

UNAUTHORIZED PRACTICE OF LAW

MANUAL FOR PROSECUTORS



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PREFACE TO THE PUBLIC EDITION

Access to an attorney to protect your rights is important in the American legal system. Unfortunately, some con artists undermine this vital key to justice by falsely claiming they are entitled to practice law. They often take large payments under false pretenses and harm the legal rights of their victims.

Such unauthorized practice of law (UPL) is a serious problem in Southern California. The crime hits immigrant communities especially hard as new arrivals to the United States seek to clarify their immigration status. Anyone, however, can be a victim. UPL occurs in all legal fields, including family law, personal injury, bankruptcy, and criminal law.

As District Attorney, I am committed to combating this form of fraud. Working with the State Bar of California and various bar associations, the District Attorney's Office has launched a broad-scale effort to identify and prosecute these crimes. The District Attorney's Office has initiated numerous investigations and prosecutions against these unscrupulous con artists and is leading statewide efforts to enhance laws dealing with UPL.

I gratefully acknowledge the work of the many other agencies and community bar associations which are active partners in addressing the problem of unauthorized practice of law. This version of the UPL manual has been prepared to assist those other offices and community groups which are active in this effort. Working together, we can protect the public from these fraudulent practices and promote the American ideal of "justice for all."

Steve Cooley
District Attorney

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Chapter II

THE PROBLEM OF UNAUTHORIZED PRACTICE OF LAW IN CALIFORNIA

Introduction

The unauthorized practice of law is not a new phenomenon. California's modern efforts to regulate law practice and discourage unqualified practitioners trace back to 1927 and before. But the UPL problem of today has taken on troubling new dimensions, as both Los Angeles and California as a whole struggle with the challenges and opportunities of unprecedented cultural diversity and social change. Disturbing new forms of UPL-related fraud are now commonplace, and the volume and intensity of complaints increase steadily. From unscrupulous "consultants" who prey on newcomers to America with promises of "special influence" at INS, to insurance salespersons masquerading as experienced estate planners, to disbarred attorneys, and those without any legal training at all, earning six figure incomes for unqualified work—the integrity of our system of access to justice is increasingly at risk.

It is of vital concern to consumers, honest law practitioners, and the justice system as a whole that we identify these problems and implement new and better strategies to protect the public and our institutions.

A. Historical Background of the UPL Issue

1. Regulating the Practice of Law in California

Although California has governed law practice since its statehood, the modern era of attorney licensure and regulation began in 1927, with the passage of the State Bar Act,

California's first comprehensive effort to regulate the legal profession. The State Bar Act created the modern State Bar of California, with the California Supreme Court as the principal regulatory authority, and promulgated statutory standards for the practice of law, including the requirement of membership in the State Bar as the prerequisite for law practice in California. Business and Professions Code section 6125 codifies that requirement: "No person shall practice law in California unless the person is an active member of the State Bar." (§6125.)

Regulation of attorneys and control over the practice of law are matters of great statewide importance. "*The profession and practice of the law . . . is . . . a matter of public interest and concern, not only from the viewpoint of its relation to the administration of civil and criminal law, but also from that of the contacts of its membership with the constituent membership of society at large, whose interest is to be safeguarded . . . the membership, character and conduct of those entering in and engaging in the legal profession have long been regarded as the proper subject of legislative regulation and control.*" *State Bar of California v. Superior Court* (1929) 207 Cal.323,331 (emphasis added); *see also In re McKenna* (1940) 16 Cal.2d 610.

The State Bar Act represented a commitment to elevating and preserving the status of law practice as a learned profession imbued with special public responsibilities. The California Supreme Court has described this public policy: "The right to practice law not only presupposes in its possessor integrity, legal standing and attainment, but also *the exercise of a special privilege, highly personal and partaking of the nature of a public trust.* It is manifest that the powers and privileges derived from it may not with propriety be delegated to or exercised by a nonlicensed person." *McGregor v. State Bar* (1944) 24 Cal.2d 283, 288 (emphasis added), citing *Townsend v. State Bar* (1930) 210 Cal.362, 364. UPL enforcement thus serves the policies of protecting potential clients and the integrity of the justice system.

2. Defining the Practice of Law: The Continuing Issue

What constitutes the "practice of law" in California is an issue which is necessarily central to any discussion of enforcement of UPL laws. Neither the Business and Professions Code, nor any other California statute, comprehensively defines the practice of law for all purposes. Over the years this has raised questions about the precise parameters of the legal profession in California. But California's Supreme Court and courts of appeals have knowingly crafted a broad definition of law practice suited to grow with the profession.

The Supreme Court has described the evolution of this definition:

As early as 1922, before the passage of the modern State Bar Act, the Supreme Court adopted the definition of "practice of law" used in an Indiana

case: ‘[A]s the term is generally understood, the practice of the law is the doing and performing services in a court of justice in any matter depending therein through its various stages and in conformity with the adopted rules of procedure. But in a larger sense it includes *legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be depending in a court of law.*’ (*People v. Merchants Protective Corp.* (1922) 189 Cal. 531,535, quoting *Eley v. Miller* (1893) 7 Ind. App. 529 [citations omitted].) ‘The legislature adopted the State Bar Act in 1927 and used the term ‘practice law’ without defining it. The conclusion is obvious and inescapable that in doing so it accepted both the definition already judicially supplied for the term and the declaration of the Supreme Court [in *Merchants*] that it had a sufficiently definite meaning to need no further definition. *The definition quoted above from People v. Merchants Protective Corp. has been approved and accepted in subsequent California decisions [citations], and must be regarded as definitely establishing, for the jurisprudence of this state, the meaning of the term “practice law.”*’

Baron v. City of Los Angeles (1970) 2 Cal.3d 535, 542-543 (emphasis added), quoting *People v. Ring* (1937) 26 Cal.App.2d Supp. 768, 772; see *Birbower, Montalban, Condo & Frank, P.C. v. Superior Court* (1998) 17 Cal.4th 119, 127-128.

Thus California today defines law practice as providing “*legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation.*” *Birbower, Montalban, Condo & Frank, P.C. v Superior Court.*, *supra*, at 128. Providing legal advice or service is a violation of the State Bar Act if done by an unlicensed person, even if the advice or service does not relate to any matter pending before a court. (*Mickel v. Murphy* (1957) 147 Cal.App.2d 718, 721.)

This definition of law practice is broad and non-specific, but that policy choice is one which the California courts have made consciously. The California court of appeals has summarized the rationale for this broad approach as follows:

[A]ny definition of legal practice is, given the complexity and variability of the subject, incapable of universal application and can provide only a general guide to whether a particular act or activity is the practice of law. To restrict or limit its applicability to situations in the interest of specificity would also limit its applicability to situations in which the public requires protection.

