Unauthorized Practice Controversy: A Struggle Among Power Groups

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THE UNAUTHORIZED PRACTICE CONTROVERSY, A STRUGGLE AMONG POWER GROUPS

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For many years, but increasingly during the past quarter of a century, the bar has been engaged in a struggle. This struggle is to maintain and increase the bar's prestige, authority and income. It has involved frequent charges by lawyers of unauthorized practice by non-lawyers. Unauthorized practice is the performance of legal services for others that by law only lawyers may perform. The line between unauthorized practice and legitimate lay representation is often a fuzzy one; but, with many exceptions, only lawyers may appear before courts, draft legal instruments, and give advice on the law. This monopoly position of lawyers has been encroached upon and is threatened with further encroachment.

The bar's major opponents have been powerful business groups that compete with lawyers or would like to do so. These businesses include accounting firms, collection agencies, banks, trust companies, realty companies, and automobile clubs. They also include insurance companies: title insurance firms, independent insurance adjusting firms, claims departments of casualty insurance companies, and life insurance underwriters. The intensity of the unauthorized practice controversy has varied from business to business and from time to time. In addition to these extensive and well-established businesses, a miscellany of individuals and minor businesses have found themselves opposed by the bar as engaging in unauthorized practice. Some of

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1 Winters considers unauthorized practice activities to include appearing as an advocate, dispensing services of lawyers, drafting legal documents, giving legal opinions and advice, simulation and misuse of legal process, and solicitation of legal business. WINTERS, BAR ASSOCIATION ORGANIZATION AND ACTIVITIES 150 (1954).

2 The leading unauthorized practice "offenders" are listed by Winters as abstract and title companies, accountants and auditors, automobile clubs, banks and trust companies, claim adjusters, clubs, collection agencies, corporation services, estate planners, industrial management consultants, justices of the peace, labor relations counselors, labor unions, law book publishers, life underwriters, newspapers, notaries public, protective associations, radio stations, real estate brokers, savings and loan associations, tax consultants, and tax reduction bureaus. Ibid.
these persons and businesses are reputable, others are engaged in illegal and fraudulent schemes as their main enterprises. When challenged as unauthorized practitioners, they do not put up as much opposition as do the well-established businesses.

Lawyers' interests in the unauthorized practice controversy are usually represented by the so-called organized bar, the bar associations. The American Bar Association, most state and big city bar associations, and some small town and county bar associations each have an unauthorized practice committee consisting of lawyers who serve voluntarily and do much of what is done to prevent laymen from practicing law. In these efforts, the bar associations frequently encounter opposition from trade associations representing the businesses involved. Although lawyers showed some concern earlier about unauthorized practice, it was not until the depression of the Thirties that the organized bar became active in combating the problem of law practice by laymen.

If the bar is defined as including all members of the legal profession, the unauthorized practice controversy is in part a struggle within the profession. Some lawyers have strong interests on the side of businesses accused of illegal practice of law, and so support these businesses

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8 In 1938 there were 430 bar association committees on unauthorized practice. Otterbourg, Collection Agency Activities: The Problem from the Standpoint of the Bar, 5 Law and Contemp. Prob. 35 (1938). Probably there are more such committees today. The New York County Lawyers Association was the first bar association to have a standing committee on unauthorized practice. Its committee was created in 1914. Hurst, The Growth of American Law 323 (1950). A bar association committee on unauthorized practice was active in Kansas City, Missouri, as early as 1916. Cohen, The Law: Business or Profession 266 (rev. ed. 1924).

The American Bar Association has had an unauthorized practice committee since 1930. At present the committee has seven members and it meets several times each year. Its members serve on the national unauthorized practice conference groups as representatives of the legal profession, although there are also legal profession representatives who are not committee members. The committee publishes a quarterly bulletin, Unauthorized Practice News, meets with local and state bar groups, does some legislative representation work on unauthorized practice matters, has filed briefs as amicus curiae in unauthorized practice litigation, has done the groundwork in the negotiation of statements of principles with business groups, and has issued several opinions on what constitutes unauthorized practice. No one on the full-time, paid staff of the American Bar Association makes any appreciable contribution to the American Bar Association program on unauthorized practice.

The National Lawyers Guild, a much smaller national bar association than the American Bar Association, has shown some concern about unauthorized practice, but has done little to combat it. For an expression of Guild policy on the question see Convention Resolutions and Statements of Policy, The Unauthorized Practice of Law, 6 Law. Guild Rev. 523 (1946).

4 See for example, Cohen, The Law: Business or Profession (1916); Bristol, The Passing of the Legal Profession, 22 Yale L. J. 590 (1913).

Hurst makes this point in considering the recent history of the bar: "However 'unauthorized' might be its form, some lay competition was the competition of one group of lawyers masked behind trust or insurance or real estate companies or collection agencies, against other lawyers conducting their professional work in more traditional style." Hurst, The Growth of American Law 321 (1950).
on questions of unauthorized practice. Frequently lawyers who do considerable legal work for these businesses or who receive important client referrals from them are on their side. Of course the lawyers who represent laymen in unauthorized practice litigation fall in this category. So do most members of the bar who have entered business on a full-time basis and perform services for their employers that non-lawyers also may perform, but for which a legal education and training are helpful. Many insurance adjusters, trust officers, and title examiners are examples of this. And similar support will be found among the lawyers that are hired by such businesses as automobile clubs and collection agencies to perform legal services for customers. Lawyers of the above kinds are likely to have different feelings about unauthorized practice than does the organized bar. Probably the bar association position on unauthorized practice fairly well represents the opinion of most lawyers, but there is not full consensus within the profession. The interests of some lawyers lie with the opposition.

It is not surprising that lawyers and various business groups are in conflict. Competition among economic groups is normal in our society. Jurisdictional quarrels between labor unions bear considerable resemblance to the bar’s conflict with lay competitors. So does the controversy among the healing arts. The position of the American Medical Association in this competitive struggle is closely analogous to that of the American Bar Association.6

In the unauthorized practice conflict, consumers of legal-type services have been inactive. They have not taken sides and appear to have no interest in the matter. It is possible that if the extreme lawyers’ position were to prevail and only lawyers were permitted to draft any legal instruments, give any legal advice, or prepare any tax returns, that then the consumers of these services would enter the conflict against the lawyers.

The most dramatic aspects of the bar’s efforts to eliminate lay competition are the law suits brought to enforce lawyers’ exclusive rights to practice law. But these are not the bar’s only efforts in this direction. It also has sought to gain the upper hand by legislation, improving the quality of the legal services it renders, and improving its reputation

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6 The political activities of the American Medical Association are discussed in Comment, The American Medical Association: Power, Purpose, and Policies in Organized Medicine, 63 Yale L. J. 937 (1954).
relative to business groups. In retaliation, the important trade groups that oppose the bar have used the same general tactics: litigation, legislation, and efforts to give better service and achieve a better reputation. But in litigation these groups are on the defensive; they do not bring suits against lawyers on unauthorized practice questions.

