

THE UNAUTHORIZED PRACTICE OF LAW IN SOUTH CAROLINA



**South
Carolina
Bar**

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SOUTH CAROLINA CODE §40-5-310

No person may either practice law or solicit the legal cause of another person or entity in this State unless he is enrolled as a member of the South Carolina Bar pursuant to applicable court rules, or otherwise authorized to perform prescribed legal activities by action of the Supreme Court of South Carolina. The type of conduct that is the subject of any charge filed pursuant to this section must have been defined as the unauthorized practice of law by the Supreme Court of South Carolina prior to any charge being filed. A person who violates this section is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than five years, or both.

UNAUTHORIZED PRACTICE OF LAW (UPL)

- A person who is not an attorney licensed to practice in South Carolina may not render a service that constitutes the practice of law.
- Unless you are a member of the South Carolina Bar or otherwise authorized to perform prescribed legal activities by action of the South Carolina Supreme Court, you are prohibited from the practice of law.

CRIMINAL LIABILITY

- Pursuant to S.C. Code §40-5-310, a person who engages in the unauthorized practice of law is guilty of a felony and, upon conviction, must be fined not more than \$5,000 or imprisoned not more than five years, or both.
- This is the penalty *per offense*.



PUBLIC POLICY AND UPL

- “The state prohibits the unauthorized practice of law not for the economic protection of the legal profession, but rather to protect the public from the consequences of erroneous advice from those untrained in the law.”

State of South Carolina vs. Buyers Service Company, Inc., 292 SC 426 (S.C. 1987)

- “The goal of the prohibition against the unauthorized practice of law is to protect the public from incompetent, unethical, or irresponsible representation.”

Renaissance Enterprises, Inc. v. Summit Teleservices, Inc., 334 SC 649 (S.C. 1999)

WHO DEFINES UPL?

- State law does not set forth a list of activities that constitute the unauthorized practice of law.
- The South Carolina Supreme Court decides on a case by case basis whether the conduct at issues is considered the unauthorized practice of law.
- Therefore, we look to Supreme Court case law to find which activities are prohibited for individuals who are not licensed attorneys.



WHAT IS THE PRACTICE OF LAW?

- It is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules. The better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy.

In re Unauthorized Practice of Law Rules Proposed by the SC Bar,

309 S.C. 304, 422 S.E.2d 123 (1992)

WHAT IS THE PRACTICE OF LAW?

- “preparation of pleadings and other papers incident to actions and special proceedings”
- “the management of actions and proceedings on behalf of clients before judges and courts”
- “conveyancing and the preparation of legal instruments of all kinds”
- “all advice to clients, and all action taken for them in matters connected with the law”
- “acting professionally in legal formalities, negotiations, or proceedings by the warrant or authority of their clients”

In re Duncan, 83 S.C. 186, 189, 65 S.E. 210 (1909)

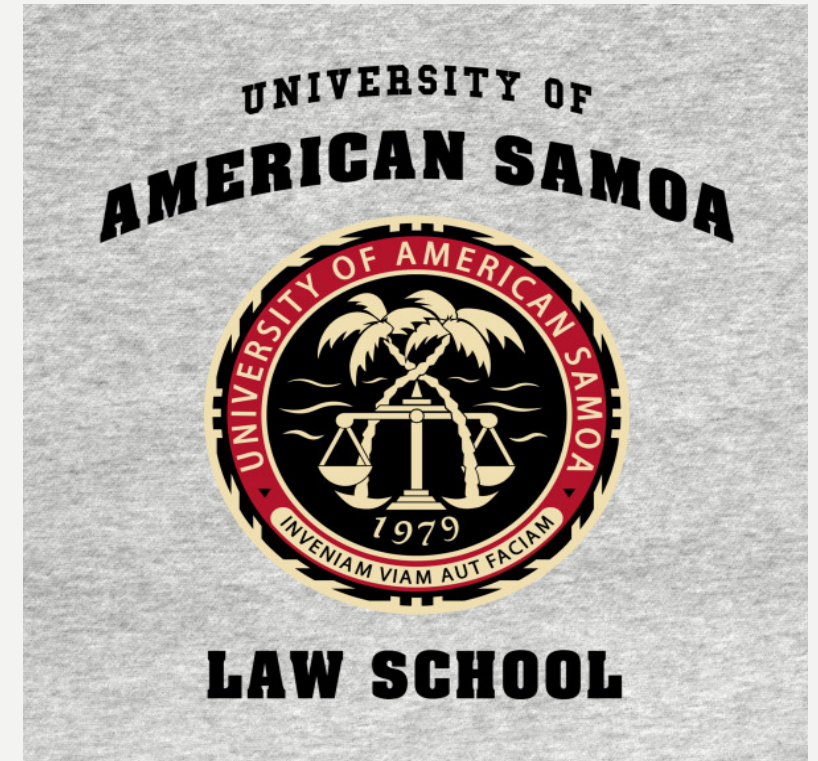
ACTIVITIES THAT ARE THE PRACTICE OF LAW

- Preparing legal documents.
- Presenting legal documents for execution.
- Giving legal advice or answering legal questions.
- Appearing in court on behalf of someone else.
- Performing a real estate or mortgage closing.
- Title search and preparing title documents.
- Settlement negotiations.
- Consumer debt pooling.



