

Testimony on: Florida House Bills 7037 and 7039: Community Association Managers and Unauthorized Practice of Law

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Testimony to the
**Florida House Judiciary
Committee**

and
**Florida House Business &
Professional Regulation
Subcommittee**

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Consumers for a Responsive Legal System (“Responsive Law”) thanks the committees for the opportunity to present its testimony on House Bills 7037 and 7039. Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to the people. We support policies that expand the range of legal services available to meet people’s legal needs. In particular, we support loosening restrictions on who may provide assistance with legal matters so that people of all income levels can get the legal help they need. **Therefore, we endorse – with reservations – House Bills 7037 and 7039, which will have a beneficial impact on Floridians’ access to their legal system.**

Access to justice is a problem of both supply and demand. Demand for legal services is relatively fixed. As long as we live in a nation governed by laws, people will need assistance in understanding those laws and resolving disputes over their application. In 2012, Florida’s legal aid programs handled 89,720 cases for low-income Floridians.¹ But with studies showing that 80% of the civil legal needs of low-income people go unmet, it’s clear these ninety-thousand cases are just the tip of the iceberg.² Courts can alleviate some of the demand for legal assistance from these people by simplifying procedures, but even if procedures are simplified, people will still face legal issues pertaining to housing, employment, family law, and consumer issues—among others—and will continue to need assistance in understanding the substantive law that pertains to their situation.

¹ The Florida Bar Foundation, *2012-13 Annual Report*, pp. 5 (Available at http://flabarfdn.org/about/news-publications/annual-report/2013/documents/2012-13AR_003.pdf)

² Brennan Center for Justice, *Access to Justice: Opening the Courthouse Door*, pp. 6 (Available at http://www.brennancenter.org/sites/default/files/legacy/d/download_file_48493.pdf)

With less ability to change the demand side of the access to justice equation, we're left trying to fix the supply side. Under the "lawyers only" status quo, Floridians are increasingly unable to afford legal help. The average take-home pay in Florida is \$37,349.³ The average person in Florida must therefore work two full days to pay for just one hour of a lawyer's time, assuming an hourly billing rate of \$300. Put another way, a minor case might require a total of 10 hours of an attorney's time. Paying for such a case would require an *entire month's* take-home pay for the average Floridian.

The prohibitive expense of legal assistance in effect denies many low and middle income Floridians access to their legal system, and is in large part due to the government-supported monopoly attorneys have on providing legal help. Responsive Law urges the committees to bring much-needed relief to the people of Florida by expanding the supply of legal services. House Bills 7037 and 7039 are small steps in the right direction, and we urge the committees to approve them. However, fundamental changes to UPL law are needed to improve the supply of legal services and bring justice within reach of all Floridians.

HB 7037 and HB 7039 Are Intended to Exempt Certain Activities From Prosecution Under UPL Law

The Unauthorized Practice of Law ("UPL") is illegal in Florida, and carries both civil and criminal penalties. The Florida Supreme Court has jurisdiction over UPL matters, and has delegated the investigation and prosecution of UPL to the Florida Bar.⁴ However, the phrase "practice of law" has no exact definition. Rather, it has been shaped through court rule, case law and advisory opinions.⁵ As such, the only hard-and-fast rules on whether a non-lawyer's activity constitutes UPL are those which have been decided in a past case. This means that UPL law is governed not by clear principles, but by a complicated list of dos and don'ts. For example, a property manager is allowed to prepare eviction notices or uncontested residential

³ U.S. Bureau of Economic Analysis, "Table SA51-53, Disposable personal income summary," <http://www.bea.gov/iTable/iTable.cfm?reqid=70&isuri=1&acrdn=4>, accessed February 20, 2014.

⁴ Florida Constitution Art. V, Sec. 15 and Florida Bar Rule 10-1.1, respectively

⁵ Florida Bar Rule 10-2.1

evictions for a landlord, but may be committing UPL if they attempt to file a complaint for eviction or motion for default in the court.⁶

Two general principles can be found in the UPL case law which are especially relevant to the bills in question. First, an activity within a profession's "sphere of activity" is more likely to be found legal for a non-lawyer of that profession to perform, even if the activity has legal implications.⁷ Similarly, the courts have tended to allow non-lawyers to perform activities where little discretion is involved—for example in filling out standardized residential lease forms.⁸

HB 7037 expands the list of activities which are within the professional sphere of Community Association Managers ("CAMs"), clarifying that these activities are within the sphere of activity for a CAM and as such do not constitute the Unauthorized Practice of Law. The bill also provides forms for the claim or release of liens by CAMs, attempting to protect them from UPL prosecution for filling such forms. This bill will help protect CAMs from being criminally or civilly liable simply for doing their job. It is not a substantive change to existing law, but rather a clarification of what it means to be a Community Association Manager.