As elsewhere in our economy, competition is tempered by attempts through agreement to avoid competition. The bar has entered into a series of agreements or statements of principles with a number of trade associations representing competing businesses. Their purpose is to solve the unauthorized practice problem by amicable cooperation. Some of them, including the agreement with the accountants, appear to be only a truce in the use of aggressive power tactics.

The reasons vary as to why non-lawyers perform legal services for others. Sometimes they do so because it is a profitable service for which they can charge a fee.\(^7\) In these instances, it may be a side-line to their main business.\(^8\) Very often it is an accommodation service for which no separate charge is made, but which might lose them customers or force a reduction in their business fees if lawyers were called in to do this work.\(^9\) It is not unusual for small businessmen to be unaware that what they are doing is illegal or of dubious validity.

Some laymen have an advantage over lawyers in securing and performing legal-type work. An accountant, for example, who does bookkeeping or auditing for a firm is already familiar with much of the factual information necessary to prepare tax returns or advise on tax matters. A lawyer retained by a firm to perform similar tax services must also acquire the relevant and often complex factual data. But he must charge the client for his time in doing so without performing, as can the accountant, any other service at the same time. Not only can

\(^7\) For example, see these unauthorized practice cases: In re Bercu, 273 App. Div. 524, 78 N.Y.S.2d 209 (1948), affirmed without opinion, 299 N.Y. 728, 87 N.E.2d 451 (1949), an accountant charged $15 an hour for auditing but $50 an hour for "tax consultation" work; People ex rel. Illinois State Bar Association v. People's Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931), an outlying metropolitan bank operated a legal department employing several attorneys, one of whom did legal work that brought the bank over $20,000 in legal fees during a 13-month period; People ex rel. Chicago Bar Association v. Goodman, 366 Ill. 346, 8 N.E.2d 941 (1937), cert. denied 302 U.S. 728 (1937), a layman represented claimants in workmen's compensation cases and collected $4,000,000 on behalf of injured workmen, his usual fee being 20 per cent of the amount recovered.

\(^8\) For example, see note 44 infra.

\(^9\) For example, realtors frequently perform an accommodation service when they draft legal instruments in closing transactions. If realtors cannot perform these services as an accommodation and their customers must go to lawyers, this increases the cost of real estate transactions and puts pressure on realtors to lower their commissions and encourages persons to buy, sell, and lease property without the assistance of brokers.
the accountant work cheaper or more efficiently on the factual side of these problems, but this and his presence as bookkeeper or auditor help his chances of being hired to work on tax matters. Realtors, collection agents, and estate planning specialists enjoy similar advantages. This is not to say that these laymen can do legal work better than can lawyers, for limited knowledge of the law and inept use of facts can cause expensive bungling.

Many of the efforts by lawyers to deal with lay competition are not based exclusively on the objective of driving laymen from the field of law practice. They are also aimed at restricting the number of lawyers so as to provide higher incomes for those who are authorized to practice; acquiring law business from sources now served by no one; and building the reputation of the bar. For example, bar examinations and pre-admission educational requirements are designed not only to insure a competent bar so as to decrease competition from outside the profession, but also to regulate the size of the bar so as to decrease competition from within the profession. And such schemes as lawyer reference services and bar association advertising seek new clients from among those who have been receiving assistance from no one as well as from those who have been receiving assistance from unauthorized practitioners. Further, each of these programs makes a favorable public impression and hence improves the reputation of lawyers.

10 During the Thirties, the correlation between bar admission standards and the economic condition of the bar was discussed more often than today. Illustrations of points of view on the subject expressed during the Thirties are Teiser, A Proposal for a Limited Bar, 21 A.B.A.J. 42 (1935); Editorial: Conditions in the Profession, 6 The Bar Examiner No. 2, p. 25 (1936); Love, Llewellyn, Fraenkel, and Sharp, Economic Security and the Young Lawyer; Four Views, 32 Ill. L. Rev. 662 (1938); Lazarus, The Economic Crisis in the Legal Profession, 1 Nat. Law. Guild Q. 17 (1937). On overcrowding of the bar, see Hurst, The Growth of American Law 313-319 (1950); and Garrison, The Problem of overcrowding, 16 Tenn. L. Rev. 658 (1941). On the financial condition of lawyers in recent years see Blaustein and Porter, The American Lawyer c. 1 (1954); and Kent, Economic Status of the Legal Profession in Chicago, 45 Ill. L. Rev. 311 (1950).

11 The study by Koos shows that 40 per cent of the middle-class families reported on and 54 per cent of the working-class families reported did not consult lawyers when they had problems needing the assistance of lawyers. Koos, The Family and the Law 4-5 (mimeographed, 2d ed. 1952). The most common legal problems encountered by these families were difficulties with landlords, marital problems, settlements of estates, purchases or sales of real property, and problems arising from installment sales. Id. at appendix B. Tax problems were not classified by the study as legal problems. Of the 4,077 families that reported, 2027 were classified as middle-class and 2050 as working-class. The families involved lived in Akron, Atlanta, Nashville, Oakland, Rochester, and Seattle. An earlier study discloses similar failure of persons in the moderate income groups to seek help from lawyers. Clark and Corstvet, The Lawyer and the Public, 47 Yale L. J. 1272 (1938). This is a study of New Haven, Connecticut. The Philadelphia neighborhood law offices which were established to attract small fee business have found that about 80 per cent of their clients never before had consulted lawyers. Abrahams, The Neighborhood Law Office Plan, 1949 Wis. L. Rev. 634 at 639.
The public utterances of bar leaders on the subject of unauthorized practice contain much that is emotional and unobjective, and customarily associate the good of the public with the good of the bar. Part of this can be attributed to exuberant advocacy, part of it to a deep-seated human desire to be on the side of the good and the righteous no matter what the facts. The same kind of self-serving emotionalism characterizes public comments of businessmen on unauthorized practice. But in fairness, it must be said that many lawyers and businessmen active in the unauthorized practice controversy are motivated by unselfish beliefs and feel that what they are doing is for the public good apart from the financial benefits that may as a result accrue to the bar or business.

Even though the unauthorized practice controversy is frequently commented on by bar and business leaders, is the subject of a substantial literature, and has often led to litigation, there is little statistical data on the extent to which laymen are performing legal-type services. Some data of this sort is disclosed by a few of the appellate opinions on unauthorized practice. In addition, a study has been made which indicates from a small sample that when persons of moderate means seek the assistance of others, they usually go to lawyers.

I. EFFORTS TO SECURE LEGAL PROTECTION, THE LAW OF UNAUTHORIZED PRACTICE

The most effective device for restricting unauthorized practice is the law. In essence this involves the use of force through the medium of the state. Although the courts have been the most important government branch resorted to in the unauthorized practice of law controversy, legislatures and executive agencies have also been significant.