COMMON UPL ACTORS

- Paralegals
- Notaries
- Jailhouse lawyers
- Homeowners Associations
- Title companies
- Disbarred/suspended lawyers
- Out-of-State lawyers
- Unregistered foreign lawyers
- Online self-help legal services



CASE EXAMPLES INVOLVING UPL-PARALEGALS

John Doe, a paralegal in a law firm, wanted to conduct educational seminars for the public related to wills and trust. The court also considered whether it was UPL for a paralegal to meet with clients privately to answer general questions about wills, trusts, and estate planning.

- Court found that offering legal presentations to the public and answering estate planning questions in legal seminars or private client interviews constitutes the practice of law.
- Court also reiterated that a paralegal's preparatory tasks must be done under an attorney's supervision and that answering legal questions constitutes UPL.

Doe v. Condon, 341 S.C. 22, 532 S.E.2d 879 (2000)

CASE EXAMPLES INVOLVING UPL-PARALEGALS

Robinson advertised his services as a paralegal and his business card and letterhead referred to him as a “paralegal consultant.” He performed services without attorney supervision, solicited clients, represented clients in court, and gave legal advice.

- The Court found Robinson’s ads were unlawful solicitations- that it is unlawful for someone not an attorney to solicit the cause of another person.
- Even if court appearance is ultimately authorized, giving advice, preparing pleadings, etc. prior to appearance is not.

CASE EXAMPLES INVOLVING UPL JAILHOUSE LAWYERS

McLauren assisted other inmates in preparing PCR applications and referred to himself as a “jailhouse lawyer.”

- The Court found that though he did not receive compensation for his services, McLauren did not obtain leave of court before providing legal services and, therefore, it was the unauthorized practice of law.
- In addition, the Court emphasized it must exercise sound discretion whether to allow representation of another person by a nonlawyer.

CASE EXAMPLES INVOLVING UPL: HOMEOWNERS ASSOCIATIONS

Peck and his company, Community Management Group, managed HOAs, enforcing covenants and rules and collecting assessments. They also prepared and recorded notice of a lien and related documents, brought an action in magistrate's court, and filed the judgement in the circuit court.

- Advertisements indicated it could “handle collections, lien filing and Small Claims Court actions in house” and that it could file judgments without use of an attorney.

- The Court found that the group engaged in UPL when it represented associations in magistrate's court, filed judgments in circuit court, prepared and recorded liens, and advertised that it could provide legal services.
- In order to appear for a company, a nonlawyer “agent” must be an officer, employee, or someone with a “nexus or connection” with the company – NOT a third party.

CASE EXAMPLES INVOLVING UPL-LEGAL SERVICES

Despain advertised her business under the category “Legal Services” but denied that she was engaged in UPL. She gave legal advice related to family law issues and used a computer software program to prepare legal documents for others to present in court. Despain also made customers sign an agreement to absolve her of liability.

- The Court found that preparation of legal documents is the practice of law when it involves the giving of advice, consultation, explanation, or recommendations on matters of law. It is also the practice of law to instruct other individuals in how to prepare and execute those documents.

State v. Despain, 319 S.C. 317, 460 S.E.2d 576 (1995)

CASE EXAMPLES INVOLVING UPL-TITLE COMPANY

Defendant was a commercial title company that assisted people in purchasing real estate. They prepared legal documents related to sales, provided title searches, conducted closings without an attorney present, and carried legal instruments to the courthouse for recording.

- The Court held that it is UPL to provide reports, opinions or certificate as to status of titles to real estate and mortgage liens, to prepare documents affecting title to real property, to handle real estate and mortgage loan closings, and to physically transport or mail documents when part of real estate transfer.

UPL AND REAL ESTATE

The area that seems to create the most confusion as to what falls under the practice of law is real estate.



- The South Carolina Supreme Court has held that an attorney must conduct all real estate and mortgage loan closings.
- However, a notary may notarize loan modification documents without an attorney present as long as the notary does not provide legal advice.

