

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF SUGGESTED)
AMENDMENTS TO GR 24—DEFINITION OF)
PRACTICE OF LAW)
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ORDER

NO. 25700-A-1256

The Practice of Law Board, having recommended the suggested amendments to GR 24—
Definition of Practice of Law and having requested that the comment period for GR 24 be
extended, and the Court having approved the suggested amendments for publication;

Now, therefore, it is hereby

ORDERED:

(a) That pursuant to the provisions of GR 9(g), the suggested amendments as attached
hereto are to be re-published for comment in the Washington Reports, Washington Register,
Washington State Bar Association and Administrative Office of the Court's websites in May
2019.

(b) The purpose statement as required by GR 9(e), is published solely for the
information of the Bench, Bar and other interested parties.

(c) Comments are to be submitted to the Clerk of the Supreme Court by either U.S.
Mail or Internet E-Mail by no later than August 30, 2019. Comments may be sent to the
following addresses: P.O. Box 40929, Olympia, Washington 98504-0929, or
supreme@courts.wa.gov. Comments submitted by e-mail message must be limited to 1500
words.

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ORDER

IN THE MATTER OF SUGGESTED AMENDMENTS TO GR 24—DEFINITION OF
PRACTICE OF LAW

DATED at Olympia, Washington this 4th day of April, 2019.

For the Court

Fairhurst, J.
CHIEF JUSTICE

GR 9 COVER SHEET DRAFT

Suggested Amendment

General Rule 24

Submitted by the Practice of Law Board

A. Name of Proponent:

Practice of Law Board

Hon. Paul Bastine, ret. , Chair

Practice of Law Board

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B. Spokespersons:

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C. Purpose:

General Rule (GR) 24 defines the practice of law in Washington. Section (b) of the current rule permits certain conduct whether or not it constitutes the practice of law. Pursuant to the discussion with the Court in April, this proposal would add new language to section (b) permitting online self-representation legal service providers. Pursuant to the discussion regarding this issue in April at the Practice of Law Board's annual meeting with the Court, the Practice of Law Board initially prepared this submission as a report for the Court . Given the suggested amendments to GR 24, however, the report has been incorporated into this GR 9 Cover Sheet.

Consumers are, in the context of self-representation, increasingly going online to seek legal information, generate legal documents, and seek assistance from unlicensed entities. The public interest is served by protecting consumers from incompetent, unfair, and deceptive online self-representation legal service providers (OLSRLSPs). In addition, online

legal service providers want guidance on where the boundaries are in providing self-representation legal services and avoiding the unauthorized practice of law (UPL). Additionally, Washington consumers need to have clarity on where to go with concerns related to OLSRLSPs.

To address these changing consumer needs, the POLB recommends that the Washington Supreme Court amend the definition of “the practice of law” to explicitly authorize’ information and document preparation services under clear limitations with registration of such provider entities with the WSBA.

What does “practicing law” mean in the age of information technology, globalization, and market disruptions that are transforming everything from health care and transportation to the music industry? The lines separating unauthorized from authorized practice of law have blurred. Online legal information, generation of legal documents, online dispute resolution, and direct representation are not just an inevitable part of the future—they are here and growing at an exponential rate. The concept of a law office being an entity owned and run exclusively by lawyers is changing. Multi-jurisdictional practice is an inescapable consequence of technology. The traditional idea of the lawyer-client relationship is changing as disciplines start to merge and innovate to find more effective and efficient ways to solve complex problems that have a legal component.

Like it or not, the culture is rapidly and continually producing innovative business models that promise more competitive services and products. The practice of law, as defined and regulated by the Court and administered by the state bar association, must thoughtfully and incrementally adjust to changing conditions by exploring ways to expand access to justice while protecting the public from the risk of harm. As technology marches forward and people look for cheaper and more efficient legal services, the organized bar should be a central player. The court, the bar association, and individual lawyers can play a leading role or sit back and watch an under-regulated potpourri of technological innovators, predators, lay people, and legislative partisans define the new world of legal

services.¹

The current sources of regulation of OLSRLSPs are RCW 2.48 (Unauthorized Practice of Law (UPL); the Consumer Protection Act, chapter 19.86 RCW, which regulates all matters in trade or commerce; and GR 24, which defines the practice of law and identifies otherwise permitted exceptions to the definition of the practice of law.

