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HANDOUT FOR "WHEN PARLIAMENTARIANS SHOULD AND SHOULD NOT ADVISE CLIENTS ABOUT THE APPLICATION OF PROCEDURAL LAW"

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Presented by Thomas (Burke) J. Balch, PRP
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This handout contains a reprint of the article:

Thomas Balch, "When Parliamentarians Should and Should Not Advise Clients about the Application of Procedural Law," *Parliamentary Journal* LXV, no. 1 (April 2024): 9–26.

Unfortunately, when the article was printed, the footnotes were numbered continuously from the preceding article instead of starting with 1 for the article itself. Because the text and footnotes refer to footnotes by their original numbers, this can cause confusion, and the cross-references can be traced to the proper footnote only by adding 18 to the number in the cross-reference. While any citations in written material should be to the page number or footnote number as printed in the *Parliamentary Journal*, to make it easier to follow the article when simply reading it, the handout precedes the reprint with the article in the form submitted to the journal, with the correct footnote numbering.

PARLIAMENTARIANS AND THE LAW:
When Parliamentarians Should and Should Not Advise Clients about the Application of Procedural Law

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Suppose a professional parliamentarian is advising the chair during a meeting of the board of directors of a small nonprofit corporation that has no regular legal counsel. With fourteen of the fifteen board members present, there are five votes for a main motion, three against, and six abstentions. The bylaws adopt a parliamentary authority but do not otherwise specify the vote required to adopt motions by the board. Under the parliamentary authority, the requirement for adoption is a majority of the votes cast, that is, a majority of the members present *and voting*.[1] However, the state not-for-profit code under which the organization is incorporated states that for a board of directors to take action requires the votes of a majority of the directors *present*. What ought the parliamentarian advise the chair concerning whether or not the main motion was adopted?

Of course, as parliamentary authorities acknowledge, applicable laws supersede conflicting provisions in the parliamentary authority.[2] Plainly, the parliamentarian could not properly advise the chair that the motion was adopted, since the statute applies to the parliamentarian as much as to the board, and were the parliamentarian to advise treating the motion as adopted, the parliamentarian would be advising violation of the law.

But may the parliamentarian advise the chair that the motion was defeated on the ground that this result is compelled by the applicable statute? Would doing so constitute unauthorized practice of law?

Parliamentarians sometimes fear that any effort to provide information about the application of a procedural[3] statute risks encroaching on the practice of law and conclude that when aware of a legal provision that conflicts with or supersedes provisions in an organization's governing documents or parliamentary authority, the most they can do is to advise clients of the law's existence and recommend consulting an attorney regarding its pertinence to them.

This conservative approach is congruent with a definition of the "practice of law" embodying what one law review article calls "the legal knowledge standard: Whatever requires the 'knowledge and the application of legal principles' constitutes the practice of law." This standard, as Deborah Rhode, the author of the law review, wrote, is "inclusive to the point of

[1] See RONR (12th ed.) 44:1; AIPSC (2nd ed.) 5.1.
[2] RONR (12th ed.) 2:2; 23:6(c); AIPSC (2nd ed.) 1.9.1, 1.10, 4.2. Although some of its concepts may have applicability trans-nationally, this article focuses on unauthorized practice of law as construed in the United States of America. For an overview of the subject in Canada, see Lisa Trabucco, "Lawyers' Monopoly? Think Again: The Reality of Non-Lawyer Legal Service Provision in Canada," *Canadian Bar Review* 96, no. 3 (2018): 460-483, https://canlii.ca/t/2d93.
[3] There is no doubt that parliamentarians may not advise clients on substantive law. Regarding the distinction, see text accompanying footnote 21.

absurdity."[4] In the words of Quintin Johnstone in another law review article, "Without clarification, some of the general rules are too vague to have much meaning, and applying some of them literally could have highly undesirable consequences."[5]

When a parent teaches a child not to cross the street against the traffic light, the parent is advising the child about a requirement of traffic law. So is a driving instructor who teaches students what various traffic signs mean. A financial advisor who tells a client the difference between traditional individual retirement accounts and ROTH IRAs is applying the Internal Revenue Code, as is a tax return preparer who suggests a taxpayer is entitled to a particular deduction. Can one realistically imagine all or any of these actually being prosecuted for engaging in the unauthorized practice of law unless they hire attorneys to provide the information instead?

A book co-authored by U.S. Supreme Court Justice Neil Gorsuch argues:

> [H]istory reveals that the definitions [of practice of law] states have adopted, usually at the behest of local bar associations, are often breathtakingly broad and opaque . . . . The fact is, nonlawyers already perform—and have long performed—many kinds of work traditionally and simultaneously performed by lawyers. They regularly negotiate with and argue cases before the Internal Revenue Service. They prepare patent applications and otherwise advocate on behalf of investors before the Patent and Trademark Office. And it is entirely unclear why exceptions should exist to help these sort of niche (and, some might say, financially capable) populations but not be expanded in ways more consciously aimed at serving larger numbers of lower- and middle-class clients.[6]

A law review article by Jan L. Jacobowitz and Peter R. Jarvis details the breadth of nonlawyer professionals who would routinely fall afoul of such a broad definition of the practice of law:

> [T]here has been a rise in the type and number of non-law firm businesses that touch upon or concern the law and on which a great many citizens can and do rely with reasonable confidence. Historically and most obviously recognized to be true for professionals such as insurance agents and accountants, the present list of these nonlawyers includes, but is by no means limited to, human relations consultants, payroll management companies (with respect to wage and hour issues, for example), home remodeling contractors (who advise homeowners about what may or may not be consistent with local building codes), ordinary salespeople (who inform customers about what may or may not be covered under a warranty), and non-lawyer employees of a business

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[4] Deborah L. Rhode, "Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions," *Stanford Law Review* 34, no. 1 (1981): 81, https://doi.org/10.2307/1228512.

[5] Quintin Johnstone, "Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution," *Willamette Law Review* 39, no. 3 (Summer 2003): 809.

[6] Neil M. Gorsuch with Jane Nitze and David Feder, *A Republic If You Can Keep It*, (New York: Crown Forum, 2019), 255-57.

> (who negotiate or draft contracts for their employers or who subsequently advise their employers about the meaning of those contracts). Thus, just as in our personal lives, many legal issues arise during the course of business dealings that can be and are addressed by individuals who have not spent three years in law school and passed a bar exam.[7]

Of course, members of these various professions are not typically convicted of or enjoined from the unauthorized practice of law. "If a practice traditionally considered to be legal in nature is performed by non-lawyers and provides a public convenience perceived to outweigh potential risks, states commonly allow the practice to continue. They may define these practices as the 'limited practice of law' or the 'authorized practice of law,' or they may simply ignore the activity's legal nature, excluding it from the definition of 'practice of law' altogether."[8]

Given this reality, I argue that for parliamentarians to avoid ever directly informing their clients about procedural law that applies to them, as in the example of the nonprofit code requiring a majority of those directors present (rather than of the votes cast) to take action, is both unnecessary and inappropriate. Doing so may sacrifice or compromise important parts of what parliamentarians do best, leaving many clients without affordable, accurate parliamentary advice. As attorney Travis Barrick points out, "most lawyers have zero knowledge of parliamentary procedure, and it would be embarrassing to prosecute a non-lawyer for doing something lawyers don't know how to do."[9]

To say that parliamentarians ought to be able to advise their clients about controlling provisions of procedural law *in some circumstances* without being liable for unauthorized practice of law is not to claim that their provision of advice about procedural law should *always* be permissible. The question is where appropriately to draw the line. It is important to recognize that this line-drawing may differ from jurisdiction to jurisdiction.[10]

At one extreme is the claim of some bar associations, articulated if rarely enforced, that *any* advice applying provisions of law to specific facts is the practice of law.

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[7] Jan L. Jacobowitz and Peter R. Jarvis, "Unauthorized Practice or Untenable Prohibitions: Refining and Redefining UPL," *St. Mary's Law Journal on Legal Malpractice and Ethics* 13, no. 2 (2023): 299-300, https://commons.stmarytx.edu/lmej/vol13/iss2/3 .

