a licensed attorney are not taken into consideration. Even though some nonlawyers are more qualified to handle certain matters than lawyers are,[82] if UPL permitted qualifications to be considered, regulation of an already complicated,[83] difficult-to-prosecute[84] area would require every single violation to go to trial. UPL would be so widespread and the risk of prosecution would be so small that the slim chance of prosecution would not effectively discourage the unlawful activity.[85]

UPL is not about lawyers protecting a monopoly;[86] rather, it concerns safeguards, nonexistent for nonlawyers, that are in place to protect the public. Lawyers are educated in the law, examined and licensed by the court, guided by professional standards and ethical rules, insured against malpractice claims, and monitored by a grievance system.[87] Nonlawyers are not. Although nonlawyers may be more qualified in some instances, that possibility is only one compo-

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80. *See* Brad Hendricks, *Barbarians at the Gate: Image, Ethics and the Unauthorized Practice of Law*, ARK. LAW. 32, 32 (Summer 1998) (stating that the public commonly perceives unlicensed practitioners as lawyers, or at least as being part of the legal profession).

81. *Cf. supra* note 77.

82. *See* Denckla, *supra* note 22, at 2594 (asserting that certain nonlawyer specialists may be more competent at certain tasks than a lawyer is).

83. *See supra* Part I.B (explaining that UPL is a complex subject matter, in part because of its varied treatment from jurisdiction to jurisdiction).

84. *See infra* Part II.C (explaining that, with respect to trust mills, the absence of complainants and the inadequacy of funding make it difficult to prosecute unauthorized practitioners).

85. Nonlawyers would use delay tactics and nonlawyer corporations would intentionally forfeit their corporate charter and re-incorporate under a new corporate entity. Furthermore, the chances of being prosecuted would be so small that additional nonlawyers would participate. *But see* Ryan J. Talamante, *We Can't All Be Lawyers . . . Or Can We? Regulating the Unauthorized Practice of Law In Arizona*, 34 ARIZ. L. REV. 873, 891 (1992) (advocating the careful implementation of a limited practice rule that permits qualified nonlawyers to engage in the practice of law).

86. *But see* Denckla, *supra* note 22, at 2594-95 (arguing that adequate client protection could be achieved without a lawyer monopoly); Baker, *supra* note 79, at 56 (asserting that recent concern over UPL may be the result of lawyers' fear and frustration over increased competition from nonlawyers).

87. *See* Talamante, *supra* note 85, at 875 (explaining that bar membership requires passing an examination, adherence to a code of professional responsibility, and contribution to an insurance fund established to compensate individuals who are harmed by a lawyer).

nent of the entire package.[88] Other public protections in place for lawyers are inapplicable for nonlawyers. Only an attorney can possess the complete package.

UPL prosecution, however, has been severely criticized.[89] Again, lawyers receive the brunt of the criticism and are viewed by consumers as self-serving,[90] greedy, and unwilling to share prospective clients.[91] UPL prosecution may appear to the consumers as if lawyers are protecting their pocketbooks,[92] but that is not the case.

B. Public Protection

Public protection is the guiding force behind the statutes, rules, and case law governing UPL. The prohibition against UPL is to protect the public from being preyed upon by those not competent to practice law—from incompetent, unethical, or irresponsible representation.[93] Further guidance is obtained from the Model Code Ethical Consideration 3-1 that states that "[t]he prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services."[94] Model Code Ethical Consideration 3-2 defines "competent professional judgment" as "the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment."[95]

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88. *See supra* note 82 and accompanying text. In Denckla's discussion of client protection he argued that the assumption that lawyers are more competent than nonlawyers is erroneous. Denckla, *supra* note 22, at 2594. His position is that a nonlawyer specialist may be more competent than an attorney. *Id.* His example of a nonlawyer advocate who advises tenants on a daily basis about how to trek through the thicket of New York City's housing court often helps train lawyers who are volunteering their services. *Id.* In that case this author agrees with Denckla's example. Yet those nonlawyers who in fact may be more competent than some lawyers are not examined and licensed by the court, guided by professional standards and ethical rules, insured by malpractice insurance, or monitored by a grievance system.

89. *See* Baker, *supra* note 79, at 55 (speculating that the aggressive pursuit of UPL claims by lawyers could damage public perception of the legal profession).

90. *See id.*

91. *Id.* (quoting Phil Shaey, co-chair of the ABA Law Practice Management Section's Futurist Committee, an advocate of selective challenges to UPL to avoid the appearance that UPL prosecution is used merely as a tool for protecting the legal monopoly).

92. *See id.*

93. *See, e.g.*, Attorney Grievance Comm'n v. Hallmon, 681 A.2d 510, 514 (Md. 1996) (citing *In re* Application of R.G.S., 541 A.2d 977, 983 (Md. 1988)); Turkey Point Property Owners Ass'n v. Anderson, 666 A.2d 904, 908-09 (Md. App. 1995) (holding that a nonlawyer's filing of a petition to request rezoning was a nullity).

94. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-1 (1980).

95. *Id.* EC 3-2.

Nonlawyers are not trained to understand the complexities of a living trust. The field of estate planning requires knowledge of difficult and technical fields of law such as estates, trusts, wills, and tax law that are not at the command of these nonlawyers.[96] There have been many examples of real harms caused by nonlawyers' trust marketing businesses. Some examples of the harms are the failure to transfer assets, resulting in heirs having to probate the estate anyway to clear title to the property,[97] consumers being incorrectly told that living trust assets avoid federal estate taxes,[98] consumers being incorrectly advised as to the amount of the probate fees,[99] and clients becoming recipients of detrimental investment advice.[100] Yet, nonlawyers are gaining financially from UPL.

