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## FISCAL IMPACT REPORT

SPONSOR Snyder DATE TYPED 03/05/04 HB \_\_\_\_\_

SHORT TITLE Prohibit Unauthorized Practice of Law SB 544

ANALYST McSherry

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
	Minimal		Minimal	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Senate Bill 544 duplicates: HB 166.

### SOURCES OF INFORMATION

- LFC Files
- Corrections Department (CD)
- Attorney General (AGO)
- Energy Minerals and Natural Resources (NMEMNRD)
- Administrative Office of District Attorneys (AODA)
- Administrative Office of the Courts (AOC)

### SUMMARY

#### Synopsis of Bill

This bill elaborates upon and replaces current state law, NMSA Section 36-2-28 1978, regulating and defining the “unauthorized practice of law” which dates back to 1925. It re-defines the practice of law and authorizes civil actions and a misdemeanor penalty for practicing law without being admitted to the State Bar. The bill would allow private actions brought by persons injured as a result of the unauthorized practice of law. It also would allow the Attorney General to bring civil actions against violators. The bill requires admission to the State Bar in order to practice law with some exceptions. Those exceptions include the services of paralegals, limited licensees, union negotiators, and lobbying activities. SB 544 would repeal the portion of NMSA 1978, Section 36-2-28, which establishes the district attorney fund.

#### Significant Issues:

According to the Corrections Department, this bill would increase prison populations and probation caseloads as a result of the creation of a new misdemeanor. The department asserts

that the proposed definition of law in this legislation may be broad enough to include activities performed by non-attorney employees for the Corrections Department such as requesting arrest and hold orders, advising probationers that certain actions could result in revocation of parole, making appearances with parolees at parole hearings and negotiating memorandums of understanding with local law enforcement agencies. Under the proposed law the Corrections Department's professionals performing these duties may be vulnerable to criminal or civil liability. A population of inmates who assist other inmates with legal matters, "jailhouse lawyers" would also be a likely group cited with unlawful practice of law which could result in additional penalties for these individuals.

The Attorney General's office cites current law which generally defines the "unauthorized practice of law" as practicing or holding oneself out to the public as someone authorized to practice law. SB 544 would repeal the current NMSA 1978, Section 36-2-27. The current statute does not define "practicing law". A separate state law, NMSA Section 36-2-27, 1978 comp, allows for contempt of court should the unauthorized practice of law occur in any court other than Magistrate Court. The office of the AG suggests that SB 544 would clarify the practice of law, the unauthorized practice of law, and exceptions to the requirement that those practicing law be admitted to the State Bar and reflects that the Supreme Court has interpreted the unauthorized practice of law by rule and through judicial decisions brought by the State Bar and others in Supreme Court Rule 16-505, *State Bar v. Guardian Abstract & Title Co.*, 91 N.M. 434, 575 P.2d 943 (1978), and *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 85 N.M. 521, 514 P.2d 40 (1973).

The Administrative Office of the District Attorneys points out that the proposed definition of practice of law in SB 544 includes selecting, drafting, or preparing any document intended to affect or secure legal rights or incur legal obligations for a specific person or negotiating legal rights or responsibilities on another person's behalf. The office further asserts that this would include all contracts, which professionals, such as non-attorneys in state agencies and realtors, often draft and prepare with review by attorneys. By defining the practice of law to include selecting and preparing any document intended to secure legal rights or incur legal obligations, a non-attorney's use of a form contract, even one an attorney developed, could be interpreted as the unauthorized practice of law.

## **PERFORMANCE IMPLICATIONS**

Agency cited performance implications are primarily related to increased workload. The possibility of increased court cases, referrals to the district attorneys, inmates for the Corrections Department and actions taken by the Attorney General were all cited in agency analysis. The amount of increased caseload is difficult to predict and has not been estimated by any agency.

Another possible outcome would be the numbers of professionals that perform many of the actions cited as practicing law would become more restricted and those with the qualifications considered acceptable to practice law would be demanded for their services to a greater extent. As this relates to agency performance in state government, agencies could experience challenges in completing tasks that were previously performed by non-attorneys.

## **FISCAL IMPLICATIONS**

Actual fiscal implications are indeterminable. Agencies note that as caseloads increase, increased fiscal increases on budgets such as district attorneys and Corrections Department are

likely to be requested, even if minimal. If civil penalties are imposed by the courts against violators, the revenue would be accrued to the benefit of the state.

Corrections projects that the new penalties might restrict the number of inmate pro-se cases and reduce the cost of defending against these suits. The Department reports that there already is a Departmental policy against inmates assisting each other in legal matters so the Department projects that the reduction in suits filed by “jailhouse lawyers” is not likely to significantly decrease due to Senate Bill 544 passing.

### **ADMINISTRATIVE IMPLICATIONS**

Administration Office of District Attorneys report this bill could result in more cases referred to district attorneys for prosecution and increase current workloads.

The Corrections Department relates that in both the short term and the long term, this bill will somewhat increase the administrative prison staff and probation staff because of the increasing prison population and probation caseloads. The Department maintains that it would be able to absorb the additional burden due to the fact that the numbers of persons convicted would be minimal. The possibility that defending against small civil suits could be an administrative burden is also raised by Corrections. Because it is unlikely that many of these cases would succeed, the Department states that it should be able to absorb the additional burden.

If this bill passes, the Energy, Minerals and Natural Resources Department's reports that the Department's contract and procurement processes and employees' ability to negotiate agreements would be affected. While EMNRD attorneys review joint power agreements, professional service contracts, memorandums of agreement or understanding, they do not review standard purchase agreements for supplies and equipment provided by the General Services Department. EMNRD asserts that the Departments attorneys' workloads would increase substantially, that the agency's ability to promptly meet obligations would be significantly impacted and that more attorneys would be required. It is likely that other state agencies would be affected similarly.

### **TECHNICAL ISSUES**

The Attorney General's Office recommends consideration be given to repealing NMSA Section 36-2-27, 1978 which prohibits the practice of law in most courts in this state unless one has been admitted to the State Bar, except within a magistrate court. Even though the Judicial Branch presumably would not tolerate the practice of law in magistrate courts, this bill prohibits representing parties in judicial proceedings, and its enactment would create an ambiguity if Section 36-2-27 is not repealed. The analysis submitted by the Attorney General's Office further relates that although the bill defines the unauthorized practice of law as a “misdemeanor”, the penalty imposed (not more than six months confinement) would remain a “petty misdemeanor” as defined by NMSA Section 30-1-6C 1978 comp.

### **OTHER SUBSTANTIVE ISSUES**

The Attorney General's Office (AGO) points out that the judicial branch has authority to determine the qualifications of those practicing law in the courts of this state and that the bill seems to take that authority into consideration by allowing the provision of lawful legal services if authorized by court rule.

**CONFLICT, DUPLICATION, COMPANIONSHIP OR RELATIONSHIP**

Senate Bill 544 is a duplicate, with identical language, to HB 166.

**ALTERNATIVES**

Modify the proposed definition of practice of law to exclude the drafting and preparation of contracts, purchase agreements, and real estate documents and negotiation by government officers and employees on local, state, or federal agencies' behalf or by an entity's agent on an entity's behalf.

**WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL?**

The current version of NMSA 1978, Section 36-2-27 concerning practice of law would remain in effect should this bill not pass. Currently there are no private statutory causes of action. The AGO will not be able to pursue the injunctive relief, civil penalties or restitution for the unauthorized practice of law. Currently the unauthorized practice of law is considered contempt of court except in magistrate courts. Court rules, administrative rules and tradition also would continue to govern the unauthorized practice of law.

**EM/lg**