12 infra note 184 for examples.
13 "Each of us operates in a value-charged world which gives shape and color to whatever we see. We rationalize our selfish acts and convince ourselves that what benefits us benefits mankind. As individuals, we have only a one-eyed view of matters that call for synoptic vision. Truth is more likely to be found with the aid of a many-perspectived view. This essential wisdom is the foundation, not only for the legal proposition that no man can be a judge in his own cause, but, ultimately, for all democratic freedom." WEIHOFEN AND GUTTMACHER, PSYCHIATRY AND THE LAW 11 (1952).
14 Supra note 7 for examples.
15 Clark and Corstvet, The Lawyer and the Public, 47 YALE L. J. 1272 at 1279 (1938). When assistance on legal problems was sought from others, the Clark study shows that over 80 per cent of the time it was from lawyers. The Koos study, also with a small sample, gives some quantitative data on the types of lay advisers to whom middle-class and working-class persons take their legal problems. KOOS, THE FAMILY AND THE LAW 8 (mimeographed, 2d ed. 1952).
The law has been used as a means for delineating the area of the lawyer's monopoly, and in applying sanctions against laymen who infringe on this monopoly. Some established businesses, particularly the accountants, have strongly resisted efforts to broaden and enforce the law providing for a lawyer's monopoly; and have even taken the initiative to obtain legislative and executive action to materially narrow it and to grant some monopolistic privileges to these businesses.

Government as a major power arena in the struggle among competing professional and business groups is common today. This arena is by no means restricted to the fight between lawyers and their competitors. The usual device for providing a government protected monopoly to a service group is licensing. Licenses are granted to one group by the state, and the performance of certain services are then restricted to those with licenses. Rates or fees of license holders are sometimes regulated by the state, but this is not true of lawyers' fees. The number of economic groups granted state monopolies through licensing has greatly increased in recent years. During the Nineteenth Century even trained lawyers had no monopoly in some states; anyone could practice law. During the middle half of the last century there was a substantial deprofessionalizing of legal practice throughout the United States. Roscoe Pound, reflecting the attitude of the modern lawyer, calls this Nineteenth Century period the "era of decadence."

To determine with accuracy the scope of the lawyer's monopoly, it is necessary to consider the various fact situations that courts have passed on as being proper or improper lay activity when unauthorized practice has been alleged. Mere resort to general definitions of the practice of law appearing in statutes or judicial opinions is not enough. Laymen have complained that the law of unauthorized practice is so vague that they cannot anticipate in advance what is lawful and so cannot plan their activities to be within the law. When this argument is advanced in good faith, it indicates ignorant referral to some general definition of the practice of law without either a determination of how courts have ruled in analogous fact situations or an understanding of

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18 There are a few minor exceptions to this. For example, 62 Stat. 984 (1948), 28 U.S.C. § 2678 (1952) sets limits on fees of attorneys representing claimants in actions under the Federal Tort Claims Act. And contingent fee agreements are generally invalid in divorce proceedings. Dannenberg v. Dannenberg, 151 Kan. 600, 100 P.2d 667 (1940).
19 infra note 141.
18 On the nature of the legal profession during this period see Pound, The Lawyer from Antiquity to Modern Times (1953) c. 8.
how readily a judicial ruling can be secured on the validity of any particular practice if it is felt that existing authority does not apply to such a practice. There is a large body of case law on unauthorized practice, and when uncertainty exists as to the nature of the law in any one state, a judicial ruling can be obtained. But laymen have carefully avoided seeking court tests to determine whether or not they are engaging in illegal law practice. 19

In classifying conduct that constitutes unauthorized practice of law, the most consistently applied principle is that a lay person cannot represent others before courts. It is rare for laymen to attempt this; but occasionally a disbarred or suspended attorney does so, or an attorney admitted in another state but not in the state where he appears. There are cases holding that when such lawyers represent others in judicial proceedings, it is the unauthorized practice of law. 20

Ordinarily, a lay person may represent himself before the courts. But a collection agency may not evade the prohibition against unauthorized practice by having claims assigned to it and then bringing judicial proceedings for collection in its own name. 21 And only a natural person may represent himself in court; a corporation may not be represented before a court by a lay agent even though an officer or employee of the company. 22 In some states, by statute, laymen may represent others before certain inferior courts, such as justice of the peace courts, 23 but the overwhelming weight of authority is against it. 24

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19 However, in Liberty Mutual Insurance Co. v. Jones, 344 Mo. 932, 130 S.W.2d 945 (1949), a lay group sought a ruling on unauthorized practice by means of a declaratory judgment proceeding.


Nor may laymen represent others by hiring a lawyer to do the legal work. Usually, in these cases, a lay organization seeks to make a profit from selling the services of a lawyer.

Laymen have greater rights to appear in a representative capacity before administrative agencies in formal proceedings than before courts. But the states have been more restrictive in this respect than has the Federal Government. There are many state decisions holding that laymen representing persons in judicial-type proceedings before administrative agencies are engaged in the unauthorized practice of law. This position has been taken by state courts even though statutes or agency rules authorize such non-lawyer representation, the courts concluding that a legislature or agency cannot legalize that which is illegal. But the federal courts have placed no similar restriction on practice before federal administrative agencies.

Many federal agencies permit laymen to appear before them in judicial-type controversies, although they frequently have formal admission requirements that involve the demonstration of a high degree


28 The United States Supreme Court has determined that the Board of Tax Appeals is a quasi-judicial agency and that the Board has power to determine the qualifications of those who appear before it. Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1925), but this was a case of a certified public accountant seeking to qualify before the Board and the question was not raised of the exclusive right of attorneys to represent clients before administrative agencies when legal skill and knowledge are required; cf. Herman v. Dulles, 205 F.2d 715 (D.C. Cir. 1953); Camp v. Herzog, 104 F. Supp. 134 (D.C. 1952).
of competence in matters with which they deal.\textsuperscript{29} There are state courts that have refused to interfere with lay practice before federal agencies when it has been questioned as constituting the unauthorized practice of law.\textsuperscript{30} For to do so, they say, would be an unconstitutional interference with federal functions.\textsuperscript{31} But there is a hint in the cases that perhaps the state can constitutionally grant to lawyers the exclusive right to perform some acts related to federal laws and regulations.\textsuperscript{82} It is not clear just what these acts are. They may be the drafting of contracts, deeds, and other instruments; they may be legal advice on matters not related to proceedings pending before the agency; they probably include appearance before state courts on federal questions; they may possibly include the use of judgment as to the content and nature of the law in advising and preparing on issues of law in matters pending before federal administrative agencies. This is an important question, particularly in the current controversy between lawyers and certified public accountants, and the federal courts may soon have to resolve it.

The state decisions have applied varying tests as to what constitutes the practice of law in representation of clients before state administrative agencies. It has been held the practice of law if it requires a high degree of legal skill and learning;\textsuperscript{33} or if the person appears in a representative capacity as an advocate before a body authorized by law to

\textsuperscript{29} Admission requirements of federal agencies are discussed in Cheatam, Cases and Materials on the Legal Profession 470-472 (2d ed. 1955); Gellhorn, Administrative Law, Cases and Comments (2d ed. 1947) 457-461; Control Over Practice Before Administrative Agencies, 17 Unauthorized Practice News, no. 2, p. 15 (1951); Waterman, Federal Administrative Bars: Admission and Disbarment, 3 U. of Chi. L. Rev. 261 (1936); and Note, Proposed Restriction of Lay Practice Before Federal Administrative Agencies, 48 Col. L. Rev. 120 (1948).