The rationale in support of a significant revision to GR 24 flows from the recognition that the internet is inexorably a marketplace where people seek information and assistance in every aspect of life, including legal matters.² Many consumers in need of legal information and assistance believe they cannot afford to hire a lawyer and have limited access to free or low-cost traditional legal services. It is estimated that 80% of consumers with legal matters do not seek the assistance of a licensed attorney. Often, consumers seek information and assistance online because it is accessible, affordable, and efficient.

As online self-help legal services expand, providers who are currently operating in Washington are largely doing so without effective regulation or oversight, albeit they are subject to the criminal prohibition of the unauthorized practice of law and the Consumer Protection Act (CPA) and held accountable through contract and tort law to the professional standard of care. *Perkins v CTX*, 137 Wn.2d 93, 106, 969 P.2d 93 (1999). The rationale for regulating this marketplace and displacing competition is that consumers of OLSRLSPs are at risk of harm by under-regulated online providers that knowingly, deceptively, or negligently create the misperception that licensed lawyers are assisting consumers or that the particular

¹ Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized Practice Enforcement*, 82 FORDHAM L. REV. 2588 (2014); Joshua Kubick, *2013 Was a Big Year for Legal Startups; 2014 Could Be Bigger*, TECHCO (Feb.14, 2015), available at <http://tech.co/2013-big-year-legal-startups-2014-bigger-2014-02>; Raymond H. Brescia et al., *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALBANY L. REV. (2014); Roger Smith, *Ten Ways in Which Technology Can Expand Access to Justice* (Feb. 12, 2018), available at <https://law-techa2j.org/digital>; John McGinnis and Russell Pearce, *The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services*, 82 FORDHAM L. REV. 3041 (2014), available at <http://ir.lawnet.fordham.edu/flr/vol82/iss6/16>.

² Examples of websites offering internet-based legal services include: <https://www.legalzoom.com/>; <https://www.rocketlawyer.com/>; <https://www.lawdepot.com/>; <https://www.nolo.com/>; <https://www.legalshield.com/>; <https://www.bizfilings.com/>.

provider is legally authorized to provide the legal assistance adapted to individual needs.³

Existing practice of law rules in Washington do not expressly authorize the provision of *interactive* online legal assistance outside the scope of the conventional lawyer-client relationship. Once a legal service is personalized for an individual's situation, it crosses over from lawful provision of generic legal information (or a mere form/scrivener service) to particularized legal advice subject to the rules and regulations governing the practice of law. Thus, only individuals authorized to practice law may lawfully provide web-based legal assistance adapted to individuals' needs. OLSRLSPs may wish to introduce innovative interactive software and helpful online services in Washington, but the legitimate prospective players will only do so if the Washington practice of law rules clearly provide permission for the services.

To address the regulatory gap, emerging OLSRLSPs could be fairly characterized as "*pro se*" assistance businesses that are an exception to the lawyer-centric practice of law. And, if the providers have attributes of the traditional "practice of law," they could nonetheless be expressly "authorized" within the qualified *pro se* exception. This authorization would be justified because these providers deliver critical information and guidance to consumers who are seeking non-lawyer assistance to assess and respond to legal issues that routinely arise in their lives. Whatever mechanism for regulation and accountability is put forward, it should be narrowly tailored to protect consumers' expectations; promote competition and access to justice; and adhere to the GR 12.1 Regulatory Objectives

The North Carolina Statute (NCS) § 84-2.2 is an example of state regulation of online legal assistance involving software that generates legal documents based on information inputted by a consumer. However, rapidly evolving technology and artificial intelligence inevitably will enable entrepreneurs to offer consumers particularized legal advice and opinions (not just documents) based on consumer input and needs. These technological developments in online legal services should be considered by the court as it considers amending GR 24.

