U.S. Department of Justice

Antitrust Division

Office of the Acting Assistant Attorney General

950 Pennsylvania Ave., NW, Suite 3218
Washington, D.C. 20530-0001

April 17, 2009

via overnight mail

Montana Supreme Court
Clerk's Office
Room 323, Justice Building
215 N. Sanders
Helena, Montana 59620-3003

Re: Comments on Proposed Revisions to the Rules on the Unauthorized Practice of Law

Dear Honorable Justices:

The Justice Department is pleased to provide comments to the Supreme Court of Montana on the proposal by the Commission on the Unauthorized Practice of Law ("Commission") to revise the rules on the unauthorized practice of law. The proposal would, among other things, add various "indicia" of the practice of law to the existing definition of the unauthorized practice of law. If adopted, the revised definition could bar non-lawyers from competing with lawyers for a range of services and could unnecessarily increase the prices paid by Montanans for those services.[1]

Consumers generally benefit from competition between lawyers and non-lawyers. Accordingly, the Justice Department believes that the definition of the unauthorized practice of law should be limited to activities for which specialized legal knowledge and training is demonstrably necessary to protect consumers and an attorney-client relationship is present. We are concerned that the Commission's proposal, by identifying broad categories of activities that may constitute the practice of law, such as "giving of advice or counsel to others as to their legal rights or responsibilities or responsibility of others," "[s]electing, drafting and completing legal papers, pleadings, agreements and other documents which affect the legal rights or responsibilities of others," and "[n]egotiating the legal rights or responsibilities of others," will unduly restrict non-lawyers from competing with lawyers.[2]

We recognize that, in *Montana Supreme Court Commission on the Unauthorized Practice of Law v. O'Neil*, this Court reviewed the indicia proposed here by the Commission and

[1] This letter focuses on the effects of the Commission's proposal on consumer welfare, and does not address whether the revised definition and potential competitive restraints arising from enforcement under it would be immunized from the federal antitrust laws under the state action doctrine.

[2] Revised Rule 2(h).

found them to be precise and readily understood.[3] However, the indicia could be interpreted to suggest that participation in a wide range of activities constitutes the unauthorized practice of law. If adopted, the proposed definition could force Montanans to hire a lawyer to provide a host of services where legal expertise should not be necessary, such as:[4]

- real estate agents explaining to consumers such things as the (i) ramifications of failing to have the home inspection done on time, (ii) meaning of a mortgage contingency clause, (iii) meaning of an easement, (iv) possible need to lower the price of a home because of an unusually restrictive easement, or (v) requirements for lead, smoke detector, and other inspections imposed by state law;

- tenants' associations informing renters of landlords' and tenants' legal rights and responsibilities, often in the context of resolving a particular landlord-tenant dispute;

- abstractors or title insurance agents, licensed by the State, issuing real estate title opinions and title reports;

- income tax preparers interpreting federal and state tax codes on behalf of their clients;

- financial institutions, investment bankers, securities brokers and other business planners or advisors providing advice to their clients that includes information about various laws;

- lay organizations, advocates, and consumer associations that provide citizens with information about legal rights and issues and help them negotiate solutions to problems; and

- human resources management and other specialists advising employers about employment discrimination and sexual harassment issues, as well as federal, state and local labor, immigration, zoning, safety and other regulatory compliance issues.

[3] 147 P.3d 200, 215 (Mont. 2006). This Court found that indicia of the practice of law identified by the District Court were "precise, comprehensible to a reasonable person and sufficient to prevent a person of common intelligence from having to guess at their meaning." *Id.* Here, the Commission proposes that those same indicia be added to the definition of the unauthorized practice of law.

[4] Non-lawyer providers of many services in Montana, including real estate brokers, are licensed and regulated under Title 37 of the Montana Code. *See* Mont. Code Ann. § 37 (2007). Depending on how the relevant provisions of the Code are construed, non-lawyers may be permitted to provide some of the services listed here even if the Court adopts the proposed definition of the unauthorized practice of law.

After providing background information and further explanation of our concerns, we suggest that the definition of the unauthorized practice of law be limited to situations where specialized legal skills are required and an attorney-client relationship is present.

The Interest and Experience of the U.S. Department of Justice and the Federal Trade Commission

The Justice Department is entrusted with enforcing the federal antitrust laws. We work to promote free and unfettered competition in all sectors of the American economy. The United States Supreme Court has observed that "ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.'"[5] Like all consumers, consumers of professional services benefit from competition,[6] and if competition to provide such services is restrained, consumers may be forced to pay higher prices or accept services of lower quality.

The Justice Department is concerned about efforts across the country to prevent non-lawyers from competing with lawyers through the adoption of excessively broad unauthorized practice of law restrictions by state courts and legislatures. Some of these proposals appear to be little more than overt attempts by lawyers to eliminate competition from alternative, lower-cost non-lawyer service providers; others, while appearing to be good faith efforts to protect consumers, have not been tailored narrowly enough to avoid unnecessary harm to competition. In addressing these concerns, the Justice Department encourages competition through advocacy letters and *amicus curiae* briefs filed with state supreme courts. Through these letters and filings, the Justice Department has urged states, the American Bar Association, and state bar associations to reject or narrow proposed restrictions on competition between lawyers and non-lawyers.[7] In

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[5] *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (quoting *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951)); *accord FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 423 (1990).

[6] *See, e.g., Prof'l Eng'rs*, 435 U.S. at 689; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *see also United States v. Am. Bar Ass'n*, 934 F. Supp. 435 (D.D.C. 1996), *modified*, 135 F. Supp. 2d 28 (D.D.C. 2001).