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96. *But see supra* Part II.A. Even if nonlawyers are competent in this area, qualifications should not be taken into consideration in evaluating whether the nonlawyer is engaging in UPL. *See id.*

97. *See* Florida Bar v. Schramek, 616 So. 2d 979, 981, 987 (Fla. 1993) (per curiam). Schramek was involved in a business that published kits used for seeking legal relief and ran a corporation called the L.A.W. Clinic without being licensed to practice law. *See id.* at 980. An elderly couple retained the services of Schramek to prepare a living trust. *See id.* at 981. Schramek prepared a quitclaim deed to transfer the couple's real property to the trust. *See id.* The forms that Schramek used were not included in either the Florida Rules of Civil Procedure or the Court's Approved Simplified Forms. *See id.* Furthermore, the quitclaim deed was defective. *See id.* Upon the death of the husband, title to the property transferred to his wife. *See id.* In preparing the deed, Schramek neglected to realize the fact that the deed required the signature of the deceased husband. *See id.* When the deed was executed, Schramek signed the deceased husband's name and notarized the signature. *See id.* Consequently, to clear the title to the property after the widow's death, her heirs were required to probate her estate formally, which resulted in costs to the estate of at least $6650. *See id.* The court held that Schramek engaged in UPL, which resulted in significant public harm. *Id.* at 987.

98. *See* People *ex rel.* MacFarlane v. Boyls, 591 P.2d 1315, 1315-16 (Colo. 1979) (en banc). A nonlawyer established Educational Scientific Publishers (ESP) with a lawyer to promote pure trusts to students, which they claimed, reduced students' taxes materially. *See id.* at 1315. ESP trusts allegedly would reduce or eliminate income, capital gains, estate and gift taxes provided that they were operated or managed properly. *See id.* ESP nonlawyer salesperson and the lawyer were available to assist purchasers and formulate an effective trust. *See id.* Neither the IRS nor any courts of record found the trusts to be viable tax saving mechanisms. *See id.* The court held that the lawyer aided the nonlawyer in UPL. *Id.* at 1316.

99. *See* People v. Laden, 893 P.2d 771, 771-72 (Colo. 1995) (en banc) (per curiam). A couple complained to the Attorney General's Office that a nonlawyer had sold them a living trust. *See id.* at 771. An out-of-state lawyer on behalf of National Family Trust prepared the trust form. *Id.* A nonlawyer then sold the trust to the couple for $1595, telling the couple that it would cost their sons $65,000 to settle their estate through probate and the courts. *See id.* A lawyer agreed to accept referrals from National Family Trust and was paid $125 for the review. *See id.* at 772. The court held that, by agreeing to accept the referrals from a nonlawyer engaged in the counseling and the sale of the trusts, the lawyer aided the nonlawyer in unauthorized practice of law. *Id.*

100. *See* Powell, *supra* note 3, at 12-13.

Nonlawyers are not regulated by rules of ethics or by any other means; they are not prohibited from taking actions which lawyers are prohibited from doing.[101] Furthermore, nonlawyers may not be held accountable for their actions.[102] Protection of the public is the backbone behind UPL prohibition.[103] The privilege of practicing law and rendering legal advice should be left to those who have obtained the proper training and education, who have successfully taken and passed the bar examination in the jurisdiction in which they practice, and who are governed by ethical rules. The legal profession's ethical rules mandate competence, integrity,[104] independence,[105] and confidentiality.[106] These rules ensure public protection to the highest level and mandate that UPL prevention remains an important concern for lawyers.

C. *Enforcement*

Effective UPL enforcement requires a complaint, funding, and appropriate penalties. The complaint places the regulatory entity on notice of the illegal activity. The regulator must have sufficient funds to proceed with the investigation. Finally, the penalties imposed upon violators must be sufficient to deter future activity.

1. Complainant.—In many jurisdictions, the UPL regulator is either the Attorney General[107] or the County Prosecutor,[108] who enforces a state's UPL provisions. In some jurisdictions, trust-mill prosecution is extremely low.[109] One reason for minimal trust-mill

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101. Door-to-door solicitation could be compared to the direct solicitation prohibited in *Florida Bar v. Went For It,* 515 U.S. 618 (1995). In *Went For It,* an attorney's direct solicitation of personal injury clients within 30 days following the accident in which they were hurt was prohibited. *Id.* at 620.

102. *See infra* Part III (discussing nonlawyer liability).

103. *See In re* Application of R.G.S., 541 A.2d 988, 983 (Md. 1988) ("The goal of the prohibition against unauthorized practice is to protect the public from being preyed upon by those not competent to practice law—from incompetent, unethical, or irresponsible representation.").

104. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-1 (1980).

105. *Id.* EC 5.

106. *Id.* EC 4.

107. *See, e.g.,* HAW. REV. STAT. ANN. § 605-15.1 (Michie 1998); ME. REV. STAT. ANN. tit. 4, § 808 (1998); MD. CODE ANN., BUS. OCC. & PROF. § 10-401 (1995); N.H. REV. STAT. ANN. § 311: 7-b (1995 & Supp. 1998); R.I. GEN. LAWS § 11-27-19 (1994).

108. *See* 1994 SURVEY ON UPL, *supra* note 21, at 24-31. In the state of Washington, one county prosecutor and the attorney general prosecute marketers of living trusts. *See id.*; *see also* 1999 Survey of Unauthorized Practice of Law Committees at 3.

