

# UPL, MDP AND MJP (DEFINING WHAT LAWYERS DO AND WHERE THEY CAN DO IT): PART I

## Hypotheticals

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\* These analyses primarily rely on the ABA Model Rules, which represent a voluntary organization's suggested guidelines. Every state has adopted its own unique set of mandatory ethics rules, and you should check those when seeking ethics guidance. For ease of use, these analyses and citations use the generic term "legal ethics opinion" rather than the formal categories of the ABA's and state authorities' opinions -- including advisory, formal and informal.

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## **Hypothetical 1**

You just participated as the "lawyer" representative on a diverse panel debating the wisdom of loosening unauthorized practice of law rules. Not surprisingly, the nonlawyer representatives have argued that society would benefit by allowing insurance agents to provide simple estate planning advice, permitting marital counselors to assist in simple divorces, etc. The audience at a recent public hearing seemed very sympathetic to these arguments, and you wonder what arguments you can or should muster in response.

Would society benefit from loosening unauthorized practice of law rules to allow nonlawyers to provide such simple services?

- (A) YES
- (B) NO

## **Hypothetical 2**

You have never given much thought to who defines and regulates the practice of law, but your law-student daughter just asked you that question over dinner.

Who defines and regulates the practice of law?

- (A) COURTS, THROUGH RULES?
- (B) COURTS, THROUGH CASE LAW?
- (C) COURTS, THROUGH ADVISORY OPINIONS?
- (D) THE LEGISLATURE, BY STATUTE?

### **Hypothetical 3**

Your law-student daughter just asked you how states define the practice of law, and draw the line between what nonlawyers can and cannot do. Although you were unable to answer that question, she quickly followed up with another question that has you equally stumped -- dealing with which branch of government enforces unauthorized practice of law restrictions.

Who enforces unauthorized practice of law restrictions?

- (A) STATE BARS?
- (B) COURT COMMISSIONERS?
- (C) CRIMINAL PROSECUTORS?

## Hypothetical 4

Your law-student daughter seems to be practicing her cross-examination skills over dinner. After asking you about how states define, regulate and enforce unauthorized practice of law restrictions, she asks perhaps the most elemental question about the profession in which you engage in which she will soon join you.

What is the "practice of law"?

## **Hypothetical 5**

As a recent law school graduate, you have had quite a bit of trouble finding work. You just received an offer to earn a fairly good salary from a company that assists people in their trust and estate planning. The company employs nonlawyer sales representatives to meet with customers and discuss their estate planning needs. These sales representatives fill out forms, which you then use to communicate with the company's main office in California. Folks in the main office prepare the estate planning documents that the customers require. You review the estate planning documents prepared by the California home office before giving them to the company sales representatives, who present them to the customers for signature. You also send the customers a letter describing your role, and sometimes communicate by telephone with the customers if they have any questions.

Does your prospective employer's process violate any UPL laws?

- (A) YES
- (B) NO

## Drawing the Line Between Permissible and Impermissible Actions by Nonlawyers

### Hypothetical 6

While you chose to attend law school, your sister decided to obtain a degree in social work and devote her life to helping the Navajo in New Mexico. Your sister just called to ask whether she can help needy folks without engaging in the unauthorized practice of law.

Without engaging in the unauthorized practice of law, may your sister undertake the following activities in connection with needy folks' small claims court proceedings:

- (a) Provide legal advice to the litigant about the best strategy to follow in small claims court?
  - (A) YES
  - (B) NO
  
- (b) Describe the small claims court process and timing?
  - (A) YES
  - (B) NO
  
- (c) Complete small claims court form documents by typing (verbatim) into the form a narrative supplied by the litigant seeking her assistance?
  - (A) YES
  - (B) NO
  
- (d) Review and revise the litigant's narrative before typing it into the small claims court forms.
  - (A) YES
  - (B) NO

- (e) Select the proper form for the litigant to use when filing in small claims court?
- (A) YES
  - (B) NO



## Hypothetical 7

One of your law school classmates was always more entrepreneurial than you were. She has now come to you with a proposition that seems potentially lucrative but has you worried. She wants you to help her create and market software that consumers can use to create simple legal documents without the direct assistance of a lawyer. Given both the vague definition of the "practice of law," and the severe punishment that states have imposed on lawyers assisting the unauthorized practice of law, you jokingly tell your husband that your roommate has asked you to become involved in what you call "LegalDoom.com."

Would you be assisting the unauthorized practice of law by helping a for-profit company create and market software that customers can use to create their own wills, deeds, articles of incorporation, etc.?

