
Judiciary Committee

HB 1114

Title: An act relating to marketing of estate distribution documents.

Brief Description: Prohibiting the marketing of estate distribution documents by persons not authorized to practice law in this state.

Sponsors: Representatives Rodne, Lantz, Moeller and B. Sullivan; by request of Attorney General.

Brief Summary of Bill

- Makes the marketing of wills, trusts, and related documents unlawful unless done by someone who is authorized to practice law.
- Makes the unlawful marketing of estate distribution documents a violation of the Consumer Protection Act.

Hearing Date: 1/19/07

Staff: Bill Perry (786-7123).

Background:

The practice of law as construed by Washington State courts includes not only legal representation of a client in court, but also legal advice and counsel as well as the preparation of legal instruments and contracts by which legal rights are secured. (See, *e.g.*, Andersen v. Northwest Bonded Escrows, 4 Wn. App. 754 (1971).)

Controversy and concern have arisen over the preparation and marketing of various documents, such as wills and trusts, that relate to the disposition of a person's property. In some instances, such documents may be prepared and marketed by persons who are not members of the state bar association.

Various statutes, common law doctrines, and court rules deal with the unlawful, unauthorized, or negligent practice of law. The state supreme court has declared that under Article IV of the state constitution, regulation of the practice of law is an area restricted exclusively to the judicial

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branch. Bennion v. Kassler Escrow, 96 Wn.2d 443 (1981), for example, invalidated a statutory attempt to allow the limited practice of law by escrow agents and others. (See the discussion on court rules below.) Although several of its provisions may be of doubtful validity, the State Bar Act remains a part of the state's statutory law, and one of its sections makes it a crime to practice law in this state without being a member of the bar.

The Crime of Unlawful Practice of Law.

The State Bar Act makes the "unlawful practice of law" a crime. One way in which the crime is committed is for a nonlawyer to practice law or hold himself or herself out as entitled to practice law or to share legal fees with a lawyer. "Nonlawyers" for purposes of this statute include anyone not an active member in good standing of the state bar association. Committing the crime of unlawful practice for the first time is a gross misdemeanor, punishable by up to one year in jail and a fine of up to \$5,000. Any subsequent violation is a class C felony, punishable by up to five years in prison and a fine of up to \$10,000.

Court Rules - Admission - Discipline - Limited Practice.

Court rules on the practice of law regulate admission to the bar and allow for discipline and disbarment of members, but do not generally directly regulate or discipline nonlawyers. Court rules do, however, provide for the "limited practice" of law by nonlawyers in one area. The court rules authorize certain certified nonlawyers to select, prepare, and complete legal documents incident to the closing of real estate and personal property transactions.

Civil Actions for Negligence and Equitable Relief.

The common law, as well as the same statute that creates the crime of unlawful practice, recognizes a civil cause of action based in negligence for harm done by the unauthorized practice of law. Injunctive and other equitable relief is also available, as are contempt proceedings. The unlawful practice statute also declares that the unlawful practice of law by a person who is licensed in another business or profession may be grounds for discipline as unprofessional conduct in that business or profession. An action may be brought by a prosecuting attorney for an injunction and a civil penalty of up to \$5,000 for each violation of the unlawful practice statute.

The Consumer Protection Act.

Under the state's Consumer Protection Act (CPA), certain activities have been designated by the Legislature as unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce. Various remedies for violations of the CPA are provided, including authorization for the Attorney General to seek restraining orders. A person who is injured by a violation of the CPA may recover treble damages, costs, and reasonable attorney's fees.

"Unlawful" Acts Without Criminal Designations.

Sometimes a statute declares an act to be "unlawful," but does not designate the act as a specific crime with specific penalties. The Washington criminal code provides that when an act is "prohibited" by a statute but "no penalty is imposed" by the statute, the commission of the prohibited act is a misdemeanor crime. The criminal code also provides that misdemeanors are punishable by up to 90 days in jail and a fine of up to \$1,000.

Summary of Bill:

It is unlawful for anyone who is not authorized to practice law in this state to market estate distribution documents in or from the state. The unauthorized marketing of such documents is also a violation of the CPA.

"Estate distribution documents" are documents such as wills or trusts that have either been prepared for a specific person or have been prepared as marketing materials. Marketing includes an offer or agreement to prepare or provide individualized advice about an estate distribution document.

A person who is *not* authorized to practice law in this state may nonetheless gather information or assist in preparing estate distribution documents if:

- He or she is employed by someone who *is* authorized to practice law in this state; and
- He or she does not provide legal advice.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.