

## Chapter Four

### Overview of the Legal System

1. **Dual sovereignty; the U.S. and state courts.** Many Americans marvel at the wisdom of the Founders of the nation, in establishing a system of “dual sovereignty.” Under dual sovereignty, there are many areas in which both sovereigns, the United States and the individual states, have overlapping power. There are some areas where one sovereign alone has authority. For instance, the power to enact medical durable power of attorney laws is a state power. The power to regulate who a beneficiary can appoint as a representative before the Social Security Administration is a federal power. The power to say who can practice law is a state power. The power to regulate immigration is a federal power. There are some areas where the power of the two sovereigns operates simultaneously. Criminal law is an example. Fraud against a health care program is a violation of the laws of both sovereigns and each can prosecute against the same fraudulent acts. This does not violate double jeopardy, because each sovereign is prosecuting only once for a violation of its particular statute. In areas where there is overlap or inconsistency, the Supremacy Clause of the U.S. Constitution makes federal law controlling. U.S. Constitution, Article VI, paragraph 2.

2. If there is thought to be a conflict between the laws of the two sovereigns, the United States Supreme Court has the ultimate authority to sort out the conflict. A matter can come to the United States Supreme Court either after the state judicial system has dealt with the matter, or after the federal trial and appellate courts have dealt with the matter. The vast majority of cases which the United States Supreme Court hears get the hearing only because the U.S. Supreme Court agrees to hear the case. In recent years, the U.S. Supreme Court has heard about 100 cases a year – about 1% of the cases, for which review was sought.

3. The United States Supreme Court would not usually hear a case from the state court system, until the highest state court available has ruled on the case. In Texas, this would be the Texas Supreme Court in civil cases, and the Texas Court of Criminal Appeals in criminal cases. These courts are headquartered in Austin. From the federal system, the United States Supreme

Court normally does not hear a case until it has been ruled on by the Court of Appeals for the area of the country. The federal Court of Appeals for the area of Texas, Louisiana, Mississippi, and the Canal Zone, is the United States Court of Appeals for the Fifth Circuit, headquartered in New Orleans.

4. In the state system, a case would usually not come before the high court, before being heard by the appellate court. Normally, the appellate court would not hear a case, before it was ruled on by a trial level court. The trial level courts hear witnesses and other evidence. Appellate level courts (and the courts above them) normally do not hear witnesses nor admit evidence into the record. Rather, appellate level and high courts usually rely on the record already created at the trial level, and compare that record with the law, to determine if the decision below should be upheld or set aside. The array of courts in Texas is very complex and is shown on Appendix B. In some regards, such as whether a county has a statutory probate court, a county-specific section of the Government Code controls.

5. In the federal system, below the Court of Appeals, there are trial level United States District Courts. Texas has four districts – Northern, Southern, Eastern, and Western. The United States Code, namely 28 U.S.C. §124, specifies which Texas counties are in which District. See Appendix C. The United States District Courts are the trial level courts in the federal system – they hear witnesses, rule on evidence, and enter judgments, which can then be appealed, such as to the U.S. Court of Appeals for the Fifth Circuit.

6. In both the federal and state system, parties may have a right to a jury trial, depending on the issues involved. (“Parties” are usually referred to as Petitioner and Respondent or Plaintiff and Defendant.) A party can waive the right to a jury trial. Many of the hearings that occur in any trial court are hearings on motions – motions for restraining orders, motions to require evidence to be produced, and so forth. There is not a right to a jury, in the hearing of motions. Even when there is a jury, it is said that the jury is the “trier of facts.” The judge usually determines what the law is, if there is a dispute as to the meaning of the law. If there is no jury in a case, the judge is said to be both the “trier of fact and law.”

7. In addition to the basic law that applies to a case (such as the Age Discrimination in Employment Act or the Texas Family Code), a trial court uses “rules of procedure” and “rules of evidence” to conduct hearings, including trials. There is one set of such rules for federal courts and another set adopted by each state. In addition, each local court in either system can adopt its own local rules, as long as the local rules do not contradict the rules of the system.