HB 7039 modifies Florida's criminal statute concerning UPL, providing a list of exempted activities which explicitly will not constitute UPL. This exemption list will only apply to the criminal prosecution of UPL – the civil cases brought by the State Bar will be unaffected. Furthermore, relevant case law already implies similar exemptions, and so HB 7039 is likewise a codification of existing UPL rules.

Both HB 7037 and HB 7039 will have a beneficial impact on Floridians' access to their legal system, and should be enacted into law. They help lift the threat of UPL prosecution that hangs over non-lawyers whose core services touch upon legal matters. For example, condo associations will no longer need to have a lawyer on retainer to draft meeting agendas.⁹ While there remains much to be done, *partially* protecting *some* service providers will result in a *marginally*

⁶ *The Florida Bar re Advisory Opinion – Nonlawyer Preparation of and Representation of Landlord in Uncontested residential Evictions*, 627 So. 2d 485 (Fla. 1993)

⁷ For example see *Keys Co. v. Dade County Bar Ass'n*, 46 So. 2d 605 (Fla. 1950)

⁸ *The Florida Bar Re: Advisory Opinion Nonlawyer Preparation of Residential Lease Up to One Year in Duration*; 602 So. 2d 914 (Fla. 1992)

⁹ HB 7037, filed version, lines 39-40

increased supply of those services, with *slightly* lower prices and better value for consumers.

However, while both HB 7037 and HB 7039 will provide some relief from onerous UPL restrictions, they also highlight deeper problems with existing UPL regulation. HB 7039 lists several exempted activities, such as self-representation, services under the supervision of a Florida attorney, and representation before a legislative body, which should clearly already be legal. The fact that such exemptions must be made explicit—that a bill is necessary to clarify that Florida’s citizens can speak about legal issues with their legislature without committing a third degree felony—indicates how oppressively broad the current definition of UPL is.

Perhaps the most beneficial clause of HB 7039, subsection (2)(e) exempts those “acting within the lawful scope of practice of a business or profession regulated by the state” from criminal UPL prosecution. But it too highlights the enormous complications that arise from an overbroad definition of UPL. First, the phrase “regulated by the state” is vague. Presumably, this applies to the professions under the purview of the Florida Department of Business and Professional Regulations. But what about other professions whose core functions may touch upon legal matters? Doctors and social workers are both regulated by the state of Florida in some sense, but not by the DBPR – are they covered under HB 7039?¹⁰ The phrase “otherwise lawful scope of practice” is similarly vague, a problem which HB 7037 makes quite clear. Will every profession need a constantly updated laundry-list of allowed activities, as Community Association Managers apparently do? Must an activity be explicitly made legal to be within a profession’s “lawful scope of practice,” or is it enough that the activity not be illegal? The too-broad definition of UPL makes legalizing desirable behavior by non-lawyers difficult and uncertain.

Finally, there is a glaring absence from HB 7039: no exemption exists for free assistance offered by friends and family. Both HB 7037 and HB 7039 will provide some additional clarity to service providers and consumers. But these bills aim to treat the symptoms of UPL over-regulation, rather than cure the disease.

¹⁰ Florida Statutes Title XXXII, ch. 458 and ch. 491, respectively

UPL Regulation as a Whole is Deeply Flawed, and Must Be Reworked

Defense of the status-quo blanket prohibition on UPL generally rests on two planks. First, proponents of existing UPL law may argue that its broad prohibitions are necessary to protect consumers from being preyed upon by individuals falsely holding themselves out to be attorneys. Responsive Law, as a consumer interest organization, certainly shares the concern that legal consumers can be victims of fraud. Consumers in Florida, however, are already protected by existing fraud statutes, which offer criminal and civil penalties for false advertising.¹¹ The best protections afforded to legal consumers under existing UPL law are largely duplicative of other sections of criminal law; and any small additional protection is more than offset by the affirmative harm UPL laws' broad language imposes on consumers.

Second, opponents of non-lawyer representation sometimes claim that it is problematic to allow non-lawyers to do work that has traditionally been performed by attorneys. Such an argument falsely assumes that Floridians are choosing between representation by a lawyer and representation by a non-lawyer. But as we have seen, the cost of an attorney is prohibitive for the average citizen of Florida, who likewise will fail to qualify for a free lawyer. For these citizens, the real choice is often not between a lawyer and a non-lawyer, but between a non-lawyer and no help at all.