People v. Landlords Professional Services (1989) 215 Cal.App.3d 1599, 1609.

In sum, California uses a broad standard for defining law practice to maximize its ability to protect its citizens from wrongs arising from the practice – or counterfeited practice – of law.

3. The UPL Statute Today: Significant Changes

The California statutes governing the unauthorized practice of law have changed significantly in the past two decades. Prior to 1988, the unauthorized practice of law – whether by a layperson or an attorney having lost the privilege of practice – was prosecutable exclusively as a misdemeanor. That year, the Legislature passed SB 1498 (Presley) in response to a growing problem of disbarred and suspended attorneys who continued to use their positions of trust and confidence to prey upon the public long after they had forfeited their right to practice. (Cal.Stats.1988, ch.1159.) SB 1498 added to section 6126 a new provision providing for alternate felony/misdemeanor prosecution of former attorneys engaged in UPL. All other UPL criminal violations continue as misdemeanors.

Even after the 1988 amendments, section 6126 was troubled by several problems. As the statute was then worded, felony prosecution of a disbarred or suspended lawyer was not possible if the former attorney did not affirmatively “advertise or hold himself out” as entitled to practice law, even if the disbarred attorney continued to practice law actively. Non-lawyers who engaged in the practice of law were subject only to the statute’s misdemeanor provision, which provided only the default six-month jail term of Penal Code section 19, and the numerous repeat offenders often faced little or no jail time as a practical matter. In addition, the statute was unclear as to the relevant time frame of licensure status for UPL purposes, raising the possibility that UPL activities could be unprosecutable if the defendant was licensed before or after the acts of unlicensed practice.

In response to these concerns, Senate Bill 1459 (Romero), supported by a coalition including the State Bar, the Los Angeles District Attorney’s Office, the California District Attorneys Association, the state Attorney General, and numerous community and bar organizations, was enacted by the state Legislature, effective January 1, 2003. (Cal.Stats.2002, ch 394.)

Senate Bill 1459 made important improvements to Business and Professions Code §6126. The bill:

- Doubled the maximum jail sentence for a misdemeanor UPL conviction of a non-attorney from six months to one year (§6126(a));
- Provided for a required county jail term of 90 days to one year for a second or subsequent UPL conviction, unless the interests of justice demand otherwise; and required that a court which deviates from this sentence must state its reasons on the record (§6126(b));
- Clarified that a person who is not a member of the California Bar, but is otherwise authorized to practice law in this state pursuant to court rule or statute (e.g., an out-of-state attorney appearing *pro hac vice*) is not engaged in the unauthorized practice of law (§6126(a));
- Clarified that whether an action constitutes UPL depends upon the suspect's status when the disputed legal activity occurred, not his or her status before or after that time (§6126(a)); and
- Eliminated a statutory loophole, thus permitting felony prosecution of disbarred or suspended attorneys engaging in UPL who continue to practice but arguably do not “advertise or hold themselves” out as entitled to practice law (either by disclosing to clients their changed licensure status or by remaining silent on the matter with continuing clients) (§6126(b)).

Section 6126, as amended effective Jan. 1, 2003, now provides as follows:

§6126. Unlawful practice or advertising as crime

(a) Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, or otherwise authorized pursuant to statute or court rule to practice law in this State at the time of doing so, is guilty of a misdemeanor punishable by to one year in a county jail or by a fine of up to one thousand dollars (\$1,000), or by both that fine and imprisonment. Upon a second or subsequent conviction, the person shall be confined in a county jail for not less than 90 days, except in an unusual case where the interests of justice would be served by imposition of a lesser sentence of less than 90 days for a second or subsequent conviction under this subdivision, the court shall state the reasons for its sentencing choice on the record.

(b) Any person who has been involuntarily enrolled as an inactive member of the

State Bar, or has been suspended from membership from the State Bar, or has been disbarred, or has resigned from the State Bar with charges pending, and thereafter practices or attempts to practice law, advertises or holds himself or herself out as practicing or otherwise entitled to practice law, is guilty of a crime punishable by imprisonment in the state prison or county jail. However, any person who has been involuntarily enrolled as an inactive member of the State Bar pursuant to paragraph (1) of subdivision (e) of Section 6007 and who knowingly thereafter practices or attempts to practice law, or advertises or holds himself or herself out as practicing or otherwise entitled to practice law, is guilty of a crime punishable by imprisonment in the state prison or county jail.

(c) The willful failure of a member of the State Bar, or one who has resigned or been disbarred, to comply with an order of the Supreme Court to comply with Rule 955, constitutes a crime punishable by imprisonment in the state prison or county jail.

(d) The penalties provided in this section are cumulative to each other and to any other remedies or penalties provided by law.

B. The Unauthorized Law Practice Problem in California Today

1. The Challenge of Measuring the UPL Problem

Prosecutors' offices, consumer affairs agencies, and community bar associations report a growing volume of complaints of consumer fraud and abuse resulting from the unauthorized practice of law in such disparate fields as immigration law, bankruptcy, estate planning, landlord/tenant disputes, and criminal law. But assessing the rising tide of UPL complaints is a difficult task, made even more problematical by the fragmentary nature of available statistics.

This difficulty of assessment is common to all forms of fraud. In measuring the full scope of the UPL problem, and based on the universal experience of federal and state consumer protection officials, our only certainty is that the problem is large and growing—and appears to be under-reported even more chronically than other forms of fraud complaints.

There are a number of reasons for the under-reporting of UPL-related matters. As with other forms of fraud, UPL fraud victims are often unaware they have been victimized, at least in the near term. It is usually not until long after they have parted with their money that victims

realize that the “immigration assistance” or bankruptcy stays or unlawful detainer papers they have bought dearly will not yield the results that were promised. Often, these victims are not sophisticated about the legal process and do not realize that the fault was that of the UPL suspect, and not their own. Also, UPL victims, like other fraud victims, are often ashamed or embarrassed about “falling for” illegal schemes (whether this embarrassment is justified or not), and as a result they are frequently reluctant to come forward to authorities.

However, unlike many other fraud victims, UPL victims are often recently arrived or undocumented immigrants who are highly unwilling to identify themselves to law enforcement agencies. Even those who are here lawfully often face substantial language barriers in attempting to explain their victimization to authorities. Based on experiences with other governments, these victims are often distrustful of the government and the legal system—a problem exacerbated by the very experiences they should complain of.

Many users of marginal or unauthorized “legal” services are poor or modestly educated. These victims tend to be unaware of proper channels for crime complaints, and often cannot devote the time and resources needed to pursue these matters.