[8] Sande L. Buhai, "Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law," *Utah Law Review* 2007 (2007), 96. To give one example, the Colorado Supreme Court has ruled, "Denying to the public the right to conduct real estate transactions in the manner in which they have been transacted for over half a century, with apparent satisfaction, and requiring all such transactions to be conducted through lawyers, would not be in the public interest; ... the advantages, if any, to be derived by such limitation are outweighed by the conveniences now enjoyed by the public in being permitted to choose whether their broker or their lawyer shall do the acts or render [legal] services." Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 312 P.2d 998, 1007 (Colo. 1957), cited with approval, People v. Layton, 531 P.3d 34, 54n.130 (Colo. 2023) ("[D]irecting or acting on matters of general knowledge, even if knowledge of a rule of law, does not constitute the practice of law." *Id.* at 54.)

[9] Travis N. Barrick, "Parliamentarians and the Unauthorized Practice of Law," *National Parliamentarian* 77, no. 1 (Fall 2015): 10.

[10] See the last two paragraphs of this article.

At the other extreme is the position taken by some who argue that all or most prohibitions on the unauthorized practice of law should be repealed as they constitute anticompetitive limits on the free market that are not justified by consumer protection.[11]

As will be discussed later in this article, there are indeed strong grounds for asking, regarding bar associations' efforts to limit unauthorized practice of law, "where consumer protection ends and economic self-protection begins."[12] Nevertheless, there are legitimate grounds for concluding that sometimes, "Nonlawyers, lacking formal training in the law, will be unable to deal with or to recognize legal complexities when they arise, and clients' legal interests will be harmed by their incompetence."[13]

Accurately applying the controlling procedural law is not always as easy as looking up a statutory provision. That provision may have been the subject of litigation resulting in court decisions interpreting and applying it – and in rare cases, perhaps declaring it unconstitutional. For state statutes, until the state's highest court rules, interpretations can vary among intermediate appellate and lower courts. Even when an interpretation has been apparently definitively articulated by the state's highest court, that decision might later be overruled or "distinguished" in a later case. Interpretations of the same or similar statutory language can vary from state to state. Federal law or constitutional provisions may be involved and lead to decisions by federal district courts, courts of appeals, or even the U.S. Supreme Court. Sometimes an issue of procedural law may be unsettled in one state, and the question of what application is most plausible and defensible might require researching the various ways it has been ruled upon in different jurisdictions – rulings that, while not controlling in the state, may be persuasive to its courts. Moreover, some procedural law may not be based on statutory provisions at all, but rather on rulings by courts based on "common law" precedents.

In addition, there is the matter of what might be called "context." While most lawyers wind up concentrating their practice in certain specialties, their law school training – and the bar examinations they must pass – require them to become familiar with basic principles and issues covering a wide scope of legal areas, from criminal to constitutional law, and from torts to property. Ideally, attorneys are trained in "issue-spotting" – that is, given a set of facts, in identifying legal issues that might be relevant even from outside their areas of specialty. While attorneys may not be up to date on statutory and case law regarding some of the issues "spotted" that are outside their usual areas of specialty, having identified them they can either research them or consult another attorney with particular experience that is relevant. In contrast, it is possible that a parliamentarian who is not a lawyer, if dealing with a complex procedural situation, may focus on a particular statutory provision or provisions while not recognizing the need to go beyond them by researching other potentially relevant provisions or cases.

As Jacobowitz and Jarvis suggest, "Decisions on what should be regarded as the unauthorized practice of law therefore requires [sic] a balanced approach which assesses factors including but not limited to: the legal complexity of the matter or matters in question; the ready availability of lawyers willing to handle such matters at a price that the recipients of those

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[11] *See, e.g.,* George C. Leef, "Lawyer Fees Too High? The Case for Repealing Unauthorized Practice of Law Statutes, *Regulation* 20, no. 1 (Winter 1997): 33-40, https://www.cato.org/sites/cato.org/files/serials/files/regulation/1991/1/reg20n1c.html (1997).

[12] Catherine J. Lanctot, "Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law," *Hofstra Law Review* 30, no. 1 (Spring 2002): 821.

[13] Turfler, "A Model Definition of the Practice of Law: If Not Now, When - An Alternative Approach to Defining the Practice of Law," Washington and Lee Law Review 61, no. 4 (Fall 2004), 1918.

services can afford; the likelihood that nonlawyers will provide competent representation and assistance; respect for client choice; potential cost savings as a result of using nonlawyers; and potential effects on the legal system."[14] Soha Turfler notes, "[M]any critics suggest that the definition of the practice of law could encompass complex or novel issues and leave routine services outside the definition of the practice of law."[15]

A 2007 law review by Sande Buhai summarizes three contrasting approaches by courts in defining the practice of law. One is "whether the services involved are of the kind that lawyers traditionally provide. Under this approach . . . 'providing legal advice' [is] treated as the practice of law per se." Under the second, "functional," approach, "'reasonable protection . . . of those advised . . . requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen'." A third approach focuses on the difficulty of the legal issues presented. Under it, "the practice of law is commenced when 'difficult or doubtful legal questions are involved . . . which, to safeguard the public, reasonably demand the application of a trained legal mind.'"[16]

This article has already pointed out the widely acknowledged vagueness and unworkability of the literal application of a standard under which "providing legal advice" is "treated as the practice of law per se." In contrast, a helpful standard was once provided by the Minnesota Supreme Court in *Gardner v. Conway*: "[W]henever, as incidental to another transaction or calling, a layman [that is, anyone who is not a licensed attorney], as part of his regular course of conduct, resolves legal questions for another--at the latter's request and for a consideration--by giving him advice or by taking action for and in his behalf, he is practicing law if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind. What is a difficult or doubtful question of law is not to be measured by the comprehension of a trained legal mind, but by the understanding thereof which is possessed by a reasonably intelligent layman who is reasonably familiar with similar transactions."[17] This standard might be described as embodying the third approach described by Buhai while also drawing on the second approach.

It can be likened to the "activity-centered" approach urged by Soha Turfler under which "when determining whether an activity should fit within the definition of the practice of law" the question is asked "is the risk of harm of this activity [to the client] severe enough to demand licensure?" In other words, the question should be whether "the service poses a severe risk of harm such that the activity should be restricted to licensed lawyers to minimize that harm."[18] It is when the legal questions involved are "difficult or doubtful" that the strongest case can be made that the danger of misinterpretation associated with a lack of in-depth legal knowledge and research concerning them creates sufficient risk for clients that advice regarding their analysis and application should be reserved to licensed attorneys.

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[14] Jacobowitz and Jarvis, "Refining and Redefining UPL," 311.

[15] Soha Turfler, "Model Definition," 1932.

[16] Buhai, "Act Like a Lawyer," 94-95. Preventing the unauthorized practice of law is defensible when, in the words of the South Carolina Supreme Court, "[R]egulation of the practice of law is not for the purpose of creating a monopoly in the legal profession, nor for its protection, but to assure the public adequate protection in the pursuit of justice, by preventing the intrusion of incompetent and unlearned persons in the practice of law."
Matter of Anonymous Applicant for Admission to South Carolina Bar, 875 S.E.2d 618, 623 (S.C. 2022)

[17] Gardner v. Conway, 48 N.W.2d 788, 796, 234 Minn. 468, 481 (Minn. 1951). More recently cited as controlling Minnesota law by In re Conservatorship of Riebel, 625 N.W.2d 480, 481 (Minn. 2001); State v. Milliman, 802 N.W.2d 776, 780 (Minn. App. 2011).

[18] Soha Turfler, "Model Definition," 1955-56.

How might the *Gardner v. Conway* standard responsibly be applied to parliamentarians advising their clients? To begin, those whose study and experience of parliamentary procedure is sufficient for them to hold themselves out as competent to advise clients for compensation should be capable of meeting the standard of one "who is reasonably familiar with similar transactions," that is, of the relevant procedures governing client meetings. Along with being familiar with an organization's governing documents and parliamentary authority, to provide competent assistance a parliamentarian must determine whether the organization is incorporated or otherwise subject to procedural laws, and if so, must carefully review those laws. Even with respect to any legal requirements about which the parliamentarian should arguably avoid directly giving advice, it is essential to be aware of pertinent provisions that might supersede or supplement the organization's rules so as to be able, at a minimum, to suggest its leaders consult an attorney concerning their impact.

Under the *Gardner v. Conway* standard, a parliamentarian should be able to inform clients of clearly applicable procedural law that is hard to misinterpret or dispute.[19] The example that began this article, a statutory provision requiring the votes of a majority of the directors present for a board to take action, easily falls within this category. Other examples likely include statutory provisions stating the number of members needed for a quorum, providing the number of days' notice required for meetings, or authorizing action which could be taken at a meeting to be adopted, as an alternative, by written consent of all the members.