\textsuperscript{30} In re Lyon, 301 Mass. 30,16 N.E.2d 74 (1938); DePass v. B. Harris Wool Co., 346 Mo. 1038, 144 S.W.2d 146 (1940). Contra: Petition of Kearney, 63 So.2d 630 (Fla. 1953); and Chicago Bar Assn. v. Kellogg, 338 Ill. App. 618, 88 N.E.2d 519, 526 (1949).

\textsuperscript{31} DePass v. B. Harris Wool Co., 346 Mo. 1038, 144 S.W.2d 146 (1940).


\textsuperscript{33} People ex rel. Chicago Bar Assn. v. Goodman, 366 Ill. 346, 8 N.E.2d 941 (1947), cert. denied 302 U.S. 728 (1937); Goodman v. Beall, 130 Ohio St. 427, 200 N.E. 470 (1936), but the practice before the Industrial Commission is not the practice of law until the claimant receives notice of disallowance of his claim; Shortz v. Farrell, 327 Pa. 81, 193 Atl. 20, 21 (1937). "In considering the scope of the practice of law mere nomenclature is unimportant, as, for example, whether or not the tribunal is called a 'court,' or the controversy 'litigation.' Where the application of legal knowledge and technique is required, the activity constitutes such practice even if conducted before a so-called administrative board or commission. It is the character of the act, and not the place where it is performed, which is the decisive factor." But because of their simplicity, workmen's compensation "pleadings" may be prepared by laymen. \textit{Ibid}.
settle controversies and declare rights, unless it is a legislative body before which the appearance is made. Although the state courts have generally held laymen representing others before state administrative agencies to be engaged in the unauthorized practice of law, much of such practice by laymen probably goes on without interference. Many state agencies, in judicial-type proceedings before them, permit lay representation by written or unwritten rule. There is no study available to indicate how prevalent this practice is. Most of it would probably be stopped by the courts if they were given the opportunity.

In addition to the representation of others in proceedings before courts and administrative agencies, the major classes of unauthorized practice are the advising of others on legal problems and the drafting of legal instruments for others. In many cases, laymen have carried on all three kinds of unauthorized practice in relation to the same matters.

Instruments usually involved in unauthorized drafting controversies are real property conveyancing instruments, wills and trusts, credit instruments, claims, pleadings, or tax returns. There are cases holding it to be unauthorized practice for a realtor to prepare deeds, contracts of sale, mortgages or notes, for a bank or trust company to prepare wills, trusts, mortgages, and deeds; if a title or abstract company prepares title opinions, deeds, notes, mortgages or releases; if an inde-

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84 Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977, 982 (1937). But a layman may represent others in informal conferences before the Workmen’s Compensation Commission, Liberty Mutual Insurance Co. v. Jones, 344 Mo. 932, 130 S.W.2d 945, 960 (1939).
85 People ex rel. Colorado Bar Assn. v. Class, 70 Colo. 381, 201 Pac. 883 (1921), the legislature; State ex rel. Johnson v. Childs, 145 Neb. 527, 23 N.W.2d 720, 724 (1946) (dissenting opinion), a rate making agency.
87 People ex rel. Illinois State Bar Assn. v. People’s Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931), legal department of a bank conducted a general practice of law; Hobson v. Kentucky Trust Co., 303 Ky. 493, 197 S.W.2d 454 (1946), trust companies may not draft deeds and wills, except with certain qualifications when the work is not solicited and is gratuitous or when the trust company is a party to the instrument; Judd v. City Trust & Savings Bank, 133 Ohio St. 81, 12 N.E.2d 288 (1937).
88 People v. Lawyers Title Corp., 282 N.Y. 513, 27 N.E.2d 30 (1940), preparation of documents in connection with F.H.A. financing; Steer v. Land Title Guarantee & Trust Co., 113 N.E.2d 763 (Ohio C.P. 1953); Hexter Title & Abstract Co. v. Grievance Committee, 142 Tex. 506, 179 S.W.2d 946 (1944), if performed for consideration. Contra as to instruments drafted by title insurance companies incidentally to the insuring of titles, La Brum v. Commonwealth Title Co., 368 Pa. 239, 56 A.2d 246 (1948); cf. People v. Title Guarantee and Trust Co., 227 N.Y. 366, 125 N.E. 666 (1919).
ependent claims' adjuster prepares contracts settling claims against insurance companies; when collection agency employees or operators prepare pleadings; when patent agents prepare patent applications, contracts, assignments, leases, or pleadings; and when accountants or tax advisers prepare tax refund or adjustment claims. There are also many additional cases prohibiting other kinds of laymen from drafting legal documents for others. In some of these cases the documents were drafted as an incident of a business conducted by the drafter and were related to that business. In other cases the drafting was a distinct business by itself. A separate profession of scrivener for drawing legal instruments is not recognized in this country.

The cases are split on the extent to which a layman may prepare legal documents consisting of legal forms with blank spaces which the layman fills in. Some cases say that this is the unauthorized practice of law because the selection of the proper form and its completion require legal skill and knowledge. But there is considerable authority permitting a layman to complete legal forms for others if the instruments are simple ones, their completion requires no legal skill or knowledge.

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39 State ex rel. Junior Assn. of Milwaukee Bar v. Rice, 236 Wis. 38, 294 N.W. 550 (1940); see Wilkey v. State ex rel. Smith, 244 Ala. 568, 14 So.2d 536 (1943); cf. Hightower v. Detroit Edison Co., 262 Mich. 1, 247 N.W. 97 (1933).


45 People ex rel. Attorney General v. Woodall, 128 Colo. 511, 265 P.2d 232 (1954), bank cashier drafted wills and other legal documents; Grievance Committee v. Payne, 128 Conn. 325, 22 A.2d 623 (1941), town clerk prepared title opinions; State ex rel. Wright v. Barlow, 131 Neb. 294, 268 N.W. 95, county judge who was not a lawyer prepared notes and mortgages; In re Baker, 8 N.J. 321, 85 A.2d 505 (1951), deputy surrogate and a title examiner drew a will to defraud a testator; People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919), real estate and insurance agent drafted many kinds of legal documents; Childs v. Smeltzer, 315 Pa. 9, 171 Atl. 883 (1934), notary public and stenographer drew over 1,000 deeds and mortgages as well as other instruments.


or if done incidentally to the layman's regular business.\(^{47}\) There is less likelihood of form instrument preparation being the unauthorized practice of law if the original form was drafted by an attorney.\(^{48}\) The mere sale of legal forms is not the unauthorized practice of law.\(^{49}\)

Closely related to the preparing of legal documents by filling in forms is the problem of preparing tax returns. Two important recent cases indicate that only lawyers may prepare such returns for others if substantial questions of law are involved,\(^{50}\) and another recent case holds that only lawyers and certain accountants may prepare tax returns.\(^{51}\) There are also cases that permit laymen to prepare simple tax returns\(^{52}\) and others that apparently permit accountants to prepare any tax returns.\(^{53}\)

The unauthorized practice problem of advising others on questions of law is very similar to that of lay drafting of legal documents. The same types of businesses are often found engaging in both activities;\(^{54}\) and illegal drafting transactions in almost every case also involve the improper giving of legal advice,\(^{55}\) although there are occasional instances of illegal advising without any drafting or court appearance being involved.\(^{56}\)

\(^{47}\) Depew v. Wichita Assn. of Credit Men, 142 Kan. 403, 49 P.2d 1041 (1935), \textit{cert. denied} 297 U.S. 710 (1936), collection agency can complete blank notes, drafts, mortgages and similar forms obtainable at any book store if filling them out requires no particular legal knowledge; Gustafson v. V. C. Taylor & Sons, 138 Ohio St. 392, 35 N.E.2d 435 (1941), realtor may fill in purchase contract forms; State \textit{ex rel.} Junior Assn. of Milwaukee Bar v. Rice, 236 Wis. 38, 294 N.W. 550 (1940), an adjuster may select and fill in release forms.