³ See Letter from Marina Lao, Director of Office of Policy Planning, Federal Trade Commission, and Robert Potter, Chief of Legal Policy Section, Antitrust Division, U.S. Dep't of Justice (June 10, 2016), https://www.ftc.gov/system/files/documents/advocacy_documents/comment-federal-trade-commission-staff-antitrust-division-addressing-north-carolina-house-bill-

The Practice of Law Board recognizes that this suggested amendment to GR 24 could be viewed as impacting competition in the legal services marketplace. This suggested amendment attempts to narrowly tailor the proposed regulations to protect consumers while avoiding unnecessary inhibitions on competition and innovation. In a June 2016 letter to the North Carolina legislature, DOJ and FTC Anti-Trust Division staff offered support for the proposed North Carolina statute. The letter stated, in part:

[S]taff believe that “the practice of law” should mean activities for which specialized legal knowledge and training is demonstrably necessary to protect consumers and an attorney-client relationship is present. Overbroad scope-of-practice and unauthorized-practice-of-law policies can restrict competition between licensed attorneys and non-attorney providers of legal services, increasing the prices consumers must pay for legal services, and reducing consumers’ choices.

Accordingly, the Agencies recommend that the North Carolina General Assembly consider the benefits of interactive websites for consumers and competition in evaluating HB 436. Interactive software for generating legal forms may be more cost-effective for some consumers, may exert downward price pressure on licensed lawyer services, and may promote the more efficient and convenient provision of legal services. Such products may also help increase access to legal services by providing consumers additional options for addressing their legal situations.

The Agencies also recognize that such interactive software products may raise legitimate consumer protection issues. The Agencies recommend that any consumer protections, such as requiring disclosures, be narrowly tailored to avoid unnecessarily inhibiting competition and new ways of delivering legal services that may benefit consumers.⁴

The Rule the POLB proposes here would expand competition in the legal services marketplace while establishing the minimum regulation necessary to protect consumers.

Rationale for Additional Regulation of Online Self-Help Legal Service Providers

To protect consumers from entities operating outside the scope of the authorized practice of

⁴ Letter from Marina Lao, Director of Office of Policy Planning, Federal Trade Commission, and Robert Potter, Chief of Legal Policy Section, Antitrust Division, U.S. Dep’t of Justice, supra note 3.

law (including outside the amended GR 24), the POLB has recommended to the WSBA and Attorney General's Office that they consider a bill providing that the Unauthorized Practice of Law is a *per se* Consumer Protection Act violation. See Attachment A for rationale and details of this approach.

Criteria for Evaluating Potential Regulatory Approaches

The threshold question in evaluating potential regulatory approaches is, "Which branch of government should regulate online legal services activity?" If it is deemed "permitted activity" under GR 24 *within* the definition of the practice of law, the Court may prefer to maintain control over such entities in order to fulfill its traditional constitutional role to regulate the practice of law in Washington. If it is deemed an exception to the definition of the practice of law, it could be regulated as "mere" commercial activity by the legislature and executive branches of government.

Our recommendation is that the Court structure the "permission" so as to retain control of the scope of the exception and who is authorized to engage in the restricted activities. Consumer protection could be strengthened by having the legislature make the unauthorized practice of law a *per se* violation of the CPA (the Practice of Law Board is currently working with WSBA to advance this suggestion). This statutory change will empower consumers, who suffer *actual* damages caused by UPL, to obtain recovery and deter unfair and deceptive practices in this emerging online self-representation legal services marketplace, while keeping authority over the practice of law with the judicial branch. This advances the public interest in access to justice and promoting a fair and non-deceptive market place.

Benefits and Drawbacks of Potential Regulatory Approaches

The POLB's recommendation focuses on the Court retaining regulatory authority over of online self-help legal service providers. This recommendation is based on our anticipation of the Court's potential concerns that legislative/executive branch oversight may violate separation of powers and tread on the Court's inherent and plenary authority to regulate the practice of law.

The POLB makes its recommendation in light of the Supreme Court Order Reconstituting the POLB dated July 8, 2015, which directs that the POLB focus on “educating the public about how to receive competent legal assistance and consider new avenues for nonlawyers to provide legal and law related services.” Our recommendation is fully aligned with that charge.