[7] *See* letters from the Justice Department to the Wisconsin Supreme Court (Oct. 10, 2008, Feb. 28, 2008 and Dec. 10, 2007); letter from the Justice Department and the FTC to the Supreme Court of Hawai'i (Jan. 25, 2008); letters from the Justice Department and the FTC to the Committee on the Judiciary of the New York State Assembly (Apr. 27, 2007 and June 21, 2006); letter from the Justice Department and the FTC to the Executive Director of the Kansas Bar Ass'n (Feb. 4, 2005); letter from the Justice Department and the FTC to the Task Force to Define the Practice of Law in Massachusetts, Massachusetts Bar Ass'n (Dec. 16, 2004); letter from the Justice Department and the FTC to Unauthorized Practice of Law Committee, Indiana State Bar Ass'n (Oct. 1, 2003); letter from the Justice Department and the FTC to the Standing Committee on the Unlicensed Practice of Law, State Bar of Georgia (Mar. 20, 2003); letters from the Justice Department to Speaker of the Rhode Island House of Representatives and to the President of the Rhode Island Senate, *et al.* (June 30, 2003 and Mar. 28, 2003); letter from the Justice Department and the FTC to Task Force on the Model Definition of the Practice of Law, American Bar Ass'n (Dec. 20, 2002); letter from the Justice Department and the FTC to the Speaker of the Rhode Island House of Representatives, *et al.* (Mar. 29, 2002); letter from the Justice Department and the FTC to the President of the North Carolina State Bar (July 11, 2002); letter from the Justice Department and the FTC to the Ethics Committee of the North Carolina State Bar (Dec. 14, 2001); letter from the Justice Department to the Board of Governors of the Kentucky Bar Ass'n (June 10, 1999 and Sept. 10, 1997); letter from the Justice Department and the FTC to the Supreme Court of Virginia (Jan. 3, 1997); letter from the Justice Department and the FTC to the Virginia State Bar

addition, the Justice Department has obtained injunctions prohibiting bar associations from unreasonably restraining competition by non-lawyers in violation of the antitrust laws.[8] Our comments on the Commission's proposal are part of our ongoing efforts in this area.

Restrictions on Competition Should Be Closely Examined to Determine Whether They Are in the Public Interest

Restrictions on competition generally are harmful to consumers. Such restrictions are in the public interest only if they are needed to achieve some overriding benefit – such as preventing significant consumer harm from the provision of services by providers who lack the requisite knowledge and training – and are narrowly drawn to minimize their anticompetitive impact.[9] The Justice Department recognizes that there are some services that should be provided only by lawyers because they require legal knowledge and training. For example, only someone who understands law and litigation procedures should represent clients in open court in matters involving their legal rights. Such a requirement protects consumers as well as the court. But consumers also benefit when non-lawyers compete with lawyers to provide many other services that do not require legal training, knowledge or skills.[10] Allowing non-lawyers to provide such

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(Sept. 20, 1996). Brief *Amicus Curiae* of the United States of America and the FTC in *Lorrie McMahon v. Advanced Title Servs. Co. of W. Va.*, No. 31706 (filed May 25, 2004), available at http://www.usdoj.gov/atr/cases/f203700/203790.htm; Brief *Amicus Curiae* of the United States of America and the FTC in On Review of ULP Advisory Opinion 2003-2 (filed July 28, 2003), available at http://www.usdoj.gov/atr/cases/f201100/201197.htm; Brief *Amicus Curiae* of the United States of America in Support of Movants Kentucky Land Title Ass'n *et al.* in *Ky. Land Title Ass'n v. Ky. Bar Ass'n*, No. 2000-SC-000207-KB (Ky., filed Feb. 29, 2000), available at http://www.usdoj.gov/atr/cases/f4400/4491.htm. The letters to the American Bar Ass'n, Wisconsin, Hawai'i, Indiana, New York, Rhode Island, Massachusetts, North Carolina, Georgia, Kansas, and Virginia may be found on the Justice Department's website, http://www.usdoj.gov/atr/public/comments/comments.htm.

[8] In *United States v. Allen County Bar Ass'n*, the Justice Department sued and obtained a judgment against a bar association that had restrained title insurance companies from competing in the business of certifying titles. The bar association had adopted a resolution requiring lawyers' examinations of title abstracts and had induced banks and others to require the lawyers' examinations of their real estate transactions. Civ. No. F-79-0042 (N.D. Ind. 1980). In *United States v. N.Y. County Lawyers Ass'n*, the Justice Department obtained a court order prohibiting a county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with lawyers. No. 80 Civ. 6129 (S.D.N.Y. 1981). *See also United States v. County Bar Ass'n*, No. 80-112-S (M.D. Ala. 1980). In addition, the Justice Department has obtained injunctions against other anticompetitive restrictions in professional associations' ethical codes and against other anticompetitive activities by associations of lawyers. *See, e.g., United States v. Am. Bar Ass'n*, 934 F. Supp. 435; *Prof'l Eng'rs*, 435 U.S 679; *United States v. Am. Inst. of Architects*, 1990-2 Trade Cas. (CCH) ¶ 69,256 (D.D.C. 1990); *United States v. Soc'y of Authors' Reps.*, 1982-83 Trade Cas. (CCH) ¶ 65,210 (S.D.N.Y. 1982).

[9] *Cf. FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986) ("Absent some countervailing procompetitive virtue," an impediment to "the ordinary give and take of the marketplace cannot be sustained under the Rule of Reason.") (internal quotations and citations omitted).

[10] "Several jurisdictions recognize that many such [law-related] services can be provided by nonlawyers without significant risk of incompetent service, that actual experience in several states with extensive nonlawyer provision of traditional legal services indicates no significant risk of harm to consumers of such services, that persons in need of legal services may be significantly aided in obtaining assistance at a much lower price than would

services permits consumers to select from a broader range of options, considering for themselves such factors as cost, convenience, and the degree of assurance that the necessary documents and commitments are sufficient. As the United States Supreme Court stated:

> The assumption that competition is the best method of allocating resources in a free market recognizes that *all elements of a bargain - quality, service, safety, and durability* - and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.[11]

Sound competition policy calls for any restriction on competition to be justified by a valid need, such as protecting the public from harm, and for the restriction to be narrowly drawn to minimize its anticompetitive impact.[12] The inquiry into the public interest involves not only an assessment of the harm that consumers may suffer from allowing non-lawyers to perform certain tasks, but also consideration of the benefits that accrue to consumers when lawyers and non-lawyers compete.[13]

The Justice Department is not aware of evidence of harm to Montana consumers arising from non-attorneys providing services such as those referenced above that do not require the skill or knowledge of a lawyer. In the absence of such evidence, we believe that the revisions to the definition of the unauthorized practice of law proposed by the Commission unnecessarily limits competition between lawyers and non-lawyers and likely will cause more harm to consumers than it will prevent.