ACTIVITIES THAT ARE NOT UPL

- CPAs may render professional assistance, including representation before agencies and the Probate Court, that is within their professional expertise and qualifications.
- State agencies may, by regulation, authorize people to appear and represent clients before the agency.

ACTIVITIES THAT ARE NOT UPL

- Businesses may be represented by an officer, agent, or employee in civil magistrate's court proceedings.
 - “Agent” cannot be a third party – only someone with a “nexus or connection” with the business.
 - Written authorization from the company's president, chair, etc. must be provided.
 - Business assumes risk of any problems resulting from the representation.

In re Unauthorized Practice of Law Rules Proposed by the SC Bar, 309 S.C. 304, 422 S.E.2d 123

Rogers Townsend & Thomas, PC v. Peck, 419 S.C. 240, 797 S.E.2d 396 (2017)

ACTIVITIES THAT ARE NOT UPL

- It is permissible for probation agents to present probation revocation cases.
 - A probation revocation hearing is not a formal criminal proceeding.
 - When a probation agent presents a probation revocation case, the agent is acting in his official capacity and not holding himself out to the public as an attorney.
- Police officers may prosecute traffic offenses in magistrate's court and municipal court.
 - But only the arresting officer (with assistance of supervisor if necessary)

State v. Barlow, 372 S.C. 534, 643 S.E.2d 682 (2007)

In re Unauthorized Practice of Law Rules Proposed by the SC Bar, 309 S.C. 304, 422 S.E.2d 123

UPL-RELATED ISSUES

- Impersonating a lawyer
- Notario publico fraud
- Immigration services



IMPERSONATING A LAWYER

S.C. Code of Laws §16-17-770(A)

It is unlawful for a person other than a lawyer, who is licensed to practice law in this State or in another state or jurisdiction in the United States and not disbarred or suspended from the practice of law in any state or jurisdiction, to represent to any person that he is a lawyer for the purpose of soliciting business, obtaining anything of value, or providing legal advice or assistance.

IMPERSONATING A LAWYER- PENALTIES

(1) for a first offense, is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned for not more than one year, or both;

(2) for a second offense, is guilty of a misdemeanor and, upon conviction, must be fined not more than two thousand five hundred dollars or imprisoned for not more than three years, or both; and

(3) for a third or subsequent offense, is guilty of a felony and, upon conviction, must be fined not more than five thousand dollars or imprisoned for not more than five years, or both.

IMPERSONATING A LAWYER- RECENT CASE

- A man posed as a lawyer in Columbia and threatened legal action against a Chinese restaurant.
- He also swindled people on the internet getting up-front fees to assist them with legal issues.
 - Ultimately, he pled guilty to wire fraud.
 - He faced similar lawyer impersonation charges in other states which were dismissed as part of his plea.



NOTARIO PUBLICO FRAUD

- Individuals represent themselves as attorneys or persons qualified to provide legal advice or services.
- They victimize members of immigrant communities who associate a different meaning to “Notario Publico.”
- Because this term has a different meaning parts of Latin America, it may be confusing to non-English speakers.



NOTARIO PUBLICO FRAUD

- These individuals often also provide services which constitute the unauthorized practice of law.
- In addition, many of those who identify themselves as notarios publico are not notaries public and, therefore, are not authorized to perform notarial acts.
- Pursuant to S.C. Code §26-1-90, a notary cannot use the term “notario publico” in any advertisements or notices.



REGISTRATION OF IMMIGRATION ASSISTANCE SERVICE

- S.C. Code of Laws §40-83-30 permits people to provide limited immigration assistance as outlined in the statute.
- Anyone providing these services must obtain a business license from LLR (and from a local governing authority where required).
- In addition, anyone providing a permitted service must post the following language:

"I AM NOT AN ATTORNEY LICENSED TO PRACTICE LAW AND MAY NOT GIVE LEGAL ADVICE OR ACCEPT FEES FOR LEGAL ADVICE."

REGISTRATION OF IMMIGRATION ASSISTANCE SERVICE

A person offering immigration assistance may not:

- (1) accept payment in exchange for providing legal advice or any other assistance that requires legal analysis, legal judgment, or interpretation of the law;
- (2) refuse to return documents supplied by, prepared on behalf of, or paid for by the customer upon the request of the customer. These documents must be returned upon request even if there is a fee dispute between the immigration assistant and the customer;

REGISTRATION OF IMMIGRATION ASSISTANCE SERVICE

A person offering immigration assistance may not:

(3) represent or advertise, in connection with providing assistance in immigration matters, other titles or credentials, including, but not limited to, "notary public" or "immigration consultant", that could cause a customer to believe that the person possesses special professional skills or is authorized to provide advice on an immigration matter, provided that a certified notary public may use the term "notary public" if the use is accompanied by the statement that the person is not an attorney. The term "notary public" may not be translated into another language;

REGISTRATION OF IMMIGRATION ASSISTANCE SERVICE

A person offering immigration assistance may not:

(4) provide legal advice, recommend a specific course of legal action, or provide any other assistance that requires legal analysis, legal judgment, or interpretation of the law; or

(5) make any misrepresentation or false statement, directly or indirectly, to influence, persuade, or induce patronage.

