The Practice of Law: Deregulate or Redefine?

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The ABA and state bar associations have worked together to create unnecessary barriers to entry into the legal profession—things like accreditation requirements for law schools, licensing requirements for attorneys, and restrictions on the ownership of law firms by non-attorneys. These artificial restrictions on the free market have prevented competition, stifled innovation, and kept costs high for consumers.

This is the position set forth in a recent Wall Street Journal editorial on the deregulation of the practice of law. The authors, Clifford Winston and Robert W. Crandall, are Fellows at the Brookings Institution, a Washington D.C. think tank.

The authors argue that the time to deregulate the practice of law has come. The regulation that they oppose comes in three primary forms:

1. The ABA has accreditation requirements for law schools, which artificially restricts the number of would-be lawyers who can obtain a legal education;
2. Many state bar associations require individuals to graduate from an ABA-accredited law school before they can sit for the state bar exam; and
3. Most legal ethics rules prohibit non-lawyers from providing legal services (or owning an interest in a law firm).

Winston and Crandall contend that these restrictions limit competition and raise the cost of legal services. If they were removed, attorneys would face more competition (from other attorneys and even non-lawyers) and be forced to innovate and lower prices.

> Allowing accounting firms, management consulting firms, insurance agencies, investment banks and other entities to offer legal services would undoubtedly generate innovations in such services and would force existing law firms to change their way of doing business and to lower prices.

The authors' position is developed more fully in a soon-to-be released book titled, "First Thing We Do, Let's Deregulate All the Lawyers" (2011, Brookings Press).

Of course, the regulations that the authors oppose are in place for a reason (and it's not just attorney job security). The educational and licensing requirements help ensure a minimum level of competence in the legal profession. The prohibition against ownership of law firms by non-lawyers helps ensure that the attorney is answerable only to the client and not to a shareholder. (When any lawyer raises these points, they are already tainted with self-interest. After all, the lawyer's own job security is threatened by the type of deregulation that is being proposed.)

As I've written before, I'm not a big fan of the myth that law is a profession and not a business. And I am generally opposed to unwarranted governmental regulation. But I am hesitant to throw open the floodgates by lowering barriers to entry into the legal profession.

In fact, given the competence of some of the lawyers that I have encountered, I would argue that more stringent standards are needed. In many legal cases, there's too much at stake to sacrifice competence in the name of innovation. But these high-stake legal cases aren't usually mentioned in

this context. Instead, those who argue for deregulation point to commodity work: wills (ouch!), no-contest divorces, trademark applications, incorporation services, etc.

These commodity serves are areas in which non-lawyers (LegalZoom, RocketLawyer, etc.) are already making inroads. I would agree with the authors that some routine administrative services do not require three years of legal education and a bar exam. If a person can obtain the form he or she needs from a non-lawyer and (this is important) the matter is simple enough for the person to represent himself, why should he have to pay for a lawyer's time?

But Winston and Crandall have misdiagnosed the disease. The real problem (assuming we agree that there is one) isn't *who* is engaged in providing legal services, but *what* activities should be included under the umbrella we call the practice of law. Instead of making it easier for anyone to become an attorney, we should be talking about what types of services should require the assistance of an attorney at all.

What the lawyer brings to the table is substantive knowledge and the ability to apply legal principles to a client's individual situation. That is the *sine qua non* of the practice of law. The documents are just paper and ink. If attorneys still think of themselves as document providers, what will they sell when the documents are free?

In my trust and estate practice, I get calls sometimes from clients with one basic question: "What do you charge for a [insert document]?" My answer: Nothing. I don't charge for documents. If they know what document they need, they are better off going to LegalZoom or the local office supply store and buying it. I don't sell documents; I sell skill. I believe that I really do know more than my clients about what the law is and how to apply it to accomplish their goals. They believe it too. That—and not the documents—is what the client gets in exchange for their hard-earned dollar.

So I disagree with Winston and Crandall. The time has not come to deregulate the practice of law, but the time may have come to redefine it. Instead of lowering the overall competency of the legal profession, let's get back to the ongoing discussion of what activities can be safely carved out of the definition of "the practice of law."

By the way, Richard Granat has written a more substantive analysis and rebuttal of some of these points, which is worth a read if you have an interest in the topic. He mentions some of the disasters he has seen when non-lawyers are allowed to handle services that probably should have been done by an attorney (or at least a better-trained paralegal).

I plan to follow this up in the next several days with a blog post about a recent Florida case involving an "E-Z Legal Form" that didn't work out as it should. I could share other stories as well. When it comes to reliance on forms without the advice of attorneys … To be honest, sometimes these things work out okay. But sometimes they don't. We, as attorneys, see what happens when it all hits the fan. This gives us an insight that Winston and Crandall do not have.