On the other hand, "a reasonably intelligent [parliamentarian] who is reasonably familiar with similar transactions" ought to understand that the procedures for incorporating an organization or for obtaining tax-exempt status require the advice of an attorney.[20] Similarly, questions of substantive law, as opposed to procedural law, are outside the province of parliamentary procedure and parliamentarians ought not opine on them.[21] For example, if a main motion proposes modifications to a building owned by an organization, whether those modifications would comply with applicable zoning ordinances or ordinances requiring building permits are matters regarding which it would be advisable for the organization to consult an attorney before voting on the motion; a non-attorney parliamentarian should not attempt to advise whether the motion would violate such ordinances.

Beyond avoiding advice in such instances, what sorts of procedural laws ought parliamentarians recognize as involving "difficult or doubtful legal questions" that should be left to attorneys? One such area involves advising national and international unions concerning at least some aspects of their parliamentary procedure. 29 United States Code Section 481, which

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[19] This recommendation applies when a parliamentarian is serving an organization without a regular attorney, or at least without the organization attorney being present at a relevant meeting. When an attorney representing the organization is present, the attorney and parliamentarian should agree on a division of labor. Presumably the attorney would advise on all questions of law, including procedural law of any sort, while the parliamentarian would advise on questions involving application of the parliamentary authority and any special rules of order. Depending on the particular circumstances, interpretation and application of the provisions in the organization's various governing documents might be agreed to be in the bailiwick of the parliamentarian, the attorney, or shared jointly.

[20] See RONR (12th ed.) 2:6; AIPSC (2nd ed.) 17.19, 17.28.

[21] RONR (12th ed.) 23:7(c) (emphasis added) recognizes points of order when "any action has been taken in violation of applicable *procedural* rules prescribed by federal, state, or local law." Similarly, ibid., 10:26(1) (emphasis added) provides that, as a question of parliamentary procedure, main motions are not in order which conflict with "*procedural* rules applicable to the organization or assembly . . . prescribed by federal, state, or local law . . . ." Under RONR a claim that a motion violates *substantive* law would not properly be a matter for a point of order. RONR thus avoids placing a parliamentarian in the position of being asked to give advice on whether a main motion conflicts with substantive laws.

(in the USA) governs such labor organizations' terms of office and election procedures, has been heavily litigated, resulting in multiple court decisions interpreting and applying its provisions. Another set of organizations that are pervasively regulated by laws that give rise to frequent legal disputes are community organizations; in addition to the application of governing statutes, legal contracts known as Covenants, Conditions and Restrictions or other titles such as Declarations may contain provisions relating to meeting procedures.[22] According to Jim Slaughter, "Several lawsuits may be lurking behind any community association decision. One annual meeting I assisted had five lawyers attending in a formal capacity. . . ."[23] A third set consists of governmental bodies such as school and zoning boards and city and county councils whose procedures are in many cases dictated by statute or ordinance; in any case, almost invariably these entities will have legal counsel present at their meetings.[24]

More generally, whenever a governing statute or regulation is arguably ambiguous, or legal disputes about its meaning or applicability are known or anticipated to exist – especially when there is a prospect of litigation concerning their interpretation or application—the parliamentarian ought to inform the client of the need to consult an attorney in place of independently opining on them.

In my view, professional parliamentarians, and organizations consisting of or representing them, should be prepared to advocate for and defend such a standard against overbroad claims that *any and all* advice applying procedural law to matters of parliamentary procedure requires consulting a licensed attorney. Can such a position prevail?

The history of efforts to define, prohibit, and enforce prohibitions on the unauthorized practice of law is instructive. "[P]rior to the twentieth century, a non-lawyer violated the unauthorized practice of law rules only by representing another individual in court."[25] Bar associations, which would become the most significant advocates for broader definition of what ought to be prohibited as the unauthorized practice of law, did not begin to form as permanent entities until roughly the last third of the nineteenth century. "Consistent with the theme of elevating the legal profession's reputation and limiting it to those who possessed the privilege to practice, some young bar associations began to turn their attention to the unauthorized practice of law at the turn of the century."[26] Initially, the focus was on those unlicensed individuals who either sought to represent clients in court or otherwise publicly held themselves out as attorneys-at-law.

By the second decade of the twentieth century, however, bar associations had begun to extend their concern to certain out-of-court activities by those who neither were nor claimed to be lawyers. They were particularly concerned by corporations providing services that, from their perspective, impinged on the exclusive rights of licensed attorneys to "practice law." As they saw it:

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[22] Jim Slaughter, "Statutes and Procedures of Community Associations," *National Parliamentarian* 66, no. 1 (First Quarter 2005): 9-14.
[23] James H. Slaughter, "Community Associations and the Parliamentarian," *National Parliamentarian* 61, no. 1 (First Quarter 2000): 28.
[24] See note 19.
[25] Mathew Rotenberg, "Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources," *Minnesota Law Review* 97, no. 2 (December 2012): 713.
[26] Laurel A. Rigertas, "The Birth of the Movement to Prohibit the Unauthorized Practice of Law," *Quinnipiac Law Review (QLR)* 37, no. 1 (2018):111-12.

> Abstract and title-insurance companies were invading the field of real estate law, banks and trust companies were handling the settlement of estates, insurance firms were beginning to indemnify policyholders against risks that formerly needed the services of lawyers, and there was an increasing tendency of many litigants to make out-of-court settlements instead of engaging in prolonged and expensive lawsuits.[27]

At the outset, at least one bar association recognized the difficulty of clearly defining what out-of-court activities constitute the "practice of law". In 1914, the Committee on Unlawful Practice of the Law of the New York County Lawyers' Association noted, "many decisions must be made before the definitions of what acts constitute the practice of law will furnish a complete understanding of this subject."[28] Nevertheless, by 1916, the committee was characterizing them broadly as "in general, all advice to clients, and all action taken for them in matters connected with the law."[29]

However, corporations did not take such assertions lying down. "[I]ndustries turned to the legislature to try to carve out exceptions. Title companies, trust companies, and collection agencies drafted legislation to try to amend statutory prohibitions on the practice of law."[30]

Although the American Bar Association (ABA) first addressed the matter of defining and working to prevent the unauthorized practice of law in 1919, its efforts took on greater intensity with the creation in the 1930s of first a special and then a standing "Committee on the Unauthorized Practice of Law."[31] It has been argued that "it is not mere historical coincidence" that bar associations aggressively challenged others encroaching on their very broad definition of the practice of law "during the Great Depression, at a time when lawyers, like other members of society, struggled against economic dislocation."[32]

Frustrated by the ability of rival entities to secure state legislative exceptions to the broad application of prohibitions on unauthorized law practice sought by the ABA, the association soon took the position that statutes "should not undertake to define the practice of law, for definitions undertaking this have been universally found to be self-limiting and to invite evasion. Whether or not a particular course of conduct constitutes the practice of law should be left to the courts for determination."[33] Perhaps the assumption was that judges, themselves lawyers, would be more sympathetic to a broad definition of unauthorized practice of law than legislators responsive to constituencies lobbying to narrow that definition.

Nonetheless, bar associations eventually found it in their interest to negotiate with organizations representing numerous other competing professions. These negotiations frequently resulted in agreed compromises upon the extent to which members of those professions could

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[27] Herman Kogan, *The First Century: The Chicago Bar Association 1874-1974* (Chicago: Rand McNally & Company, 1974), 88.

[28] Julius Henry Cohen, "Report of the Committee on Unlawful Practice of the Law," *in N.Y. County Lawyers' Association Year Book 1914* (New York: N.Y. County Lawyers' Association, 1914), 243.

[29] Cohen, "Report of the Committee on Unlawful Practice of the Law," in *N.Y. County Lawyers' Association Year Book 1916* (New York: N.Y. County Lawyers' Association, 1916), 180-84.

[30] Rigertas, "Birth of Movement," 148.

[31] Rigertas, "Birth of Movement," 157.

[32] Lanctot, "Scriveners in Cyberspace," 813. According to Rigertas, "Birth of Movement," 112, "Their initiatives were steeped in rhetoric about increasing the professional status of the bar, but those initiatives focused more on erecting barriers to protect the professional elite."