Evidence suggests that lay people can and do competently perform many of the services that the proposed rule could limit to lawyers.[14] Academic research indicates that consumers likely face little risk of harm from non-lawyer competition in many areas. For example, studies of lay specialists who provide bankruptcy and administrative agency hearing representation find

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be entailed by segregating out a portion of a transaction to be handled by a lawyer for a fee, and that many persons can ill afford, and most persons are at least inconvenienced by, the typically higher cost of lawyer services. In addition, traditional common-law and statutory consumer-protection measures offer significant protection to consumers of such nonlawyer services." Restatement (Third) of Law Governing Lawyers § 4 cmt. c (2000).

[11] *Prof'l Eng'rs*, 435 U.S. at 695 (emphasis added); *accord*, *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 423.

[12] *Cf. FTC. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) ("Absent some countervailing procompetitive virtue," an impediment to "the ordinary give and take of the market place . . . cannot be sustained under the Rule of Reason.") (internal quotations and citations omitted).

[13] *See Prof'l Eng'rs*, 435 U.S. at 689; *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975). *See also In re Opinion No. 26 of the Comm. on Unauthorized Practice of Law*, 654 A.2d 1344, 1345-46 (N.J. 1995) (lawyer/non-lawyer competition benefits the public interest).

[14] Significantly, a 1999 survey found that in most states complaints about the unauthorized practice of law did not come from consumers, the potential victims of such conduct, but from attorneys, who did not allege any claims of specific injury. Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 Geo. J. Legal Ethics 369, 407-08 (2004).

that they perform as well as or better than lawyers.[15] Similarly, a study comparing five states where lay providers examined title evidence, drafted real estate-related instruments, and facilitated the closing of real estate transactions with five states that prohibited lay provision of such services found, "The only clear conclusion . . . is that the evidence does not substantiate the claim that the public bears a sufficient risk from lay provision of real estate settlement services to warrant blanket prohibition of those services under the auspices of preventing the unauthorized practice of law."[16]

If non-lawyers were barred from providing the services encompassed by the proposed rule, fees for those services likely would rise. The potential harm from increasing the cost for these services may deter some consumers from seeking assistance of any kind. Consumers who otherwise would receive assistance from non-lawyer service providers – tenants' associations, lay organizations, and others – would be forced to choose between hiring a lawyer and going without assistance altogether. Similarly, a 1996 ABA task force survey concluded that low income and middle-income households were underserved by the legal system, with cost being a major reason why these groups avoided the legal system.[17]

Even Montanans who would choose a lawyer over a lay service provider likely will pay higher prices if the revised definition is adopted. Evidence gathered in a New Jersey Supreme Court proceeding indicated that, in communities in New Jersey where non-lawyers frequently competed with lawyers to close real estate transactions, buyers represented by counsel paid on average $350 less for closings, and sellers represented by counsel paid $400 less, than in the New Jersey communities where lay closings were not prevalent.[18] Likewise, the Kentucky Supreme Court concluded that prices for real estate closings by lawyers dropped substantially–by as much as one percent of the loan amount plus fees–as a result of competition from lay title companies, explaining that the lay competitors' presence "encourages attorneys to work more cost-

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[15] Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 Geo. J. Legal Ethics 369, 407-08 (2004). *See also* Herbert M. Kritzer, *Legal Advocacy: Lawyers and Non Lawyers at Work* 50-51 (1998) (finding that in unemployment compensation appeals before the Wisconsin Labor and Industry Review Commission, "[t]he overall pattern does not show any clear differences between the success of lawyers and agents").

[16] Joyce Palomar, *The War Between Attorneys and Lay Conveyancers – Empirical Evidence Says "Cease Fire!"*, 31 CONN. L. REV. 423, 520 (1999).

[17] Am. Bar Ass'n Fund for Justice & Ed., Legal Needs & Civil Justice: *A Survey of Americans* (1996). The most common legal needs reported by respondents were related to personal finances, consumer issues, and housing. For low- and middle-income households, the most common response to a legal problem was "handling the situation on their own." For low-income households, the second most common response was to take no action at all. The second-most common response for middle-income households was to use the legal system, including contacts with lawyers, mediators, arbitrators, or official hearing bodies.

[18] *See In re Opinion No. 26 of the Comm. on Unauthorized Practice of Law*, 654 A.2d 1344, 1348-49 (N.J. 1995).

effectively."[19] And, in Virginia, where the legislature passed a law upholding the right of consumers to continue using lay closing services, proponents of lay competition presented survey evidence suggesting that lay closings in Virginia cost on average $150 less than lawyer closings.[20]

Restrictions on Lawyer/Non-Lawyer Competition Should Be Limited to Services Provided Pursuant to an Attorney-Client Relationship

The revised definition appears to be overbroad because it could bar non-lawyers from providing services in many instances where it is apparent that specialized legal skills are not required and an attorney-client relationship does not exist. To preserve competition, and to benefit consumers, the Court should consider adopting language similar to that found in Rule 49 of the District of Columbia Court of Appeals. Although Rule 49 defines the practice of law, as opposed to the unauthorized practice of law, the reasoning behind it is informative for consideration of a definition of the unauthorized practice of law. Rule 49 defines the practice of law as "the provision of professional legal advice or services where there is a client relationship of trust or reliance."[21] The Commentary to Rule 49 makes clear that giving advice or counsel to others as to legal rights or responsibilities is not necessarily the practice of law. Rather, such services may be the practice of law if they are provided in the context of an attorney-client relationship. The Commentary explains:

> As originally stated in . . . the prior Rule, the "practice of law" was broadly defined, embracing every activity in which a person provides services to another relating to legal rights. This approach has been refined, in recognition that there are some legitimate activities of non-Bar members that may fall within an unqualifiedly broad definition of the law. The definition set forth in section (b)(2) is designed to focus first on the two essential elements of the practice of law: The provision of legal advice or services, and a client relationship of trust or reliance. Where one provides such advice or services within such a relationship, there is an implicit representation that the provider is authorized or competent to provide them; just as one who provides any services requiring special skill gives an implied warranty that they are provided in a good and workmanlike manner. . . . The presumption that one's engagement in [an activity] is the 'practice of law' may be rebutted by showing that there is no client relationship of trust or reliance, or that there is no explicit or implicit representation of authority or competence to practice law, or that both are absent. . . [T]he Rule is not intended to cover conduct which lacks the essential features of an attorney-client relationship. . . . Tax accountants, real estate agents, title company attorneys, securities advisors, pension consultants, and the like, who do not indicate they are providing legal advice or services based on competence and

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[19] *See, e.g., Countrywide Home Loans, Inc. v. Ky. Bar Ass'n*, 113 S.W.3d 105, 120 (Ky. 2003) ("before title companies emerged on the scene, [the Kentucky Bar Association's] members' rates for such services were significantly higher").

[20] *See* letters to the Virginia Supreme Court and Virginia State Bar, *supra* n.7.

[21] D.C. Court of Appeals Rule 49(b)(2) (2004) (outline letters omitted).

> standing in the law are not engaged in the practice of law, because their relationship with the customer is not based on a reasonable expectation that learned and authorized professional legal advice is being given. Nor is it the practice of law under the Rule for a person to draft an agreement or resolve a controversy in a business context, where there is no reasonable expectation that she is acting as a qualified or authorized attorney. . . .[22]

Adding the requirement of an attorney-client relationship and similar commentary to the proposed definition would protect Montana consumers from harm caused by persons engaged in the unauthorized practice of law, while also preserving lawyer/non-lawyer competition that benefits consumers.

Conclusion

The choice of whether to use a lawyer or non-lawyer service provider should rest with the consumer unless it is clear that specialized legal skills or training are required. Lawyer/non-lawyer competition benefits consumers, particularly when there is no evidence that consumers have been harmed by non-lawyer service providers. We urge the Court to revise the proposed definition to preserve competition in service areas for which the knowledge and skill of a lawyer is not required.

The Justice Department thanks you for this opportunity to present our views. We would be pleased to address any questions or comments regarding this letter.

Yours Sincerely,

Scott D. Hammond
Acting Assistant Attorney General

[22] *Id.* Commentary on Rule 49(b)(2).

DECLARATION OF OPINION & QUALIFICATIONS
CHARLES EDWARD LINCOLN, III
January 18, 2023

Background and Relationship to Parties:

(1) My name is Charles Edward Lincoln, III. I am over the age of 18 and otherwise competent to make this affidavit based on my education and experience.

(2) I have known the Plaintiff Jerry O'Neil for the past twenty years, and although he has not specifically paid me to produce this affidavit, as required by Rule 26, I acknowledge and confirm that he has donated large sums of money for my research and support over the last two decades, and is definitely among the best friends and patrons I have ever had in my life.

(3) I am qualified to write this affidavit based on my education.

(4) I hold a B.A. (1980, Tulane University: College of Arts & Sciences), M.A. (1982, Harvard University: Graduate School of Arts & Sciences), and Ph.D. in the subject of Anthropology (1990, also GSAS).

(5) I also received a J.D. from the law school of the University of Chicago (1992).

(6) I served as a judicial extern to the Honorable Stephen Reinhardt in the 9th Circuit Court of Appeals in 1987-88.

(7) I served as a judicial law clerk to the Honorable Kenneth L. Ryskamp in the Southern District of Florida 1991-1993.

(8) My doctoral research at Harvard concerned comparative structural and functional study of social and political hierarchies around the world.

(9) I passed the bar exams and formerly served as a licensed attorney in Florida (1992-2002), California (1994-2003) and Texas (1994-2000), but I have continued active in litigation and legal advocacy my entire life since.

(10) I have specifically been actively involved in civil rights and constitutional litigation for most of the past 30 years, including one case

decided by the Supreme Court of the United States: ***Atwater v. Lago Vista*** (2001) in which I was the original lead counsel.

(11) I write especially to support Plaintiff Jerry O'Neil's contentions in ¶¶35-63 of his First Amended Complaint concerning the Structural and Functional Analysis and Equation of the requirements of membership in a state bar as a pre-requisite for holding judicial office and/or the title of an attorney-at-law (who is also an "officer of the court") with constitutionally prohibited titles of nobility.

Methodology:

(12) "Participant observation" in studied societies is a standard technique of anthropological and ethnological research.

(13) My years of involvement in constitutional litigation qualifies me to make as anthropologically valid conclusions from "participant observation" field research into the customs, practices, and policies of the Courts and judicial system of the United States.

Souvereigntée Magique et Juridique:
The First Function of Sovereignty according to Georges Dumézil

(14) Article I, §9, Clause 8, and Article I, §10, Clause 1, of the Constitution prohibit, but do not specifically define or in any way qualify, "titles of nobility" but state only: "No Title of Nobility shall be granted by the United States (or state): And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

(15) My doctoral dissertation included a review of the evolution of political specialization according to social function, and developed in particular along the lines of analysis developed by the French student of Classical Mediterranean and Indo-European civilizations, Georges Dumézil, who showed the close structural and operational relationships between magic and religious dialogue on the one hand and "law" and judicial functions on the other.

