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## Professional Malpractice in a World of Amateurs

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## PROFESSIONAL MALPRACTICE IN A WORLD OF AMATEURS

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Abstract: An increasing number of tasks once reserved to lawyers are now being performed by non-lawyers. That reality seems likely to continue. The question then becomes against what standard of performance such “amateur” practice should be assessed. One answer might be that a non-lawyer should be guilty of malpractice if the work is performed below the level of quality to which a lawyer would be held. This paper argues that the work should instead be judged against the standard of performance the non-lawyer purported to be able to deliver.

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My purpose in this paper is to have us think about legal malpractice in a world that for lawyers is rapidly changing. Our clients experience changes at an accelerating pace and expect us to be able to keep up. Lawyers are simultaneously blessed and cursed by technology that allows us to deliver services more quickly and in more places but keeps us tethered to our cell phones and email day and night. Work we thought we did well for clients that we have known seemingly forever is threatened by people promising to do the same work better, faster, cheaper, or all of these. Such developments will inevitably affect how we view professional malpractice, if only in adapting the way we understand what constitutes the “competence and diligence normally exercised by lawyers” that the Restatement of the Law Governing Lawyers says a

lawyer is required to bring to bear on a client's matter.<sup>1</sup>

What I want to do in this paper is focus on a related question. I want to suggest that one of the changes facing lawyers and their clients has been an increase in non-lawyer delivery of what have traditionally been seen as legal services. It is a trend that I believe is destined only to accelerate. The malpractice question then becomes: To what standard of care and competence should such "amateur" lawyers be held?

*Some Examples to Set the Scene*

Three fictional examples may help make concrete the kinds of situations I have in mind.

First, Chemco manufactures chemicals used by other firms to make a wide range of end products. From time to time, when a consumer is injured by one of the end products, the plaintiff also joins Chemco as a defendant. Chemco self-insures such claims and has retained a company called QuickSettle to manage and try to settle the claims as they arise. QuickSettle is composed entirely of non-lawyers – most of them former insurance company claims agents. Chemco gives QuickSettle authority to settle cases for up to \$50,000. If a case cannot be settled within that limit, it is referred to a lawyer for possible trial, but most of the time, QuickSettle gets good results and Chemco has been very pleased. Recently, however, a QuickSettle employee mistakenly filed a medical report from a case with severe injuries among the records in a different case with injuries that were much less severe. The QuickSettle claims agent did not catch the error and agreed on behalf of Chemco to settle what should have been a low value case for a clearly excessive sum. Chemco wants damages for QuickSettle's negligence.

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<sup>1</sup>American Law Institute, Restatement of the Law (Third): The Law Governing Lawyers § 52(1) (2000). I was one of the two Associate Reporters for this Restatement.

Second, Jerry and Martha James want a divorce. They earn too much to qualify for legal aid but they cannot afford to hire private lawyers. No children are involved, and there has been no complication such as domestic violence. But they both believe the marriage was a mistake, and they want out before things get more complicated. Paul Palmer created DivorceMagic for just such situations. Palmer is not a lawyer, nor is anyone on his staff. He was simply upset about how his own divorce was handled, so his DivorceMagic company publishes a 60-page book called “When Your Marriage Was a Mistake.” The book is sold on-line for \$49. It offers check lists and forms that purport to allow lay people to obtain a divorce in any jurisdiction. If a couple wants help filling out the forms, DivorceMagic will provide a non-lawyer employee to do that as well for an additional \$99. Jerry and Martha bought the book. They agreed on a property division, that there would be no alimony, and they paid the extra \$99 for a consultation about how to fill in the forms to record their agreement.<sup>2</sup>

Sure enough, the forms were enough to obtain a speedy divorce. Jerry later learned, however, that a recent court decision in their state would have entitled him to be covered by Martha’s health insurance for a year after the divorce, at no additional cost to Martha, if the settlement agreement incorporated in the divorce had so provided. Now it is too late to correct the situation. The court decision had been the subject of CLE programs attended by many divorce lawyers, although it is hard to say that all lawyers in the state would have known about it. In any event, the DivorceMagic book said nothing about the issue and the consultant who helped with the forms was also ignorant. As a result, Jerry had to pay \$4,500 out of pocket for his own

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<sup>2</sup>This problem is based loosely on *State Bar v. Cramer*, 249 N.W.2d 1 (Mich. 1976) (holds that written divorce kits with forms are not unauthorized practice, but personal conferences with clients are).

health insurance and he now believes DivorceMagic owes him that sum.