Experienced consumer fraud prosecutors estimate that the ratio of actual violations to formal complaints filed with authorities in fraud cases ranges from 10-1 to 50-1, depending on the industry, the dollar value of harm, and the nature of the victim class. Poor and uneducated victims with uncertain immigration status, for example, would certainly be at the far end of this spectrum. Each written complaint from this source probably represents fifty or more violations.

2. Assessing the Scope of the Problem

State Bar of California complaint data provide at least a partial picture of the extent of this problem and the types of UPL activities taking place. The bulk of State Bar complaints concern the conduct of active members of the Bar. The State Bar also receives complaints against non-lawyers for unauthorized practice of law, but this is not a basic function of the State Bar disciplinary system—these complaints are not solicited and often cannot be investigated by the State Bar staff. Thus State Bar UPL complaints are necessarily only a fragment of the UPL universe.

Even given this fragmentary nature, the pattern of UPL complaints received by the State Bar is revealing. Table 1 indicates the State Bar received 210 complaints involving non-attorney

UPL in 2001, and 25% more such complaints (262) just two years later.

The most recent data from 2002-2003 indicate that a minimum of 250+ non-attorney UPL complaints per year are received by the State Bar intake center, notwithstanding that investigation of these complaints is not part of the core mission of the State Bar disciplinary system. Using a highly conservative 10-1 violations-to-complaints ratio, these data suggest thousands of non-attorney UPL violations occur each year.

Table 1. Non-Attorney UPL Complaints Received by State Bar (2001-2003).

<u>Subject Area</u>	<u>2001</u> ¹	<u>2002</u>	<u>2003</u>
Immigration	–	83	109
General Civil	–	36	37
Family Law	–	9	8
Criminal Law	–	13	4
Personal Injury	–	8	13
Identity Theft	–	12	11
Bankruptcy	–	3	5
Collections	–	7	17
Probate	–	21	19
Other/Unidentified	–	<u>52</u>	<u>39</u>
TOTALS	210	244	262

State Bar complaints against disbarred/resigned and suspended attorneys indicate a similar pattern. Table 2 shows the State Bar received 215 complaints of UPL against former attorneys in 2001, but an average of 339 complaints in 2002 and 2003 (a 57% increase over 2001). Clients using apparently licensed attorneys are a class of consumers more likely to complain formally to the State Bar. However, these recent averages suggest thousands of actual violations in recent years, using minimum consumer fraud projection ratios.

¹ State Bar data by complaint category is only available for 2002 and 2003.

Table 2. Former Attorney UPL Complaints to State Bar (2001-2003).

<u>Complaint Subject</u>	<u>2001</u>	<u>2002</u>	<u>2003</u>
Disbarred/Resigned Attorneys	14	36	41
Suspended Attorneys	<u>201</u>	<u>355</u>	<u>246</u>
TOTALS	215	391	287

The pattern from existing consumer complaint data is fully supported by the continuing experiences reported in recent years by the community bar associations of Southern California, including the Mexican American Bar Association, the Southern California Chinese Lawyers Association, the Korean American Bar Association, the Asian Pacific American Legal Center, Public Counsel, and the Bet Tzedek Law Center. These organizations have reported to this Office that consumer complaints of UPL abuse and fraud have increased alarmingly in the communities these groups represent.

In sum, complaint statistics and reports from a wide spectrum of community groups together indicate a clear pattern: the unauthorized practice of law is a serious and growing problem in California.

2. Continuing and New Patterns of UPL Activities

Table 1 (above) illustrates the range of unauthorized law practice activities now occurring in California. The pattern of UPL problems consists of both “traditional” forms of UPL and new variations reaching into additional areas of legal service.

The **traditional forms of UPL** continue to generate a significant portion of consumer complaints. The second highest total of specific State Bar complaints (more than of 20% of all complaints) consists of UPL allegations in the general civil area of practice, and many complaints fall into the unspecified/general practice category. Consumer organizations and prosecutors continue to field complaints of paralegals posing as attorneys and performing general functions in civil law practice (*see, e.g.*, UPL complaint in *People v. Hylland* in chapter VII), as well as complaints of resigned attorneys simply continuing their previous general law practices (*see, e.g.*, UPL complaint in *People v. Schultz* in chapter VII).

However, the complaint information also indicates that UPL fraud and abuse is occurring with greater frequency in specialty areas of law practice reflecting the legal issues facing our community in the 21st century. Chapter V (“Special Types of UPL Matters”) provides details on

these new and emerging aspects of the UPL problem, including:

UPL and immigration fraud. As Los Angeles has become the nation's immigration hub, the demand for legal services to assist new arrivals has made immigration UPL fraud the top source of non-attorney UPL complaints to the State Bar (at 31% of the 2002-2003 total). The wave of immigration fraud matters led this Office to coordinate the Los Angeles Immigration Fraud Task Force, a working group of more than 20 law enforcement agencies and community organizations, and that Task Force has successfully prosecuted more than 50 felony and misdemeanor matters in this field since 1998.

Other new forms of UPL now occur with frequency in such fields of practice as:

- **Estate planning** and living trust counseling (*see, e.g., People v. Fremont Life Ins. Co.*, (2002) 104 Cal. App. 4th 508);
- **Bankruptcy counseling** and petition preparation (*see, e.g., In re Anderson* (1987) 79 B.R. 482; *In re Kaitangian* (1998) 218 B.R. 102; *In re Boettcher* (2001) 262 B.R. 94);
- **Landlord-tenant and housing issues** (*see, e.g., People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599); and
- **Identify theft** and personal privacy (*see People v. Morrison* discussion in chapter V).

(*See generally* chapter V.)

Conclusion

All relevant indicators confirm there has been a troubling increase in both the number and the types of unscrupulous UPL-related practices victimizing Californians just when they are most vulnerable—when they need skilled professional assistance to protect their rights in an increasingly complex legal system.

It is the conclusion of this Office that the appropriate response is a comprehensive and consistent effort to detect, punish, and prevent the unauthorized practice of law and related fraud and abuse, as these practices significantly harm consumers, honest competitors, and our system of justice.

Chapter IV

**STATUTES APPLICABLE
TO UNAUTHORIZED PRACTICE
OF LAW**

Chapter Outline

Introduction

A. Business and Professions Code section 6125 et seq.: Definition
of UPL and Elements of the Crime

1. UPL Statutory Scheme

2. Definition of the Practice of Law

3. Elements of the Offense

B. Other Statutory Alternatives for Prosecuting UPL.

1. Grand Theft by False Pretenses (Pen. Code § 484/487)

2. Illegal Practice of Business (Bus. & Prof. Code § 16240)

3. Immigration Consultants Act (Bus. & Prof. Code § 22400 et seq.)

4. False or Misleading Statements in an Immigration Matter
(Penal Code § 653.55)

5. False Advertising (Bus. & Prof. Code § 17500)

6. Unfair Competition (Bus. & Prof. Code § 17200 et seq.)

7. State Bar Ethical Standards and Related Rules and Statutes

Introduction

Acts constituting the unauthorized practice of law may violate many different California statutes and ethics regulations. In assessing potential charges, the prosecutor should consider *all* alternatives, including criminal sanctions in the Business and Professions and Penal Codes, civil remedies in the Business and Professions Code and elsewhere, and potential referral for violations of State Bar ethical standards. UPL cases need not be complex, and often the basic

UPL misdemeanor charge is all that is appropriate. However, sound charging decisions call for consideration of all relevant alternatives.