\(^{49}\) See \textit{ex rel.} Attorney General v. Bennett, 101 Colo. 403, 74 P.2d 671 (1937).


\(^{51}\) Rhode Island Bar Assn. v. Libutti, 100 A.2d 406 (R.I. 1953), interpreting a state statute enumerating those who may prepare returns.

\(^{52}\) Lowell Bar Assn. v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943).


\(^{54}\) see \textit{ex rel.} Illinois State Bar Assn. v. Schafer, 404 Ill. 45, 87 N.E.2d 773 (1949), a realtor; Depew v. Wichita Assn. of Credit Men, 142 Kan. 403, 49 P.2d 1041 (1935), \textit{cert. denied} 297 U.S. 710 (1936), collection agency; Judd v. City Trust & Savings Bank, 133 Ohio St. 81, 12 N.E.2d 288 (1937), bank and trust company; Marshall v. New Inventor's Club, 117 N.E.2d 737 (Ohio C. P. 1953), patent agent; Hexter Title and Abstract Co. v. Grievance Committee, 142 Tex. 506, 179 S.W.2d 946 (1944), title and abstract company; State \textit{ex rel.} Junior Assn. of Milwaukee Bar v. Rice, 236 Wis. 38, 294 N.W. 550 (1940), insurance adjuster.

\(^{55}\) Supra note 54.

\(^{56}\) Supra note 54.
A lay person may draft legal documents when he is a party to them, and he may do whatever research is necessary to advise himself on the law. There apparently is no question but that a corporation, through its lay agents, may do the same thing, and in this respect it is treated differently from when it seeks to represent itself before a court by a lay agent. But the cases are divided on whether or not a corporate trust company may permit its employed attorneys to draft trusts when it is to act as a fiduciary under the instruments being drafted. There is authority that permits such drafting on the theory that it is incidental to the fiduciary's authorized business. But a line of cases holds this to be unauthorized practice because essentially it is the performing of legal services for others. However, corporate fiduciaries, once appointed by the court, may permit their employed attorneys to draft documents or make court appearances in the course of estate or trust administration.

A lay association of individuals, corporate or otherwise, may not perform legal services for individual members. Automobile clubs and other organizations have sought to give members the advantage of specialized service, or insurance against the need for legal assistance, by means of association provided legal assistance. These efforts have had their proponents, but the courts have not been among them.

The Courts have had before them the question of whether or not there is still another general class of acts that constitutes the unau-
The unauthorized practice controversy involves the investigation of facts. They have consistently decided that it is not and that the mere acquisition of evidence by a layman is not the practice of law.\footnote{Vitaphone Corp. v. Hutchinson Amusement Co., 28 F. Supp. 526 (D. Mass. 1939); Liberty Mutual Ins. Co. v. Jones, 344 Mo. 932, 130 S.W.2d 945, 961 (1939); State ex rel. Junior Assn. of Milwaukee Bar v. Rice, 236 Wis. 38, 294 N.W. 550 (1940).}

In determining if unauthorized practice exists, courts have applied a number of tests. By far the most common tests used are the incidental one and the legal skill and knowledge one. Under the incidental test, a layman may prepare legal instruments and give legal advice if incidental to his regular business. Under this test, accountants have been authorized to decide legal questions when preparing tax returns;\footnote{In re Bercu, 273 App. Div. 524, 78 N.Y.S.2d 209 (1948), affirmed without opinion 299 N.Y. 728, 87 N.E.2d 451 (1949).} trust companies have been authorized to draft trust agreements;\footnote{Merrick v. American Security & Trust Co., 107 F.2d 271 (D.C. Cir. 1939), cert. denied, 308 U.S. 625 (1940).} title insurance companies have been permitted to draft deeds, mortgages, and other instruments related to the titles of property being insured;\footnote{LaBrum v. Commonwealth Title Co., 368 Pa. 239, 56 A.2d 246 (1948).} and realtors have been permitted to draft instruments incidental to transactions in which they are brokers.\footnote{Agran v. Shapiro, 127 Cal. App.2d 807, 273 P.2d 619 (1954); Gardner v. Conway, 234 Minn. 648, 48 N.W.2d 788, 795 (1951).} Application of the legal skill and knowledge test is more likely to result in lay conduct being considered the practice of law than if the incidental test is applied. The outcome of the unauthorized practice conflict in such important fields as accounting may turn on which of the two tests is generally adopted by the courts. Two important accounting cases subsequent to the recent Bercu opinion have strongly opposed the incidental test applied in the Bercu case.\footnote{In re Bercu, 273 App. Div. 524, 78 N.Y.S.2d 209 (1948), affirmed without opinion 299 N.Y. 728, 87 N.E.2d 451 (1949).} Under the legal skill and knowledge test, it is unauthorized practice for laymen to perform services requiring the competence and knowledge of a lawyer or an understanding of the law.\footnote{Childs v. Smeltzer, 315 Pa. 9, 171 Atl. 883 (1934).}

Possibly because the legal skill and knowledge test, if applied literally, could including the drafting of very simple legal instruments...
ordinarily prepared by laymen and the giving of the most elementary kind of legal advice, some cases hold that laymen may draft simple legal documents and give simple legal advice. But other courts have rejected this simple-complex test.

There are cases that permit laymen to draft legal instruments and give legal advice if these acts are not regularly done as a major or incidental business practice. This authority permits the occasional, sporadic, or emergency legal service by laymen for others. A "practice" is conceived of as something regularly and repetitively done. Closely related to this concept is the one requiring that a layman who drafts instruments or gives advice must receive consideration for his services if they are to constitute unauthorized practice of law. Most truly gratuitous legal services are performed only sporadically. The prevailing view rejects the consideration requirement on the grounds that the lay practitioner is just as dangerous whether or not he charges for his work.

Some slight authority exists to the effect that community practices and customs are determinants of what is unauthorized practice of law; and if laymen in a community frequently perform certain legal services, it is legal for them to do so.

It is not unusual for courts to give reasons for their stand on un-


73 People v. Lawyers Title Corporation, 282 N.Y. 513, 27 N.E.2d 30 (1940); People v. Title Guarantee & Trust Co., 227 N.Y. 366, 125 N.E. 666 (1919), (concurring opinion of Judge Pound); Hexter Title & Abstract Co. v. Grievance Committee, 142 Tex. 506, 179 S.W.2d 946, 953 (1944).