Third, Jose Ramos has been injured on the job and he is about to lose his house. His state allows non-lawyers to appear on behalf of claimants before the state Industrial Accident Board seeking workers' compensation benefits. Ramos' union representative recommended that Ramos consult Maria Castro, a non-lawyer, to file his claim and obtain benefits for him. Castro made the filing in a timely manner and obtained the maximum award available for Ramos' injury. She did nothing, however, either to help Ramos file an additional action for negligence against the third party who caused the injury or to renegotiate his mortgage so that he might have a chance of keeping his house. Nor did Castro help Ramos find a lawyer who might provide such help. Ramos appreciated Castro's help but believes she ultimately committed malpractice.<sup>3</sup>

*Could Examples Like This Ever Happen?*

Three examples. Do they sound plausible? We used to think that prohibitions of the unauthorized practice of law meant such that cases could not arise. Each example involves work lawyers could have done. Each involves applying legal principles to concrete facts involving particular clients, which is the traditional line non-lawyers may not cross.<sup>4</sup> Yet such cases do arise and their number is likely to increase in the future. Think about some reasons why.

First, some of the services described in our three cases have long been held not to violate unauthorized practice of law prohibitions. Writing and selling the DivorceMagic book, for example, is not the practice of law. The leading case involved Norman Dacey and his best-seller,

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<sup>3</sup>This fact situation is based loosely on *Bland v. Reed*, 67 Cal.Rptr. 859 (Cal. Ct. App. 1968) (holds that neither the union nor the advisor is liable for malpractice).

<sup>4</sup>This definition was used in ABA Code of Professional Responsibility, Ethical Consideration 3-5 (1970).

How to Avoid Probate,<sup>5</sup> but we can be sure that many law school casebooks used at St. Mary's are also not written by Texas-licensed lawyers and no one thinks that, even if a potential client reads a casebook, the book's author would be guilty of practicing without a license.<sup>6</sup>

Likewise, Maria Castro's representation of Jose Ramos before the workers' compensation agency was likely not unauthorized practice. Several states now permit non-lawyer representation before state agencies<sup>7</sup> and many federal agencies are required to make non-lawyer representation before those agencies possible as well.<sup>8</sup>

Further, while the activities of QuickSettle may be within most states' current prohibition of unauthorized practice, think about what is going on. It is no accident that QuickSettle is composed of former insurance company employees. Non-lawyer claims adjusters have been a staple of the insurance industry for years. We have justified that on the grounds that it was the insurance company's money that was at risk and they could hire whomever they wanted to try to protect it, but in our example Chemco is a self-insurer. It could have hired the employees of QuickSettle as its own employees to try to dispose of the cases. Compliance programs in many corporations in areas such as environmental, human resources, tax, antitrust, and health and safety are often under the direction of non-lawyer compliance officers who have access to

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<sup>5</sup>New York County Lawyers Assn v. Dacey, 234 N.E.2d 459 (N.Y. 1967). See also, In re Thompson, 574 S.W.2d 365 (Mo. 1978).

<sup>6</sup>Nor does a law professor practice law when teaching, because he or she teaches the law as it relates to hypothetical persons and does not give advice to actual clients.