[33] Frederick C. Hicks and Elliott R. Katz, *Unauthorized Practice of Law: A Handbook for Lawyers and Laymen*, (Baltimore: American Bar Association, 1934), 5-6.

provide specified services that bar associations insisting on a broad definition would otherwise claim to be included in the unauthorized practice of law. Under these agreements, the bar associations would refrain from challenging provision of these services by the professionals represented by these associations; in return, the professional associations representing competing professionals would accept that other relevant services would be reserved to lawyers to provide. "Beginning in 1937, the ABA and various state and local bar associations entered into formal 'Statements of Principles' with various occupations, including accountants, architects, bankers, claims adjusters, collection agents, engineers, social workers, law book publishers, realtors, and insurance brokers."[34]

Decades later, these negotiated compromises came under antitrust scrutiny. In 1979, the U.S. Justice Department issued a public notification that it was investigating whether such agreements violated the Sherman Antitrust Act.[35] In response, the American Bar Association Board of Governors "authorized appropriate steps directed toward rescinding statements of principles with other professional organizations by joint consent."[36]

Meanwhile, considerable controversy and publicity had arisen in the 1960's over a book with the title "How to Avoid Probate!" The book included multiple forms its author claimed could be filled out by purchasers without the involvement of a lawyer, together with instructions on how to complete them. The New York County Lawyers' Association instituted a lawsuit contending the book constituted the unauthorized practice of law. After it obtained victories in lower courts, however, New York's highest court disagreed, holding that publication of a book of legal forms accompanied by instructions could not be deemed the unauthorized practice of law.[37]

In the twenty-first century, the ubiquity of personal computers and the widespread availability of the Internet lead to the development of software and services consisting of questionnaires, the answers to which were converted into legal documents. These were challenged as amounting to the unauthorized practice of law. Of particular note were developments regarding LegalZoom in North Carolina. When the state bar declared its use in the state to be illegal as unauthorized law practice, LegalZoom filed suit. After LegalZoom prevailed in a trial court decision, the state bar association entered into negotiations with the company. These negotiations resulted in a consent judgment that allowed LegalZoom to provide its services subject to certain conditions, such as requiring a North Carolina attorney to pass on the validity of the forms used.[38]

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[34] Rhode, "Policing Professional Monopoly," 9.

[35] More recently, the Antitrust Division of the U.S. Department of Justice warned, "While there is an appropriate role for certain qualification requirements to protect the public's interest in effective legal representation, unduly broad restrictions on the practice of law impose significant competitive costs on consumers and workers and impede innovation." Maggie Goodlander, Deputy Asst. Atty. General, Antitrust Division, U.S. Dep't of Justice, to North Carolina General Assembly, 14 February 2023, https://www.ncjfap.org/_files/ugd/8a3baf_dd75e7277d134fd4b5b632fdbe41f089.pdf.

[36] Rhode, "Policing Professional Monopoly," 10 n. 36.

[37] Julian Moradian, "A New Era of Legal Services: The Elimination of Unauthorized Practice of Law Rules to Accompany the Growth of Legal Software," Wm. & Mary Bus. L. Rev. 12, no. 1 (2020): 253, https://scholarship.law.wm.edu/wmblr/vol12/iss1/7; N.Y. Cnty. Lawyers' Ass'n v. Dacey, 234 N.E.2d 459,459, adopting N.Y. Cnty. Lawyers' Ass'n v. Dacey, 28 A.D. 2d 161, 174, 283 N.Y.S.2d 984, 996 (N.Y. App Div. 1967)(Stevens, J., dissenting).

[38] Julian Moradian, "New Era," 255. As a consent judgment in litigation, this agreement was not subjected to antitrust challenge.

According to a late-twentieth-century study, the principal way in which activities claimed to constitute unauthorized practice of law are challenged is through "low-visibility, largely informal action" by bar associations. "To facilitate informal compliance . . . bar associations may issue cautionary or cease and desist letters, and . . . may issue informal opinions in response to inquiries . . . ." They may threaten to make referrals to "state attorneys general or local district attorneys."[39]

These bar associations, while hoping thus to discourage competition from non-lawyers, may be reluctant to press the matter if they encounter resistance. "As one chairman [of an unauthorized practice committee] volunteered, his committee preferred not to file complaints that might result in adverse precedents, and thereby 'open the floodgates' to lay practice."[40]

In the United States, of the 50 states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands, 18 have voluntary bar associations with no official regulatory authority to define and enforce prohibitions on unauthorized practice of law in the jurisdiction. In 36 other jurisdictions, the bar associations are "integrated" ones to which all lawyers must belong in order to conduct business there, and these have varying degrees of authority to define and enforce such prohibitions. Generally, however, an integrated bar association is subject to the authority of the highest court of its jurisdiction, and resort may be had to that court to dispute an unfavorable determination by the bar association.[41]

Moreover, under U.S. Supreme Court precedent, a bar association's acts are subject to limitations based on federal antitrust law unless its anticompetitive regulations are immune from those limitations because they are actively supervised by the state's highest court or another entity possessing state sovereignty. "[I]n *Goldfarb* [*v. Virginia State Bar,* 421 U.S. 773 (1975)] . . . the [U.S. Supreme] Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had 'joined in what is essentially a private anticompetitive activity' for 'the benefit of its members.' 421 U.S., at 791, 792. This emphasis on the Bar's private interests explains why *Goldfarb* . . . considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity."[42]

With this background, a few conclusions seem apparent.

First, when a bar association representative claims that a parliamentarian's provision of particular advice based on procedural law constitutes the unauthorized practice of law, skepticism is warranted whether that necessarily represents a definitively correct interpretation of the jurisdiction's actual legal requirements.

Second, parliamentarians, just as much as groups of realtors and tax advisers, can push back in the courts and potentially in legislatures against unjustifiably broad interpretations of unauthorized practice of law.

Parliamentarians may lack the substantial financial resources and large membership base of other occupations that have been able, often successfully, to advocate for determinations that

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[39] Rhode, "Policing Professional Monopoly," 15-16, 23.

[40] The article notes, "A concrete example of that phenomenon is West Virginia, where the bar has had 'some success' in preventing the sale of do-it-yourself kits through cease-and-desist letters. Although there are no West Virginia cases on point, other state supreme courts have almost universally struck down restraints on kit distribution." Rhode, "Policing Professional Monopoly," 28.

[41] Summary derived from information in "State Bar Associations," Lawyer Legion, updated January 3, 2019, https://www.lawyerlegion.com/associations/state-bar.

[42] N.C. State Bd. Of Dental Exam'rs v. Fed. Trade Comm'n, 474 U.S. 494, 510 (2015).

relevant actions within the appropriate scope of their professions are not subject to penalty or prohibition as unauthorized practice of law. Nevertheless, associations of parliamentarians that pool their resources and mobilize their members should be able to undertake effective efforts to defang unwarrantedly extreme interpretations of unauthorized practice of law that severely constrain our ability adequately to provide core services to our clients.

The American College of Parliamentary Lawyers (ACPL), composed of credentialed parliamentarians from Canada and the United States who are also attorneys, has the opportunity to play a particularly important role in this regard. In 2015, the organization's then-vice-president, Travis Barrick, wrote, "If you are ever challenged regarding your parliamentary services, contact the American College of Parliamentary Lawyers (*www.parliamentarylawyers.com*). . . . We may be able to provide a written opinion on your behalf."[43]

If a bar association sends a threatening letter to a parliamentarian, a reasoned written response by ACPL or an attorney who is a member of it may be enough to induce the association to drop the matter.[44] If litigation is actually brought, a friend-of-the-court brief may have a positive impact. While it would require a greater investment of time and funds, in some circumstances a parliamentary association might even institute a lawsuit to seek a judicial clarification of the law, such as when there is a pattern or practice of bar association challenges to parliamentarians in a particular jurisdiction or if an entity with legal standing to enforce prohibitions on unauthorized practice of law issues a formal opinion whose content would limit appropriate parliamentary advice to clients about procedural law.

One annual routine by parliamentary associations at the provincial or state level that would be helpful to their members would be to engage an attorney to prepare a summary of that jurisdictions's statutes and court rulings on the unauthorized practice of law, evaluating their relevance to parliamentarians.

How ought individual parliamentarians deal with the need to inform their clients of applicable law when necessary to give accurate parliamentary advice? In the rare case that there may be a court ruling in the jurisdiction that clearly limits what parliamentarians can do in that respect, of course a parliamentarian must abide by it, pending possible litigation or legislation to secure its mitigation. Otherwise, however, parliamentarians who reasonably apply a standard like that enunciated in *Gardner v. Conway* along the lines recommended by this article will best responsibly serve their clients with very little probability of encountering legal difficulties, and with a strong basis for surmounting them in the unlikely case that they do.

