

Testimony on: S.B. 829 – Unauthorized Practice of Law

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Testimony To the
**Connecticut Joint
Committee on Judiciary**

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Consumers for a Responsive Legal System (“Responsive Law”) thanks the House for the opportunity to present its testimony on Senate Bill 829, concerning the unauthorized practice of law. Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to the people.

We oppose the passage of the bill, which greatly expands the definition of the unauthorized practice of law and makes it a felony, punishable by five years in prison. The bill makes two critical changes to the regulation of the unauthorized practice of law (UPL) in Connecticut. First, it changes the substantive UPL standard by incorporating the superior court’s definition of the “practice of law.” Second, it makes UPL a class D felony, punishable by up to five years imprisonment, instead of a class C misdemeanor, punishable by up to three months imprisonment. We oppose both changes.

Under the current UPL statute, a person who has not been admitted to the state bar is prohibited from, inter alia, “practice[ing] law”; “making it a business to practice law”; or indicating to the public that he or she practices, or is entitled to practice, law.¹ The bill maintains this statutory definition,² with two significant changes: first, the bill exempts legal services provided pursuant to statute or superior court rule; and second, the bill incorporates “engag[ing] in the practice of law *as defined by . . . rule of the superior court.*”³ The first change is entirely salutary – it protects those who provide statute- or court-directed services from the threat of prosecution and the accompanying chill that could otherwise hinder legislative or judicial efforts at providing alternative legal services. The second change, however, is affirmatively harmful to legal consumers because the superior court UPL rule is expansive, overbroad, and inappropriate for a criminal statute.

¹ Conn. Gen. Stat. § 51-88(a).

² Aside from minor technical corrections, the bill’s language is identical to that of current section 51-88(a).

³ Emphasis added.

The bill creates a vague and overbroad standard of liability.

The current superior court rule defines the “practice of law” as “ministering to the legal needs of another person and applying legal principles and judgment to the circumstances or objectives of that person.”⁴ The superior court rule also provides a non-exhaustive list of qualifying conduct, including any “act which *may indicate* an occurrence of the authorized practice of law . . . as established by case law, statute, ruling or other authority”⁵ – thereby incorporating the entire body of Connecticut decisional law, as well as unspecified “other authorit[ies].” The superior court promulgated the current rule pursuant to its authority to create judicial rules of practice.⁶ The superior court has equitable jurisdiction to restrain UPL violations,⁷ and UPL cases in Connecticut have primarily consisted of injunctive actions, rather than criminal prosecutions.⁸ Jurisdictions across the country have struggled to formulate a clear standard for differentiating legal from non-legal services. “The reason for this is the broad field covered.”⁹ As the Connecticut Supreme Court has repeatedly recognized, “[a]ttempts to define the practice of law have not been particularly successful. [. . .] The more practical approach is to *consider each state of facts* and determine whether it falls within the fair intendment of the term.”¹⁰ This “practical approach” has proven workable in the context of equitable enforcement, but is wholly inapplicable to criminal prosecution.¹¹

⁴ Conn. Super. Ct. R. § 2-44A(a).

⁵ *Id.* at § 2-44A(a)(6) (emphasis added).

⁶ Conn. Gen. Stat. § 51-14(a); *see also* Conn. Rules of Prof'l Conduct R 5.5 (“The practice of law in this jurisdiction is defined in Practice Book Section 2-44A.”)

⁷ Conn. Gen. Stat. § 51-88(c).

⁸ *See, e.g., Statewide Grievance Comm. v. Patton*, 239 Conn. 251, 683 A.2d 1359 (1996); *State Bar Ass'n of Conn. v. Conn. Bank & Trust Co.*, 145 Conn. 222, 140 A.2d 863 (1958); *Statewide Grievance Comm. v. Irizarry*, CV030194210, 2003 WL 23025436 (Conn. Super. Ct. Dec. 8, 2003); *Statewide Grievance Comm. v. Zadora*, CR 980058137, 1998 WL 550757 (Conn. Super. Ct. Aug. 20, 1998).