8. Overwhelmingly, no persons can represent others in a trial level or appellate or supreme court, unless they have been admitted to practice. Except in some very rare areas (such as representing creditors in some bankruptcy matters), persons who are not lawyers cannot be admitted to represent other persons before any level of court. On the other hand, every level of court can allow a person to represent himself or herself, as long as proceedings are not disruptive. (The Texas Property Code has a short section that allows non-lawyers to represent parties in justice court, in suits for non-payment of rent or for holding over beyond a rental term. The non-lawyer must be the “authorized agent” of the party. Texas Property Code §24.011.)

9. **Attorney representation.** Because of the complexity of court matters, especially above the small claims court level, parties usually want to be represented by an attorney. If a person in a court case cannot afford to hire an attorney, the court has the authority to try to arrange legal representation. In the federal system, the federal court can request an attorney to represent a party who has filed an affidavit of poverty. 28 U.S.C. §1915(d). In the Texas system, the trial courts actually have the mandatory power to appoint an attorney in a civil case for a person who has made an affidavit of poverty, if there is an exceptional need for attorney representation. This power is given to Texas state district judges at Government Code §24.016, and to Texas county judges at Government Code §26.049. To make use of either of these state statutes, a party would need to file a written motion requesting appointment of counsel, a very detailed affidavit of poverty and of why there are exceptional circumstances requiring attorney representation, and a proposed order. Neither the federal civil “request” statute nor the state mandatory statutes are of use outside the litigation setting – they do not help a poor person get an attorney for a will or a general durable power of attorney, for instance. It should be kept in mind that there is not a constitutional right in most civil cases to the appointment of an attorney. In criminal cases, a poor person who cannot hire his or her own attorney and who asks the court to appoint an

attorney cannot be imprisoned for conviction for the offense charged, if an attorney was not appointed.

10. Appendix C has a Motion, Affidavit, and Order for Appointment of an attorney in civil cases in Texas District Courts. Appendix D has the same documents for cases in Texas county courts. These are not official forms. Rather the forms make use of the words and concepts of Texas Government Code §24.016 and §26.049. *Filling out these forms itself must either be done by the individual or by an attorney or by a person directed by an attorney.* Otherwise, the law against unauthorized practice of law will be violated. The Legal Hotline for Older Texans can provide clients advice about these forms.

11. In both systems referred to in paragraph 9, there was also a reference to “poor” persons. In both systems, people who are too poor to pay a filing fee can have access to courts without paying the filing fee. In the state system, this is provided for at Texas Rule of Civil Procedure 145 (T.R.C.P. 145), and it requires the filing of an “Affidavit of Inability [to Pay Costs].” A person who receives a government entitlement based on indigency, or who has no ability to pay costs, can file such an affidavit. Unless it is contested, the party will likely be able to participate in the litigation without having to pay costs. T.R.C.P. 145 has very precise controls on the affidavit and proceedings for its use. In the federal system, 28 U.S.C. §1915 allows a court to authorize a party to proceed without paying filing fees and other costs, if the party makes an affidavit of inability to pay the costs. The court must rule on whether the party will be allowed to proceed without payment.

12. **Unauthorized practice of law.** Under the system of “dual sovereignty”, the states have the sole authority to define what “Practice of Law” and “Unauthorized Practice of Law” mean in their state systems. In Texas, Government Code Chapter 81 regulates the practice of law. If that section of law is violated, the Texas “Unauthorized Practice of Law Committee” can sue the wrongdoer for an injunction, to stop the unauthorized practice of law. Paragraphs 21 through 26 discuss this section of state law, and a recent federal court case which interpreted it, and a new section of state law that responded to the federal court ruling. Government Code Chapter 81 is the usual section of Texas law that is used to curb unauthorized practice of law.

13. There is another part of Texas law, in the Texas Penal Code, that can be used to criminally prosecute persons who hold themselves out to be attorneys, or who practice law without a license. These sections of the Penal Code are discussed at paragraphs 31 and 32. Although they are rarely used, non-lawyers should act as if they are always available to be enforced – because they are.

14. **Separation of powers.** The Founders who created the system of “dual sovereignty” also established the “separation of powers” among the branches of the federal government. The federal legislature – the Congress – passes the bills, which become law when the President signs them. The executive – the President and the federal agencies – implement the laws. The Judicial Branch – the court system – interprets the laws, and applies them to specific facts. Whether or not a particular state was going to have the same separation of powers was not explicitly determined by the Founders. They merely specified “The United States shall guarantee to every State in this Union a Republican Form of Government...” U.S. Constitution, Article IV, Section 4. Nonetheless, the separation of powers adopted for the federal government from the outset has also been adopted by the states.