[43] Barrick, "Parliamentarians and Unauthorized Practice," 11.
[44] See text accompanying note 40.

PARLIAMENTARIANS AND THE LAW:
When Parliamentarians Should and Should Not Advise Clients about the Application of Procedural Law

Thomas J. Balch, J.D.

Suppose a professional parliamentarian is advising the chair during a meeting of the board of directors of a small nonprofit corporation that has no regular legal counsel. With fourteen of the fifteen board members present, there are five votes for a main motion, three against, and six abstentions. The bylaws adopt a parliamentary authority but do not otherwise specify the vote required to adopt motions by the board. Under the parliamentary authority, the requirement for adoption is a majority of the votes cast, that is, a majority of the members present *and voting*.[19] However, the state not-for-profit code under which the organization is incorporated states that for a board of directors to take action requires the votes of a majority of the directors *present*. What ought the parliamentarian advise the chair concerning whether or not the main motion was adopted?

Of course, as parliamentary authorities acknowledge, applicable laws supersede conflicting provisions in the parliamentary authority.[20] Plainly, the parliamentarian could not properly advise the chair that the motion was adopted, since the statute applies to the parliamentarian as much as to the board, and were the parliamentarian to advise treating the motion as adopted, the parliamentarian would be advising violation of the law.

But may the parliamentarian advise the chair that the motion was defeated on the ground that this result is compelled by

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[19] See RONR (12th ed.) 44:1; AIPSC (2nd ed.) 5.1.

[20] RONR (12th ed.) 2:2; 23:6(c); AIPSC (2nd ed.) 1.9.1, 1.10, 4.2. Although some of its concepts may have applicability trans-nationally, this article focuses on unauthorized practice of law as construed in the United States of America. For an overview of the subject in Canada, see Lisa Trabucco, "Lawyers' Monopoly? Think Again: The Reality of Non-Lawyer Legal Service Provision in Canada," *Canadian Bar Review* 96, no. 3 (2018): 460-483, https://canlii.ca/t/2d93.

the applicable statute? Would doing so constitute unauthorized practice of law?

Parliamentarians sometimes fear that any effort to provide information about the application of a procedural[21] statute risks encroaching on the practice of law and conclude that when aware of a legal provision that conflicts with or supersedes provisions in an organization's governing documents or parliamentary authority, the most they can do is to advise clients of the law's existence and recommend consulting an attorney regarding its pertinence to them.

This conservative approach is congruent with a definition of the "practice of law" embodying what one law review article calls "the legal knowledge standard: Whatever requires the 'knowledge and the application of legal principles' constitutes the practice of law." This standard, as Deborah Rhode, the author of the law review, wrote, is "inclusive to the point of absurdity."[22] In the words of Quintin Johnstone in another law review article, "Without clarification, some of the general rules are too vague to have much meaning, and applying some of them literally could have highly undesirable consequences."[23]

When a parent teaches a child not to cross the street against the traffic light, the parent is advising the child about a requirement of traffic law. So is a driving instructor who teaches students what various traffic signs mean. A financial advisor who tells a client the difference between traditional individual retirement accounts and ROTH IRAs is applying the Internal Revenue Code, as is a tax return preparer who suggests a taxpayer is entitled to a particular deduction. Can one realistically imagine all or any of these actually being prosecuted for engaging in the unauthorized practice of law unless they hire attorneys to provide the information instead?

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[21] There is no doubt that parliamentarians may not advise clients on substantive law. Regarding the distinction, see text accompanying footnote 21.

[22] Deborah L. Rhode, "Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions," *Stanford Law Review* 34, no. 1 (1981): 81, https://doi.org/10.2307/1228512.

[23] Quintin Johnstone, "Unauthorized Practice of Law and the Power of State Courts: Difficult Problems and Their Resolution," *Willamette Law Review* 39, no. 3 (Summer 2003): 809.

A book co-authored by U.S. Supreme Court Justice Neil Gorsuch argues:

> [H]istory reveals that the definitions [of practice of law] states have adopted, usually at the behest of local bar associations, are often breathtakingly broad and opaque . . . . The fact is, nonlawyers already perform—and have long performed—many kinds of work traditionally and simultaneously performed by lawyers. They regularly negotiate with and argue cases before the Internal Revenue Service. They prepare patent applications and otherwise advocate on behalf of investors before the Patent and Trademark Office. And it is entirely unclear why exceptions should exist to help these sort of niche (and, some might say, financially capable) populations but not be expanded in ways more consciously aimed at serving larger numbers of lower- and middle-class clients.[24]

A law review article by Jan L. Jacobowitz and Peter R. Jarvis details the breadth of nonlawyer professionals who would routinely fall afoul of such a broad definition of the practice of law:

> [T]here has been a rise in the type and number of non-law firm businesses that touch upon or concern the law and on which a great many citizens can and do rely with reasonable confidence. Historically and most obviously recognized to be true for professionals such as insurance agents and accountants, the present list of these nonlawyers includes, but is by no means limited to, human relations consultants, payroll

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[24] Neil M. Gorsuch with Jane Nitze and David Feder, *A Republic If You Can Keep It*, (New York: Crown Forum, 2019), 255-57.

> management companies (with respect to wage and hour issues, for example), home remodeling contractors (who advise homeowners about what may or may not be consistent with local building codes), ordinary salespeople (who inform customers about what may or may not be covered under a warranty), and non-lawyer employees of a business (who negotiate or draft contracts for their employers or who subsequently advise their employers about the meaning of those contracts). Thus, just as in our personal lives, many legal issues arise during the course of business dealings that can be and are addressed by individuals who have not spent three years in law school and passed a bar exam.[25]

Of course, members of these various professions are not typically convicted of or enjoined from the unauthorized practice of law. "If a practice traditionally considered to be legal in nature is performed by non-lawyers and provides a public convenience perceived to outweigh potential risks, states commonly allow the practice to continue. They may define these practices as the 'limited practice of law' or the 'authorized practice of law,' or they may simply ignore the activity's legal nature, excluding it from the definition of 'practice of law' altogether."[26]

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[25] Jan L. Jacobowitz and Peter R. Jarvis, "Unauthorized Practice or Untenable Prohibitions: Refining and Redefining UPL," *St. Mary's Law Journal on Legal Malpractice and Ethics* 13, no. 2 (2023): 299-300, https://commons.stmarytx.edu/lmej/vol13/iss2/3 .

[26] Sande L. Buhai, "Act Like a Lawyer, Be Judged Like a Lawyer: The Standard of Care for the Unlicensed Practice of Law," *Utah Law Review* 2007 (2007), 96. To give one example, the Colorado Supreme Court has ruled, "Denying to the public the right to conduct real estate transactions in the manner in which they have been transacted for over half a century, with apparent satisfaction, and requiring all such transactions to be conducted through lawyers, would not be in the public interest; ... the advantages, if any, to be derived by such limitation are outweighed by the conveniences now enjoyed by the public in being permitted to choose whether their broker or their lawyer shall do the acts or render [legal]

Given this reality, I argue that for parliamentarians to avoid ever directly informing their clients about procedural law that applies to them, as in the example of the nonprofit code requiring a majority of those directors present (rather than of the votes cast) to take action, is both unnecessary and inappropriate. Doing so may sacrifice or compromise important parts of what parliamentarians do best, leaving many clients without affordable, accurate parliamentary advice. As attorney Travis Barrick points out, "most lawyers have zero knowledge of parliamentary procedure, and it would be embarrassing to prosecute a non-lawyer for doing something lawyers don't know how to do."[27]

To say that parliamentarians ought to be able to advise their clients about controlling provisions of procedural law *in some circumstances* without being liable for unauthorized practice of law is not to claim that their provision of advice about procedural law should *always* be permissible. The question is where appropriately to draw the line. It is important to recognize that this line-drawing may differ from jurisdiction to jurisdiction.[28]

At one extreme is the claim of some bar associations, articulated if rarely enforced, that *any* advice applying provisions of law to specific facts is the practice of law.

At the other extreme is the position taken by some who argue that all or most prohibitions on the unauthorized practice of law should be repealed as they constitute anticompetitive limits on the free market that are not justified by consumer protection.[29]

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services." Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 312 P.2d 998, 1007 (Colo. 1957), cited with approval, People v. Layton, 531 P.3d 34, 54n.130 (Colo. 2023) ("[D]irecting or acting on matters of general knowledge, even if knowledge of a rule of law, does not constitute the practice of law." *Id.* at 54.)