⁹ *Patton*, 239 Conn. at 254, 683 A.2d at 1361 (quoting *Grievance Committee v. Payne*, 128 Conn. 325, 329, 22 A.2d 623, 625 (1941)).

¹⁰ *Id.* (emphasis added).

¹¹ *Id.*, 239 Conn. at 255, 683 A.2d at 1361 (recognizing the standard for “an activity on the ‘outerboundaries’ of the ‘practice of law’ might be impermissibly vague.” (quoting *Monroe v. Horwitch*, 820 F.Supp. 682, 686 (D.Conn.1993), *aff'd*, 19 F.3d 9 (2d Cir.1994)) (alteration omitted)).

Although the rule includes a list of specifically *permitted* conduct, these narrow exceptions do very little to constrain the sweeping language of the rule's broad prohibition. Of the fifteen listed exceptions, eight are limited to highly particular classes of individuals – e.g., “neutral mediator[s],” “legislative lobbyist[s],” “statutorily authorized . . . licensed real-estate agent[s]” or “statutorily authorized . . . accountant[s].”¹² Another five are limited to highly particular situations – e.g., administrative hearings, labor negotiations, activities “preempted by federal law.”¹³ A somewhat more substantive exception authorizes “provid[ing] information of a general nature about the law and legal procedures to members of the public”;¹⁴ however, neither “information of a general nature” nor “members of the public” are defined. The broadest exception is a catch-all provision excluding “such other activities as the courts of Connecticut have determined do not constitute [UPL].”¹⁵ Again, this incorporates the entire body of Connecticut decisional law – decisional law which, as noted above, is primarily a product of equitable actions “consider[ing] each state of facts.” Unsurprisingly, these cases tend to be highly individualized and provide few articulable principles on which individuals can rely in order to avoid the risk of criminal prosecution.¹⁶

The bill deprives consumers of valuable information and advice.

The superior court rule also defines the “practice of law” to include “giving advice or counsel to persons concerning or with respect to their legal rights or responsibilities, or with regard to any matter involving the application of legal principles to rights, duties, obligations or liabilities.”¹⁷ Criminally prohibiting any advice “concerning . . . legal rights or responsibilities” would deprive consumers of a wide array of valuable information, both legal and non-legal. Moreover, it could potentially subject thousands of

¹² Conn. Super. Ct. R. § 2-44A(b)(3), (6), (10).

¹³ *Id.* at § 2-44A(b)(2), (4), (8).

¹⁴ *Id.* at § 2-44A(d).

¹⁵ *Id.* at § 2-44A(b)(11).

¹⁶ *See, e.g., State Bar Ass'n of Conn. v. Conn. Bank & Trust Co.*, 145 Conn. 222, 236, 140 A.2d 863, 871 (1958) (differentiating between legal determinations concerning the administration of trust accounts that were “internal” or “external” to the bank).

¹⁷ Conn. Super. Ct. R. § 2-44A(a)(2).

ordinary law-abiding people to significant prison time simply for doing their jobs or trying to help a friend or family member in need.

Many basic legal tasks that people commonly encounter can be performed by a friend or family member who has familiarity or experience with the issue involved. This third party can provide invaluable assistance concerning a particular legal task without causing any harm to the individual. If such assistance were criminally prohibited because it “concern[s] . . . legal rights or responsibilities,” it would effectively deny access to the legal system to a great number of low- and medium-income Connecticut residents. Retaining a lawyer to perform such tasks is simply not practically or economically feasible for most people. The average take-home pay in Connecticut is \$48,873.¹⁸ The average person must therefore work an entire week in order to pay for only three hours of a lawyer’s time, assuming an hourly billing rate of \$300.

In addition to basic legal assistance, advice “concerning . . . legal rights or responsibilities” can encompass *any* advice that includes a legal component or that bears on a legal issue. Accountants, financial planners, real estate agents, social workers, and even doctors could find themselves facing five years in prison if their professional advice happens to touch on “legal rights or responsibilities.” In short, anyone whose occupation involves giving advice or providing information of any sort is potentially implicated by this bill. Critically, the prohibition on advice is not limited to compensated services. Accordingly, *anyone* who tries to help a friend or family member with any kind of legal problem could be criminally prosecuted and sentenced to five years in prison.

