

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: SB 1496

INTRODUCER: Senator Evers

SUBJECT: Unlicensed Practice of Law

DATE: March 31, 2014

REVISED: 03/31/14

| ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|-----------------|----------------|-----------|--------------------|
| 1. <u>Davis</u> | <u>Cibula</u> | <u>JU</u> | <u>Pre-meeting</u> |
| 2. | | <u>GO</u> | |
| 3. | | <u>RC</u> | |

I. Summary:

SB 1496 lists seven activities that are not considered a violation of the statute prohibiting the unlicensed practice of law. Those activities are:

- Pro se representation by an individual;
- Serving as a mediator or arbitrator;
- Providing services under the supervision of an attorney in compliance with the Rules of Professional Conduct, which are promulgated by the Florida Supreme Court;
- Providing services authorized by court rule;
- Acting within the lawful scope of practice of a business or profession regulated by the state;
- Giving legal notice in the form and manner required by law; or
- Representation of another person before a legislative body, committee, commission, or board.

Under existing s. 454.23, F.S., it is a third degree felony to engage in the unlicensed or unauthorized practice of law. A definition of the unlicensed practice of law is not contained in statute but has been developed over the years through case law and advisory opinions. This list of seven activities provides some clarity as to what is not criminal conduct when performed by a lay person and prohibits prosecution of those activities.

II. Present Situation:

The Florida Supreme Court has stated that the primary goal of regulating the unlicensed practice of law is the protection of the public. The Court's regulation is not performed to "aid or protect the members of the legal profession either in creating or maintaining a monopoly or closed shop."¹ Accordingly, there are two methods to enforce that prohibition: civil actions and criminal penalties.

¹ *Florida Bar v. Brumbaugh*, 355 So. 2d 1186, 1189 (Fla. 1978).

Civil Actions

Civil actions are authorized and governed by court rules. Article V, section 15, of the Florida Constitution provides that the Supreme Court has exclusive jurisdiction to regulate the admission of people to the practice of law as well as the discipline of those admitted. The Florida Bar, then, “as an official arm of the court,”² has been delegated the duty and responsibility of investigating and prosecuting alleged offenders.³ In dealing with the unlicensed practice of law, the bar employs two separate methods in an attempt to protect the public. The Bar will investigate written complaints submitted by the public and issue advisory opinions regarding what constitutes the unlicensed practice of law when requested by an individual or organization.

Complaints

The Florida Bar is authorized to receive a written complaint signed by the complainant which alleges the unlicensed practice of law. If a circuit committee in the jurisdiction where the alleged offender resides or conducts business determines that the unlicensed practice of law has occurred, the committee may issue a cease and desist affidavit or recommend civil prosecution. The remedies available to the Bar are to seek injunctive relief before the Supreme Court to enjoin the offender, seek restitution for the victim, assess a monetary penalty of \$1,000 per violation, and recover costs that the Bar has expended pursuing the action. If the injunction is violated, the Bar may file an action before the Supreme Court of Florida seeking indirect criminal contempt that may result in restitution to the victim, a penalty of up to \$2,500, imprisonment not to exceed 5 months, or both, and costs the Bar expended pursuing the action.⁴

According to The Florida Bar, the unauthorized practice of law, or UPL, is a significant problem in this state. The Bar reports opening 655 cases in 2011, 714 cases in 2012, and 550 cases in 2013. In this fiscal year, which runs from July 1-June 30, 361 cases have been opened. As of March 3, 2014, nine cases are pending at the Supreme Court of Florida and nine cases are pending with a state attorney. The Bar also reports closing 390 cases in this fiscal year, but points out that those cases were opened over several years.⁵

Advisory Opinions

The Florida Bar is also authorized to issue advisory opinions to individuals or organizations seeking guidance as to whether certain activities constitute the unlicensed practice of law. Under this process, a person or organization may submit a written request, in hypothetical form, seeking guidance. If the committee agrees to accept the request for a formal advisory opinion, notice is published and a public hearing is held in which the committee takes testimony from interested individuals. After the public hearing, the committee decides whether it will issue a proposed formal advisory opinion and what it will contain. If the committee determines that the conduct in question constitutes the unlicensed practice of law, a proposed, or draft, formal advisory opinion is filed with the Florida Supreme Court. The Court may then adopt, reject, or modify the

² R. Regulating Fla. Bar 10-1.2.

³ *Id.*

⁴ R. Regulating Fla. Bar 10-7.2.

⁵ E-mail from Lori Holcomb, Director, Client Protection, The Florida Bar (March 21, 2014) (on file with the Senate Committee on Judiciary).

opinion.⁶ Between 1988 and 1997, nine advisory opinions have been released determining whether certain activities by business groups constitute the unlicensed practice of law. Two additional formal advisory opinions are pending.⁷

Criminal Penalties

The Legislature enacted a statute in 1925 which prohibited the unlicensed practice of law. The statute stated that any person who was not entitled to practice law or who held himself out to the public as being qualified to practice law without having first obtained a certificate from the State Board of Law Examiners, as required by law, would be guilty of a penal offence punishable by not more than \$1,000 or imprisonment in a “county jail with or without hard labor for not more than twelve months” or by both the fine and imprisonment.⁸ In 1971, the \$1,000 fine and hard labor provisions were replaced and the offense became a first degree misdemeanor.⁹ The statute was amended in 1997 to clarify that it applied also to women¹⁰ and again in 2004 to establish a third degree felony penalty for the unlicensed practice of law or for any person who unlawfully holds himself or herself out to the public as qualified to practice law.