15. **Administrative system.** In addition to the classic three branches of government, there has arisen over the years an administrative system. It is sometimes referred to as a “Fourth Branch” of government. This is found in both sovereigns. The Social Security Administration is an example in the federal system. The Texas Department on Aging is an example in the state system. Through the administrative procedure laws of each sovereign, these administrative agencies and their siblings have the authority both to make law (by adopting rules that have the force of law) and to enforce those rules, through hearings. When an administrative agency hears an individual claim for benefits, the hearing is usually presided over by an administrative law judge or a hearing officer.

16. **Judicial Review.** It is up to each sovereign to decide whether a person can have a court of the sovereign review a decision of an administrative agency. In the federal system, any person wronged by a decision of a federal agency has the right to have a federal court review the decision. 28 U.S.C. §702. Examples of decisions that can be reviewed in federal court include

denials of Social Security or Supplemental Security Income (SSI), and denials of Medicare benefits (if the amount denied is \$1000 or more, under Medicare). Although the Texas Government Code in general sets up a complete system of judicial review, cases involving Medicaid, food stamps, and cash assistance are specifically excluded from that system of judicial review. Government Code, §2001.223. Judicial review of administrative decisions (when it exists) can be either “de novo” or “on the record.” Social Security, SSI, and Medicare cases are reviewed “on the record,” if appealed to U.S. District Court. That means new evidence is not taken and witnesses are not heard in the federal court – the court relies on the record that was created at the administrative hearing. When judicial review is “de novo” that means the trial court will hear witnesses and evidence – the trial court hears the case anew. If judicial review is not available – such as in the Texas Medicaid, and food stamp programs -- a person who has been wrongly denied benefits can consider filing a regular lawsuit, under 42 U.S.C. §1983, to right the wrong. If the person wins in the trial court, the court can order the agency that loses to pay the person’s attorneys fees.

17. **Alternative dispute resolution.** Another fundamental aspect of the legal system today is “alternative dispute resolution” or ADR. Both sovereigns emphasize settling cases without going to court. Appendix D has a list of dispute resolution centers in Texas. Even where there is no such center, it may be possible to arrange pro bono dispute resolution. There are two main types of ADR – mediation and arbitration. The main difference is that mediation is voluntary in the sense that if a party does not like the result reached, the party does not have to agree to it, and can take its chances in court. But with arbitration, the result is usually binding, unless the arbitrator has acted improperly or irrationally. Arbitration usually cannot be forced on a party unless it has been agreed to in a contract. A party can be forced by a court to mediate, but cannot be forced to sign the proposed agreement resulting from the mediation.

18. **Unauthorized practice of law restrictions.** As noted at paragraph 12, each state has the power to regulate what is meant by “practice of law” and “unauthorized practice of law.” Texas has taken a very comprehensive position, concerning unauthorized practice of law, in the sense that the definition of it is very broad. There are two definitional sections in the Government Code, concerning unauthorized practice of law. One is in Chapter 81 of the Government Code,

and one is in Chapter 83 of the Government Code. Government Code §81.101 states:

#### SUBCHAPTER G. UNAUTHORIZED PRACTICE OF LAW

##### Sec. 81.101. Definition.

(a) In this chapter the "practice of law" means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.

(b) The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.

Government Code §81.101.

19. Also, there is a specific section of the Government Code that deals with the preparation of real estate documents, namely Government Code Chapter 83. That Chapter provides:

#### CHAPTER 83. CERTAIN UNAUTHORIZED PRACTICE OF LAW

##### Sec. 83.001. Prohibited Acts.

(a) A person, other than a person described in Subsection (b), may not charge or receive, either directly or indirectly, any compensation for all or any part of the

preparation of a legal instrument affecting title to real property, including a deed, deed of trust, note, mortgage, and transfer or release of lien.