109. In 1999, Melvin Hirshman, Counsel of the Attorney Grievance Commission of Maryland, stated that in 1998 there were 40 UPL prosecutions and not one involved a trust mill. *See* THE ATTORNEY GRIEVANCE COMMISSION OF MARYLAND, 25TH ANNUAL REPORT 14

prosecution amongst jurisdictions is the absence of complainants. The regulator needs witnesses and credible evidence to prosecute trust mills effectively. In many instances, regulatory entities are not receiving complaints to warrant an investigation.[110] Moreover, potential witnesses are often unwilling to participate in the process.[111] Perhaps the complainant is unable to participate in the prosecution because of a memory loss, illness[112] or fear.[113] Additionally, the problem may be discovered upon the potential witness' death during the administration of his or her estate.[114]

Without complainants UPL prosecution will not proceed against the trust mill. Generally, UPL prosecution hinges on harm not prevention.[115] A recent UPL prosecution was successful from a prevention perspective but was reversed after a special exemption was enacted for the software giant.[116]

(2000). In Maryland, the Attorney General's Office (and by informal agreement Bar Counsel) may investigate a UPL complaint. MD. CODE ANN., BUS. OCC. & PROF. § 10-401 (1995). *But see infra* notes 122, 130 (dealing with the prosecution of the Allstate Insurance Company). Florida has the best prosecution record of trust mills. *See* Nilsson, *supra* note 13, at 30 n.2 (noting Florida's efforts in stopping nonlawyers from promoting, creating, and selling living trusts).

110. Maryland Bar Counsel Hirshman noted that the complaints are coming from the bar association, not the victim. Notification from the members of the bar is insufficient because to prosecute the cases properly, there must be a witness to the trust scam. The number of members of the bar complaining of the trust mills' existence are insufficient.

111. *See* Powell, *supra* note 3, at 13 (discussing a specific instance of UPL and noting the Maryland Attorney General's Office's inability to investigate because the victims were unwilling to cooperate).

112. Trust mills target the elderly for just these reasons. *See* Powell, *supra* note 3.

113. *See id.*; *supra* Part II.A; *see also supra* note 77 and accompanying text.

114. *See* Ebert v. The National Estate Plan, Inc., No. WMN99CV2596 (D. Md. filed Aug. 25, 1999) (explaining a situation in which a victim contacted an attorney after the death of his wife at which time the trust scam unfolded); *see also* Vallario, *supra* note 3, at 15.

115. *See* Vallario, *supra* note 3, at 15 (comparing UPL prosecution to that of a child entering into a busy intersection and posing the question of whether the child should be stopped before the first step is taken or after the fact).

116. Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. Civ.A.3:97CV-2859H, 1999 WL 47235, at *1-2, *6 (N.D. Tex. Jan. 22, 1999), *vacated by* 179 F.3d 956 (5th Cir. 1999). The Committee, comprised of six lawyers and three lay persons appointed by the Supreme Court of Texas, filed a suit to enforce the state's UPL statute. *See id.* at *1. The suit was brought against a California corporation, whose principal place of business is in Iowa, engaged in the business of developing, publishing, and marketing a computer software program called the Quicken Family Lawyer (QFL). *See id.* QFL had over 100 legal forms including seven different will forms along with instructions on how to fill out the forms. *See id.* The product was advertised as being valid in 49 states including the District of Columbia and that the forms were developed and reviewed by expert attorneys. *See id.* The program asked short questions regarding marital status, number of children, and familiarity with living trusts. *See id.* at *2. If the individual answered in the positive with respect to the living trusts, then she was further asked how much effort she was willing to put into her estate plan. *See id.* at *2 n.3. After the selection of the document, there were

2. Funding.—Trust-mill prosecution is costly and a contributing factor to the dismal prosecution record.[117] To properly prosecute a trust mill, documents will need to be subpoenaed and examined by experts, experts will be needed to testify, and judges and law clerks will need to spend substantial time being brought up to speed on a complex issue.[118] Most jurisdictions are not financially funded to accommodate active prosecution of trust mills.[119] Jurisdictions are in need of additional funding to prosecute trust-mill endeavors properly. Furthermore, government prosecutors may not be equipped with the sophisticated knowledge necessary to prosecute these specialized matters. Florida has been the most successful at prosecuting trust mills. Florida currently has an annual budget for UPL enforcement in excess of one million dollars.[120] The substantial funding has lead to overwhelmingly successful results in the state's endeavors to stop trust mills from practicing law.[121]

Limited funding has prevented many jurisdictions from addressing trust mills.[122] Yet, despite needed funding in Texas,[123] the Unau-

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an additional series of questions asked of the user with respect to the chosen form. *See id.* at *2. The Unauthorized Practice of Law Committee (UPLC) filed an action in state court alleging that the selling of QFL violated the unauthorized practice of law statute in Texas. *See id.* at *3. The district court, relying heavily on *Fadia v. Unauthorized Practice of Law Committee*, 830 S.W.2d 162 (Tex. App. 1992), held that the QFL fell within the range of conduct that Texas courts have determined to be the unauthorized practice of law. *Id.* at *6. The case, however, was appealed, and the summary judgment was vacated after Governor George W. Bush signed legislation exempting formbook publishers from UPL prosecution. Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., 179 F.3d 956 (5th Cir. 1999).

117. *See* Gibeaut, *supra* note 39, at 16 (quoting Steven Craig Nelson, ABA Commission on Multidisciplinary Practice).

118. *See* Ellen F. Deason, *Allerton House Conference '98: Confronting and Embracing Changes in The Practice of Law*, 86 ILL. B.J. 628, 631 (1998) (discussing conferees' recommendation for increased UPL enforcement with a focus on nonattorneys in recognition of the need to commit significant resources in UPL enforcement).

119. Arizona and Kentucky have no annual budget for UPL enforcement. Jurisdictions like Maryland and Pennsylvania have no specific line item in the annual budget for UPL enforcement. *See* 1994 SURVEY ON UPL, *supra* note 21, at 16; *see also* 1999 Survey of Unauthorized Practice of Law Committees at 4.

120. 1999 Survey of Unauthorized Practice of Law Committees at 4. Florida's annual budget for UPL enforcement was $1,044,309.

121. *See* Florida Bar v. American Senior Citizens Alliance, Inc., 689 So. 2d 255 (Fla. 1997); *see* Nilsson, *supra* note 13, at 30 n.2.