(16) Priestly and Judicial roles, in ancient Israel as well as India and Rome, were effectively class-based "castes" of society, but these roles could either be assigned or inherited, and inheritance of socio-cultural roles was not required.
(17) Throughout the ancient states of the Classical Mediterranean and Indo-European, judicial and priestly roles were always closely related, as demonstrable through a comparison of the "Judges" who served in Israel according to the laws of Moses with the Brahmins and Flamines of India and Rome.

(18) My comparative research including but not limited to my participant observation in the legal system (1987-present) has led me to conclude that bar membership is a social construct directly analogous to race, class, or caste, and that discrimination based on bar membership is as inconsistent with the equal protection provisions of the Constitution as discrimination based on status as a Indian Brahmin (at any stage of Vedic, Hindu, or modern caste society and evolution), a Hebrew Levite, or a member of the Roman Senatorial class or caste, from whom the Roman Priesthood was primarily derived.

(19) For example, Julius Caesar was High Priest of Jupiter---Flamen Major Dialis before entering into either his more famous military or political roles.

(20) Historically, in Europe, the Mediterranean, Near Eastern, and Indian Civilizations, and even in other complex societies such as the Aztec, Maya, or Natchez Indians of the New World, or the Hawaiians, Maori, or Tahitians of Polynesia, "the Nobility" constitute a special class of individuals imbued by ritual membership in a class or caste with special governmental and political power to interpret, apply, construe, or implement law.

(21) In Europe, the historical and semiotic, symbolic, equivalence and functional relationship of what Dumézil called "magical and religious sovereignty" can be seen in the traditional robes worn only by traditional Roman Catholic and Anglican/Episcopal Priests with those worn by Judges.

(22) Among the early modern courts of law were the Courts of Inquisition in continental Europe, and all judges were priests.

AMERICAN ANTECEDENTS IN ENGLAND & FRANCE

(23) In the English tradition, judges were representatives of the King, who derived his power from God, and the King ultimately became the head of the English Church, as well as the head of State.

(24) Archbishop (and later Saint) Thomas à Beckett was King Henry II's Chancellor of the Exchequer (the highest Judge of Equity) before trading judicial for clerical robes.

(25) The Three Estates of the Ancien Régime in France included three grades of nobility: the clerics and priesthood, the "warrior" nobility, and the town-dwelling landowners or "bourgeois."

(26) In England, the clerical and warrior nobility sat together in the House of Lords, but the House of Lords included appointed "Law Lords" appointed only for individual lifetimes and not heritable.

(27) Lifetime peerages (i.e. ranks and titles of nobility, within which "peerage" all knights, baronets, barons, earls, marquises and dukes are all "roughly" equal, even though they may in fact be graded from 1 to infinity in order categorical according to seniority of peerage or other factors) have always existed in England, they existed during the reigns of Queen Elizabeth I, the Stuarts, and the Hanoverians (including King George III), and the UK Life Peerages Act of 1958 simply continued but modernized this method of enoblement.

(28) The House of Lords acted and operated as the Supreme Court of England and the United Kingdom right up until the Judiciary Act of 2005, and included both the "law lords" and the Lord Chancellor, chief judge of equity as mentioned above in the reference to St. Thomas à Becket and for that matter also St. Thomas More was also Lord Chancellor before his martyrdom under Henry VIII.

(29) It was this system of Noble, titled, Judges of Law and Equity (sitting as noble, life-tenured members of the House of Lords) which informed the Founding Fathers' understanding and definition of "nobility" in Article I, §9, Clause 8, and Article I, §10, Clause 1, of the Constitution.

(30) Thus, inheritance of titles is not, and has never been, an essential characteristic of "titles of nobility."

(31) Moses appointed the original "Judges" of Ancient Israel in Sinai without regard to their lineage (there were certainly no "noble slaves" among the Hebrews in Egypt prior to their Exodus) and membership in the Scribal classes of Biblical society might be achieved either by inheritance or appointment, and this hybrid nature of the scribal or "legal" profession has continued throughout history.

(32) The lowest level of nobility in England and the United Kingdom has always been the "knighthood"---which is traditionally not an inherited title, but only awarded to an individual for his life (the title of "Dame" is the female equivalent of knighthood or "being knighted", despite the incongruously plebian sound of "dames" and "being damed" to American ears).

EARLY YEARS OF THE AMERICAN COURTS: 18th-19th Centuries

(33) Like titles of Nobility, the structure of American Courts was nowhere defined or outlined in the American Constitution, but upon independence, the colonies simply emulated the customs, practices, and policies of "the mother country" for a time, without noble titles, but with a much greater reliance on the democratic process of juries, as so richly described in several chapters of Alexis de Tocqueville's "Democracy in America."

(34) But judges retained (and still retain, and now enhance) their social isolation, their political secrecy and silence, their robes and ritualized procedures including elevated seats or thrones on a dais as semiotic expressions of their office and power over all "mere mortals" below.

(35) All of these features, including taboos on social association and other expressive behavior, correlates the modern judge with his ancient antecedents among the Brahmins and Flamines of the Ancient Indo-European peoples from Rome to India.

(36) Admission to the bar in the early American Republic was effectively democratic and open to all who could read, write, and (most importantly) vote.

(37) And all voters were, subject to certain age and residence requirements, eligible to serve in all political offices, including the judiciary, law schools not being common, much less required, roads to the practice of law until the early 20th century.

(38) Throughout the 19th century, American Courts borrowed more and more of the practice and procedure of English Courts, in part due to pressures for uniformity of practice resulting from international commerce and trade.

MODERN AMERICAN BENCH & BAR FORMATION

(39) During the early 20th century, formal education in law school became common enough that membership in the bar was predicated upon graduation from law school and passing a standardized state-wide bar exam and finally, starting in the 1930s, on admission to an "integrated bar."

(40) It was at this stage, in the 1940s and 50s, that membership in the bar effectively began to acquire its highly ritualized status as a **class or even caste** like structural and functional subset of society.