This section does not apply to:

(b)

(1) an attorney licensed in this state;

(2) a licensed real estate broker or salesman performing the acts of a real estate broker pursuant to The Real Estate License Act (Article 6573a, Vernon's Texas Civil Statutes); or

(3) a person performing acts relating to a transaction for the lease, sale, or transfer of any mineral or mining interest in real property.

(c) This section does not prevent a person from seeking reimbursement for costs incurred by the person to retain a licensed attorney to prepare an instrument.

#### Sec. 83.002. Expenses.

This chapter does not prevent an attorney from paying secretarial, paralegal, or other ordinary and reasonable expenses necessarily and actually incurred by the attorney for the preparation of legal instruments.

#### Sec. 83.003. Forms.

This chapter does not prevent a person from completing lease or rental forms that:

(1) have been prepared by an attorney licensed in this state and approved by the attorney for the particular kind of transaction involved; or

(2) have been prepared by the property owner or prepared by an attorney and required by the property owner.

Sec. 83.004. Cumulative Remedies.

This chapter is not exclusive and does not limit or restrict the definition of the practice of law in the State Bar Act (Chapter 81). This chapter does not limit or restrict any remedy provided in the State Bar Act or any other law designed to eliminate the unauthorized practice of law by lay persons and lay agencies.

Sec. 83.005. Recovery.

A person who pays a fee prohibited by this chapter may bring suit for and is entitled to:

- (1) recovery of the fee paid;
- (2) damages equal to three times the fee paid; and
- (3) court costs and reasonable and necessary attorney's fees.

Sec. 83.006. Unauthorized Practice of Law.

A violation of this chapter constitutes the unauthorized practice of law and may be enjoined by a court of competent jurisdiction.

20. The courts have the power to interpret the laws. Texas Government Code Chapter 81 was recently interpreted by the United States District Court for the Northern District of Texas. The Court was asked to decide if that section of law violated the First Amendment to the U.S. Constitution. The case involved a company that had produced a computer software system called "Quicken Family Lawyer." The Unauthorized Practice of Law Committee (UPLC) of the State Bar of Texas challenged the computer program, as amounting to the unauthorized practice of law. The trial court ruled that it was indeed unauthorized practice of law. The trial court stated:

No one disputes that the practice of law encompasses more than the mere conduct of cases in the courts. See *In re Duncan*, 83 S.C. 186, 65 S.E. 210 (S.C. 1909)

(finding that the practice of law includes "the preparation of legal instruments of all kinds, and, in general, all advice to clients, and all action taken for them in matters connected with the law."). However, a comprehensive definition of just what qualifies as the practice of law is "impossible," and "each case must be decided upon its own particular facts." *Palmer v. Unauthorized Practice of Law Committee*, 438 S.W.2d 374, 376 (Tex. App. – Houston 1969, no writ); see also *State Bar [\*15] of Michigan v. Cramer*, 399 Mich. 116, 249 N.W.2d 1, 7 (Mich. 1976) ("any attempt to formulate a lasting, all encompassing definition of 'practice of law' is doomed to failure.").

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As already mentioned, the Palmer court found that the preparation of legal instruments of all kinds involves the practice of law. *Palmer* 438 S.W.2d at 376. The Texas Supreme Court has since held that the mere advising of a person as to whether or not to file a form requires legal skill [\*18] and knowledge, and therefore, would be the practice of law. *Unauthorized Practice of Law Committee v. Cortez*, 692 S.W.2d 47, 50 (Tex. 1985).

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Therefore, [\*20] a judge could legitimately determine, under the authority granted in paragraph (b), that services provided to the public as a whole, as opposed to a singular client, qualify as the practice of law.

*Unauthorized Practice of Law Committee v. Parsons Technology, Inc. d/b/a/ Quicken Family Lawyer*, Civil Action No. 3:97-CV-2859-H (January 22, 1999) (U.S. District Court, N.D. Tx.).

21. Therefore, under the ruling in the Parsons case, the unauthorized practice of law civil statutes – Government Code §81.101 and Chapter 83 -- remain in effect, as before, unless the Legislature of Texas makes some change. And, indeed, the Legislature did make a change -- in response to the Parsons case. By House Bill 1507 of the 76<sup>th</sup> Legislature, the Government Code

§81.101 was amended. House Bill 1507 provides:

1-1 AN ACT

1-2 relating to the definition of the practice of law.