In considering these alternative charges, the prosecutor should consult as needed with the special units in the District Attorney's Office which have relevant expertise:

- **Justice System Integrity Division** (213-974-3888) – Felony charges against disbarred or resigned attorneys who continue to practice, or for attorney misconduct more generally;
- **Consumer Protection Division** (213-580-3273) – Cases involving unfair and deceptive business practices, false advertising, and for information or assistance with civil enforcement tools;
- **Major Fraud Division** (213-580-3200) – Cases involving complex and large-scale fraud offenses.

These divisions stand ready to assist in case evaluation and application of the statutes referenced in this chapter.

A note of caution is appropriate with regard to the broad concept of “practice of law” upon which the crime of UPL is dependent. Although this chapter summarizes the extensive case law guidance on this term, there is no state statute which comprehensively defines the “practice of law.” Most cases will involve clear facts of law practice, but prosecutors should be alert for issues arising in this regard.

A. Business and Professions Code section 6125 et seq.: Definition of UPL and Elements of the Crime

1. UPL Statutory Scheme

The unauthorized practice of law is governed by Business and Professions Code sections 6125-6133. (All following references in this section are to the Business and Professions Code, unless otherwise specified.) The California Legislature enacted these provisions originally in 1927 as part of the State Bar Act which comprehensively regulated the practice of law in California. These provisions require licensure to practice law; punish unauthorized practice of law and related practices; and provide a wide range of potential civil remedies ancillary to an enforcement case.

a. Licensure Required

Section 6125 establishes the basic requirement of licensure to practice law: “No person shall practice law in California unless the person is an active member of the State Bar.” (§6125.)

The California requirement of licensure to practice law is a valid exercise of the state’s police power and serves the legitimate state interest of assuring the competency of those performing this service. (*J.W. v. Superior Court* (1993) 17 Cal.App.4th 958.). The licensure requirement does not violate First Amendment free speech rights (*Howard v. Superior Court* (1975) 52 Cal.App.3d 722), and has survived Equal Protection challenge (*People v. Sipper* (1943) 61 Cal.App.2d Supp. 844).

b. Unauthorized Practice or Attempted Practice Prohibited

Section 6126 is the basic charging statute for most UPL crimes. Section 6126(a) provides, in relevant part:

Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, or otherwise authorized . . . to practice law in this state at the time of doing so, is guilty of a misdemeanor . . . (§6126(a).)

Misdemeanor violation of section 6126 is punishable by up to one year in county jail or a fine of up to \$1000, or both. However, in a new provision sponsored by the State Bar and this Office, upon a second or subsequent conviction, the defendant “shall be confined in a county jail for not less than 90 days, except in an usual case where the interests of justice would be served” by a lesser sentence. If the court imposes the lesser sentence, it must state its reasons on the record. (§6126(a).)

A felony charge is available for any person who has been suspended from membership from the State Bar, or has been disbarred, or has resigned from the State Bar with charges pending, and thereafter practices or attempts to practice law , or advertises or holds himself or herself out as entitled to practice law. (*See* alternate felony/misdemeanor provision of § 6126(b).)

c. Other Sanctions for UPL-Related Offenses

A felony may also be charged in a case of a willful failure of a State Bar member to comply with a Supreme Court order under Rule 955 regarding return of documents and legal fees, notice to clients and opposing counsel, and other matters. (§6126(c).) And contempt of court sanctions are available where a person assumes to be an attorney without authority, or advertises or holds himself or herself out as entitled to practice law. (§6127.) All penalties under section 6126 are cumulative to each other and any other remedies provided by law. (§6126(d).)

d. Other Remedies for UPL Violations

In an important new development in UPL enforcement, legislation in 2001 (Stats.2001, c.304 (SB 1194)) added a new section 6126.5, which provides prosecutors a wide range of additional remedies and penalties available “in any enforcement action brought in the name of the people of the State of California by the Attorney General, a district attorney, or a city attorney, acting as a public prosecutor.” In UPL cases where victims purchased services or goods, or were otherwise harmed, the court is empowered to award as additional relief in the enforcement action:

- (1) Actual damages.
- (2) Restitution of all amounts paid.
- (3) The amount of penalties and tax liabilities incurred in connection with the sale or transfer of assets to pay for any goods, services, or property.
- (4) Reasonable attorney's fees and costs expended to rectify errors made in the unlawful practice of law.
- (5) Prejudgment interest at the legal rate from the date of loss to the date of judgment.
- (6) Appropriate equitable relief, including the rescission of sales made in connection with a violation of law. (§6126.5(a).)

The court is to award this relief directly to victims, or if direct restitution is impracticable, the court may distribute this relief as it chooses “pursuant to its equitable powers.” (§6126.5(b).)

Significantly, prosecutors may also recover “reasonable attorney's fees and costs and, in the court's discretion, exemplary damages as provided in Section 3294 of the Civil Code” (the provision governing such damages in California litigation). (§6126.5(c).)

Prosecutors should now actively consider these alternative remedies in UPL cases, in addition to traditional criminal fines and imprisonment. And these new remedies are expressly cumulative of each other and all other remedies and penalties provided by law. (§6126.5(d).)

2. Definition of the Practice of Law

a. Case Law Definition of “Practice Law”

Successful UPL prosecution under section 6126 requires that the prosecutor prove the defendant sought to “*practice law*,” or advertised or held himself or herself out as entitled to practice law. (§6126(a).) Neither the Business and Professions Code, nor any other California statute, comprehensively defines the practice of law.

However, the California Supreme Court and courts of appeal have developed a definition of law practice within the meaning of the State Bar Act, and the Supreme Court has concluded that this case law definition serves the purpose of “. . . definitively establishing, for the jurisprudence of this state, the meaning of the term ‘practice law’.” (*Birbower, Montalban, Condo & Frank, P.C. v. Superior Court* (1998) 17 Cal.4th 119, 127-128.)

The Supreme Court has determined that the term “practice law” as used in sections 6125 and 6126 means:

. . . the doing and performing services in a court of justice in any matter depending therein throughout the various stages and in conformity with the adopted rules of procedure. It includes *legal advice and counsel and the preparation of legal instruments and contracts by which the legal rights are secured* although such matter may or may not be depending in a court.