REGISTRATION OF IMMIGRATION ASSISTANCE SERVICE

- Violations of this chapter may result in a civil penalty of up to \$1,000.00 per violation and revocation of the business license.
- Anyone who knowingly and willfully makes a false, fictitious, or fraudulent statement or representation in any document as part of providing immigration assistance (or who aids or abets someone who does or solicits or conspires to do so) is guilty of a felony.
- The penalty is:
 - A fine in the discretion of the court or
 - Imprisonment not more than 10 years or both
 - Disgorging of any benefit received or making restitution

UNAUTHORIZED PRACTICE OR MULTIJURISDICTIONAL PRACTICE?

South Carolina Jurisdiction Over 'Unlicensed' Lawyers

- Rule 2(q), RLDE:
Definition of 'lawyer'
- Rule 5.5, RPC:
Multijurisdictional Practice
- Rule 418, SCACR:
Advertising & Solicitation
by 'unlicensed' lawyers
- Rule 404, SCACR:
Pro Hac Vice
Admission
- Rule 405, SCACR:
Limited Certificate
of Admission for
In-House Counsel

UNAUTHORIZED PRACTICE OR MULTIJURISDICTIONAL PRACTICE?

Establishes jurisdiction of ODC, CLC, Supreme Court for regulation of lawyers and enforcement of conduct rules

Definition of 'lawyer' includes:

- A lawyer not admitted in SC who provides or offers to provide legal services in SC
- A lawyer not admitted in SC whose advertisements or solicitations are subject to Rule 418, SCACR

UNAUTHORIZED PRACTICE OR MULTIJURISDICTIONAL PRACTICE?

Rule 5.5(b) Prohibits UPL:

“A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.”

UNAUTHORIZED PRACTICE OR MULTIJURISDICTIONAL PRACTICE?

Rule 5.5(b) Prohibits Out-of-State Lawyers from:

- establishing office or other systematic and continuous presence for the practice of law in SC
- holding out to the public or otherwise representing that the lawyer is admitted to practice law in SC

UNAUTHORIZED PRACTICE OR MULTIJURISDICTIONAL PRACTICE?

However, under Rule 5.5(d), an out-of-state lawyer is permitted to establish an office or other systematic and continuous presence in South Carolina for the purpose of providing legal services permitted by federal law.

UNAUTHORIZED PRACTICE OR MULTIJURISDICTIONAL PRACTICE?

However, under Rule 5.5(d), an out-of-state lawyer is permitted to establish an office or other systematic and continuous presence in South Carolina for the purpose of providing legal services permitted by federal law.

UNAUTHORIZED PRACTICE OR MULTIJURISDICTIONAL PRACTICE?

- Presence may be “systematic and continuous” even if the lawyer is not physically present in SC
- No single test to determine whether services are provided on a "temporary basis" in SC
- Services may be "temporary" even if provided on a recurring basis, or for an extended period of time (such as a single lengthy negotiation or litigation)

UNAUTHORIZED PRACTICE OR MULTIJURISDICTIONAL PRACTICE?

Rule 5.5(c), RPC, permits unlicensed lawyers to provide legal services on a “temporary basis” under four circumstances...

UNAUTHORIZED PRACTICE OR MULTIJURISDICTIONAL PRACTICE?

- In association with a SC lawyer who actively participates; OR
- Related to a pending/potential proceeding with PHV admission or reasonable expectation of PHV; OR
- ADR related to representation of an existing client in home jurisdiction; OR
- Not court or ADR, but otherwise related to the lawyer's representation of existing client in home jurisdiction.

UPL RESOURCES

South Carolina Bar
UPL Committee
950 Taylor Street
Columbia, SC 29201
803-799-6653
www.scbar.org

SC Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
803-734-3970
www.scag.gov

SC Dept. of Labor, Licensing & Regulation
110 Centerview Drive
Columbia, SC 29210
803-896-4300
www.llr.state.sc.us

SC Dept. of Consumer Affairs
2221 Devine Street, Second Floor
P.O. Box 5757
Columbia, SC 29250
803-734-4200
www.scconsumer.gov



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