122. In Maryland, the regulatory authority has not prosecuted one trust mill. There is clear evidence of trust-mill existence within the state. No victims, however, have come forward willing to participate in the prosecution. *See* Powell, *supra* note 3. According to Bar Counsel, the only complainants are lawyers who have not been victimized by the trust mills. *But see* Allstate v. West Va. State Bar, 998 F. Supp. 690, 690 (S.D. W.Va. 1998) (dismissing an action filed against the State Lawyer Disciplinary Board Committee on Unlawful Practices after licensed lawyer's complaint about distributed pamphlets led to the Commit-

thorized Practice of Law Committee (UPLC)[124] aggressively prosecutes UPL cases.[125] Recent notoriety was attributed to the Texas UPLC in its suit against Parsons Technology (aka Quicken Family Lawyer).[126] The UPLC was granted a summary judgment in favor of preventing Quicken Family Lawyer from distributing legal software that went beyond the UPL limits in its computer-generated advice.[127] The Texas decision, however, was appealed, and the summary judgment was vacated as a result of new legislation[128] that exempted publishers of formbooks from UPL prosecution.[129]

In an attempt to cut out the middleman attorney in personal injury cases, Allstate Insurance Company ventured into the practice of law with the distribution of a pamphlet titled "Do I Need An Attorney?"[130] The court held the distribution of the pamphlet to a third-party insurance claimant constituted the unauthorized practice of law.[131] Funding is necessary for all UPL cases, especially situations like Allstate and the Big Five accounting firms.[132] It is impossible to regulate large companies without substantial financial backing.[133] Allstate

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tee's finding of the unauthorized practice of law). *See also* Ebert v. The Nat'l Estate Plan, Inc., No. WMN99CV2596 (D. Md. filed Aug. 25, 1999) (describing charges levied against The National Estate Plan, Inc., and Henry Abts, one of its principle officers, for assisting nonlawyers in the sale and the preparation of joint living trusts as UPL).

123. *See infra* note 135 (discussing the Texas UPL budget).

124. The UPLC is responsible for enforcing Texas's Unauthorized Practice of Law statute. *See id.*; *see also supra* note 116.

125. *See* Unauthorized Practice of Law Comm. v. Parsons Tech. Inc., No. Civ.A.3:97CV-2859H, 1999 WL 47235, at *1 (N.D.Tex. Jan. 22, 1999).

126. *See supra* note 116.

127. *Parsons Tech.*, 1999 WL 47235, at *7, 11.

128. TEX. GOV'T CODE ANN. § 81.101 (West 1998 & 1999 Supp.) (exempting software producers from the practice of law definition if they state that the products are no substitute for the advice of an attorney).

129. *Id.*

130. Allstate Ins. Co. v. West Va. State Bar, 998 F. Supp. 690, 690 (S.D.W.Va. 1998). A licensed attorney filed a complaint with the State of West Virginia Disciplinary Board alleging that Allstate unlawfully engaged in the practice of law by distributing the pamphlet. *See id.* Allstate unsuccessfully contended that the committee's decision violated the First Amendment and Dormant Commerce Clause. *See id.* at 692 n.4.

131. *Id.* at 692.

132. One of the Big Five Accounting Firms is Arthur Andersen with more than $5 billion in revenues. *See Texas Panel Dismisses Complaint Against Arthur Anderson*, PR NEWSWIRE (July 29, 1998).

133. *See* Commonwealth v. Allstate Ins. Co., 729 A.2d 135, 141 (Pa. Commw. Ct. 1999) (holding that "Do I Need an Attorney" pamphlet and other documents did not constitute the UPL). Pennsylvania has no specific line item for its annual budget for UPL enforcement. The lack of needed resources could have made the difference in Pennsylvania. *See also Texas Panel Dismisses Complaint Against Arthur Anderson*, *supra* note 132.

apparently financially outsized other regulators and was permitted to intervene and to negotiate settlements with potential claimants.[134]

Few jurisdictions have a sufficient budget to enforce UPL provisions against trust mills. Florida has more than ten times the amounts found amongst the next two contenders.[135] Limited or non-existent budgets make trust-mill prosecution difficult at best. Trust-mill prosecution is a costly venture and without needed funding trust mills will continue to practice law and to cause harm to consumers.

3. Penalties.—In an effort to curtail the UPL, several states have enacted and have enforced a variety of remedies, such as (1) injunctions, (2) criminal prosecution, (3) contempt citations, and (4) writs of *quo warranto*. The most common remedy[136] for an UPL violation is an injunction,[137] which has been instituted in over thirty jurisdictions.[138] Proponents of injunctive relief credit its effectiveness to the fact that juries are not generally permitted, and therefore, the possi-

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134. *See Allstate Ins. Co.*, 729 A.2d at 137 n.4, 141. Allstate contacted claimants who had claims against a policyholder attempting to have them settle other claims quickly by telling them they would offer them a fair amount and that there was no need for an attorney. *See id.* at 137. Allstate obtained authorization from claimants to obtain their medical and employment records. *See id.* Allstate gave the claimants three documents: "Quality Service Pledge," a letter titled "Do I Need an Attorney?", and a form entitled "Authorization to Furnish Medical/Employment Information." *Id.* The Pennsylvania court held that Allstate did not engage in the UPL. *Id.* at 141. The averments could not be construed in a manner such that Allstate was "offering legal advice to claimants or [was] rendering legal judgment regarding the merits of any claim. . . . At best, the complaint . . . alleg[ed] that . . . Allstate misrepresent[ed] that it [would] perform an unbiased review of the case and . . . discourag[ed] claimants from hiring attorneys." *Id.* Allstate has continued its UPL practice in Maryland. Maryland Ins. Comm'r v. Allstate Ins. Co., Md. Ins. Admin # MIA-56-2/00 (Feb. 14, 2000). Allstate will likely venture into jurisdictions with nominal UPL enforcement funding.

135. Tennessee has an annual budget for UPL enforcement in the amount of $90,000. Texas has an annual budget for UPL enforcement in the amount of $70,000. *See* 1999 SURVEY ON UPL; *see also supra* note 120 and accompanying text.