People v. Merchants Protective Corp. (1922) 189 Cal. 543, 535 (emphasis added), cited with approval in *Birbower, Montalban, Condo & Frank, P.C. v. Superior Court* (1998) 17 Cal.4th 119, 127-128. Law practice encompasses “legal advice and legal instrument and contract preparation, whether or not these subjects were rendered in the course of litigation” (*Birbower, Montalban, Condo & Frank, P.C., supra*, at 128), and the giving of legal advice on a matter not pending before a court is nonetheless a violation of section 6125 and 6126. (*Mickel v. Murphy* (1957) 147 Cal.App.2d 718, 721.)

Thus the California Supreme Court's functional definition of "law practice," as developed in *Birbower* and *Merchants Protective Corp.*, *supra*, can be summarized as **the giving of legal advice and counsel and the preparation of legal instruments affecting the client's legal rights**. This definition, "does not encompass all lawyers' professional activities which could reasonably be included . . . however, the definition does delineate those services which only licensed attorneys can perform." *Baron v. City of Los Angeles* (1970) 2 Cal.3d 535, 542-543. *See also State Bar of California v. Superior Court* (1929) 207 Cal. 323, 331; *People v. Ring* (1937) 26 Cal.App.2d Supp. 768, 772-773. (*See further discussion of definition of "law practice" and policies behind it in Ch. II ("The UPL Problem in California").*)

Although the Business and Professions Code does not provide a comprehensive statutory definition of law practice for all purposes, other statutes in the Code provide additional guidance and may be useful to supplement the broad definition of *Merchants* and *Birbower*. Most directly applicable are the provisions of the Business and Professions Code governing the work of legal document preparers (sections 6400 et seq.). For the purposes of this regulatory scheme, section 6411(d) provides: "The practice of law includes, but is not limited to, giving any kind of advice, explanation, opinion, or recommendation to a person about that person's possible legal rights, remedies, defenses, options, selection of forms or strategies."

b. Examples of the Practice of Law

California courts have found the practice of law in circumstances including the following:

- **Providing legal advice and counsel** for clients even when no matters were pending before a court (*People v. Merchants Protective Corp.* (1922) 189 Cal.531, 535; *Simons v. Stevenson* (2001) 88 Cal.App.4th 693);
- **Preparing a trust deed** (*People v. Sipper* (1943) 61 Cal.App.2d Supp. 844);
- **Operating an eviction service** by providing information to clients concerning eviction procedures (*People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599);
- **Providing bankruptcy legal services** (*In re Anderson* (1987) 79 B.R. 482, 485 (paralegal assisting with bankruptcies answered legal questions and assisted in legal decisions, all of which acts "require the exercise of legal judgement beyond the knowledge and capacity of the lay person"); *In re Kaitangian* (1998) 218 B.R. 102, 113 ("bankruptcy petition preparers are strictly limited to typing bankruptcy forms"); *In re Boettcher* (2001) 262 B.R. 94 (bankruptcy

petition preparer selected appropriate form, later prepared by attorney, but actions still constituted UPL);

- **Selection and preparation of marital dissolution documents**, and providing counseling/ drafting services for the public concerning corporate formation, bankruptcy and real estate (*State Bar Ethics Opinions* 1983-7, 1983-12);

- **Selling estate planning services** (involving preparation of trusts and wills), and falsely representing that attorneys would oversee such services and prepare the documents (*People v. Fremont Life Ins. Co.*, (2002) 104 Cal. App. 4th 508);

- **Operating a phony “legal aid” business** providing legal advice, violating both the State Bar Act and the unfair competition law (*Brockey v. Moore* (2002) 107 Cal. App.4th 86);

- **Merely “holding oneself out” as a licensed attorney** by a layman or suspended attorney, even if no actual legal services are rendered (*Farnham v. State Bar* (1976) 17 Cal.3d 605);

- **A single act of law practice**, even without allegation or proof of a pattern of conduct or a business “practice” (*People v. Ring* (1937) 26 Cal.App.2d Supp. 768);

- **Providing legal advice or assistance from out-of-state** to a California resident, using the telephone, fax, computer, or other new technologies (*Simons v. Stevenson* (2001) 88 Cal.App.4th 693).

c. Examples of Activities Which Are Not the Practice of Law

California courts have found no practice of law, within the meaning of sections 6125 and 6126, in the following circumstances:

- **Self-representation**, as law practice in this context means practice or assistance on behalf of others and does not affect a person’s right to appear and conduct his or her own case (*Gray v. Justice Court of Williams Judicial Township* (1937) 18 Cal.App.2d 420);

- **Giving a client a manual** on the preparation of unlawful detainer cases, where defendant did not personally advise the client with regard to a specific case (*People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1399, review denied);

- **Tasks merely “preparatory in nature”** performed by nonattorneys in a law firm supervised by an attorney (*In re Carlos* (Bkrtcy.C.D.Cal.1998) 227 B.R. 535);

- **Negotiating a tax settlement** with the federal government on behalf of a client, where the issue (whether reserves constituted taxable income) was within the normal purview of an accountant (*Zelkin v. Caruso Discount Corp.* (1960) 186 Cal.App.2d 802);

- **The acts of a “scrivener” filling in the blanks on a form** at the direction of a client (*People v. Landlords Professional Services* (1989) 215 Cal.App.3d 1599, 1608 (defendants who "made forms available for the client's use and filed and served those forms as directed by the client" did not practice law); *Mickel v. Murphy* (1957) 147 Cal.App.2d 718; *People v. Sipper* (1943) 61 Cal.App.2d Supp. 844).

3. Elements of the Offense

The elements of the offenses of unauthorized practice of law, as prohibited in section 6126, are as follows:

a. Practicing law, or advertising or holding oneself out as practicing law, without authorization
(Bus. & Prof. Code §6126(a), a misdemeanor)

- (1) A person practiced law, OR advertised or held himself or herself out as entitled to practice; AND
- (2) That person is not an active member of State Bar or otherwise entitled to practice law pursuant to statute or court rule.

b. Practicing law while involuntarily enrolled as inactive member
(Bus. & Prof. Code §6126(b), an alternate felony/misdemeanor)

- (1) A person practiced law or attempted to practice law, OR advertised or held himself out as practicing or otherwise entitled to practice law; AND
- (2) That person was involuntarily enrolled as an inactive member of the State Bar.

c. Practicing law, or advertising and holding oneself out as entitled to practice law, while disbarred/suspended/resigned with charges pending (Bus. & Prof. Code §6126(b), an alternate felony/misdemeanor)

- (1) A person practiced law or attempted to practice law, OR advertised or held himself out as practicing or otherwise entitled to practice law; AND
- (2) That person was suspended from membership from the State Bar, OR was disbarred, OR had resigned from the State Bar with charges pending.

d. Failing to comply with an order of the Supreme Court under Rule 955 (Bus. & Prof. Code §6126(c), an alternate felony/misdemeanor)

- (1) A person was a member of the State Bar, OR a former member who has resigned from the State Bar, OR has been disbarred;
- (2) That person failed to comply with an order of the Supreme Court pursuant to Rule 955; AND;
- (3) The failure to comply with Rule 955 was willful.