Section 454.23, F.S., states that it is a felony of the third degree for an unlicensed or unauthorized person to practice law in this state or hold himself or herself out to the public as qualified to practice law in the state or willfully pretend or imply that he or she is qualified or recognized by law as qualified to practice law in this state. A third degree felony is punishable by a term of imprisonment that does not exceed 5 years and a fine that does not exceed \$5,000.¹¹

The Florida Department of Law Enforcement (FDLE) reports that between 2004 and 2013, 104 arrests were made for a violation of this statute. Of those arrests, 50 cases resulted in a judicial disposition of guilty and seven cases were categorized as adjudication withheld. In 2014, six arrests have been reported and one count has been recorded as adjudication withheld.¹²

Definition

The “unlicensed practice of law” is not defined in statute or in court rules. When the allegation was made that an earlier version of the statute was unconstitutionally vague, the First District Court of Appeal concluded that the statute was not void for vagueness.¹³ The court further noted that the definition of the practice of law “is not confined to the language in section 454.23, but rather, is shaped by the decisional law and court rules as well as common understanding and practices.”¹⁴

⁶ Florida Bar Rule 10-9.1.

⁷ The Florida Bar, *Formal Advisory Opinions*,

<http://www.floridabar.org/tfb/TFBLawReg.nsf/9dad7bbda218afe885257002004833c5/34fac28eda9ca382852579ac006aff21!OpenDocument#FAORequestReMedicaidPlan> (last visited March 28, 2014).

⁸ Chapter 10175, s. 21, Laws of Fla. (1925).

⁹ Chapter 71-136, s. 384, Laws of Fla.

¹⁰ Chapter 97-103, s. 184, Laws of Fla.

¹¹ See ss. 775.082(3)(d) and 775.083(1)(c), F.S.

¹² E-mail from Rachel Truxell, Office of Legislative Affairs, Florida Department of Law Enforcement (March 21, 2014) (on file with the Senate Committee on Judiciary).

¹³ *State v. Foster*, 674 So. 2d 747 (Fla. 1st DCA 1996).

¹⁴ *Id.*, at 751.

The definition of the unlicensed practice of law is derived from case law and formal advisory opinions developed by The Florida Bar Standing Committee on Unlicensed Practice of Law. In demonstrating the difficulty in defining the practice of law to establish what constitutes the unlicensed practice of law, the Florida Supreme Court has stated:

This definition is broad and is given content by this court only as it applies to specific circumstances of each case. We agree that “any attempt to formulate a lasting, all encompassing definition of ‘practice of law’ is doomed to failure ‘for the reason that under our system of jurisprudence such practice must necessarily change with the everchanging business and social order.’”¹⁵

Throughout the years courts have decided, on a case by case basis, what constitutes the unauthorized practice of law. Some unauthorized activities involve a nonlawyer examining witnesses,¹⁶ taking a deposition,¹⁷ and representing an investor for compensation in a securities arbitration against a broker.¹⁸

In contrast, the courts have found that the practice of law does not include:

- A real estate licensee preparing residential lease forms approved by the Court,¹⁹
- A nonlawyer property manager preparing complaints for eviction and handling uncontested residential evictions on behalf of a landlord,²⁰
- Title insurance companies and their agents preparing abstracts of title to real property and issuing policies of title insurance,²¹ and
- Lobbying.²²

III. Effect of Proposed Changes:

This bill, in an effort to further define what constitutes the unlicensed practice of law, lists seven activities that do not constitute the unlicensed practice of law. Those activities include:

- Pro se representation by an individual;
- Serving as a mediator or arbitrator;
- Providing services under the supervision of an attorney in compliance with the Rules of Professional Conduct;
- Providing services authorized by court rules;
- Acting within the lawful scope of practice of a business or profession regulated by the state;
- Giving legal notice in the form and manner required by law; or

¹⁵ *Brumbaugh* at 1191, 1192 (quoting *State Bar of Michigan v. Cramer*, 399 Mich. 116, 249 N.W. 2d 1 at 7 (1976).

¹⁶ *Millen v. Millen*, 122 So. 3d 496 (Fla. 3d DCA 2013)

¹⁷ *Foster*, supra note 10.

¹⁸ *The Florida Bar Re Advisory Opinion on Nonlawyer Representation in Securities Arbitration*, 696 So. 2d 1178 (Fla. 1997).

¹⁹ *The Florida Bar Re: Advisory Opinion-Nonlawyer Preparation of Residential Leases Up To One Year In Duration*, 602 So. 2d 914 (Fla. 1992).

²⁰ *The Florida Bar Re Advisory Opinion-Nonlawyer Preparation of and Representation of Landlord in Uncontested Residential Evictions*, 627 So. 2d 485 (Fla. 1993).

²¹ *Cooperman et al., v. West Coast Title Company*, 75 So. 2d 818 (Fla. 1954).

²² *Florida Association of Professional Lobbyists, Inc., etc., v. Division of Legislative Information Services*, 7 So. 3d 511 (Fla. 2009).

- Representation of another person before a legislative body, committee, commission, or board.

This list provides some measure of clarity as to what activities may be performed by a lay person.

The bill takes effect July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The Office of the State Courts Administrator does not expect the bill to have a significant fiscal impact.²³

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends s. 454.23, F.S.

²³ Office of the State Courts Administrator, *2014 Judicial Impact Statement for SB 1496*, March 23, 2014.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