136. *See* Note, *Remedies Available to Combat the Unauthorized Practice of Law*, 62 COLUM. L. REV. 501, 505 (1962) (stating that an injunction has been the most popular remedy for the unauthorized practice of law and noting that various obstacles in some jurisdictions have made it less effective than it could be).

137. An injunction acts as a restraint on an action that is injurious in nature. *See* BLACK'S LAW DICTIONARY 784 (6th ed. 1990); *see also supra* note 8 (discussing a Florida trust mill that consented to the entry of an injunction).

138. *See* 1999 Survey of Unauthorized Practice of Law Committees at 4; *see also* IND. CODE ANN. § 33-2-3-1 (West 1995) (granting the Indiana Supreme Court exclusive jurisdiction to issue restraining orders and injunctions against those found to be involved in the unauthorized practice of law); MISS. CODE ANN. § 73-51-1(1) (1993) (authorizing the board of commissioners of the Mississippi State Bar to seek an injunction against any individual engaged in the unauthorized practice of law).

bility of a sympathetic ruling in favor of the nonlawyer is unlikely.[139] Generally, to obtain injunctive relief, an individual must show, among other things, a threat of irreparable injury to his or her rights.[140] UPL statutes expressly enable the regulator to obtain injunctive relief.[141]

Criminal contempt proceedings are the most drastic remedy against UPL violators.[142] Punishment in the form of criminal contempt may be by imprisonment, fine, or both.[143] As lawyers commit themselves to prosecuting UPL cases, criminal contempt, as a remedy, should become a more common penalty. Thirty-seven states have enacted penalties making UPL a misdemeanor.[144] This position requires additional funding for personnel, time, and money for the state.[145] Limited UPL budgets amongst a majority of the jurisdictions places practical limitations on criminal enforcement prosecution. Such limitations often result in nonprosecution.[146]

Quo warranto actions are available in Kansas[147] and in Wisconsin.[148] *Quo warranto* tests whether a corporation is validly organized or has power to engage in the business for which it is involved.[149] Historically, *quo warranto* has been brought by the attorney general on the behalf of the public.[150] Where the action has been extended to proceedings brought by other interested parties, however, it has become an effective tool in combating UPL.[151]

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139. *See generally* Alexandra M. Ashbrook, *The Unauthorized Practice of Law in Immigration: Examining the Propriety of Non-Lawyer Representation*, 5 GEO. J. LEGAL ETHICS 237, 284 (1991) (analyzing remedial schemes in prosecuting UPL).

140. *See, e.g.*, Middleton-Keirn v. Stone, 655 F.2d 609, 611 (5th Cir. 1981) (citing Clements Wire and Mfg. Co. v. NLRB, 589 F.2d 894, 897 (5th Cir. 1979)). The court, however, stated that irreparable injury is presumed when all administrative remedies have been exhausted and suit has been filed in district court. *Id.* at 612.

141. *See, e.g.*, IND. CODE § 33-2-3-1 (Michie 1998); MASS. GEN. LAWS ANN. ch. 221, § 46B (West 1995); MINN. STAT. ANN. § 481.02 (West 1994); N.Y. JUD. LAW § 476-a (McKinney 1983); R.I. GEN. LAWS § 11-27-19 (1994); *see also* 1994 SURVEY ON UPL, *supra* note 21, tbl.2.

142. *See* Ashbrook, *supra* note 139, at 286.

143. *See id.*

144. *See id.* at 280; *see also* FLA. STAT. ANN. § 454.23 (West 1991 & Supp. 1999) (imposing fines of $500 for a noncriminal misdemeanor and of a definite term of imprisonment not to exceed six months); N.Y. JUD. LAW § 485 (McKinney Supp. 1990) (providing no elaboration on fines or sentencing); CAL. BUS. & PROF. CODE § 6126 (West 1990) (same).

145. *See* Ashbrook, *supra* note 139, at 281.

146. *See id.* at 280. The author's argument is that the state is unable to initiate action on its own information and procedural safeguards available to the criminal defendant may cause delays. These are additional limitations to stopping UPL.

147. *See* KAN. GEN. STAT. ANN. § 60-1601 (1994).

148. *See* WIS. STAT. ANN. §§ 757.30, 784.04 (West 1994).

149. *See* BLACK'S LAW DICTIONARY 1257 (6th ed. 1990).

150. *See* 1994 SURVEY ON UPL, *supra* notes 21, 107 and accompanying text.

151. *See infra* Part III.A (discussing varying standards of care applied to nonlawyers).

The legislatures have paved the way for tough UPL enforcement with deterrent penalties. Unless the regulators are sufficiently funded to use the criminal process, however, the penalties will not serve their needed purpose. Therefore, in conjunction with the additional funding, regulators must strive for criminal penalties against trust mills to deter such illegal practices effectively.

III. NONLAWYER LIABILITY

When consumers seek legal assistance from nonlawyers, liability issues are unclear. Standard of care provisions in place for lawyers are not always applicable to nonlawyers. The variations amongst the standard of care to which the lawyer and nonlawyer are held accountable are of great concern.[152] The problems and complexities that arise as a result of nonlawyers practicing law are endless.[153] Furthermore, consumers should be concerned about the validity of the legal documents when prepared by nonlawyers.

A. Standard of Care

Nonlawyers may not be held to the same standard of care as lawyers. Consumers who deal with nonlawyers may find difficulties in recovering from wrongs. No jurisdiction specifically recognizes a cause of action against a nonlawyer for practicing law. Moreover, case law is sparse and conflicting in terms of addressing the standard of care by which nonlawyers are held.[154] Although the existing case law does not address liability in the living trust setting, it is helpful to identify problems for consumers dealing with trust mills.