It is also unfair to assume that non-lawyers cannot competently perform law-related work. In many cases, familiarity with the specifics of a particular field could very well count for more than a general-purpose law degree, in terms of the quality of services rendered. Why would an intellectual property lawyer be better able to aid someone in a housing dispute than a social worker with years of relevant experience?

¹¹ Florida Statutes, Title XLVI ch. 817, s. 40, s. 41, and s. 44

UPL Regulation, in its Current Form, Produces a Vague and Overbroad Sense of Liability Which is Ultimately Harmful to the Consumers of Legal Services

Over-regulation of UPL has a chilling effect on legitimate service providers. Many professions provide services in areas that touch upon the law: accountants, legal document assistants, financial consultants, and medical professionals, to name a few. These professionals are likely to provide fewer services in law-adjacent areas for fear of prosecution; UPL is, after all, a felony charge in Florida. This is exactly the problem that the two bills in question today attempt to patch up, but patches like these would not be necessary if UPL were implemented better.

Even worse, the prohibition on legal advice is not limited to individuals asking payment for their work: anyone who tries to help a friend or family member with any kind of legal problem could be criminally prosecuted and sent to prison for five years.¹² Katie Vickers, a 70-year-old Florida retiree, was sued by the state bar for helping a member of her church fill out a petition for worker's compensation benefits.¹³ That it was Ms. Vickers' opponent—rather than her friend—who sought to punish her activity indicates whom UPL law was actually protecting.¹⁴ It also makes clear the flaws of the argument that legitimate service providers can count on prosecutorial discretion from broad UPL prohibitions: In civil matters, it is the bar's decision whether to use UPL to attack their competitors. Those who are trying to help others gain access to the legal system should be praised rather than made criminals, especially when they are doing so as good Samaritans.

Of course, the ultimate victims of all this are consumers, who will have fewer choices and ~~in~~erace higher costs when seeking professional

license to practice law have little room to complain that their government-provided monopoly may be taken away.

In any industry, consumers are best served when a range of services are available to meet the continuum of needs they have. For example, doctors, physical therapists, exercise instructors, diet consultants, and even pharmacists all offer health-related services. The consumer decides who will serve her best based on what type of service she needs and what she is willing to pay; she is not forced to go to an M.D. for all services related to her health. Legal service over-regulation denies consumers this same range of options.

The broadly-ban, narrowly-allow structure of current UPL regulation creates a legal minefield for alternative service providers, rewards attorneys with an industry monopoly, and—worst of all—denies consumers the benefits and protections of a free market.

UPL Laws Should be Amended to Clarify That They Are Meant to Protect Consumers From Fraud, Not Protect Lawyers From Competition

We should empower, not criminalize, alternative non-lawyer service providers to help people navigate the labyrinthine legal system. Not only is the existing UPL law written too broadly, but the criminal statute carries disproportionate penalties. Two changes would drastically improve UPL law, and we urge the committees to consider enacting them, granting relief to all consumers of legal services.

First, there should be no cause of action for UPL against those who provide services for free, unless those people falsely claim to be a lawyer. Even legal help that does not rise to the level of that provided by an attorney is more useful than no legal assistance at all, which is what most people can afford. Florida should not punish good Samaritans who, in the absence of payment, yet offer their hand to those in need.

Second, UPL causes of action should require a complaint from a customer and a showing of actual harm to that customer. Today, a non-lawyer providing great value to their customers, one with an overwhelmingly satisfied client base, is likely to draw the jealous eye of the Bar association and face prosecution for *benefiting* consumers.

That someone paid a non-lawyer for services should not, in itself, constitute UPL: there should be a requirement for harm caused by the services themselves. This would go a long way towards making UPL about protecting consumers from fraud and incompetence, rather than protecting lawyers from competition.

Consumers of legal services would be the greatest beneficiary of these changes. Those in need of assistance with basic legal matters could go to friends, family members, or fellow parishioners, thus avoiding the pitfalls of their own inexperience and the prohibitive expense of a full attorney. Likewise, they would gain access to a truly free market in legal services: a market with more choices, lower costs, and better value.

In Conclusion

We urge the committees to endorse HB 7037 and HB 7039, which will benefit Florida's consumers of legal services. However, the need for these bills brings the larger problems with UPL law into focus. As such, we take this opportunity to encourage the committees to reshape UPL legislation in the interests of consumers. Doing so would be a great boon to the goal of true access to justice for all Florida's citizens, who deserve a free market for legal services. Providing a lawyer to all who have legal problems may be beyond our means, but we can at least allow those who cannot afford a lawyer to seek help from others.