75 People ex rel. Hunter v. Kirk, 133 Neb. 625, 276 N.W. 380 (1937); In re Baker, 8 N.J. 321, 85 A.2d 505 (1951); Hexter Title & Abstract Co. v. Grievance Committee, 142 Tex. 506, 179 S.W.2d 946, 952 (1944), consideration found to exist even though a separate charge was not made for legal services rendered. In re Opinion of the Justices, 289 Mass. 607, 194 N.E. 313, 317 (1935), contains dictum that "gratuitous furnishing of legal aid to the poor and unfortunate without means in the pursuit of any civil remedy" is not the practice of law which must be performed by a member of the bar. This case apparently is relied on to justify law student legal aid activity in Massachusetts.


77 People v. Title Guarantee & Trust Co., 227 N.Y. 366, 125 N.E. 666 (1919); and see Lowell Bar Assn. v. Loeb, 315 Mass. 176, 52 N.E.2d 27, 34 (1943).
authorized practice, and these reasons are much the same as those advanced by bar associations and practitioners in advocating the elimination of laymen from the practice. The usual reason is that they are protecting the public, particularly those who seek the legal services of others, by excluding the incompetent and untutored from the practice of law. The intensive pre-admission educational requirements and the examination and licensing of lawyers insure that all lawyers will have a substantial degree of competence. Courts have flatly denied that the purpose of the unauthorized practice rules is to benefit the bar by protecting its monopoly. But the Kansas Supreme Court, in response to the monopoly argument has said: “That may be good retaliatory argument, but it cannot affect a licensed privilege while it legally exists.” The high professional standards of ethics held by the bar and enforced by the courts is another reason given by the courts for restricting law practice to lawyers. The implication is that comparable standards do not exist and are not enforced among lay groups, and so there would be undue risk of the public being defrauded if laymen could practice law. When the legal skill and knowledge of laymen in one field of law has been argued as justifying their right to practice in that area, it has been asserted by a court that general knowl-

78 "The justification for excluding from the practice of law persons not admitted to the bar is to be found, not in the protection of the bar from competition, but in the protection of the public from being advised and represented in legal matters by incompetent and unreliable persons, over whom the judicial department could exercise little control.” Lowell Bar Assn. v. Loeb, 315 Mass. 176, 52 N.E.2d 27, 31 (1943). Accord: Bump v. District Court of Polk County, 232 Iowa 623, 5 N.W.2d 914, 922 (1942), quoting from the annual reports of the American Bar Association Committee on the Unauthorized Practice of Law; and In re Baker, 8 N.J. 321, 85 A.2d 505, 514 (1951).


82 The law practice franchise or privilege is based upon the threefold requirements of ability, character, and responsible supervision. The public welfare is safeguarded not merely by limiting law practice to individuals who are possessed of the requisite ability and character, but also by the further requirement that such practitioners shall henceforth be officers of the court and subject to its supervision. See, 40 Dick. L. Rev. 225, 229 (1936). In consequence, lawyers are not merely bound by a high code of professional ethics, but as officers of the court they are subject to its inherent supervisory jurisdiction, which embraces the power to remove from the profession those practitioners who are unfaithful or incompetent in the discharge of their trust. In re Tracy, 197 Minn. 35, 266 N.W. 88, 267 N.W. 142; see, In re Opinion of the Justices, 289 Mass. 607, 194 N.E. 313. This is in itself an important reason why law practice should be confined to members of the bar.” Gardner v. Conway, 234 Minn. 468, 48 N.W.2d 788, 795 (1951). Accord: Hexter Title & Abstract Co. v. Grievance Committee, 142 Tex. 506, 179 S.W.2d 946 (1944).
edge of law is needed to practice even legal specialties.\textsuperscript{88} The exclusion of corporations from the practice of law has been justified on the grounds that if this practice were permitted it would destroy the confidential relationship between lawyer and client, even if the corporations employed attorneys to perform legal work for others, and would handicap court control over practitioners of law.\textsuperscript{84}

The courts usually talk about laymen as though they all should be treated alike, and what is improper for one group to do is improper for all. But the legal knowledge and skill of lay groups varies greatly. For example, certified public accountants are relatively well informed in one area of the law, compared to realtors, collection agency personnel or notaries public in the areas of the law most closely related to their businesses. This situation has disturbed many courts. It probably is one reason that the preparation of tax returns is considered legitimate work for accountants. It may be one reason for the development of the incidental test, which excludes strangers to a business specialty from performing legal services.

But powerful business groups are recognizing that legislatures and executive agencies are more likely than the courts to give lay groups increased rights to perform legal services. Some legislatures have been prevailed upon to authorize certain lay groups to do limited legal work for others.\textsuperscript{85} Many executive agencies, especially at the federal level, have adopted liberal policies in relation to unauthorized practice so as to permit extensive lay practice before them. This explains in part the resistance that powerful elements in the legal profession have expressed to the expansion of administrative law. If the courts remain as adamant as they have in defining and restricting unauthorized practice, the pressure by lay groups to secure more liberal treatment from the other branches of the government will probably increase.

There are constitutional problems on the scope of the court’s authority to regulate the practice of law and whether or not this authority is exclusive. It is generally conceded that under their constitution cre-


\textsuperscript{84} \textit{State ex rei. McKittrick v. C. S. Dudley & Co.}, 340 Mo. 852, 102 S.W.2d 895, 900 (1937); \textit{Stack v. P. G. Garage, Inc.}, 7 N.J. 118, 80 A.2d 545 (1951).

\textsuperscript{85} \textit{Infra.} note 96.
ated judicial power, the courts have authority to determine who shall appear before them and to restrict such appearances to lawyers. A supreme court has the power to regulate admissions to practice before subordinate courts and punish non-lawyers appearing before any trial or appellate court within the state. It is generally agreed that courts have the constitutional power to determine who may draft legal instruments and give legal advice, whether or not there is a statute giving them such power. And there are cases saying that under separation of powers, the right of the courts to regulate the practice of law is broad enough to include practice before administrative agencies. A corollary of the question of judicial power over unauthorized practice of law is that of legislative power over it. There are cases holding that the legislature and courts have joint authority in this field. There are cases saying that the legislature’s authority is based on the police power and may be used to restrict unauthorized practice when justified by the police power. Some cases question the constitutionality of all statutes

86 People ex rel. Illinois State Bar Assn. v. People’s Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); In re Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935); Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977 (1937); State ex rel. Johnson v. Childe, 139 Neb. 91, 295 N.W. 381 (1941); In re Baker, 8 N.J. 321, 85 A.2d 505 (1951); Rhode Island Bar Assn. v. Automobile Service Assn., 55 R.I. 122, 179 Atl. 139 (1935), and this inherent right in the courts existed prior to the constitution; Washington State Bar Assn. v. Washington Assn. of Realtors, 41 Wash.2d 697, 251 P.2d 619 (1952), an inherent power of the court, no reference to its constitutional source. Contra, to the effect that New York courts have no power to regulate the practice of law except as the legislature has delegated such power, In re Bercu, 69 N.Y.S.2d 730 (1947), overruled on other grounds, 273 App. Div. 524, 78 N.Y.S.2d 209 (1948), affirmed without opinion, 299 N.Y. 728, 87 N.E.2d 451 (1949).