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152. If nonlawyers practice law and are held to a lower standard of care, then what incentive does an attorney have for keeping his license active? Some jurisdictions require continuing education. *See* Rocio T. Aliaga, *Framing the Debate on Mandatory Continuing Legal Education (MCLE): The District of Columbia Bar's Constitution of MCLE*, 8 GEO. J. LEGAL ETHICS 1145, 1145 (1995) (listing 38 states which, as of 1995, imposed mandatory Continuing Legal Education). All jurisdictions impose fees to keep a lawyer's license active. *See, e.g.*, MD. RULE 16-702 (requiring each lawyer to pay an annual assessment for the operation of the Attorney Grievance Commission as a condition precedent to the practice of law); GA. STATE BAR RULE 1-501; IOWA BAR RULE 123.4; NEV. SUP. CT. RULE 98.

153. *See supra* Part II.B. (dealing with the complexities of a living trust and discussing the real harms caused by nonlawyers' trust marketing businesses); *see also infra* Part III.B (dealing with the enforceability and validity of the legal document itself when prepared by a nonlawyer).

154. *See* Cornelia Wallis Honchar, *Evolving Standards of Nonlawyer Liability*, PROF. LAW. 14 (May 1995) (warning that "consumers who turn to nonlawyers should be well informed that if something goes wrong in a matter, they may have no redress or face limited recoveries").

Damages caused by a nonlawyer's negligence may not be compensated through common law remedies. Jurisdictions are split as to whether a nonlawyer can be held to the same standard of care as that of an attorney. Courts in California,[155] Washington,[156] and Kansas[157] have held that activities performed by nonlawyers are held to the same standard of care as lawyers.[158] The District of Columbia Court of Appeals ruled on a case that dealt with establishing the duties and legal accountability of nonlawyers.[159] The court held that a nonlawyer, who

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155. In *Biankanja v. Irving*, 320 P.2d 16 (Cal. 1958) (en banc), a notary public prepared a will for a testator. The will was invalid because the notary public failed to have it properly attested. *See id.* at 18. The testator died without revoking the will, and the beneficiary named only received one-eighth of the estate by intestate succession. *See id.* at 17. The beneficiary recovered a judgment for the difference between the amount, which she would have received had the will been valid, and the amount distributed to her. *See id.* The court held that the nonlawyer engaged in the unauthorized practice of law and was negligent even though there was no privity of contract between the nonlawyer and the beneficiary. *See id.* at 19.

156. In *Bowers v. Transamerica Title Insurance Co.*, 675 P.2d 193 (Wash. 1983) (en banc), a buyer purchased a parcel of real estate as an investment and advertised the property for sale. *See id.* at 196. A second party presented an agreement to the seller. *See id.* The agreement designated the defendant as the closing agent for the transaction. *See id.* The defendant prepared escrow instructions, a promissory note, a statutory warranty deed, and a modification of the promissory note. *See id.* at 197. The court held that the preparation was of a legal document and that the escrow agent may be held to the same duties and standard of care as an attorney escrow agent. *See id.* at 200. The court concluded that the layman's attempt made him liable in negligence. *See id.* at 200-01. The court reasoned that persons injured by such prohibited practices may bring a private action to recover damages and the costs of the suit, including attorney fees under the Consumer Protection Act. *See id.* at 201-02.

In *Cultum v. Heritage House Realtors, Inc.*, 694 P.2d 630 (Wash. 1985) (en banc), a client brought an action against a licensed realtor for the loss of use of earnest money and also sought a permanent injunction restraining the realtor from engaging in the unauthorized practice of law. *See id.* at 633. The realtor failed to follow the client's explicit instructions by including a subjective right in the contingency clause. *See id.* at 632. The court allowed a nonlawyer to prepare legal forms as long as they "compl[ied] with the standard of care demanded of an attorney." *Id.* at 633.

157. In *Webb v. Pomeroy*, 655 P.2d 465 (Kan. Ct. App. 1982), a couple transferred interest in 56 acres of land and their home to the third party to preclude foreclosure and cancellation of their contract of sale. *See id.* at 466. A nonlawyer handled the transaction and continually promised to secure repurchase rights from the third party and repeatedly indicated that he had done so. *See id.* When the third party indicated that the property was theirs, the couple brought suit against the nonlawyer. *See id.* The court held that a nonlawyer, who attempted to practice law, was amenable to suits in legal malpractice and misrepresentation for representing his work in preparing and in conveying documents to be as good as that of a lawyer. *See id.* at 468.

158. *See supra* notes 155-157 (discussing cases in which nonlawyers, found to have engaged in the unauthorized practice of law, were held to the same standard of care as lawyers).

159. Banks v. District of Columbia Dep't of Consumer and Regulatory Affairs, 634 A.2d 433, 434 (D.C. 1993). A nonlawyer sought the reversal of a decision by the Department of Consumer and Regulatory Affairs, which concluded that he had committed six unlawful

represented himself as a lawyer or as one possessing skill similar to that of a lawyer, was subject to charges of unlawful trade practices.[160]

Contrary authority exists holding loan closers to a different standard of care from that of lawyers.[161] Furthermore, nonlawyers who represent employees in administrative hearings have not been held responsible for negligence or legal malpractice.[162] A court held that a union representative did not owe the client a lawyer's standard of care in representing the employee before an administrative tribunal.[163] The court adopted a standard of caveat emptor because the employee knew that he was not dealing with an attorney and because union officials suggested that the union representative handle the claim before the tribunal.[164]

B. Validity

Furthermore, some scholars suggest living trusts are void when prepared by a nonlawyer.[165] Consumers need to concern themselves with the validity of legal documents prepared by nonlawyers.[166] There are also numerous cases in which legal documents were invalid when prepared by nonlawyers.[167]

Legislation that invalidates legal documents when prepared by nonlawyers seems harsh. It will likely deter consumers from seeking the assistance of nonlawyers on legal matters. This, in turn, will bene-

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trade practices in violation of the Consumer Protection Procedures Act. The nonlawyer rendered legal advice to a client.