(41) As lawyers became more "educated" they were more aloof, and at some point, judges could no longer be appointed or elected from the general electorate, but only from the Bar.

(42) On the Supreme Court of the United States, Associate Justice James F. Byrnes, whose short tenure lasted from June 1941 to October 1942, was the last Justice without a law degree to be appointed; Stanley Forman Reed, who served on the Court from 1938 to 1957, was the last sitting Justice from such a background.

(43) States began amending their constitutions to require **bar membership** for lawyers and that judges could only be elected from the bar.

(44) This modern trend entirely contravenes American Democracy and violates our original Republican Form of Government.

(45) The increasing complexity of the law has grown as a correlate of the number of lawyers, and the ever exploding and inflation of numbers of cases, statutes and practitioners has by a positive feedback system enhanced the mysterious isolation of lawyers and judges from society as a whole.

(46) All of this is fundamentally inconsistent with the constitutional prohibition on titles of nobility in the early constitution, which was the

precursor and predecessor to the later constitutional and statutory guarantees of equality and equal protection under the laws established by and pursuant to the 14th Amendment.

(47) This Court has the power and obligation, in this case, to adjudicate, make findings, declare and adjudge the structural and functional nature of state bar membership as a structural and functional nobility operating to the injury of cultural norms of communication, social and political equality, and even occupational equality and eligibility for all political offices equally.

(48) In the early American Republic, all citizens were voters and all voters were equally eligible for office in all three branches of government under the constitution.

(49) That was the founding fathers original understanding and original intent, and it should now be restored.

(50) Persons of all educational levels of achievement, and members of all professions, are equally eligible for election to legislative and executive office, and members of all professions and levels of educational achievement should likewise be eligible for election to judicial office or for appointment as "officers of the court" (i.e. "lawyers").

(51) Otherwise, the American legal system has become an unique occupational caste with disproportionate and unequal political power, and is an anathema to the Democratic-Republican form of government.

APPLICATION OF HISTORICAL AND LINGUISTIC ANALYSIS TO THE DECISIONMAKING PROCESS IN THIS CASE

(52) Courts hold the responsibility to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action.

(53) This includes using principles of linguistic structural and functional analysis to interpret ambiguous constitutional or statutory provisions. The foundational interpretive principle that courts adhere to is the ordinary meaning, not literal meaning, when interpreting statutes, applying the meaning that a reasonable reader would derive from the text of the law at the time of its enactment.

(54) There is no serious debate about the foundational interpretive principle that courts adhere to ordinary meaning, not literal meaning, when interpreting statutes. ***Bostock v. Clay County, Georgia***, 590 U.S. ____, 140 S.Ct. 1731 (June 15, 2020).

(55) As Justice Scalia explained, "the good textualist is not a literalist." A. Scalia, A Matter of Interpretation 24 (1997).

(56) Or as Professor Eskridge stated: The "prime directive in statutory interpretation is to apply the meaning that a reasonable reader would derive from the text of the law," so that "for hard cases as well as easy ones, the ordinary meaning (or the 'everyday meaning' or the 'commonsense' reading) of the relevant statutory text is the anchor for statutory interpretation." W. Eskridge, Interpreting Law 33, 34-35 (2016) (footnote omitted).

(57) Or as Professor Manning put it, proper statutory interpretation asks "how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context. This approach recognizes that the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language." Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2392-2393 (2003).

(58) Or as Professor Nelson wrote: No "mainstream judge is interested solely in the literal definitions of a statute's words." Nelson, What Is Textualism?, 91 Va. L. Rev. 347, 376 (2005).

(59) The ordinary meaning that counts is the ordinary public meaning at the time of enactment-although in this case, that temporal principle matters little because the ordinary meaning of "discriminate because of sex" was the same in 1964 as it is now...."

(60) The process is not rigid, and courts utilize canons of statutory interpretation as interpretative tools rather than strict rules.

(61) Courts focus on the broader social and political history, and the immediate statutory context rather than merely dissecting statutory phrases into their component words.

(62) So it should be with this Court's interpretation of titles of nobility: historical reality and the world of the original legislators (i.e. the Founding Fathers) rather than any arbitrary modern definition or prejudice concerning the words.

(63) When the meaning of a statute's terms is plain, the court's job is at an end. The people are entitled to rely on the law as written, without fear that courts might disregard its plain terms based on extratextual consideration.

(64) But that is NOT the case with the Titles of Nobility clauses.

(65) Where a statute or constitutional provision is reasonably susceptible to divergent interpretations, courts adopt the reading that accords with traditional understandings and basic principles such as I have described herein above.

(66) In cases where a provision is ambiguous, courts may apply accepted legal principles in determining the "better" interpretation.

(67) In some cases, courts have rejected attempts at an overly narrow interpretation that abandons a plain reading of the statute and focuses more on dissecting immediate phrases than considering the broader statute.

(68) Any interpretation of the constitutional prohibition on "titles of nobility which focuses only on titles which existed in England or France in 1787 or on such aspects of nobility as the heritability of titles or eligibility to sit in a legislative body or occupy executive positions (such as the Kingship itself) would be examples of such an overly narrow interpretation which would abandon a plain reading of the provision as reflecting an aspiration to a society in which the only peerage was "citizenship" and no ranks of citizens could be maintained or tolerated.

(69) Membership in the bar has now become an intolerably elite peerage within American society, and accordingly, it must be abolished as a requirement for eligibility to occupy judicial office.

(70) Even more, membership in the bar must be abolished as an intolerably elite peerage because it limits the ability to APPLY, CONSTRUE and INTERPRET the law to a certain occupation class or caste, even to the exclusion of individuals such as Jerry O'Neil who have previously served as

LEGISLATORS and been reelected to multiple terms to MAKE laws which they then LOSE THE ABILITY TO APPLY, CONSTRUE, OR INTERPRET outside the confines of the legislature itself.