<sup>7</sup>E.g., Bland v. Reed, 67 Cal.Rptr. 859 (Cal. Ct. App. 1968) (non-lawyer represented person before industrial accident commission); Harkness v. Unemployment Compensation Bd. of Rev., 920 A.2d 162 (Pa. 2007) (non-lawyer may represent employer before unemployment compensation board of review). But see, Advisory Opinion HRS Non-lawyer Counselor, 547 So.2d 909 (Fla. 1989) (non-lawyers may not draft documents and represent government department in uncontested juvenile dependency proceedings).

<sup>8</sup>Executive Order 12988: Civil Justice Reform (Feb. 5, 1996).

lawyers but do not necessarily report to them,<sup>9</sup> so it should not surprise us when courts start to say that companies may use claims adjusters working through an entity such as QuickSettle.

Finally, although DivorceMagic's provision of non-lawyers to fill in the blanks on the pre-printed forms would also be unauthorized practice in most states because it involves making judgments about how legal standards apply to Jerry and Martha's specific case,<sup>10</sup> even that kind of prohibition is likely soon to break down. Think of the typical real estate agent, for example, who every day fills in the blanks on forms for buyers' offers and sellers' counteroffers. A lot more than Jerry's lost \$4,500 turns on getting the terms right, but as those here in Texas who followed the controversy over Quicken Family Lawyer realize,<sup>11</sup> we are well past the day in most states where even people making the biggest purchase of their lives are required to have a lawyer.<sup>12</sup>

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<sup>9</sup>See, e.g., Susan Hackett, *Inside Out: An Examination of Demographic Trends in the In-House Profession*, 44 *Ariz. L. Rev.* 609, 616 (2002). Professor Kritzer calls such non-lawyers "law workers" and sees them as examples of the kinds of people with whom lawyers are likely to compete in the future. See Herbert M. Kritzer, *The Future Role of "Law Workers": Rethinking the Forms of Legal Practice and the Scope of Legal Education*, 44 *Ariz. L. Rev.* 917 (2002). See also, HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS & ORDINARY LITIGATION* (1990); HERBERT M. KRITZER, *LEGAL ADVOCACY: LAWYERS AND NON-LAWYERS AT WORK* (1998). But cf., *Hipwell v. Kentucky Bar Ass'n*, 267 S.W.3d 682 (Ky. 2008) (even corporate general counsel of company must be licensed in the state in which the company is based).

<sup>10</sup>E.g., *Ohio State Bar Ass'n v. Martin*, 886 N.E.2d 827 (Ohio 2008) (franchised company called "We the People" violated unauthorized practice prohibition when it gave advice about completing legal pleadings and other documents).

<sup>11</sup>The case was *Unauthorized Practice of Law Comm. v. Parsons Technology, Inc.*, 1999 WL 47235 (N.D. Tex. 1999), which enjoined the sale of software that purported to help users select and complete legal forms. The Texas legislature then changed the result by statute, and the Fifth Circuit vacated the injunction in light of the statute, 179 F.3d 956 (5<sup>th</sup> Cir. 1999). See also, *In re Reynoso*, 477 F.3d 1117 (9<sup>th</sup> Cir. 2007) (lay seller of web-based software for preparation of bankruptcy forms is subject to regulations imposed on bankruptcy petition preparers and violated California unauthorized practice of law prohibition).

<sup>12</sup>Probably the leading case is *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 366 P.2d 1 (Ariz. 1961), supplemented 371 P.2d 1020 (Ariz. 1962). There, after the state supreme court held that filling in the blanks on a real estate contract constituted the practice of law, the citizens of Arizona passed a ballot initiative amending the state constitution to reverse the decision. See also, *Opinion No. 26 of the Committee on Unauthorized Practice of Law*, 654 A.2d 1344 (N.J. 1995) (real estate brokers handling entire closing of a real estate transaction does not