160. *Id.* at 434.

161. *See, e.g.*, Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 652 P.2d 962 (Wash. Ct. App. 1982). Loan closers provide legally related services but do not work under the supervision of a lawyer, and the profession requires that they give advice to consumers. *See id.* at 965. The court in *Hangman Ridge* reasoned that a loan closer could not be liable in negligence for failing to disclose the potential tax consequences of a deed of sale to a client because his duty was to complete the deed documents to meet the requirements of the escrow instructions. *See id.*

162. *See* Bland v. Reed, 67 Cal. Rptr. 859, 863 (Cal. Ct. App. 1968) (holding that where an injured employee knew that the union employee who represented him at an administrative hearing was not a lawyer, neither the union nor the union employee is liable); United Steelworkers of Am. v. Craig, 571 So. 2d 1101, 1102 (Ala. 1990) (concluding that nonlawyers' failure to adequately represent union members in a discrimination suit is not a basis for a legal malpractice suit).

163. *Reed*, 67 Cal. Rptr. at 861-62 (finding that nonlawyers were authorized by the statute to go before the tribunal because "numerous claimants for compensation [were] indigent and their claims [were] . . . so small as not to justify the engagement or service of a member of the bar").

164. *Id.* at 863.

165. *See* Nilsson, *supra* note 13.

166. *See id.*

167. *See supra* notes 97, 99.

fit consumers because the profession's ethical rules established to ensure their protection will remain intact.

Nonlawyer liability is uncertain especially in jurisdictions that have not specifically addressed the issue. Consumers, however, are likely to find that nonlawyers are held to a lower standard of care,[168] especially if the nonlawyer's status is known to the consumer.[169] Therefore, consumers dealing with trust mills must be aware that there is limited protection. Consumers generally do not realize, understand, or appreciate the protections in place for their benefit when dealing with an attorney.[170] Only consumers in an adversarial situation against an attorney are informed of the client-protection fund, which is established for their benefit. Consumers must be educated on what good lawyers do and the protections in place for their benefit. Educating consumers on the risks involved in dealing with nonlawyers may deter consumers from seeking alternatives in the estate planning area.

IV. PROPOSED SOLUTION

To combat UPL effectively, lawyers must unite as a profession to protect the public and to protect themselves. There is no single solution to the UPL problem in the United States. Instead, a number of actions will be required of the legal profession.

First, it is up to the legal profession to clarify the definitions of the practice of law and the UPL.[171] The definition should make it clear that the process of creating a living trust constitutes the practice of law and nonlawyers' involvement should only be the gathering of the client's information.[172] The proposed ABA definition is a start. In addition, a specific item or parenthetical should be made for living trusts in light of the revocable living trust revolution and the real harms that have been caused by the trust mills.

The definition of the practice of law should represent a balance between a bright-line laundry list of what constitutes the practice of

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168. *See supra* notes 161-164.

169. *See Reed*, 67 Cal. Rptr. at 863 (holding that neither the union nor a union employee who represented an injured employee is liable provided that injured employee was aware of his representor's nonlawyer status).

170. *See* A.B.A., *supra* note 20, at 129 (detailing reasons for which consumers are assured greater protection when dealing with an attorney to include the existence of client protection funds, malpractice insurance, and disciplinary systems to enforce ethical standards).

171. Revised Recommendation, *supra* note 40.

172. *See* Florida Bar re Advisory Opinion—Non-lawyer Preparation of Living Trusts, 613 So. 2d 426, 428 (Fla. 1992) (per curiam) (finding that the drafting and execution of a living trust document constitute the practice of law).

law and clarification of the vagueness that exists today. This author's proposed definition as it relates to living trusts is:

> (1) Preparing . . . living trusts for another based on the individual's particular facts and circumstances, or
> (2) Recommending . . . living trusts based on an individual's particular facts and circumstances without indicating that an attorney's independent advice is necessary.
>
> In determining borderline cases, the more detailed the advice regarding the appropriateness or inappropriateness of the living trust for the consumer the more likely the advice constitutes the practice of law.

Regardless of the resolution the multidisciplinary practice concept, the practice of law and conversely the unauthorized practice of law definitions across American jurisdictions need clarification and uniformity. A uniform, clear provision should be proposed and uniformly adopted to articulate what constitutes the practice of law. Each state should then be permitted to carve out its own exceptions. With modern technology and the use of toll-free numbers, trust mills from other jurisdictions are a menace. Therefore, it is only with uniformity that acceptable results can be achieved.

Second, the legal profession has to take on the task of regaining a good reputation in the public eye. Lawyers must alleviate the "fear out there in the general public about 'probate' and lawyers."[173] It is important that the legal profession take steps to educate consumers. Bar associations around the country should host seminars for lay persons. Technology provides a medium of exchange that should be used by bar associations to make available to consumers general information about what the good lawyers do and the truths of probate.[174]

Consumers are not nor should they be expected to understand and to appreciate the ethical standards developed for their protection. The consumer cannot be expected to identify with an UPL problem. Consumers cannot be expected to realize that the hard-sell promises are false and misleading. Consumers should be warned about trust mills and encouraged to come forward to the extent they

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173. E-mail from Bruce Stone to the Estate Planners and Administrators List (Aug. 19, 1999) (on file with author).