B. Other Statutory Alternatives for Prosecuting UPL

Cases involving unauthorized practice of law, as prohibited by Business and Professions Code section 6126, may also be appropriate for charges under a number of other statutes. The following are those statutes most likely to apply to such facts, but other statutes may also apply in particular circumstances, and thus this list is not exhaustive.

1. Grand Theft by False Pretenses (Pen. Code § 484/487)

a. Provisions and Applicability to UPL

Many factual situations involving unauthorized practice of law can also be charged as grand theft under California's unified theft statute, Penal Code sections 484(a) and 487. Often the use of Penal Code sections 484/487 is the most appropriate means of charging a felony in these cases, as UPL by a non-attorney is a misdemeanor. But note that it is generally also appropriate to charge a parallel misdemeanor under Business and Professions Code section 6126,

in light of the newly added provision of Bus. & Prof. Code section 6126(a) which, effective January 1, 2003, requires a minimum county jail sentences of 90 days for repeat offenders.

The essential elements of grand theft by false pretenses (the theft theory most likely to be applicable) include a misrepresentation of a past or existing fact, made with the intent to defraud and to permanently deprive the victim, which statement is relied upon by the victim, who parts with money or property in excess of \$400.

Many UPL cases involve misrepresentations of fact by the UPL suspect which statements can readily meet the required elements of the grand theft offense. Examples of these misrepresentations include:

- the knowing misrepresentation that the UPL suspect is in fact a lawyer when the suspect is not (or is not now) qualified or entitled to practice law;
- the knowing misrepresentation that the UPL suspect is able lawfully to handle all aspects of the victim's case including court appearances;
- false claims of "special influence" with the INS in an immigration context, or similar claims that a potential immigration strategy (such as political asylum) is available or has worked previously.

b. Elements of the Offense

Grand theft by false pretenses

(Penal Code sections 484(a) and 487a, a felony)

- (1) A person made or caused to made a promise without intent to perform it, OR a false pretense or representation of a past or existing fact known to be false or made recklessly;
- (2) The person made the pretense, representation or promise with the specific intent to defraud;
- (3) The pretense, representation or promise was believed and relied upon by the victim and was material in inducing the victim to part with money or property; AND

- (4) The theft was accomplished in that the victim parted with his or her money or property intending to transfer ownership thereof.

(See CALJIC 14.10.)

2. Illegal Practice of Business (Bus. & Prof. Code § 16240)

a. Provisions and Applicability to UPL

Because the practice of law requires a license in California, individuals who wrongly hold themselves out as lawyers are also subject to prosecution under Business and Profession Code section 16240. This misdemeanor statute does not depend on the definition of what constitutes the practice of law. Instead, mere holding oneself out while not actually having a valid certificate is a completed misdemeanor violation.

Section 16240 provides that every person who practices, offers to practice, or advertises any business, trade, profession, occupation, or calling, or who uses any title, sign, initials, card, or device to indicate that he or she is qualified to practice any business, trade, profession, occupation, or calling for which a license, registration, or certificate is required by any law of this state, without holding a current and valid license, registration, or certificate as prescribed by law is guilty of a misdemeanor, punishable by a fine of not more than \$1,000, or six months in county jail, or both (see Penal Code §19).

b. Elements of the Offense

Illegally practicing or offering to practice a business without a required business license (Bus. & Prof. Code § 16240, a misdemeanor)

- (1) A person practiced, OR offered to practice, OR advertised any business, trade, profession, occupation, or calling, or who used any title, sign, initials, card, or device to indicate that he was qualified to practice any business, trade, profession, occupation, or calling;
- (2) That business, trade, profession, occupation or calling is one which a license, registration, or certificate is required by law; AND

- (3) That person did not hold the requisite current and valid license, registration, or certificate.

3. Immigration Consultants Act (Bus. & Prof. Code § 22400 et seq.)

a. Provisions and Applicability to UPL

The single most common form of unauthorized practice of law in California today involves the activities of immigration consultants or others seeking to assist recent immigrants to this country with their legal status. Thus activities constituting UPL often raise issues of potential violations of the Immigration Consultants Act (“ICA”), found in Bus. and Prof. Code §§22440-22448), which governs the activities of immigration consultants in California.

Originally enacted in 1986, the Immigration Consultants Act recognized a new class of service providers called “immigration consultants” who were to provide assistance to the millions of persons who sought to take advantage of the Federal government’s sweeping “amnesty” program then briefly in existence.

Under the ICA an immigration consultant is defined as a person who gives “nonlegal assistance or advice on any immigration matters.” (§22441.) The ICA specifically limits the scope of work for immigration consultants solely to *non-legal* matters. Assistance is confined to helping persons complete INS forms, translating their answers to questions on the forms, submitting completed forms to the INS, and making referrals to those who are qualified to perform legal tasks. (*Id.*) The ICA specifically prohibits immigration consultants from practicing law, and even from advising persons concerning their answers on the INS forms. (§22440(a).)

The ICA imposes a number of specified obligations on immigration consultants. An immigration consultant is required to conspicuously display a notice in English and in the native language of his clients, which notice includes the consultant’s name, address, proof of bond with its number, and a statement that the consultant is not an attorney. (§22442.2.)

The consultant must have a written contract in English and in the client’s native language specifying the services the consultant will perform, describing fees to be charged, and providing notification that the client can rescind the contract within 72 hours of signing. (§22442.) The consultant’s contract must state clearly and conspicuously that the immigration consultant is not

an attorney. (§22442.2.)

Immigration consultants are required to obtain and maintain a \$50,000 bond which may be access by clients in cases of wrongdoing (§22443.1). The consultants must keep copies of client documentation and forms for at least 3 years (§22443(b)), but are prohibited from retaining original documents belonging to the client. (§22443(c).)

An immigration consultant cannot translate documents or advertisements in a way that misleads the client or implies to the client that he is are an attorney. (§22442.)