1-3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE  
OF TEXAS:

1-4 SECTION 1. Section 81.101, Government Code, is amended by  
1-5 adding Subsection (c) to read as follows:

1-6 (c) In this chapter, the "practice of law" does not include  
1-7 the design, creation, publication, distribution, display, or sale,  
1-8 including publication, distribution, display, or sale by means of  
1-9 an Internet web site, of written materials, books, forms, computer  
1-10 software, or similar products if the products clearly and  
1-11 conspicuously state that the products are not a substitute for the  
1-12 advice of an attorney. This subsection does not authorize the use  
1-13 of the products or similar media in violation of Chapter 83 and  
1-14 does not affect the applicability or enforceability of that  
1-15 chapter.

1-16 SECTION 2. The importance of this legislation and the  
1-17 crowded condition of the calendars in both houses create an  
1-18 emergency and an imperative public necessity that the  
1-19 constitutional rule requiring bills to be read on three several  
1-20 days in each house be suspended, and this rule is hereby suspended,  
1-21 and that this Act take effect and be in force from and after its  
1-22 passage, and it is so enacted.

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President of the Senate

Speaker of the House

I certify that H.B. No. 1507 was passed by the House on April  
21, 1999, by the following vote: Yeas 138, Nays 2, 1 present, not voting..

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Chief Clerk of the House

I certify that H.B. No. 1507 was passed by the Senate on May 21, 1999, by the following vote: Yeas 26, Nays 4.

22. The analysis of this bill states:

RULEMAKING AUTHORITY

It is the opinion of the Office of House Bill Analysis that this bill does not expressly delegate any additional rulemaking authority to a state officer, department, agency, or institution.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 81.101, Government Code, by adding Subsection (c), to provide that in this chapter (State Bar), the practice of law does not include the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products, if the products clearly and conspicuously state that they are not a substitute for the advice of an attorney. Provides that this subsection does not authorize the use of the products or similar media in violation of Chapter 83 (Certain Unauthorized Practice of Law), Government Code, and does not affect the applicability or enforceability of that chapter.

SECTION 2. Emergency clause. Effective date: upon passage.

23. The result of the court ruling in Parsons, and of House Bill 1507, is this: The previous law in Texas concerning the unauthorized practice of law remains in effect, except that the design, creation, publication, distribution, display, or sale of written materials, books, forms,

computer software, or similar products, is not unauthorized practice of law IF the products clearly and conspicuously state that they are not a substitute for the advice of an attorney.

24. **Administrative law exception.** There has been a long-standing area of law, in which non-lawyers are explicitly authorized to represent parties: Administrative Law – the “Fourth Branch,” described above at paragraph 15.

25. Neither the federal Administrative Procedure Act (APA) nor the state Administrative Procedure and Texas Register Act (APTRA) grant or forbid non-lawyers from representing a third party before an administrative agency. Rather, the right must be found in the statutes governing specific agencies. Most federal and Texas agencies permit non-lawyer representation at the local and state agency levels. A non-lawyer may not represent a claimant or beneficiary at the appeals level, where the appeal is taken up by the state or federal courts. Most agencies require that the representative be “authorized” by use of a designation form signed by the claimant. As an authorized agent, a representative may advise and represent the individual as to issues of law and fact. The individual represented is never denied the opportunity to appear with legal counsel as opposed to a lay representative.

26. Due to the Supremacy Clause, *state* programs and agencies falling under the auspices of Titles I, IV-A, X, XIV or XVI (AABD) of the Social Security Act must, upon notification of a hearing before the state agency or an evidentiary hearing at the local level with the right of appeal to the state agency, inform the applicant or recipient of his or her right to be represented by an authorized representative such a legal counsel, a relative, a friend, or other spokesman (or they may appear pro se). For these programs, a non-lawyer may advise and represent the individual before the agency at both the state and local level, but if the case is appealed to a court of law, the non-lawyer may no longer serve in this capacity. 45.C.F.R. sec. 205.10