There is an overarching reason, of course, why law and practice are making a lawyer's involvement in traditional lawyer functions less required. That reason is that our profession has tended to do a poor job of meeting many of the needs of potential clients. Lay persons have long been entitled to act *pro se*, i.e., without any legal assistance, and many do so because they cannot afford several hundred dollars per hour for a lawyer's time. No state requires that its lawyers provide pro bono service, and while some courts continue to defend the legal profession's right to prevent others from providing many kinds of services, other judges recognize that many clients require a careful, caring friend more than a trained lawyer. Chief Justice Kavanagh of Michigan put it well when he said in words that could apply to each of our examples: "[The] closed-shop attitude is utterly out of place in the modern world where claims pile high and much of the work of tracing and pursuing them requires the patience and wisdom of a layman rather than the legal skills of a member of the bar."<sup>13</sup>

Furthermore, the line between lawyer and non-lawyer work can be exceedingly fine. Lobbyists, for example, are often lawyers and often not. Lawyers correctly believe that their malpractice policies cover work they do while lobbying, but even non-lawyers are not enjoined from engaging in lobbying on behalf of others. Sports agents and mediators similarly use skills lawyers possess but are often non-lawyers. In this paper, we have talked about examples

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constitute unauthorized practice of law); *Dressel v. Ameribank*, 664 N.W.2d 151 (Mich. 2003) (mortgage company may charge fee for preparation and completion of home loan documents); *Perkins v. CTX Mortgage Co.*, 969 P.2d 93 (Wash. 1999) (same). But see, *The Florida Bar v. Beach*, 675 So.2d 106 (Fla.1996) (lawyer who consults with clients of a firm run by paralegals violates prohibitions against assisting the unauthorized practice of law and sharing legal fee with non-lawyers); *Carpenter v. Countrywide Home Loans*, 250 S.W.3d 697 (Mo. 2008) (mortgage broker may not charge fee for preparation of mortgage documents); *Franklin v. Chavis*, 640 S.E.2d 873 (S.C. 2007) (filling in blanks in computer-generated will form constituted unauthorized practice of law).

<sup>13</sup>*State Bar of Michigan v. Cramer*, 249 N.W.2d 1, 11 (Mich. 1976) (Kavanagh, CJ, dissenting from holding that non-lawyer may not help clients fill in the blanks on forms in a divorce kit).

traditionally handled only by lawyers, but one of the implications of getting into this subject is the realization that more and more situations require multiple skills and that pressure is likely only to grow to have non-lawyers as well as lawyers available to handle them.

*To What Standard of Performance Should a Non-lawyer Be Held?*

The purpose of this paper in this symposium, of course, is more than just to convince you of the possibility that non-lawyers might provide what are otherwise legal services. The more important question for us is to what standard of performance or care such a non-lawyer should be held. The most obvious possible answer to that question is the one offered in an excellent article by Professor Sande Buhai of Loyola Law School in Los Angeles. “Act Like a Lawyer,” Professor Buhai asserts, “Be Judged Like a Lawyer.”<sup>14</sup>

There are good arguments in favor of demanding that non-lawyers meet the standard to which a lawyer is held. First, the purpose of unauthorized practice prohibitions is said to be to protect the public against unqualified practitioners. Clients, we argue, have a right to expect that when they seek help with legal issues, they will get help from someone fully qualified to perform the services. The fact we might not always require a license to deliver a service should not diminish the client’s right to enforce a standard of lawyer-quality work.

*Buscemi v. Intachai*,<sup>15</sup> a Florida case, illustrates the powerful instinct behind such a rule. Buscemi, a financial planner with a legal education but not a license to practice law, advised a

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<sup>14</sup>Sande L. Buhai, Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law, 2007 Utah L. Rev. 87 (2007). This subject has only rarely been examined in the scholarly literature, and Professor Buhai deserves great praise for her excellent, thorough review of the cases. See also, Cornelia Wallis Honchar, Evolving Standards of Non-lawyer Liability, 6 Prof. Law. 14 (May 1995) (an earlier, much shorter review of the issues, but one that also teased out key questions before others appreciated their importance).