[27] Travis N. Barrick, "Parliamentarians and the Unauthorized Practice of Law," *National Parliamentarian* 77, no. 1 (Fall 2015): 10.

[28] See the last two paragraphs of this article.

[29] *See, e.g.,* George C. Leef, "Lawyer Fees Too High? The Case for Repealing Unauthorized Practice of Law Statutes, *Regulation* 20, no. 1 (Winter 1997): 33-40, https://www.cato.org/sites/cato.org/files/serials/files/regulation/1991/1/reg20n1c.html (1997).

As will be discussed later in this article, there are indeed strong grounds for asking, regarding bar associations' efforts to limit unauthorized practice of law, "where consumer protection ends and economic self-protection begins."[30] Nevertheless, there are legitimate grounds for concluding that sometimes, "Nonlawyers, lacking formal training in the law, will be unable to deal with or to recognize legal complexities when they arise, and clients' legal interests will be harmed by their incompetence."[31]

Accurately applying the controlling procedural law is not always as easy as looking up a statutory provision. That provision may have been the subject of litigation resulting in court decisions interpreting and applying it – and in rare cases, perhaps declaring it unconstitutional. For state statutes, until the state's highest court rules, interpretations can vary among intermediate appellate and lower courts. Even when an interpretation has been apparently definitively articulated by the state's highest court, that decision might later be overruled or "distinguished" in a later case. Interpretations of the same or similar statutory language can vary from state to state. Federal law or constitutional provisions may be involved and lead to decisions by federal district courts, courts of appeals, or even the U.S. Supreme Court. Sometimes an issue of procedural law may be unsettled in one state, and the question of what application is most plausible and defensible might require researching the various ways it has been ruled upon in different jurisdictions – rulings that, while not controlling in the state, may be persuasive to its courts. Moreover, some procedural law may not be based on statutory provisions at all, but rather on rulings by courts based on "common law" precedents.

In addition, there is the matter of what might be called "context." While most lawyers wind up concentrating their practice in certain specialties, their law school training – and the bar

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[30] Catherine J. Lanctot, "Scriveners in Cyberspace: Online Document Preparation and the Unauthorized Practice of Law," *Hofstra Law Review* 30, no. 1 (Spring 2002): 821.

[31] Turfler, "A Model Definition of the Practice of Law: If Not Now, When - An Alternative Approach to Defining the Practice of Law," Washington and Lee Law Review 61, no. 4 (Fall 2004), 1918.

examinations they must pass – require them to become familiar with basic principles and issues covering a wide scope of legal areas, from criminal to constitutional law, and from torts to property. Ideally, attorneys are trained in "issue-spotting" – that is, given a set of facts, in identifying legal issues that might be relevant even from outside their areas of specialty. While attorneys may not be up to date on statutory and case law regarding some of the issues "spotted" that are outside their usual areas of specialty, having identified them they can either research them or consult another attorney with particular experience that is relevant. In contrast, it is possible that a parliamentarian who is not a lawyer, if dealing with a complex procedural situation, may focus on a particular statutory provision or provisions while not recognizing the need to go beyond them by researching other potentially relevant provisions or cases.

As Jacobowitz and Jarvis suggest, "Decisions on what should be regarded as the unauthorized practice of law therefore requires [sic] a balanced approach which assesses factors including but not limited to: the legal complexity of the matter or matters in question; the ready availability of lawyers willing to handle such matters at a price that the recipients of those services can afford; the likelihood that nonlawyers will provide competent representation and assistance; respect for client choice; potential cost savings as a result of using nonlawyers; and potential effects on the legal system."[32] Soha Turfler notes, "[M]any critics suggest that the definition of the practice of law could encompass complex or novel issues and leave routine services outside the definition of the practice of law."[33]

A 2007 law review by Sande Buhai summarizes three contrasting approaches by courts in defining the practice of law. One is "whether the services involved are of the kind that lawyers traditionally provide. Under this approach . . . 'providing legal advice' [is] treated as the practice of law per se." Under the second, "functional," approach, "'reasonable protection . . . of those advised . . . requires that the persons giving such advice possess

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[32] Jacobowitz and Jarvis, "Refining and Redefining UPL," 311.

[33] Soha Turfler, "Model Definition," 1932.

legal skill and a knowledge of the law greater than that possessed by the average citizen'." A third approach focuses on the difficulty of the legal issues presented. Under it, "the practice of law is commenced when 'difficult or doubtful legal questions are involved . . . which, to safeguard the public, reasonably demand the application of a trained legal mind.'"[34]

This article has already pointed out the widely acknowledged vagueness and unworkability of the literal application of a standard under which "providing legal advice" is "treated as the practice of law per se." In contrast, a helpful standard was once provided by the Minnesota Supreme Court in *Gardner v. Conway*: "[W]henever, as incidental to another transaction or calling, a layman [that is, anyone who is not a licensed attorney], as part of his regular course of conduct, resolves legal questions for another--at the latter's request and for a consideration--by giving him advice or by taking action for and in his behalf, he is practicing law if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind. What is a difficult or doubtful question of law is not to be measured by the comprehension of a trained legal mind, but by the understanding thereof which is possessed by a reasonably intelligent layman who is reasonably familiar with similar transactions."[35] This standard might be described as embodying the third approach described by Buhai while also drawing on the second approach.

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[34] Buhai, "Act Like a Lawyer," 94-95. Preventing the unauthorized practice of law is defensible when, in the words of the South Carolina Supreme Court, "[R]egulation of the practice of law is not for the purpose of creating a monopoly in the legal profession, nor for its protection, but to assure the public adequate protection in the pursuit of justice, by preventing the intrusion of incompetent and unlearned persons in the practice of law."
Matter of Anonymous Applicant for Admission to South Carolina Bar, 875 S.E.2d 618, 623 (S.C. 2022)

[35] Gardner v. Conway, 48 N.W.2d 788, 796, 234 Minn. 468, 481 (Minn. 1951). More recently cited as controlling Minnesota law by In re Conservatorship of Riebel, 625 N.W.2d 480, 481 (Minn. 2001); State v. Milliman, 802 N.W.2d 776, 780 (Minn. App. 2011).

It can be likened to the "activity-centered" approach urged by Soha Turfler under which "when determining whether an activity should fit within the definition of the practice of law" the question is asked "is the risk of harm of this activity [to the client] severe enough to demand licensure?" In other words, the question should be whether "the service poses a severe risk of harm such that the activity should be restricted to licensed lawyers to minimize that harm."[36] It is when the legal questions involved are "difficult or doubtful" that the strongest case can be made that the danger of misinterpretation associated with a lack of in-depth legal knowledge and research concerning them creates sufficient risk for clients that advice regarding their analysis and application should be reserved to licensed attorneys.

How might the *Gardner v. Conway* standard responsibly be applied to parliamentarians advising their clients? To begin, those whose study and experience of parliamentary procedure is sufficient for them to hold themselves out as competent to advise clients for compensation should be capable of meeting the standard of one "who is reasonably familiar with similar transactions," that is, of the relevant procedures governing client meetings. Along with being familiar with an organization's governing documents and parliamentary authority, to provide competent assistance a parliamentarian must determine whether the organization is incorporated or otherwise subject to procedural laws, and if so, must carefully review those laws. Even with respect to any legal requirements about which the parliamentarian should arguably avoid directly giving advice, it is essential to be aware of pertinent provisions that might supersede or supplement the organization's rules so as to be able, at a minimum, to suggest its leaders consult an attorney concerning their impact.

Under the *Gardner v. Conway* standard, a parliamentarian should be able to inform clients of clearly applicable procedural law that is hard to misinterpret or dispute.[37] The example that

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[36] Soha Turfler, "Model Definition," 1955-56.

[37] This recommendation applies when a parliamentarian is serving an organization without a regular attorney, or at least without the organization attorney being present at a relevant meeting. When an attorney representing

began this article, a statutory provision requiring the votes of a majority of the directors present for a board to take action, easily falls within this category. Other examples likely include statutory provisions stating the number of members needed for a quorum, providing the number of days' notice required for meetings, or authorizing action which could be taken at a meeting to be adopted, as an alternative, by written consent of all the members.