27. Non-lawyer representatives, if they plan to be a representative in more than one particular case, may be accredited by a recognized Veterans’ organization, through the Office of the General Counsel, Department of Veterans’ Affairs. Such accreditation requires the successful completion of a course of instruction, an examination, and the meeting of other incidental character and membership requirements. One may become accredited as an agent directly through the Department of Veterans’ Affairs, also by meeting instruction, examination and

character requirements. Representation of a particular claimant in a particular case (generally, a one-time commitment) requires only a power of attorney and a statement signed by the representative and the claimant that no compensation will be charged or paid for the services. The Power of Attorney may be given through a signed writing in letter form identifying the claimant and the type of benefit or relief sought, specifically authorizing a named individual to act as the claimant's representative, and further authorizing direct access to records pertinent to the claim. 38 C.F.R. secs. 14.627 - 14.630

28. For food stamp hearings at the local and state levels (before the agency), the household has a right to be represented by a household member or other representative such as a legal counsel, a relative, a friend, or other spokesperson. 7 C.F.R. sec. 273.15(f).

29. In Social Security, SSI, and Medicare matters, a non-lawyer representative may appear before the agency, the administrative law judge or the Appeals Council if he or she is generally known to have a good character and reputation, is capable of giving valuable help in connection with the claim, is not disqualified or suspended from acting as a representative before the SSA, and is not prohibited by any law from acting as a representative. Upon signing and filing a written notice appointing them as representative, the representative can: Obtain information about the claim to the extent that such information would be available to the claimant; submit evidence; make statements about facts and law; make any request or give any notice about proceedings before the Social Security Administration. A representative may NOT sign applications for rights or benefits under title II unless the claimant is under the age of sixteen, deceased, or physically or mentally unable to sign the application himself. 20 C.F.R. sec. 404.1710.

30. In IRS matters, non-lawyers must be accredited as "enrolled agents" by passing a test of competency, or meeting a requirement of a minimum number of years of experience as a certified public accountant. Non-lawyer CPA's may advise clients during the normal course of their tax duties, but only with regard to the particular task which they are performing for their clients. Although enrolled agents and CPA's may appear before the IRS, they are not authorized representatives in tax court.

31. Therefore, in the core areas in which Benefits Counselors can provide services at client

request, there should not be a problem with representation before administrative agencies. Representation in court will, of course, require an attorney. Also, due to House Bill 1507, distribution of written materials which clearly state that they are not a substitute for the advice of a lawyer, will be permissible.

32. What remains impermissible is what has always been impermissible. The following points about non-administrative law matters remain valid. Non-lawyers may address a question regarding non-administrative law matters with a client only in the most general terms. No analysis may be made of the law as it pertains or might pertain to the client. No legal conclusions may be drawn. And the client must be made aware of the fact that the non-lawyer's understanding of the law is incomplete, and that the client should obtain a lawyer. Tex. Gov't Code Ann. Sec 81.101 (Vernon 1988); 5 U.S.C.A. secs. 500, 555 (West 1977).

33. In non-administrative law matters, forms may be filled out for a client only if the client dictates his or her answers for each blank (applicable primarily for blind or disabled clients, and for those who can't type but submit the written answers to a typist). The non-lawyer may not prompt the client with questions about his or her situation (i.e. the facts of the case), and neither may the non-lawyer provide information as to how to fill out the form, which form to use, or where to file it. The non-lawyer may not correct the client's answers. It is possible for a non-lawyer to hand out generalized information sheets on specific areas of the law. They may not be written as flow charts or in a Q&A format which may lead a client to believe that he or she has no legal recourse except through the means spelled out in the handout, or which may lead a client to believe that the information given is exhaustive or complete. Under no circumstances should the client be led to believe that if their situation is not addressed in the information sheet then they have no legal recourse. Unauthorized Practice Committee State Bar of Texas v. Cortez, 692 S.W. 2d 47 (Tex 1985). Since a supervising attorney is responsible for the actions of the non-lawyers in his corporation, clinic or other public interest entity, the information sheets should be written or approved by the attorney. Again, with regard to all legal questions posed to non-lawyers, there must be NO tailoring of advice to the client's situation.

34. The courts come down hard on non-lawyer advice given for a fee and on poor attorney supervision of a non-lawyer's activity. The courts are also especially stringent regarding non-lawyer advice concerning wills. Fadia v. Unauthorized Practice of Law Comm., 830 S.W. 2d

162 (Tex. App. – Dallas 1992) (Texas courts will not distinguish between the provision of generalized will-making forms and case-specific advice as to how to fill out the forms. Both are considered the unauthorized practice of law when performed by non-lawyers).