<sup>15</sup>730 So.2d 329 (Fla. Ct. App., 2d Dist. 1999).

couple that it would be in their financial interest – and that of their dependent child – if they obtained a divorce. He helped them fill out the necessary forms and divide their existing property, but he failed to obtain either alimony or child support for the wife. She was understandably upset. The defendant had discouraged the couple from hiring attorneys and the wife said she trusted him because: “Number one, he’s graduate from law school. Number two, he’s a financial advisor. \* \* \* I trust him and since he charge two hundred, I think that’s reasonable and he said it’s easy to get divorce, so I expect him to take care of everything.”<sup>16</sup> Buscemi said that as a non-lawyer he could not be expected to perform as well as a lawyer. The court disagreed. “Appellant overlooks the fact that whether a lawyer or not, if he undertakes to give legal advice, he is subject to a standard of due care.”<sup>17</sup>

Second, enforcement of a standard of lawyer-quality performance should tend to deter non-lawyers from undertaking the representation in the first place. Unauthorized practice committees tend to give off a somewhat embarrassing odor of self-interestedness. If we want to reserve tasks to lawyers without being obvious about what we are doing, one way to do it would be to hold all providers to a standard that lawyers can confidently meet but that non-lawyers sometimes might not.

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<sup>16</sup>Id. at 330.

<sup>17</sup>Id. The lawyer-quality standard is the one used in the state of Washington, the jurisdiction that has most fully considered the question. See, e.g., *Jones v. Allstate Insurance Co.*, 45 P.3d 1068 (Wash. 2002) (claims adjuster who advised accident victim held to same standard of care as a practicing lawyer); *Bowers v. Transamerica Title Ins. Co.*, 675 P.2d 193 (Wash. 1983) (non-lawyer who prepared closing documents held to same standard of care as a lawyer). Cf., *Marks v. Estate of Marks*, 957 P.2d 235 (Wash. Ct. App. 1998) (non-lawyer held subject to lawyer professional disciplinary rule prohibiting lawyer preparation of will giving gift to organization in which lawyer is interested). Courts in Kansas have reached the same result, e.g., *Ford v. Guarantee Abstract & Title Co.*, 553 P.2d 254 (Kan. 1976); *Webb v. Pomeroy*, 655 P.2d 465 (Kan Ct. App. 1982).

An argument to this effect is found in *Wright v. Langdon*,<sup>18</sup> where a real estate broker who prepared a contract of sale had miscalculated the payments needed to allow the seller to pay off a mortgage and the buyer to get good title. In assessing his conduct, the court said, “[R]eason urges that the standard should be no less than that required of a licensed attorney, and conceivably an even higher standard would be appropriate—strict liability, for example, to deter those who might be otherwise tempted to profess a competence they have no right to claim.”<sup>19</sup>

*Non-lawyers Should Instead Be Held to a Standard of Keeping Their Promises*

But however reasonable the “act like a lawyer, be judged like a lawyer” principle may initially seem, my object in this paper is to suggest that non-lawyers should not be held to the standard of performance of a lawyer. The primary reason is this: One reason we tend to look the other way when non-lawyers delivers services at all is that lawyers are often too costly for many consumers to afford. No state has required lawyers to provide pro bono service,<sup>20</sup> and the amount of service lawyers voluntarily perform falls well short of meeting client needs.

Further, there is little reason to believe that non-lawyers will not do a good job of meeting the needs of most clients. In tax preparation, real estate services, and countless other areas, there are few cases where lack of competence has been a serious problem. As Professor Deborah Rhode has noted, “it is not self-evident that professional certification or supervision insures

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<sup>18</sup>623 S.W.2d 823 (Ark. 1981).

<sup>19</sup>Id. at 826.