(71) In determining whether constitutional meanings or statutory language might be ambiguous, the court must consider not only the bare meaning of the critical word or phrase but also its placement and purpose in the statutory scheme in historical, linguistic, and original social context. Only when the statute's terms are ambiguous or unclear does the court consider legislative history and other tools of statutory interpretation.

(72) American courts have, with greater and greater frequency starting in the early 1950s, also expressly allowed and considered the use of "deconstruction methodologies" in the linguistic or functional interpretation of statutes, such as the application of the plain meaning rule, variations of the statutory interpretation maxim of excluding one evidence inclusion of another, and the use of analogies.

(73) That is what I propose here. ***Rodearmal v. Clinton*** is an example of a case where a team of experts in linguistics advised and instructed the court concerning ambiguous constitutional language. 666 F.Supp.2d 123 (2009).

(74) The application of such methodologies depends on the context and the specific case, but I submit that the interpretation of the Titles of Nobility clause positively screams out for such expert historical and linguistic deconstruction.

(75) Thus, courts may employ principles of linguistic structural and functional analysis to interpret ambiguous provisions of constitutional or statutory law, the application of these principles is always subject to the overall statutory context, the plain and ordinary meaning of the text, and the traditional understandings and basic principles of statutory interpretation.

(76) State constitutions, such as those of Indiana and South Carolina, do refer to hereditary distinctions or emoluments in the same provisions that prohibit titles of nobility; by the maxim, ***"expressio unius exclusio alterius,"*** such provisions plainly suggest that the possession of certain traditional European life titles or hereditary distinctions among people are a related, but not integral or essential, aspect of "titles of nobility."

(77) Federal regulations for the naturalization process require applicants who have held any hereditary title or have been of any of the orders of nobility in any foreign state to renounce such title or order of nobility.

(78) This suggests that the U.S. government recognizes the existence of both lifetime and inherited titles of nobility, at least in the context of foreign states.

(79) In conclusion, while the U.S. Constitution prohibits the granting of titles of nobility, it does not provide a specific definition of such titles or specify whether they are necessarily inherited or whether the concept relates only to titles defined or created by "old English" or any sort of European law.

(80) However, some state constitutions and federal regulations suggest that both life-tenured and inherited titles or distinctions can exist, at least in certain contexts.

MEMBERSHIP IN THE BAR AMOUNTS STRUCTURALLY TO A PEERAGE CLASSIFICATION INCONSISTENT WITH THE FOURTEENTH AMENDMENT

(81) The titles of nobility clause is declaratory a fundamental values and public policy, standing at the rock bottom of the "American Experiment."

(82) Regarding the nature of "titles of nobility," the ***Dred Scott v. Sanford*** case, 60 U.S. 393, 19 How. 393 (March 6, 1857) discusses the Constitution's restriction on Congress creating privileged classes within the States, which could be interpreted as a commentary on the nature of nobility titles.

(83) ***Scott v. Sanford*** does not, however, directly address whether such titles have necessary elements other than inequality of power and influence and access to certain rights.

(84) The subject of ***Scott v. Sanford*** of course was slavery, a heritable condition of servitude which stands as the extreme opposite of "nobility."

(85) The American Civil War brought fully into focus the unamerican nature of classifications which render some people greater than or lesser to

others in regard to their tenure and exercise of or their exclusion from certain civil rights, including the rights to vote, hold property, make contracts, and run for office.

JERRY O'NEIL SHOULD BE ALLOWED TO RUN FOR JUSTICE OF THE SUPREME COURT OF MONTANA

(86) The profession of an attorney amounts to little more than dedication to freedom of speech and all other forms of symbolic expression relating to life, liberty or property, the right to assemble or associate freely with others, and the right to petition for redress of grievances.

(87) Legislators debate the existence or desirability of certain rights or duties, meaning of words and write the law.

(88) Executive officers apply, construe and enforce the law, effectively judging how rights and duties should be protected or curtailed.

(89) The judiciary decides disputes which arise concerning the rights or duties created and worded by legislators and applied or construed by executive officers.

(90) Law is language. Legislation and litigation involve the use and application of language.

(91) Historical custom, practice, and policy, and the historical experience of language, lies at the essential structure and function of law.

(92) Without ever going to law school or taking any state bar exam, Jerry O'Neil has operated as an attorney in the Blackfeet Nation for nearly 40 years.

(93) Jerry O'Neil has been elected four times to the Montana State Legislature (both House and Senate), and served on the judiciary committees of both legislative houses.

(94) It is simply preposterous to bar a man of Jerry O'Neil's experience and stature from presenting himself as a candidate for the elective office of justice of the Supreme Court of Montana.

(95) To bar a former legislator who has dedicated his life to the law from the judiciary represents the culminating zenith of surreal absurdity.

(96) I am available for oral examination concerning my qualifications and opinions and my relationship to and employment by Jerry O'Neil as required by Rule 26 of the Federal Rules of Civil Procedure and Rules 702-704 of the Federal Rules of Evidence at any time.

(97) I make the above and foregoing declaration, pursuant to 28 U.S.C. §1746, concerning my qualifications and opinions in New Orleans, Louisiana under penalty of perjury on this Thursday the 18th day of January 2024.

(98) Further affiant sayeth naught.

/s/ Charles Edward Lincoln, III /s/

Charles Edward Lincoln, III
1507 St. Ann Street
New Orleans, Louisiana 70116
(504) 777-5021/(504) 777-5023

242 P.3d 1282 (2010)
2010 MT 82
356 Mont. 109

In re DISSOLVING the COMMISSION ON the UNAUTHORIZED PRACTICE OF LAW.

No. AF 09-0068.

Supreme Court of Montana.

April 20, 2010.