- (A) YES
- (B) NO

## Exception for Pro Se Litigants

### Hypothetical 8

You always figured that nonlawyers could represent themselves in court. However, a pro se adversary just filed a pleading that had been signed on her behalf by her so-called "representative."

Is a court likely to recognize such a pleading as permissible and legitimate?

- (A) YES
- (B) NO

## **Hypothetical 9**

Your gardener asked you this morning about a problem that he is facing with the Social Security Administration. Specifically, he has been very dissatisfied with the person he hired to help him pursue a Social Security claim. You do a little background checking, and you find that your gardener is being represented in his dispute with the Social Security Administration by one of his neighbors -- who apparently attended one year of law school before flunking out.

Is your gardener's neighbor engaged in the unauthorized practice of law?

- (A) YES
- (B) NO

## **Hypothetical 10**

A local real estate development company just hired you to handle most of its legal work. As you begin to analyze what assistance the company might need, you learn that company employees engage in several activities that have you worried.

- (a) May nonlawyer company employees prepare legal documents (such as deeds and conveyances) for the company itself to use?
- (A) YES
- (B) NO
- (b) May nonlawyer company employees prepare legal documents (such as deeds) for signing by landowners with whom the company deals?
- (A) YES
- (B) NO
- (c) May nonlawyer company employees represent the company in small claims court -- specifying what amount of money customers owe the company?
- (A) YES
- (B) NO
- (d) May nonlawyer company employees represent the company in small claims court -- presenting arguments in favor of default judgments against customers who owe the company money?
- (A) YES
- (B) NO

- (e) May nonlawyer company employees represent the company in arbitrations?
- (A) YES
  - (B) NO

## **Hypothetical 11**

As your practice has grown, you have found that you need additional help in serving your clients. You realize that the clients would benefit from increasing the role of paralegals (because of their lower hourly rate), but you wonder about the UPL consequences.

- (a) May you have a paralegal conduct the initial client interview with new clients?
  - (A) YES
  - (B) NO
  
- (b) May you have a paralegal undertake research about a legal issue and report the results directly to the client?
  - (A) YES
  - (B) NO
  
- (c) May you have a paralegal draft legal documents for your review?
  - (A) YES
  - (B) NO
  
- (d) May you have a paralegal discuss legal options with a client?
  - (A) YES
  - (B) NO
  
- (e) May you have a paralegal supervise a real estate closing without a lawyer present?
  - (A) YES
  - (B) NO

## **Hypothetical 12**

One of your law school classmates decided not to join a law firm after graduation, but instead opened his own law firm. Over a recent lunch, he told you that he had just established another office in a city about 30 miles from where both of you practice. The only folks who work in that office are paralegals and secretaries, although your classmate visits the office every Friday afternoon to check on its operations.

Is your classmate risking sanctions by arranging for paralegals to operate in the other office?

- (A) YES
- (B) NO

### **Hypothetical 13**

You are representing a client in contentious litigation, which has increasingly focused on your withholding of documents you claim to be protected by the attorney-client privilege. Your adversary just filed a motion arguing that the attorney-client privilege does not protect direct communications between your client and one of your paralegals -- because no lawyer participated in the communications.

May the attorney-client privilege protect communications between your client and your paralegal, in which no lawyer participated?

- (A) YES
- (B) NO



## **Hypothetical 14**

In very contentious litigation you are handling for a client, the adversary claims that your paralegal cannot create protected "work product" because he is not a lawyer.

May your paralegal create documents protected by the work product doctrine?

(A) YES

(B) NO

## **Hypothetical 15**

You have been involved in a high-stakes patent dispute, in which your adversary is represented by a "scorched-earth" lawyer. You just discovered that the other side's lawyer had let his bar license lapse two years ago -- and therefore has been acting without a license during the dispute.

- (a) Has the other side's lawyer engaged in the unauthorized practice of law?
- (A) YES
  - (B) NO
- (b) Can your client assert a cause of action against the other side's lawyer for the unauthorized practice of law?
- (A) YES
  - (B) NO

## **Hypothetical 16**

As your law firm's partner in charge of young associates, you tried to help one young associate deal with a heartbreaking addiction to painkillers. Your efforts were unsuccessful, and the young associate eventually lost her license. She has now started to put her life together again, and you believe she deserves a second chance.

Can your firm employ your now-disbarred former associate as a paralegal?