87 People ex rel. Illinois State Bar Assn. v. People’s Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); In re Morse, 98 Vt. 85, 126 Atl. 550 (1924).

88 People ex rel. Illinois State Bar Assn. v. People’s Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977 (1937).

89 Ibid; and State ex rel. Johnson v. Childe, 139 Neb. 91, 295 N.W. 381 (1941). But cf. note 28 supra, and cases cited.

90 Rhode Island Bar Assn. v. Automobile Service Assn., 55 R.I. 122, 179 Atl. 139 (1935); Grievance Committee v. Dean, 190 S.W.2d 126 (Tex. App. 1945).


The judicial department of government, and no other, has power to license persons to practice law. Statutes may aid by providing machinery and criminal penalties, but may not extend the privilege of practicing law to persons not admitted to practice by the judicial department.” Lowell Bar Assn. v. Loeb, 315 Mass. 176, 52 N.E.2d 27, 30 (1943). As a matter of “comity,” the courts can accept and apply statutes on the practice of law. Covern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940).

90 Grievance Committee v. Dean, 190 S.W.2d 126 (Tex. App. 1945), and the excellent dissenting opinion of Shaw, J., in People ex rel. Chicago Bar Assn. v. Goodman, 366 Ill. 346, 8 N.E.2d 941 (1937), cert. denied 302 U.S. 728 (1937), arguing that under separation of powers, the legislature and executive, not the courts, except by legislative delegation, have authority to punish unauthorized practice by non-lawyers.
regulating the practice of law.\textsuperscript{92} These cases proceed on the theory that the courts have exclusive authority over the subject. Many appellate opinions ignore constitutional questions as to the source of the courts' rights to decide unauthorized practice questions. Many such opinions are based on statutes, and the questions of law involved are mostly those of statutory interpretation.\textsuperscript{95}

Even though the courts have been the major law-makers on unauthorized practice, statutes and administrative regulations have had some influence in this field. Many states have statutes that expressly prohibit the practice of law by laymen, but do not define the practice of law.\textsuperscript{94} A few statutes attempt a general definition of the practice of law,\textsuperscript{95} and a few statutes go farther and state whether or not certain practices of particular businesses are valid under the law of unauthorized practice.\textsuperscript{96} The Congress of the United States has so far not seen

\textsuperscript{92}"We agree with the holding that the power to define and regulate the practice of law is, in its exercise, judicial and not legislative, but we do not agree with the further holding that the exercise of such power may be regulated by statute. If it is correct to hold that such power is judicial, then it is not correct to hold that the exercise of such power may be reasonably regulated by the Legislature, in face of the constitutional injunction that the legislative department of government shall not encroach upon the powers and functions properly belonging to the judicial department." Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977, 980 (1937), but the concurring opinion of Gantt, J., states that the "question of the authority of the Legislature to enact such statutes [condemning the unlicensed practice of law] is not presented by the record in this case and is not ruled by the principal opinion."

"Any legislative attempt to authorize the practice of law by one not duly licensed by the supreme court is absolutely void as an attempt to exercise judicial powers by the legislative branch of the government." State ex rel. Johnson v. Child, 139 Neb. 91, 295 N.W. 381 (1941), but this opinion also states that the legislature may have a "possible right . . . to make minimum requirements for the protection of the public by a proper exercise of the police power, to fix the qualifications for admission to the bar." And People ex rel. Chicago Bar Assn. v. Goodman, 366 Ill. 346, 8 N.E.2d 941 (1937), cert. denied 302 U.S. 728 (1937), states that statutes or executive rulings concerning the practice of law are invalid if inconsistent with judicial rulings.

\textsuperscript{93} People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919); Shortz v. Farrow, 327 Pa. 81, 193 Atl. 20 (1937); Rhode Island Bar Assn. v. Libuti, 100 A.2d 406 (R.I. 1953); Hexter Title & Abstract Co. v. Grievance Committee, 142 Tex. 506, 179 S.W.2d 946 (1944).


\textsuperscript{95} For example, Wis. Stat. § 256.30 (2) (1951):

"Every person who shall appear as agent, representative or attorney, for or on behalf of any other person, or any firm, copartnership, association or corporation in any action or proceeding in or before any court of record, court commissioner, or judicial tribunal of the United States, or of any state, or who shall otherwise, in or out of court for compensation or pecuniary reward give professional legal advice not incidental to his usual or ordinary business, or render any legal service for any other person, or any firm, copartnership, association or corporation, shall be deemed to be practicing law within the meaning of this section."

Also see Minn. Stat. § 481.02 (1) (1949).

\textsuperscript{96} For example, Minn. Stat. § 481.02 (3) (1949), permits certain laymen to do certain specified acts. They may draw wills for others in an emergency; lay brokers or agents in the sale or lease of property may draw papers incidental to the transaction; insurance companies may defend insured persons against claims covered by the companies' policies; and labor organizations may give legal advice to their members in matters arising out of the members' employment. And the Rhode Island statutes on unauthorized practice set forth many types of factual situations, and include this section:
fit to legislate on the subject of unauthorized practice by laymen, except to authorize some administrative agencies to control the admission of persons who may practice before them. Some administrative agencies, both state and federal, have established restrictions on who may practice before them. These regulations frequently permit laymen to represent others in matters before the agencies.

An intensive struggle for legal supremacy is now being waged at the federal legislative and administrative level between lawyers and accountants. Bills have been introduced in the last two sessions of Congress designed to give non-lawyers the statutory right to represent others in federal tax matters. The bar is opposed to these bills, the accountants favor them. The United States Treasury Department has also considered making changes in its regulations that would broaden the rights of non-lawyers who represent others on federal tax matters. The bar is opposed to any such changes, and the accountants want the changes. Controversy is centered on Section 10.2(f) of the Treasury Department regulations. Both the lawyers and accountants have

"Nothing in this section shall be construed to limit or prevent: . . . (7) Any certified public accountant or member of the American Institute of Accountants from appearing or acting as a representative of another person before any federal, state or municipal department, board, division, department, commission, agency, or any body other than a court, authorized or constituted by law to determine any question of fact, affecting the imposition or adjustment of taxes or regarding any financial or accounting matter, or from preparing for or on behalf of another person any federal, state or municipal return or report of any nature or description, or advising another person in relation to the preparation of any such return or report." R.I. GEN. LAWS, c. 612, § 43 (1938). Also see N.J. STAT. ANN. § 2A:170-79 to 170-82.