Proponents of this bill may contend that reasonable construction and prosecutorial discretion will protect the doctors, accountants, and family members from the literal language of the bill. However, this kind of overbroad criminal statute is affirmatively harmful in and of itself, even if not enforced to its fullest extent. The threat of five years in prison for potentially infringing advice cannot help but chill the offering of such advice. This chill would deprive consumers

¹⁸ U.S. Bureau of Economic Analysis, “Table SA51-53, Disposable personal income summary,” <http://www.bea.gov/iTable/iTable.cfm?reqid=70&isuri=1&acrdrn=4>, accessed April 17, 2013.

of a significant amount of essential assistance and valuable information.

The bill imposes unjustified and disproportionate penalties.

Under the current statute, UPL is a class C misdemeanor,¹⁹ punishable by up to three months imprisonment and a fine of up to five hundred dollars.²⁰ If enacted, the bill would make UPL a class D *felony*,²¹ classifying it alongside such crimes as jury tampering²² and third-degree burglary.²³ The bill would also drastically increase the punishment to up to *five years* imprisonment and a fine of up to five thousand dollars.²⁴ As originally raised, the bill would have made UPL a class A misdemeanor, punishable by up to one year imprisonment and a fine of up to two thousand dollars.²⁵ The bill was amended at the recommendation of the Division of Criminal Justice, which expressed its belief that “the unauthorized practice of law is so serious offense [sic] that a felony penalty and its ramifications are appropriate.”²⁶ Neither the Division nor anyone else, however, has presented any evidence that the problem of UPL in Connecticut is sufficiently pervasive, or has produced sufficient harm, as to merit felony classification. Absent such a showing, the imposition of so severe a penalty is wholly inappropriate. This is especially true in light of the bill’s extraordinarily broad definition of UPL.

Proponents may argue that stringent penalties are necessary to protect consumers from being preyed upon by individuals falsely holding themselves out to be attorneys. Responsive Law certainly shares the concern that legal consumers can be victims of fraud. Consumers in Connecticut, however, are already protected by existing fraud statutes.²⁷ For example, if a non-attorney obtains more than two thousand dollars from a consumer by holding himself out

¹⁹ Conn. Gen. Stat. § 51-88(b).

²⁰ *Id.* at §§ 53a-36, -42.

²¹ *Id.* at § 53a-35a(8).

²² *Id.* at § 53a-154.

²³ *Id.* at § 53a-103.

²⁴ *Id.* at § 53a-41(4).

²⁵ *Testimony of the Division of Criminal Justice in Support of: S.B. No. 829: An Act Concerning the Unauthorized Practice of Law*, Joint Com. on Judiciary, 1 (Feb. 13, 2013).

²⁶ *Id.* at 2.

²⁷ *E.g.*, Conn. Gen. Stat. § 53a-119.

as an attorney, he has committed the class D felony of third degree larceny.²⁸ The protections afforded to legal consumers under this bill are therefore largely duplicative of existing criminal law; and any small additional protection is more than offset by the affirmative harm the bill's broad language would impose on consumers.

Requiring a showing of consumer harm could produce a legitimate consumer protection bill.

Although Responsive Law opposes this bill, we recognize that, if properly amended, it could potentially provide some protection for legal consumers. As presently drafted, the bill lacks any requirement of harm to consumers. If the consumer of the service does not object to and suffers no harm from the service, the provider of that service should not be prosecuted for UPL. Accordingly, Responsive Law suggests that, at a minimum, the bill be amended to include harm to a consumer as a required element of UPL.

In an economic climate in which four out of five people cannot afford a lawyer, additional barriers should not be placed between people and the legal system that is intended to adjudicate their disputes. **On behalf of the users of the legal system, we urge the Committee to oppose this legislation.**

²⁸ *Id.*; *id.* at § 53a-124(a).