- (A) YES
- (B) NO

## **Hypothetical 17**

You just received a frantic call from a local publicly-traded company's chairman. The chairman tells you that the company's general counsel had resigned about six months ago. The company was in the midst of an important transaction at that time, and turned for legal advice to another board member who had practiced for many years at a large New York law firm. About three months ago, everyone learned why the general counsel had resigned -- because she had been involved in some questionable options backdating activities. The interim general counsel continued to advise the board as the scandal grew. Last month, the interim general counsel sheepishly advised the board that he had let his law license lapse several years ago -- it had never dawned on him to tell the board about this. The board continued to rely on his advice until yesterday -- when the chairman read an article about a similar situation in which a court found that a company could not claim attorney-client privilege protection for communications to and from an in-house lawyer not licensed in any state. The chairman wants your quick advice about the effect of this scenario.

- (a) Will the attorney-client privilege protect communications to and from the interim general counsel before he advised the board that his law license had lapsed?
- (A) YES
- (B) NO
- (b) Will the attorney-client privilege protect communications to and from the interim general counsel after he advised the board that his law license had lapsed?
- (A) YES
- (B) NO

## **Hypothetical 18**

You recently attended an ethics program that warned about the dangers of in-house lawyers representing entities or people other than their client/employers. An obvious question came to mind as you walked out of the seminar.

As an in-house lawyer, may you represent a corporate affiliate of your client/employer?

- (A) YES
- (B) NO

## **Hypothetical 19**

After several years in private practice, you joined a local company's law department as Associate General Counsel. You mostly handle labor and employment matters for your client/employer. You are trying to reduce the cost of outside counsel, and you are wondering if you can represent both your client/employer and its executives or other employees jointly sued in employment discrimination or other employment cases.

May in-house lawyers represent their client/employer's executives or other employees?

- (A) YES
- (B) NO

## **Hypothetical 20**

You serve as the general counsel (and only lawyer) at a local company which provides software services to local businesses under contract with the federal government. Many of your customers have trouble dealing with the federal government (both in connection with using your software and generally). Over lunch, you and your company's CEO have discussed what you can do to help these customers.

- (a) May you represent your client/employer's customers in their dealings with the federal government in other matters unrelated to your company's software?
- (A) YES
- (B) NO
- (b) May you represent your client/employer's customers in their dealings with the federal government related to your company's software?
- (A) YES
- (B) NO

## **Hypothetical 21**

You have become quite active in your local bar association, and the other members welcome both your insights as an in-house lawyer and some of the corporate support you can arrange for several worthwhile projects. Among other things, your client/employer has opened its offices in the evening for various "no bills nights" as part of your local bar's push to increase pro bono representation of indigents.

As an in-house lawyer, may you represent local indigent people pro bono?

- (A) YES
- (B) NO



## **Hypothetical 22**

Your law firm recently hired a new marketing director, who has proven remarkably successful in expanding your firm's healthcare practice. The firm's Executive Committee has suggested a new compensation package for the marketing director, which would include a salary, benefits, and an incentive bonus based on a percentage of the increased revenues received by the firm from new healthcare clients that the marketing director attracts to the firm through her efforts.

May your firm pay an incentive bonus to the marketing director based on a percentage of the increased revenues received by the firm from new healthcare clients that the marketing director attracts to the firm through her efforts?

- (A) YES
- (B) NO

## **Hypothetical 23**

Your law firm has enjoyed phenomenal financial success after hiring a nonlawyer executive director about five years ago. Both the firm's revenues and profits have increased tenfold during his tenure, and your executive committee wants to explore ways that you can keep the executive director on board and let him share in the firm's great success.

May you allow the executive director to become a partial owner of the law firm?

- (A) YES
- (B) NO

## **Hypothetical 24**

Because your firm has offices in a number of state capitals, you have hired several lobbyists to provide lobbying and related services to clients retaining the firm for legal services, as well as clients who require only lobbying services (and not any legal services). You wonder to what extent you can integrate the very successful lobbyists' practice into the law firm's legal practice.

- (a) May lobbyists employees of the law firm provide lobbying services to clients who also receive legal services from the firm?
- (A) YES
- (B) NO
- (b) May lobbyists employees of the law firm provide lobbying services to law firm clients who do not receive legal services from the firm?
- (A) YES
- (B) NO
- (c) May lobbyists offer their services through a wholly owned subsidiary of the law firm?
- (A) YES
- (B) NO
- (d) May lobbyists become partial owners of the law firm?
- (A) YES
- (B) NO

## **Hypothetical 25**

You have kept up with legal developments in the United Kingdom, because you recently merged with a London law firm. You have read that UK law firms may sell stock to raise equity. You wonder whether the same structure would work in the United States.

Should U.S. law firms be allowed to raise equity by selling stock?

- (A) YES
- (B) NO