35. It should be noted that collecting a fee for representation in administrative law cases is strictly regulated. Above all is the fact that services under the Older Americans Act are to be provided without demand for payment. In matters before the Social Security Administration, the fee, if any, must be approved by the Administrative Law Judge. In matters before the Texas Department of Human Services, there is a special law. It states: “A person who is not a lawyer commits an offense if the person charges a fee for representing or aiding an applicant of recipient in procuring assistance from the department.” A violation is a Class A misdemeanor. A Class A misdemeanor carries a fine of up to \$4000, up to one year of jail, or both. Human Resources Code §12.001; Penal Code §12.21.

36. In sum, in the core administrative law areas of health benefits and public benefits, in which Benefits Counselors should concentrate their advocacy services, there should not be an “unauthorized practice of law” problem at the administrative level. In other areas, it is best to not go beyond pre-printed materials that clearly and conspicuously state they are not a substitute for the advice of an attorney. In filling out forms, outside the administrative law context, a non-lawyer who does not do any more than be a scribe for the other person, should not face a charge of “unauthorized practice of law.” One step beyond being a scribe, in the non-administrative law context, can lead to such a charge.

37. In addition to the definition of unauthorized practice of law found in the Government Code at Chapter 81, the Penal Code has two further important sections:

Sec. 38.122. Falsely Holding Oneself Out as a Lawyer.

(a) A person commits an offense if, with intent to obtain an economic benefit for himself or herself, the person holds himself or herself out as a lawyer, unless he or she is currently licensed to practice law in this state, another state, or a foreign country and is in good standing with the State Bar of Texas and the state bar or licensing authority of any and all other states and foreign countries where licensed.

(b) An offense under Subsection (a) of this section is a felony of the third degree.

(c) Final conviction of falsely holding oneself out to be a lawyer is a serious crime for all purposes and acts, specifically including the State Bar Rules.

Sec. 38.123. Unauthorized Practice of Law.

(a) A person commits an offense if, with intent to obtain an economic benefit for himself or herself, the person:

(1) contracts with any person to represent that person with regard to personal causes of action for property damages or personal injury;

(2) advises any person as to the person's rights and the advisability of making claims for personal injuries or property damages;

(3) advises any person as to whether or not to accept an offered sum of money in settlement of claims for personal injuries or property damages;

(4) enters into any contract with another person to represent that person in personal injury or property damage matters on a contingent fee basis with an attempted assignment of a portion of the person's cause of action; or

(5) enters into any contract with a third person which purports to grant the exclusive right to select and retain legal counsel to represent the individual in any legal proceeding.

(b) This section does not apply to a person currently licensed to practice law in this state, another state, or a foreign country and in good standing with the State Bar of Texas and the state bar or licensing authority of any and all other states and foreign countries where licensed.

(c) Except as provided by Subsection (d) of this section, an offense under Subsection (a)

of this section is a Class A misdemeanor.

(d) An offense under Subsection (a) of this section is a felony of the third degree if it is shown on the trial of the offense that the defendant has previously been convicted under Subsection (a) of this section.

38. Although the usual method used to curb unauthorized practice of law is for the State Bar to seek an injunction to stop it – the method used in the Parsons case – the criminal statutes found at Penal Code §38.122 and §38.123 remain on the books.

39. Again, Benefits Counselors who focus on the core administrative law areas of health benefits and public benefits representation at the administrative level, and who do not hold themselves out as attorneys, should not encounter difficulty from the Unauthorized Practice of Law Committee, nor from local prosecutors.

40. **Legal Assistance vs. Legal Awareness.** The concepts of legal assistance and legal awareness are defined at 40 TAC §260.3(p)(1)(A) and (B).

The definitions are under the heading “Benefits Counseling”:

(1) **Benefits Counseling.** Benefits counseling includes both legal assistance and legal awareness services.

(A) **Legal Assistance.** Legal assistance includes the provision of client-specific advice, counseling and/or representation on matters involving insurance issues, public/private benefits, consumer problems and other legal issues.