<sup>20</sup>ABA Model Rule 6.1 is the only rule in which “should” replaces “shall” as the relevant standard. The ABA House of Delegates has consistently refused to recommend mandatory pro bono service, and while courts often praise lawyers who do it, none have seen fit to require it other than in specific “appointed counsel” cases.

special competence.”<sup>21</sup> If we set the performance bar artificially high by imposing damages for not meeting lawyer professional standards, in short, the likely result is not that lawyers will step in to meet the need, but that clients will be more likely to go unserved.<sup>22</sup>

Instead of holding non-lawyers to a tort standard that treats them as if they were lawyers, I suggest we move toward a contract-based standard that asks what the non-lawyer purported to be competent to do and whether she met a client’s reasonable expectations about the services to be provided. The burden of proof would initially be on the plaintiff client, and the non-lawyer defendant could show specific disclaimers of experience or limits on work that would be done.

In applying such a standard, non-lawyers should be required to identify themselves as such. Anyone who impersonates a lawyer should be held to the standard of lawyer performance on the basis of an implied promise to deliver the services a lawyer can be expected to provide.<sup>23</sup> Similarly, a client whose work is done by a paralegal or other non-lawyer that the client knows works for or under the supervision of a lawyer should be entitled to expect that the work will be done to the standard the client can expect from the lawyer for whom the paralegal works.

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<sup>21</sup>Deborah Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 Stan. L. Rev. 1, 87 (1981).

<sup>22</sup>Mine is not the argument sometimes seen that a non-lawyer can never be guilty of lawyer malpractice. E.g., *Divine v. Giancola*, 635 N.E.2d 581 (Ill.App.1st Dist. 1994); *Palmer v. Westmeyer*, 549 N.E.2d 1202 (Ohio Ct. App. 1988). Such cases get stuck on the term “*lawyer*” instead of focusing on the term “malpractice.” All can agree that non-lawyers are not lawyers without immunizing non-lawyers from liability for their negligence or other malfeasance. On the other hand, in some cases, courts simply hold that non-lawyers, such as those working for a union, have no personal duty to union members complaining about the quality of their representation. E.g., *United Steelworkers of America, AFL-CIO v. Craig*, 571 So.2d 1101 (Ala. 1990).

<sup>23</sup>Professor Buhai addresses this issue by applying the term “unauthorized” practice to such imposters, while reserving the term “unlicensed” practice for practitioners of other disciplines who provide legal services as part of their work. Sande L. Buhai, *Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law*, 2007 Utah L. Rev. 87, 88-89 (2007). One example of such an imposter-lawyer is found in *Tegman v. Accident & Medical Investigations, Inc.*, 30 P.3d 8 (Wash. Ct. App. 2001), remanded 75 P.3d 497 (Wash. 2003).

But beyond that, I believe that my proposed standard for self-acknowledged independent non-lawyers doing things lawyers do as well is consistent with the result reached in California's *Biakanja v. Irving*<sup>24</sup> where a notary public had prepared a will for a client. While I have to concede that the court was ambiguous about the standard it was applying, in upholding the finding of liability the court focused on the fact that the notary had "agreed and undertook to prepare a valid will" that "was invalid because defendant negligently failed to have it properly attested."<sup>25</sup> In short, liability turned on the fact that the will's invalidity was inconsistent with the notary's "undertaking" or agreement to prepare a valid instrument.

The proposed standard is perhaps best illustrated, however, by *Bland v. Reed*,<sup>26</sup> where an injured steel worker had been represented before the state industrial accident commission by a union-recommended non-lawyer. The representation had led to a good award, but neither the non-lawyer nor the union had recommended that the worker also sue the company whose negligence caused his injury. In denying a cause of action for the failure to advise the separate lawsuit, the court noted that "Reed was not a lawyer and appellant knew it."<sup>27</sup> The California legislature had expressly permitted non-lawyer representation before the commission, and the provider did that job well. The court went on: "we consider it improper to hold a non-lawyer

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<sup>24</sup>320 P.2d 16 (Cal. 1958). The holding of the case focuses on liability of the non-lawyer to the beneficiary of the will in question; one must infer the standard of liability the court contemplated. See also, *Buscemi v. Intachai*, 730 So.2d 329, 330 (Fla. Ct. App.1999) ("whether a lawyer or not, if [anyone] undertakes to give legal advice, he is subject to a standard of due care"). Cf. *Kronzer v. First Nat'l Bank*, 235 N.W.2d 187 (Minn. 1975) (even if bank officer engaged in unauthorized practice in helping person prepare trust liable, bank not held to standard of negligence per se).