D. Hearing:

A hearing is not recommended.

E. Expedited Consideration:

Expedited consideration is not requested.

Supporting Material:

The Board has involved stakeholders during the development of this rule proposal, including representatives from the Access to Justice Board. The proposed rule was provided to the WSBA Board of Governors. The Board has not received written comments from stakeholders on this rule.

Attachments:

GR 24 Proposed Redline

GR 24 Proposed-Clean

SUGGESTED AMENDMENT
SUPERIOR COURT GENERAL RULES (GR)
GR 24 – DEFINITION OF PRACTICE OF LAW

1 (a) [Unchanged.]

2 (b) **Exceptions and Exclusions:** Whether or not they constitute the practice of law, the following are
3 permitted:

4 (1) - (11) [Unchanged.]

5 (12) The operation of a hosted site or service, including but not limited to a web site, hosted service, mobile
6 app, or cloud-based application that offers self-represented consumers access to interactive software, including
7 software that gives legal information related to civil law matters or generates a legal document based on the
8 consumer's input and responses to questions presented by the software, under the following conditions:

9 (A) Providers must:

10 (i) provide consumers a means to view the blank template and the final document before finalizing a
11 purchase of that document;

12 (ii) have an attorney licensed to practice law in the state of Washington review all blank templates and legal
13 operative language offered to Washington consumers, and that may appear in the completed document;

14 (iii) maintain the name and address of each reviewing attorney and provide this information to any
15 Washington State regulatory authority or agency, including but not limited to the Washington State Bar Association,
16 or the Washington State Attorney General upon request;

17 (iv) provide consumers a written itemization of the services and documents provided and the total cost of
18 each, including all fees when the final document is viewed;

19 (v) communicate clearly and conspicuously that the services provided are not a substitute for the advice or
20 services of an attorney. This disclosure shall be separately and expressly acknowledged by the consumer;

21 (vi) disclose to consumer the entity name, entity type, state of entity formation, and physical address of the
22 provider's main place of business;

23 (vi) disclose clearly and conspicuously to the consumer that personal information provided by the
24 consumer and other communications through the service are not subject to the attorney client evidentiary privilege

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1 and the provider or consumer may be compelled to testify about the information in a court action. This disclosure
2 shall be separately and expressly acknowledged by the consumer;

3 (vii) consent to service of process on a registered agent in Washington;

4 (viii) have a voluntary consumer satisfaction process clearly and conspicuously documented and displayed
5 on the provider's website, service or application;

6 (ix) refer all consumer concerns involving the unauthorized practice of law to the Practice of Law Board;

7 (x) register with the Washington State Bar Association, pursuant to fees and conditions approved by the
8 Court, prior to commencing operation in the State and renew the registration annually. The Washington State Bar
9 Association shall have the authority to recommend denial or revocation of registration or renewal to the Supreme
10 Court, pursuant to regulations adopted by the court;

11 (xi) pay an initial registration fee and an annual renewal fee in an amount set by the Supreme Court.

12 (B) Providers may not:

13 (i) directly or indirectly offer or sell any financial or investment products or financial or investment
14 services to a consumers who purchase completed forms or services;

15 (ii) use the consumer's information for any purpose other than preparing the purchased documents or
16 providing the services;

17 (iii) misrepresent, directly or by implication its products or services;

18 (iv) disclaim any warranties or liability or limit the recovery of damages or other remedies by the
19 consumer;

20 (v) require the consumer to agree to jurisdiction or venue in any state other than Washington for the
21 resolution of disputes between the provider and the consumer.

22 (vi) act as the appointed power of attorney for the consumer or any beneficiary;

23 (vii) appear in any proceeding nor take on the role of representative for any consumer or beneficiary in any
24 context, forum, communication or proceeding.

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SUPERIOR COURT GENERAL RULES (GR)
GR 24 – DEFINITION OF PRACTICE OF LAW

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(viii) Accept compensation for services from anyone other than the consumer.

(c) - (f) [Unchanged.]