(B) **Legal Awareness.** Legal awareness includes general education and outreach on matters involving insurance issues, public/private benefits, consumer problems and other legal issues.

40 TAC §§260.3(p)(1)(A) and (B).

41. From the previous discussion of “unauthorized practice of law,” it is very clear that any of the activities in paragraph 40 are permissible if the client requests them, and if they are at the

administrative level, and if they are in the Social Security, Supplemental Security Income (SSI), food stamp, Medicare, or Medicaid programs. These happen to be programs where there is vast unmet need for assistance.

42. Outside the administrative law areas mentioned in paragraph 41, before providing Legal Assistance, a non-lawyer must locate some explicit permission in the law. There is no such permission regarding general durable powers of attorney. There is not even permission regarding the medical power of attorney, or the directive to physician. Being more than a scribe writing down the older person's words is risky – being more than a scribe could be considered the unauthorized practice of law, in these types of matters. It is clearly forbidden for a non-lawyer to draft the will of another person. The preparation of real estate documents is regulated by Chapter 83 of the Government Code.

43. **Range of services that a non-lawyer can provide.** In those administrative law areas in which a non-lawyer can provide services, the services can be very comprehensive. The non-lawyer can prepare and represent clients at hearings before administrative law judges or hearing officers. The non-lawyer can call witnesses, cross-examine witnesses, introduce documents into evidence, object to evidence, state oral arguments regarding the case, and file written arguments with the administrative law judge or the hearing officer, if allowed. In preparing a client's case, a non-lawyer can interview witnesses, help to complete forms required by the administrative agency, and gather evidence from other records. The Texas Health and Safety Code §161.201 - 204, which requires the cost-free forwarding of a copy of medical records in certain circumstances, allows for a non-attorney to make the request. The copy must be requested to support an application for benefits based on disability in Social Security, SSI, Medicare, Medicaid, TANF, or Veterans Benefits programs. The cited sections of law have detailed procedures that should be read.

44. What if the area of need does not fit within the administrative law exception? Fortunately, there are alternatives. Firstly, the definition of Legal Awareness at 40 TAC §260.3 (p) is a very good fit, with House Bill 1507. Under House Bill 1507, the distribution of written materials is permissible, as long as there is a clear and conspicuous statement that the materials are not a substitute for the advice of an attorney.

45. Also, the Legal Hotline for Older Texans is available Monday - Friday, 9:00 a.m.- 5:00 p.m., to provide the cost free advice of its attorneys to any Texans sixty (60) years of age and older. Furthermore, Benefits Counselors of the Area Agencies on Aging of Texas can call the Legal Hotline for Older Texans, for back-up on client matters – including resolving whether a matter involves the unauthorized practice of law. The number for Benefits Counselors to call to reach the Legal Hotline for Older Texans is 1-800-880-9797. This is a number for Benefits Counselors – not for clients. The email address of the managing attorney of the Legal Hotline for Older Texans is rcurme@tlsc.org.

46. Resources for Referral. For matters which a non-lawyer cannot handle, low-income clients can seek the services of the legal services office that serves their area. The eligibility criteria vary. Usually the income limit is set at 100% or 125% of the federal poverty income level. To give a “rule-of-thumb,” the SSI benefit for an individual is about 75% of the federal poverty income limit. The QMB eligibility limit is 100% of the federal poverty income limit. Legal services offices cannot accept criminal cases, nor fee-generating cases. Most legal services offices do accept cases in the core areas of domestic violence, landlord-tenant (for the tenant), mortgage foreclosure, and public benefits cases. If a legal services office is not the answer, either because the client’s income is too high or the case is not the sort that a legal services office handles, the Legal Hotline for Older Texans may be able to offer the client a referral to a reduced-fee attorney. (Of course, the Legal Hotline for Older Texans can provide cost-free legal advice and consultation, as well.) In the larger cities of Texas, the local bar association often operates a lawyer referral program. The State Bar of Texas has a lawyer referral service at 1-800-252-9690.

47. Of course, many Area Agencies on Aging have also arranged for pro bono – volunteer – lawyering for certain types of cases. Many Area Agencies on Aging also contract with local law offices to provide certain types of legal services. Please familiarize yourself with any such arrangements that your Area Agency on Aging may have.