OPINION AND ORDER

¶ 1 On February 4, 2009, the Commission on the Unauthorized Practice of Law (CUPL) filed a Petition and Memorandum in Support of Revision of the Rules on the Unauthorized Practice of Law (Petition). The proposed rule changes were attached to the Petition. On February 19, 2009, this Court issued its Order submitting the Petition and proposed rule changes for public comment. Over the period during which public comment was accepted (February 19, 2009 through April 20, 2009), attorneys, other interested persons, organizations, institutions, businesses, and local governments filed voluminous, thoughtful comments with the Clerk of this Court. Indeed, we cannot recall a matter on which there has been more comment by members of the public on a matter before us. On June 23, 2009, the CUPL filed its response to the comments and matters raised therein.

¶ 2 Subsequently, on March 19, 2010, the CUPL filed its Motion to Withdraw the Petition and Memorandum in Support and to Dissolve the Commission (Motion). To this latter document, the CUPL attached a Memorandum of Understanding entered into on March 19, 2010, between the State Bar of Montana and the Attorney General's Office of Consumer Protection. Under that Memorandum of Understanding, the Office of Consumer Protection has agreed to receive, process, evaluate, and — in appropriate cases — assign attorneys to address complaints of unauthorized practice of law by non-attorneys. The Office of Consumer Protection has further agreed to direct complaints of unauthorized practice of law by attorneys not licensed in Montana to the State Bar of Montana for possible referral to the Office of Disciplinary Counsel.

¶ 3 We conclude that the CUPL's Motion should be granted. However, in order to explain our decision in this regard, we summarize the evolution of this matter following the filing of the CUPL's Petition.

Background

¶ 4 Following the close of the comment period on the Petition, we carefully studied and deliberated the comments and the CUPL's response. As a result of these deliberations and consultations with the CUPL, the State Bar of Montana, and the Montana Attorney General, we reached several conclusions, which are summarized here.

¶ 5 First, we conclude that this Court is not authorized either directly or through a Commission to regulate the "unauthorized 1283 practice of law." Article VII, Section 2(3) of Montana's Constitution empowers this Court to

"make rules governing appellate procedure, practice and procedure for all other courts, *admission to the bar and the conduct of its members* [subject to the legislature's power to disprove rules which we adopt]" (italics added). Pursuant to this Constitutional scheme, the legislature has historically defined what constitutes the practice of law (§ 37-61-201, MCA)[1] and has charged the executive branch with the duties of investigating and prosecuting the "unauthorized" practice of law (§ 37-61-214, MCA).

¶ 6 Second, we conclude that the array of persons and institutions that provide legal or legally-related services to members of the public are, literally, too numerous to list. To name but a very few, by way of example, these include bankers, realtors, vehicle sales and finance persons, mortgage companies, stock brokers, financial planners, insurance agents, health care providers, and accountants. Within the broad definition of § 37-61-201, MCA, it may be that some of these professions and businesses "practice law" in one fashion or another in, for example, filling out legal forms, giving advice about "what this or that means" in a form or contract, in estate and retirement planning, in obtaining informed consent, in buying and selling property, and in giving tax advice. Federal and state administrative agencies regulate many of these professions and businesses via rules and regulations; federal and state consumer protection laws and other statutory schemes may be implicated in the activities of these professions and fields; and individuals and non-human entities may be liable in actions in law and in equity for their conduct. Furthermore, what constitutes the practice of law, not to mention what practice is authorized and what is unauthorized is, by no means, clearly defined. Finally, we are also mindful of the movement towards nationalization and globalization of the practice of law, and with the action taken by federal authorities against state attempts to localize, monopolize, regulate, or restrict the interstate or international provision of legal services.

¶ 7 Third, we conclude that this Court has no Constitutional authority to define, generally, what constitutes the practice of law, except within the context of a case or controversy properly before this Court. Moreover, it follows that this Court has no Constitutional authority to define the "unauthorized practice of law," again, except within the context of a case or controversy properly before this Court. And, finally, it follows that we have no Constitutional authority, except within the context of a case or controversy properly before this Court, to sanction or remedy the "unauthorized practice of law."

¶ 8 Fourth, we conclude that our proper role in matters involving the practice of law or the unauthorized practice of law is to exercise the authority granted to us under Montana's Constitution. We will hear and determine cases and controversies properly before the Court and we will continue to exercise our exclusive, original jurisdiction to supervise all other courts of Montana and the admission to, and conduct of members of, the bar, pursuant to Article VII, Section 2(1), (2), and (3) of Montana's Constitution. In this regard, we conclude also that it is appropriate that we adopt rules for the regulation of the practice of law in Montana by Montana attorneys in addition to those already adopted, and we will do so by subsequent order.

¶ 9 Fifth and finally, based upon the foregoing, we conclude that the CUPL's instant Motion is well taken and should be granted. In so doing, we acknowledge the excellent, and often frustrating, work of the CUPL over the years, and we thank CUPL co-chairs Carol Bronson and John Connor and all others who have served on the CUPL for their service to this Court and to the people of Montana. We also commend the State Bar of Montana and the Attorney General for their work toward establishing a better way of handling complaints of unauthorized practice of law.

¶ 10 Therefore, good cause having been shown,

¶ 11 IT IS ORDERED that the CUPL's Motion is GRANTED. The CUPL is dissolved 1284 effective April 20,

2010, and its Petition is dismissed as moot. This Court's February 15, 2000 order adopting rules for the CUPL is vacated and all rules for the CUPL are repealed.

¶ 12 IT IS FURTHER ORDERED that the Clerk of this Court give notice of this Opinion and Order to the co-chairs of the CUPL, to the Attorney General, and to the Executive Director of the State Bar of Montana with the request that notice of this Opinion and Order be published in the next available issue of the *Montana Lawyer*.

¶ 13 IT IS FURTHER ORDERED that this Opinion and Order be published on this Court's website.

/s/ MIKE McGRATH Chief Justice /s/ JAMES C. NELSON /s/ PATRICIA O. COTTER /s/ MICHAEL E. WHEAT /s/ W. WILLIAM LEAPHART /s/ BRIAN MORRIS /s/ JIM RICE Justices

[1] The legislature has also enacted other laws under Title 37, Ch. 61, MCA, which are not at issue here.