On the other hand, "a reasonably intelligent [parliamentarian] who is reasonably familiar with similar transactions" ought to understand that the procedures for incorporating an organization or for obtaining tax-exempt status require the advice of an attorney.[38] Similarly, questions of substantive law, as opposed to procedural law, are outside the province of parliamentary procedure and parliamentarians ought not opine on them.[39] For example, if a main motion proposes modifications to a building owned by an organization, whether those modifications would comply with applicable zoning ordinances or ordinances requiring building permits are matters regarding which it would be advisable for the organization to consult an attorney before voting on the motion; a non-attorney

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the organization is present, the attorney and parliamentarian should agree on a division of labor. Presumably the attorney would advise on all questions of law, including procedural law of any sort, while the parliamentarian would advise on questions involving application of the parliamentary authority and any special rules of order. Depending on the particular circumstances, interpretation and application of the provisions in the organization's various governing documents might be agreed to be in the bailiwick of the parliamentarian, the attorney, or shared jointly.

[38] See RONR (12th ed.) 2:6; AIPSC (2nd ed.) 17.19, 17.28.

[39] RONR (12th ed.) 23:7(c) (emphasis added) recognizes points of order when "any action has been taken in violation of applicable *procedural* rules prescribed by federal, state, or local law." Similarly, ibid., 10:26(1) (emphasis added) provides that, as a question of parliamentary procedure, main motions are not in order which conflict with "*procedural* rules applicable to the organization or assembly . . . prescribed by federal, state, or local law . . . ." Under RONR a claim that a motion violates *substantive* law would not properly be a matter for a point of order. RONR thus avoids placing a parliamentarian in the position of being asked to give advice on whether a main motion conflicts with substantive laws.

parliamentarian should not attempt to advise whether the motion would violate such ordinances.

Beyond avoiding advice in such instances, what sorts of procedural laws ought parliamentarians recognize as involving "difficult or doubtful legal questions" that should be left to attorneys? One such area involves advising national and international unions concerning at least some aspects of their parliamentary procedure. 29 United States Code Section 481, which (in the USA) governs such labor organizations' terms of office and election procedures, has been heavily litigated, resulting in multiple court decisions interpreting and applying its provisions. Another set of organizations that are pervasively regulated by laws that give rise to frequent legal disputes are community organizations; in addition to the application of governing statutes, legal contracts known as Covenants, Conditions and Restrictions or other titles such as Declarations may contain provisions relating to meeting procedures.[40] According to Jim Slaughter, "Several lawsuits may be lurking behind any community association decision. One annual meeting I assisted had five lawyers attending in a formal capacity. . . ."[41] A third set consists of governmental bodies such as school and zoning boards and city and county councils whose procedures are in many cases dictated by statute or ordinance; in any case, almost invariably these entities will have legal counsel present at their meetings.[42]

More generally, whenever a governing statute or regulation is arguably ambiguous, or legal disputes about its meaning or applicability are known or anticipated to exist – especially when there is a prospect of litigation concerning their interpretation or application—the parliamentarian ought to inform the client of the need to consult an attorney in place of independently opining on them.

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[40] Jim Slaughter, "Statutes and Procedures of Community Associations," *National Parliamentarian* 66, no. 1 (First Quarter 2005): 9-14.

[41] James H. Slaughter, "Community Associations and the Parliamentarian," *National Parliamentarian* 61, no. 1 (First Quarter 2000): 28.

[42] See note 19.

In my view, professional parliamentarians, and organizations consisting of or representing them, should be prepared to advocate for and defend such a standard against overbroad claims that *any and all* advice applying procedural law to matters of parliamentary procedure requires consulting a licensed attorney. Can such a position prevail?

The history of efforts to define, prohibit, and enforce prohibitions on the unauthorized practice of law is instructive. "[P]rior to the twentieth century, a non-lawyer violated the unauthorized practice of law rules only by representing another individual in court."[43] Bar associations, which would become the most significant advocates for broader definition of what ought to be prohibited as the unauthorized practice of law, did not begin to form as permanent entities until roughly the last third of the nineteenth century. "Consistent with the theme of elevating the legal profession's reputation and limiting it to those who possessed the privilege to practice, some young bar associations began to turn their attention to the unauthorized practice of law at the turn of the century."[44] Initially, the focus was on those unlicensed individuals who either sought to represent clients in court or otherwise publicly held themselves out as attorneys-at-law.

By the second decade of the twentieth century, however, bar associations had begun to extend their concern to certain out-of-court activities by those who neither were nor claimed to be lawyers. They were particularly concerned by corporations providing services that, from their perspective, impinged on the exclusive rights of licensed attorneys to "practice law." As they saw it:

> Abstract and title-insurance companies
> were invading the field of real estate law, banks

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[43] Mathew Rotenberg, "Stifled Justice: The Unauthorized Practice of Law and Internet Legal Resources," *Minnesota Law Review* 97, no. 2 (December 2012): 713.

[44] Laurel A. Rigertas, "The Birth of the Movement to Prohibit the Unauthorized Practice of Law," *Quinnipiac Law Review (QLR)* 37, no. 1 (2018):111-12.

> and trust companies were handling the settlement of estates, insurance firms were beginning to indemnify policyholders against risks that formerly needed the services of lawyers, and there was an increasing tendency of many litigants to make out-of-court settlements instead of engaging in prolonged and expensive lawsuits.[45]

At the outset, at least one bar association recognized the difficulty of clearly defining what out-of-court activities constitute the "practice of law". In 1914, the Committee on Unlawful Practice of the Law of the New York County Lawyers' Association noted, "many decisions must be made before the definitions of what acts constitute the practice of law will furnish a complete understanding of this subject."[46] Nevertheless, by 1916, the committee was characterizing them broadly as "in general, all advice to clients, and all action taken for them in matters connected with the law."[47]

However, corporations did not take such assertions lying down. "[I]ndustries turned to the legislature to try to carve out exceptions. Title companies, trust companies, and collection agencies drafted legislation to try to amend statutory prohibitions on the practice of law."[48]

Although the American Bar Association (ABA) first addressed the matter of defining and working to prevent the unauthorized practice of law in 1919, its efforts took on greater intensity with the creation in the 1930s of first a special and then a standing "Committee on the Unauthorized Practice of Law."[49] It

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[45] Herman Kogan, *The First Century: The Chicago Bar Association 1874-1974* (Chicago: Rand McNally & Company, 1974), 88.

[46] Julius Henry Cohen, "Report of the Committee on Unlawful Practice of the Law," *in N.Y. County Lawyers' Association Year Book 1914* (New York: N.Y. County Lawyers' Association, 1914), 243.

[47] Cohen, "Report of the Committee on Unlawful Practice of the Law," in *N.Y. County Lawyers' Association Year Book 1916* (New York: N.Y. County Lawyers' Association, 1916), 180-84.

[48] Rigertas, "Birth of Movement," 148.

[49] Rigertas, "Birth of Movement," 157.

has been argued that "it is not mere historical coincidence" that bar associations aggressively challenged others encroaching on their very broad definition of the practice of law "during the Great Depression, at a time when lawyers, like other members of society, struggled against economic dislocation."[50]

Frustrated by the ability of rival entities to secure state legislative exceptions to the broad application of prohibitions on unauthorized law practice sought by the ABA, the association soon took the position that statutes "should not undertake to define the practice of law, for definitions undertaking this have been universally found to be self-limiting and to invite evasion. Whether or not a particular course of conduct constitutes the practice of law should be left to the courts for determination."[51] Perhaps the assumption was that judges, themselves lawyers, would be more sympathetic to a broad definition of unauthorized practice of law than legislators responsive to constituencies lobbying to narrow that definition.

Nonetheless, bar associations eventually found it in their interest to negotiate with organizations representing numerous other competing professions. These negotiations frequently resulted in agreed compromises upon the extent to which members of those professions could provide specified services that bar associations insisting on a broad definition would otherwise claim to be included in the unauthorized practice of law. Under these agreements, the bar associations would refrain from challenging provision of these services by the professionals represented by these associations; in return, the professional associations representing competing professionals would accept that other relevant services would be reserved to lawyers to provide. "Beginning in 1937, the ABA and various state and local bar

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[50] Lanctot, "Scriveners in Cyberspace," 813. According to Rigertas, "Birth of Movement," 112, "Their initiatives were steeped in rhetoric about increasing the professional status of the bar, but those initiatives focused more on erecting barriers to protect the professional elite."