<sup>25</sup>320 P.2d at 18.

<sup>26</sup>67 Cal.Rptr. 859 (1968).

<sup>27</sup>67 Cal.Rptr. at 861.

practicing before the Commission to a lawyer's degree of care – particularly when the negligence charged in not in respect \* \* \* of the claim before the Commission.”<sup>28</sup>

Thinking back, then, to the examples with which this paper began, even under my “do what you promise” standard, QuickSettle should be liable to Chemco for the clerical error that led to the excessive payment. Managing paper flow is presumably among the things claims adjusters purport to do best. One need not adopt the standard of performance of a lawyer to find that QuickSettle failed to live up to the standard of performance its client had a right to expect.

My principle is also consistent with *Wright v. Langdon*, the case discussed earlier in which the real estate broker miscalculated the required payments.<sup>29</sup> Lawyers are no better at payment calculation than real estate brokers, and the essence of the case is clearly that the broker failed to do what his clients had every right to expect the broker had undertaken to do.

Similarly, the proposed principle explains our example in which Maria Castro represented Jose Ramos ably before the compensation commission but failed also alert him to his right to sue to redress the negligence of the third party wrongdoer. Sometimes cases have held that a lawyer must tell the client about matters beyond the express subject about which the lawyer was hired,<sup>30</sup> but what I am arguing is that so long as a non-lawyer does what she promises to do, she should not be liable for failing to do more.

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<sup>28</sup>67 Cal.Rptr. at 862.

<sup>29</sup>623 S.W.2d 823 (Ark. 1981). See text accompanying n. 18.

<sup>30</sup>E.g., *Barnes v. Turner*, 606 S.E.2d 849 (Ga. 2004) (lawyer who filed security document for client must tell the client when and how to renew the filing); *Wood v. McGrath, North, Mullin & Kratz, P.C.*, 589 N.W.2d 103 (Neb. 1999) (lawyer failed to tell divorce client she might be entitled to some of her husband's unvested stock options). But see, *Darby & Darby, P.C. v. VSI International, Inc.*, 739 N.E.2d 744 (N.Y. 2000) (lawyer need not tell client about possibility of insurance coverage for costs of the litigation).

Of course, there is always the problem with a proposal such as mine that clients will not understand what the non-lawyer is promising to do and how that compares to the level of service someone else might provide. *Buscemi v. Intachai*, the Florida case discussed earlier,<sup>31</sup> presents that problem in a particularly poignant form. That was the case in which the financial planner obtained the promised divorce but left the wife without alimony or child support. In that case, the financial planner had specifically required the clients to sign a document saying they knew he was not a lawyer and could not give legal advice. However, the court held – I believe wisely – that Buscemi in fact gave legal advice and created an expectation he would do so competently.

In short, the burden of proof should be placed on the service provider to live up to the promises he or she explicitly or implicitly makes.<sup>32</sup> It should not be hard to make the promises clearly – on signs, in engagement agreements, in brochures, and in the course of actual dealings. The level of detail required in explanation should vary depending on the sophistication of the client or the client’s representative. A corporate general counsel hiring QuickSettle will need less explanation than an injured employee seeking compensation. Indeed, I believe, contrary to some cases cited here, that as well as telling their clients what they will do and are not competent to do, if other services may be necessary to protect an unsophisticated clients’ interests more fully, a non-lawyer should be required to say so and suggest who might provide the services.

The hardest example I have posed was that of DivorceMagic whose book and advisor did not talk about the recent decision that could have protected the husband’s right to remain covered

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<sup>31</sup>730 So.2d 329 (Fla. Ct. App., 2d Dist. 1999). See text accompanying nn. 15-17.