The ICA has been strengthened through legislative amendment numerous times in recent years, often at the initiation of this Office. Misdemeanor criminal sanctions are now imposed for the following violations:

- Failure to provide a client with a written contract (§22442(a));
- Failure to conspicuously display in the office adequate notice, in the language of the consultant's clients, providing phone and address, that the consultant has a bond, the bond number, and that the consultant is not an attorney (§22442.2);
- Intentionally translating from English into another language word(s) that imply the consultant is an attorney in any document describing the consultant (§22442.3);
- Failure to notify the California Secretary of State within 30 days of a change of name, address, phone number, etc. (§22442.4);
- Failure to obtain and maintain a \$50,000 bond accessible for victims of misconduct (§22443.1); and
- Failure to provide a disclosure statement in all advertising that the immigration consultant is not an attorney (§22442.2).

Criminal sanctions and civil remedies under the ICA. First violations of most of the ICA's misdemeanor provisions are punishable by a fine of between \$2,000 and \$10,000 as to each client-victim, or county jail of up to one year, or both (although victim restitution takes precedence over these fines). (§22445(b).) The posting and notification provisions of the ICA are punishable as misdemeanors only for the second and subsequent offenses. (§22445(c).)

Second and subsequent offenses other than the posting and notification offenses are punishable as felonies. (§22445(c) (Certain practices prohibited by the ICA are characterized only as “unlawful,” and do not appear to have criminal sanctions (see, e.g., misrepresentations regarding special influence with the INS, § 22444). These practices would, however, trigger civil remedies under the Unfair Competition Law, *infra*.)

The ICA also provides substantial civil remedies. Civil lawsuits may be brought by any person injured by violations under the Act, and a civil penalty of up to \$100,000 may be imposed for each violation. (§22445). Victims may also seek injunctive relief or damages, or both. A court may award actual damages, treble damages, and reasonable attorneys’ fees and costs. (§22446.5) Prosecutors should be alert for circumstances where these remedial alternatives are applicable, as these alternatives may be of special value for victims in cases where criminal prosecution is not viable or appropriate.

b. Elements of the Offense

The elements of the numerous distinct misdemeanor offenses of the Immigration Consultants Act are provided in the sample jury instructions in chapter VII (“Models and Forms”).

4. False or Misleading Statements in an Immigration Matter (Penal Code § 653.55)

a. Provisions and Applicability to UPL

Unscrupulous immigration consultants often file unnecessary INS paperwork and charge their clients knowing these papers are improper and cannot yield the promised results. Obtaining money based on misleading promises of this kind – such as filing asylum papers for a victim from a country not eligible for asylum status – can also be addressed by charging a violation of recently enacted Penal Code section 653.55. This misdemeanor statute should prove to be a useful additional tool to punish misleading material statements made in connection with immigration assistance.

Section 653.55 generally prohibits the making of false or misleading material statements detrimentally relied upon by those seeking assistance with immigration matters. Specifically the new law provides:

It is a misdemeanor for any person for compensation to knowingly make a false or misleading material statement or assertion of fact in the

preparation of an immigration matter which statement or assertion is detrimentally relied upon by another.

Violation of section 653.55 is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding \$2,500, or both.

b. Elements of the Offense

**False or misleading statements in an immigration matter
(Penal Code § 653.55, a misdemeanor)**

- (1) A person made a false or misleading statement or assertion in the preparation of an immigration matter;
- (2) That person received compensation for the services performed in the preparation of the immigration matter;
- (2). That person knew the statement or assertion was false or misleading; AND
- (3) The false or misleading statement was detrimentally relied upon by another.

5. False Advertising (Bus. and Prof. Code § 17500 et seq.)

a. Provisions and Applicability to UPL

Any non-attorney, or attorney no longer entitled to practice law, who advertises or holds himself or herself out as a lawyer or as practicing law violates California's false advertising statute, Business and Professions Code section 17500. This section provides, in pertinent part:

It is unlawful for any person, firm, corporation or association, or any employee thereof, with intent directly or indirectly to dispose of real or personal property or to perform services...to make or disseminate...any statement which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading.

Any non-attorney or former representing in any manner that he/she is a lawyer, on business cards, stationary, signs, billboards, or in advertisements, including those in telephone books, is violating the false advertising law. Section 17500 is governed by the “capacity to deceive” legal standard, meaning that there is a violation of law if the advertisement or statement has a tendency or capacity to deceive or confuse the public. (*Committee on Children’s Television v. General Foods* (1983) 35 Cal.3d 197, *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, *Chern v. Bank of America* (1976) 15 Cal.3d 866, 876.) “It is necessary only to show that members of the public are likely to be deceived.” *Committee on Children’s Television, supra*, at 211. It is not necessary to prove intent to defraud, reliance, or actual injury in such cases (*id.*), greatly reducing the prosecutor’s proof burden in contrast to most other fraud offenses. And industry customs or practices are not a defense to a false advertising allegation, rendering ineffective the common defense that no one is deceived because “everyone says this” in the particular industry. (*People v. Cappuccio* (1988) 204 Cal. App. 3d 750.)

The untrue or misleading statements under section 17500 can take the form of affirmative misrepresentations or indirect deception by statements or inferences which omit material facts necessary to avoid misleading the consumer. For instance, appropriating the symbol for “scales of justice,” or use of the statement “Law Offices,” on business cards, without any further clarification about whether anyone employed in the business is in fact a licensed attorney, may convey the impression that a licensed attorney works in that office. The California Supreme Court has declared: “[w]here, in the absence of an affirmative disclosure, consumers are likely to assume something which is not in fact true, the failure to disclose the true state of affairs can be misleading” and thereby a violation of law. (*Ford Motor Dealers Association v. DMV* (1982) 32 Cal.3d 347, 363-364). If the overall impression of the words, pictures or format of an advertisement has the capacity to deceive, the advertisement violates section 17500, as well as its companion statute, the Unfair Competition Law, Business and Professions Code section 17200, detailed below (*see Committee on Children’s Television, supra*).

Knowledge element for criminal violations. Section 17500 requires that the misrepresentation be one “which is known, or which by the exercise of reasonable care should be known to be untrue or misleading.” This provision requires some proof of *mens rea*, and thus “[t]his section proscribing...misleading statements does not impose strict criminal liability.” *People v. Regan* (1979) 95 Cal.App.3d Supp. 1. However, the legal standard of “know or should have known” is substantially less burdensome for prosecutors than a minimum requirement of actual knowledge.