174. *See* Maryland State Bar Association, *Living Trusts: Get the Facts* (2000), *supra* note 14. The MSBA Estate and Trust Law Section and Offices of the Register of Wills have prepared a brochure on living trusts. The brochures are available to the consumer at the Register of Wills Offices throughout the State of Maryland.

have dealt with a trust mill.[175] The trust-mill revolution that developed as a result of consumers' desire to avoid probate should publicize warnings against trust mills.[176]

Lawyers must keep in mind that consumers cannot be expected to understand the ethical rules to which lawyers are bound. For consumers who were victimized because they believed that they were dealing with an attorney, there is a simple solution. With technology, a system should be in place for consumers to verify the status of an alleged attorney.[177]

Thirdly, UPL prosecution of trust mills must be active and effective. Bar associations should have committees[178] and task forces[179] established to deal directly with trust mills. Consumers should be put on notice with press releases and advertisements informing them of the trust-mill scams. Members of the bar associations should participate on a pro bono basis as experts in UPL trials. The communities of lawyers need to unite to prosecute trust-mill cases. Moreover, bar members should be asked to report trust-mill operations[180] and prosecution should begin upon the violation of the UPL provision and not when the trust mill has caused harm.

It is up to the legal profession to educate consumers. Many bar associations have stepped up to the plate.[181] Various free seminars should be provided to lawyers and to consumers on the living trust

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175. Indiana State Bar Association, *Individuals Harmed by Deceptive Sales Practices of Living Trusts Sought by Attorney General*, RES GESTAE 27 (Mar. 1995) (encouraging individuals to contact various attorneys if they were victims of a trust mill or know of anyone who had been victimized by trust mills).

176. THE SINCLAIR LAW FIRM, LOCAL FIRM REVEALS IMPORTANT FACTS YOU SHOULD KNOW ABOUT LIVING TRUSTS 2 (1999). Although in this author's opinion the advertisement weighs strongly on the side of a misleading advertisement, it correctly recognized that "[b]ecause living trusts are becoming more popular, many lawyers—and even non-lawyers with no experience—are trying to exploit their benefits."

177. The D.C. Bar has such a system in place. For example, the D.C. Bar Association Committee on Admissions can verify whether a potential D.C. attorney is in good standing by calling a specified telephone number. Other bar associations should do the same.

178. *See supra* notes 15, 175 (discussing states which have established such committees); *see also* Stiegel, *supra* note 5.

179. *See supra* note 15.

180. Powell, *supra* note 3. The Westminster trust mill still operates in Maryland. The trust mill has changed its name over the course of the years but, in any event, operates in the same town as the law office of a MSBA Past-President. No attempts have been made to bring UPL charges against the trust mill because of the lack of the needed complainant to come forward voluntarily to participate in the trial. *See supra* Part II.C.

181. *See supra* note 15 (discussing MSBA's actions toward educating the public about living trusts).

scams.[182] Brochures and the other reading material should be made available.[183]

Finally, it will take the imposition of tougher penalties to close down the trust-mill operation. Injunctive relief is not a sufficient penalty to curtail the activity. Trust mills are slapped with an injunction and generally consent to take their business elsewhere. The only thing an injunction accomplishes is the protection of one state's citizens from one trust mill. This is a "Band-Aid" approach and will not solve the UPL problem. Penalties need to be tougher and regulatory entities must seek criminal penalties as opposed to injunctions and/or fines.[184] Additional penalties such as forfeiture of any other license possessed by the trust-mill employee should be seriously considered by the legislatures.

Furthermore, successful prosecution of a trust mill in one jurisdiction should be sufficient to prevent the same individuals from setting up shop in a neighboring jurisdiction. The trust-mill problem has become so widespread and serious that it is time the federal government intervenes.[185] Federal enforcement is necessary to correct the problem.

Bar associations should work together with the ABA to (1) clarify and come up with a uniform definition of the practice of law and UPL; (2) alleviate fear of lawyers and educate consumers about trust-mill operations; (3) have active and effective trust-mill prosecution and (4) impose tougher penalties for violations. The implementation of these proposed actions will result in a greater chance that the trust-mill problem in the United States will come to an end.

CONCLUSION

The involvement of the trust mills in UPL is an ongoing problem. Prosecution has commenced amongst various jurisdictions and continues to be a problem for others. The legal profession must regain its profession from nonlawyers who have gained financially and have harmed many consumers. To achieve this accomplishment, we must educate the general public about the good lawyers do and the harms that the trust mills cause. It is time for the media frenzy on the living trust to take a new approach. Advertisements should focus on the

182. The Estates and Trusts Section of the Prince George's County Bar Association hosted a seminar for lay persons on the revocable trust in May 1999 and in May 2000.

183. *See supra* note 14.

184. *See supra* Part II.C.3 (detailing various penalties applicable against UPL violators).

185. *See* Hendricks, *supra* note 80, at 32-34 (explaining the numerous harms posed by UPL to both unwary consumers and to the legal profession at large).

problems of the living-trust promoters instead of exaggerating the "expensive legal nightmare"[186] of probate. Prosecution must move to federal agents such as IRS or FBI to combat the problem.

The advantages and disadvantages of the multidisciplinary practice are beyond the scope of this Article. As a result of the heated debate over the issue, however, lawyers are seriously revisiting the UPL problem. The multidisciplinary practice may not be resolved favorably for nonlawyers, but hopefully it will help the legal profession address its existing UPL problem.

The steps involved in advising and in counseling consumers about living trust constitutes the practice of law. The practice of law and the UPL definitions should be improved to dictate that living trusts are only to be prepared by an attorney. Prosecution of nonlawyers is an uphill battle. UPL is about protecting the public. It is only within the legal profession that such protection can be provided. Only lawyers are educated in the law, examined and licensed by a court, guided by professional standards and ethical rules, insured against malpractice claims, have client-protection funds, and monitored by a grievance system. Even qualified nonlawyers do not possess the entire package.

Trust-mill prosecutions are expensive, and for prosecution to be active and effective, jurisdictions and federal government will need to provide necessary funding. Jurisdictions need to mirror the legislative efforts that took place in Florida, which were instrumental in obtaining such funding. Trust mills must be halted. A tremendous amount of damage has occurred. It is in the public's best interest and not a protection of the legal monopoly that warrants immediate attention to trust-mill prosecution.

186. MARYLAND ESTATE PLANNING, INC., *supra* note 1, at 3.