<sup>32</sup>This standard seems to me consistent with Restatement (Second) of Torts § 299A that a professional or tradesperson must perform to the standard “normally possessed by members” of the profession or trade in similar circumstances “unless [the person] represents that he has greater or less skill or knowledge.”

by his ex-wife's health insurance for an additional year. The hypothetical assumed that the non-lawyers did not know what at least most divorce lawyers would have known, and my standard would not automatically hold DivorceMagic to the lawyer standard. To that extent at least, then, I have to acknowledge the possibility of "second class" service for clients of non-lawyers. One could analogize this situation to *Buscemi*, of course, and say that DivorceMagic had implicitly contracted to provide full service but I think that would stretch the truth. The fact is that lawyers can often do a sufficiently better job than non-lawyers that my standard may leave some clients with a reduced standard of protection. I suggest – and leave to others' evaluation, however – that non-lawyer representation will on balance tend to be better than no representation at all. And the latter, I fear, will be many potential clients' only realistic alternative to non-lawyer assistance.

*A Note on the Broader Implication of My Proposal*

If the only point of this article were to illuminate a small corner of the world involving practice by non-lawyers, it would hardly be worth the effort. I believe, however, that the analysis and my proposed standard sheds light on what may be an evolving contract standard of malpractice in cases involving lawyers. While a lawyer may not disclaim competence to handle cases he or she undertakes and ask a client for a waiver of malpractice liability,<sup>33</sup> under ABA Model Rule 1.2(c), with client consent, a lawyer may limit the scope of representation. If a lawyer wishes to help a client get a divorce but not take responsibility for tax implications of the settlement, for example, Rule 1.2(c) expressly permits that arrangement.

That is a huge analytic exception from the traditional idea of a clear, uniform standard of lawyer performance. It has been necessitated, however, by the increasing specialization of what

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<sup>33</sup>ABA Model Rule 1.8(h).

most lawyers do. None of us is competent in more than a few fields today. In the same way, contract principles even govern client waiver of the requirement that a lawyer hold information confidential,<sup>34</sup> as well as waiver of most conflicts of interest.<sup>35</sup> My point, then, is that the lawyer-client relationship is becoming increasingly based on contract rather than immutable principles.<sup>36</sup>

Even in Washington state, where holding non-lawyers to a lawyer standard is well established, that result works for the courts because both kinds of relationships are now ultimately contract-based. In *Hangman Ridge Training Stables v. Safeco Title Insurance Co.*,<sup>37</sup> for example, the clients wanted to borrow money, and to do so they needed to convey real property from their corporation to themselves. Safeco, a company composed of non-lawyers, prepared the necessary deed and accomplished the change of title. Later, the clients learned that engaging in the transaction had tax consequences that the clients had not contemplated, so they sued Safeco for not telling them about those consequences. The clients asserted that a lawyer at least would have had to counsel the clients to get tax advice, but the court answered, “The standard of care or duty of an attorney or non-attorney closer is to close in accordance with their instructions.”<sup>38</sup> Neither a lawyer nor a non-lawyer need give advice outside the narrow scope of the representation, the court said. So long as either a lawyer or this non-lawyer did the particular work for which it was hired, that was enough.

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<sup>34</sup>See ABA Model Rule 1.6(a) (allows waiver of confidentiality with informed consent).

<sup>35</sup>See, e.g., ABA Model Rule 1.7(b) (waiver of current client conflict of interest).

<sup>36</sup>The relationship between a negligence and an implied contract theory is discussed in Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 8.7 (2007 ed.).

<sup>37</sup>652 P.2d 962 (Wash. Ct. App. 1982).

<sup>38</sup>*Id.* at 134.

Ultimately, then, what I am arguing is that client relationships with non-lawyers should be at least as open to negotiation and reasonable interpretation of the non-lawyer's performance promise as relationships with lawyers are becoming. If that is the same as saying "act like a lawyer, be judged like a lawyer," so be it, but hopefully by the time we reach that conclusion we all will have enriched our understanding of the world clients face today in dealing with both lawyers and non-lawyers.