Even in the misdemeanor context, the acts of employees can visit liability on corporation,

although for individual defendants to incur liability, some evidence of individual participation or knowledge of the subordinates' acts is required. (*People v. Toomey* (1984) 157 Cal.App.3d 1, 15.) (In this context, the prosecutor should also consider also the possible allegation of conspiracy to misrepresent, see, e.g, *People v. Bestline* (1976) 61 Cal.App.3d 879, 918.) However, the defense claim that a violation involved only "low level" employees was held meritless in *Dollar Rent-A-Car, supra*. And the owner/president of car dealership was held criminally liable for misrepresentations by salesmen in *People v. Conway* (1974) 42 Cal.App.3d 875. Thus businesses or corporations engaged in UPL activities -- and their operators or principals -- may be subject to false advertising liability, including potential criminal sanctions, if their employees or staff misrepresent the nature of their work or their entitlement to practice law.

b. Criminal Sanctions and Civil Remedies for False Advertising

False advertising is a misdemeanor, punishable by a fine up to \$2500 and by up to six months in county jail.

The civil remedies under section 17500 (and the Unfair Competition Law) are potent, and may be even more effective than criminal sanctions in certain contexts. Section 17536 provides for:

- **Civil penalties** of up to \$2500 "per violation" are available, but only to public agencies. A "per victim" test is applied, permitting substantial aggregation of penalties. Under Sec. 17534.5, penalties are cumulative of all penalties and remedies of other laws. (*Toomey, supra*, at 22). Six factors are used in assessing penalties. (§17536.)

- **Injunctive relief**, including permanent injunctions entailing both prohibitory and mandatory injunctive terms (§17535),

- **Restitution** for any money or property taken by means of false advertising (see *Children's Television, supra*, 35 Cal.3d at 215), but damages other than restitution may not be recovered, *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254.

- **Costs** for specified public agencies may be recovered under section 17536.

c. Elements of the Offense

False advertising**(Business and Professions Code section 17500, a misdemeanor)**

- (1) A person made an untrue or misleading statement;
- (2) The statement was made in connection with the sale or lease of goods or services;
- (3) The statement was made in circumstances where the suspect knew or should have known that the statement was untrue or misleading.

Consultation with the Consumer Protection Division (213-580-3273) may be appropriate when considering a criminal false advertising charge, and is required before proceeding with a civil false advertising case.

6. Unfair Competition (Bus. & Prof. Code § 17200 et seq.)**a. Provisions and Applicability to UPL**

A non-attorney or a former attorney who practices law or advertises or holds himself or herself out as entitled to do so violates California's broad-scale Unfair Competition Law (UCL), Business and Professions Code section 17200. Although not a criminal statute, the UCL provides powerful civil remedies (including permanent injunctions, restitution, and large civil penalties) and is thus a useful adjunct or alternative form of enforcement in particular business circumstances.

Section 17200 prohibits "unfair competition," defined as an "unlawful, unfair or fraudulent business act or practice," and any unfair, deceptive, untrue or misleading advertising. (§17200.) (See generally *Barquis v. Merchant Collection Association* (1972) 7 Cal.3d 94, 113; *People v. McKale* (1979) 25 Cal.3d 626; *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 839.) By its specific terms, the UCL is also triggered by any act violating California's false advertising law, Business and Professions Code section 17500, described above.

Of particular relevance here is the UCL's prohibition against "unlawful" business practices. The California Supreme Court has held that this provision applies to anything that can properly be called a business practice and that at the same time is forbidden by law. (*People v. McKale* (1979) 25 Cal.3d 626, 632; *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94,

111-112.) Thus, a criminal violation of Business and Professions Code sections 6125 and 6126 will generally also trigger civil liability under section 17200 as it is both a business activity and it is proscribed by law. The only defense to an allegation of an unlawful business act or practice based upon a violation of another law is that the underlying law was not violated (*Hobby Industry Assn. Of America. Inc. v. Younger* (1980) 101 Cal.App.3d 358, 372). With specific reference to UPL, the California court of appeals has recently held that misrepresentations regarding entitlement to practice law and the improper legal activities of non-lawyers violate section 17200. (*People v. Fremont Life Ins. Co.* (2002) 104 Cal. App. 4th 508 (permanent injunction and \$2.5 million in civil penalties and restitution upheld in living trusts case).)

By its own language, section 17200 includes any act which violates the false advertising laws defined in section 17500 and discussed above. Thus, both violations of the unfair competition statute and the false advertising statute trigger exposure to legal remedies that include substantial civil penalties, costs, and injunctive relief.

b. Civil Remedies for Unfair Competition

The Unfair Competition Law provides only civil remedies for unlawful, unfair, or fraudulent business acts or practices, but these remedies are potent. Like the false advertising statute, Business and Professions Code section 17200 provides for:

- **Civil penalties** of up to \$2500 "per violation" are available for public agency enforcement actions. (§17206.) A "per victim" test is applied, permitting substantial aggregation of penalties. Under Sec. 17205, penalties are cumulative of all penalties and remedies of other laws. (*Toomey, supra*, at 22). Six factors are used in assessing penalties. (§17206.) Civil penalties under these statutes are *mandatory*, in an amount determined by the court, once a violation of the statute has been established in a public enforcement action. (*People v. National Association of Realtors* (1984) 155 Cal.App.3d 578.). The civil penalties of sections 17500 and 17200 are cumulative.

- **Injunctive relief** (§17203) including permanent injunctions entailing both prohibitory and mandatory injunctive terms,

- **Restitution** for any money or property taken by means of false advertising (see *Children's Television, supra*, 35 Cal.3d at 215), but damages other than restitution may not be recovered, *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254.

- **Costs** for specified public agencies may be recovered under section (§17206.)

Consultation with the Consumer Protection Division (213-580-3273) is required before proceeding with a civil unfair competition action, and most such cases will be referred to CPD for investigation and litigation.

7. State Bar Ethical Standards and Related Rules and Statutes

State Bar ethical rules and related California Rules of Court and statutes also establish ethical and legal prohibitions applicable to the unauthorized practice of law. Although local prosecutors do not enforce most of these prohibitions directly, facts revealed in UPL investigations may often call for appropriate referral of findings to the State Bar disciplinary system. In addition, certain provisions of the Business and Professions Code carry criminal sanctions for attorney and non-attorney conduct violating California norms of professional practice.

The full range of these standards is beyond the scope of this manual, but a selected few of these applicable standards include:

- Improper fee sharing between attorneys and non-lawyers (see, e.g., Rules of Professional Conduct 1-320: Financial Arrangements with Non-Lawyers);
- Standards governing the conduct of legal service programs utilizing non-attorney personnel (Rules of Professional Conduct 1-600: Legal Service Programs);
- Business and Professions Code sections 6151-6152 prohibiting acting as a “runner or capper” soliciting or procuring business for an attorney, including paralegals acting in that illegal capacity as prohibited by Business and Professions Code section 6450(b).
- Cal Rules of Court, Rule 955, which imposes duties on disbarred, resigned, or suspended attorneys, including: notification of clients; return of client papers and property; and notices to opposing counsel. (Sanctions include contempt of court and criminal sanctions, *see* Bus. & Prof. Code §6126(c), *supra*.)