[51] Frederick C. Hicks and Elliott R. Katz, *Unauthorized Practice of Law: A Handbook for Lawyers and Laymen*, (Baltimore: American Bar Association, 1934), 5-6.

associations entered into formal 'Statements of Principles' with various occupations, including accountants, architects, bankers, claims adjusters, collection agents, engineers, social workers, law book publishers, realtors, and insurance brokers."[52]

Decades later, these negotiated compromises came under antitrust scrutiny. In 1979, the U.S. Justice Department issued a public notification that it was investigating whether such agreements violated the Sherman Antitrust Act.[53] In response, the American Bar Association Board of Governors "authorized appropriate steps directed toward rescinding statements of principles with other professional organizations by joint consent."[54]

Meanwhile, considerable controversy and publicity had arisen in the 1960's over a book with the title "How to Avoid Probate!" The book included multiple forms its author claimed could be filled out by purchasers without the involvement of a lawyer, together with instructions on how to complete them. The New York County Lawyers' Association instituted a lawsuit contending the book constituted the unauthorized practice of law. After it obtained victories in lower courts, however, New York's highest court disagreed, holding that publication of a book of legal forms accompanied by instructions could not be deemed the unauthorized practice of law.[55]

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[52] Rhode, "Policing Professional Monopoly," 9.

[53] More recently, the Antitrust Division of the U.S. Department of Justice warned, "While there is an appropriate role for certain qualification requirements to protect the public's interest in effective legal representation, unduly broad restrictions on the practice of law impose significant competitive costs on consumers and workers and impede innovation." Maggie Goodlander, Deputy Asst. Atty. General, Antitrust Division, U.S. Dep't of Justice, to North Carolina General Assembly, 14 February 2023, https://www.ncjfap.org/_files/ugd/8a3baf_dd75e7277d134fd4b5b632fdbe41f089.pdf.

[54] Rhode, "Policing Professional Monopoly," 10 n. 36.

[55] Julian Moradian, "A New Era of Legal Services: The Elimination of Unauthorized Practice of Law Rules to Accompany the Growth of Legal Software," Wm. & Mary Bus. L. Rev. 12, no. 1 (2020): 253, https://scholarship.law.wm.edu/wmblr/vol12/iss1/7; N.Y. Cnty. Lawyers' Ass'n v. Dacey, 234 N.E.2d 459,459, adopting N.Y. Cnty. Lawyers' Ass'n v. Dacey, 28

In the twenty-first century, the ubiquity of personal computers and the widespread availability of the Internet lead to the development of software and services consisting of questionnaires, the answers to which were converted into legal documents. These were challenged as amounting to the unauthorized practice of law. Of particular note were developments regarding LegalZoom in North Carolina. When the state bar declared its use in the state to be illegal as unauthorized law practice, LegalZoom filed suit. After LegalZoom prevailed in a trial court decision, the state bar association entered into negotiations with the company. These negotiations resulted in a consent judgment that allowed LegalZoom to provide its services subject to certain conditions, such as requiring a North Carolina attorney to pass on the validity of the forms used.[56]

According to a late-twentieth-century study, the principal way in which activities claimed to constitute unauthorized practice of law are challenged is through "low-visibility, largely informal action" by bar associations. "To facilitate informal compliance . . . bar associations may issue cautionary or cease and desist letters, and . . . may issue informal opinions in response to inquiries . . . ." They may threaten to make referrals to "state attorneys general or local district attorneys."[57]

These bar associations, while hoping thus to discourage competition from non-lawyers, may be reluctant to press the matter if they encounter resistance. "As one chairman [of an unauthorized practice committee] volunteered, his committee preferred not to file complaints that might result in adverse precedents, and thereby 'open the floodgates' to lay practice."[58]

A.D. 2d 161, 174, 283 N.Y.S.2d 984, 996 (N.Y. App Div. 1967)(Stevens, J., dissenting).

[56] Julian Moradian, "New Era," 255. As a consent judgment in litigation, this agreement was not subjected to antitrust challenge.

[57] Rhode, "Policing Professional Monopoly," 15-16, 23.

[58] The article notes, "A concrete example of that phenomenon is West Virginia, where the bar has had 'some success' in preventing the sale of do-it-yourself kits through cease-and-desist letters. Although there are no West Virginia cases on point, other state supreme courts have almost universally struck down restraints on kit distribution." Rhode, "Policing Professional Monopoly," 28.

In the United States, of the 50 states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands, 18 have voluntary bar associations with no official regulatory authority to define and enforce prohibitions on unauthorized practice of law in the jurisdiction. In 36 other jurisdictions, the bar associations are "integrated" ones to which all lawyers must belong in order to conduct business there, and these have varying degrees of authority to define and enforce such prohibitions. Generally, however, an integrated bar association is subject to the authority of the highest court of its jurisdiction, and resort may be had to that court to dispute an unfavorable determination by the bar association.[59]

Moreover, under U.S. Supreme Court precedent, a bar association's acts are subject to limitations based on federal antitrust law unless its anticompetitive regulations are immune from those limitations because they are actively supervised by the state's highest court or another entity possessing state sovereignty. "[I]n *Goldfarb* [*v. Virginia State Bar,* 421 U.S. 773 (1975)] . . . the [U.S. Supreme] Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had 'joined in what is essentially a private anticompetitive activity' for 'the benefit of its members.' 421 U.S., at 791, 792. This emphasis on the Bar's private interests explains why *Goldfarb* . . . considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity."[60]

With this background, a few conclusions seem apparent.

First, when a bar association representative claims that a parliamentarian's provision of particular advice based on procedural law constitutes the unauthorized practice of law, skepticism is warranted whether that necessarily represents a

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[59] Summary derived from information in "State Bar Associations," Lawyer Legion, updated January 3, 2019, https://www.lawyerlegion.com/associations/state-bar.

[60] N.C. State Bd. Of Dental Exam'rs v. Fed. Trade Comm'n, 474 U.S. 494, 510 (2015).

definitively correct interpretation of the jurisdiction's actual legal requirements.

Second, parliamentarians, just as much as groups of realtors and tax advisers, can push back in the courts and potentially in legislatures against unjustifiably broad interpretations of unauthorized practice of law.

Parliamentarians may lack the substantial financial resources and large membership base of other occupations that have been able, often successfully, to advocate for determinations that relevant actions within the appropriate scope of their professions are not subject to penalty or prohibition as unauthorized practice of law. Nevertheless, associations of parliamentarians that pool their resources and mobilize their members should be able to undertake effective efforts to defang unwarrantedly extreme interpretations of unauthorized practice of law that severely constrain our ability adequately to provide core services to our clients.

The American College of Parliamentary Lawyers (ACPL), composed of credentialed parliamentarians from Canada and the United States who are also attorneys, has the opportunity to play a particularly important role in this regard. In 2015, the organization's then-vice-president, Travis Barrick, wrote, "If you are ever challenged regarding your parliamentary services, contact the American College of Parliamentary Lawyers (*www.parliamentarylawyers.com*). . . . We may be able to provide a written opinion on your behalf."[61]

If a bar association sends a threatening letter to a parliamentarian, a reasoned written response by ACPL or an attorney who is a member of it may be enough to induce the association to drop the matter.[62] If litigation is actually brought, a friend-of-the-court brief may have a positive impact. While it would require a greater investment of time and funds, in some circumstances a parliamentary association might even institute a lawsuit to seek a judicial clarification of the law, such as when there is a pattern or practice of bar association challenges to

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[61] Barrick, "Parliamentarians and Unauthorized Practice," 11.

[62] See text accompanying note 40.

parliamentarians in a particular jurisdiction or if an entity with legal standing to enforce prohibitions on unauthorized practice of law issues a formal opinion whose content would limit appropriate parliamentary advice to clients about procedural law.

One annual routine by parliamentary associations at the provincial or state level that would be helpful to their members would be to engage an attorney to prepare a summary of that jurisdictions's statutes and court rulings on the unauthorized practice of law, evaluating their relevance to parliamentarians.

How ought individual parliamentarians deal with the need to inform their clients of applicable law when necessary to give accurate parliamentary advice? In the rare case that there may be a court ruling in the jurisdiction that clearly limits what parliamentarians can do in that respect, of course a parliamentarian must abide by it, pending possible litigation or legislation to secure its mitigation. Otherwise, however, parliamentarians who reasonably apply a standard like that enunciated in *Gardner v. Conway* along the lines recommended by this article will best responsibly serve their clients with very little probability of encountering legal difficulties, and with a strong basis for surmounting them in the unlikely case that they do.

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