Footnotes:

67 Supra note 29.
68 For example, 49 Code Fed. Regs. § 1.8, Interstate Commerce Commission; 46 Id. § 201.26, Federal Maritime Board; 37 Id. § 1.341 (1949), Patent Office, Department of Commerce; 31 Id. §§ 10.2 and 10.3 (1949), and as amended (1953 Supp.), Treasury Department.
69 H.R. 5206, 84th Cong., 1st Sess., introduced by Representative Dingell; H.R. 2416, 84th Cong., 1st Sess., introduced by Representative Lipscomb; H.R. 1601, 84th Cong., 1st Sess., introduced by Representative Reed of New York; H.R. 10007, 83rd Cong., 2d Sess., introduced by Representative Reed of New York, and again as amended (1953 Supp.), Treasury Department.
70 All of the bills are quite similar. H.R. 1601 provides:
   "To authorize the Secretary of the Treasury to prescribe regulations relating to qualifications of persons who assist taxpayers in the determination of their Federal tax liabilities, and for other purposes.
   "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury shall by regulations prescribe, to the extent that he considers practicable and desirable, qualifications, rules of practice, and standards of ethical conduct applicable to persons who assist taxpayers in determination of their Federal tax liabilities, in preparation of their Federal tax returns, and in settlement of their Federal tax liabilities with the Internal Revenue Service. Provided, that no person shall be denied the right to engage in such activities solely because he is not a member of any particular profession or calling."

The bar is opposed to the last proviso in this bill. All of the above five bills contain this proviso.
71 Section 10.2 (f) now provides:
   "Rights and duties of agents. An agent enrolled before the Treasury Department shall
brought strong pressures on Congress and on the Treasury Department in this struggle.\textsuperscript{101} The leading protagonists for the accountants have been the certified public accountants acting through the American Institute of Accountants. Dean Griswold thinks that the certified public accountants would be in a better tactical position if they did not align themselves with the public accountants and other groups less skilled in tax matters and less developed professionally than the certified public accountants.\textsuperscript{102} The outcome of this controversy between lawyers and accountants may possibly set the pattern for the resolution of other lawyer-lay group conflicts.

II. EFFORTS AT AGREEMENT

Eight important competing businesses, through their national associations, have entered into written agreements with the American Bar Association concerning the unauthorized practice of law.\textsuperscript{103} These agreements, often called statements of principles, are an effort to resolve the unauthorized practice controversy through promises by competing businesses not to do specified things which the bar considers improper practices by laymen. Similar agreements have been negotiated by some local and state bar associations with businesses in their localities.\textsuperscript{104}

\begin{itemize}
\item Have the same rights, powers, and privileges and be subject to the same duties as an enrolled attorney: Provided, That an enrolled agent shall not have the privilege of drafting or preparing any written instrument by which title to real or personal property may be conveyed or transferred for the purpose of affecting Federal taxes, nor shall such enrolled agent advise a client as to the legal sufficiency of such an instrument or its legal effect upon the Federal taxes of such client: And provided further, That nothing in the regulations in this part shall be construed as authorizing persons not members of the bar to practice law.” 31 Code Fed. Regs. § 10.2 (f), (1949).
\item For example, see the communications from bar associations to the Secretary of the Treasury concerning proposed changes in the Treasury Department regulations. Opposition to Amendment of Treasury Department Circular 230, 20 Unauthorized Practice News, no. 3, p. 6 (1954); and a summary of statements made in May, 1955, by the American Bar Association and the American Institute of Accountants to the Undersecretary of the Treasury, 99 J. Accountancy 10 (June, 1955). Also see Lawyers and Accountants, 41 A.B.A.J. 439 ff. (1955); Lawyers and Accountants: Chairman Jameson’s Statement to the House, 41 A.B.A.J. 318 (1955); and infra. notes 200 and 201.
\item Griswold, Lawyers, Accountants, and Taxes, 10 The Record 52, 68 (1955), reprinted in 18 Texas B.J. 109, 182 (1955), and 99 J. Accountancy 33, 35 (April, 1955); commented on editorially with favor, id. at 31.
\item These agreements are printed in 2 Martindale-Hubbell Law Directory 107A-114A (1955) and 79 A.B.A. Rep. 675-691 (1953). Interpretations have been made from time to time. A citation list of interpretations appears in 14 Unauthorized Practice News, no. 4, p. 24 (1948).
\item In 1951, the Indiana Law Journal published the results of a survey it conducted on state bar activity in entering into agreements. The survey shows that slightly over half of the states have some kind of local or state agreements on unauthorized practice between the bar and one or more businesses. California, Georgia, Texas, Utah, and Wisconsin appear to have the most agreements, and more agreements have been entered into with banks than with
\end{itemize}
The first national agreement, made in 1937, was with collection agency representatives. Subsequently, national agreements have been reached with insurance adjusters, banks doing trust business, publishers of legal materials, realtors, life insurance underwriters, life insurance companies, and accountants. Consideration was recently given to the possibility of an agreement with the National Society of Public Accountants, but decision on the matter was postponed because the Society represents too small a proportion of the public.


In Kansas, the state bar association has entered into statements of principles with the Kansas Claims Association (lay-adjusters) and the Kansas Trust Bankers, and has adopted a statement of principles for submission to the Kansas Association of Real Estate Boards for approval. 23 KAN. BAR. J. 60-76 (1954). The state bar has committees on Relations with Abstracters, Relations with Lay-Adjusters, Relations with the Medical Profession, Relations with Realtors, and Relations with Trust Bankers. For reports of these committees see ibid.

By 1947, trust agreements were adopted by bar and business associations in 39 localities, including 18 states. The national agreement was the one adopted in 9 of these localities, including 8 states. 13 Unauthorized Practice News, no. 4, p. 17 (1947).

One function that the national conference groups should perform is the maintenance of up-to-date records on local and state agreements and the activities of local and state conference groups. Correlation and encouragement of local activities are impossible when there is no accurate record of how many agreements and conference groups there are. If the national conference groups cannot do this job, perhaps the American Bar Association Unauthorized Practice Committee should do it, or some paid American Bar Association staff member, with all cooperating trade associations contributing to his salary.

For the discussion of a local agreement between the Chicago Bar Association and the Corporate Fiduciaries Association of Chicago that preceded the national collection agency agreement by eight years, see Strawn, Ways of Dealing With Unauthorized Practice of the Law, 20 A.B.A.J. 639 (1934). Other early agreements are discussed in Hicks and Katz, The Practice of Law by Laymen and Lay Agencies, 41 YALE L. J. 69, 98 (1931), and many of them are reprinted in full in Hicks and Katz, Unauthorized Practice of Law, Part III (1934).


Adopted in 1941 and approved by the American Bar Association and the Executive Committee of the Trust Division of the American Bankers Association.


Approved in 1943 by the American Bar Association and the National Association of Real Estate Boards.

Approved in 1948 by the American Bar Association and the National Association of Life Underwriters.

Approved in 1951 by the American Bar Association and the American Institute of Accountants.
accountants in the United States. No national agreement has been attempted with the automobile clubs because they have no national organization of sufficient stature. There have been so few complaints of banks in their non-trust work engaging in unauthorized practices that no agreement has been sought in this area. Every organization requested by the American Bar Association to enter into a national agreement has ultimately done so. State and city bar associations have in some instances entered into agreements with state and local counterparts of national organizations having agreements with the American Bar Association. Further, state bar groups have made at least three agreements with title companies and one with an automobile club.

Permanent national conference groups of ten to seventeen members each have been set up to administer the agreements and to generally obtain better cooperation between the bar and business on unauthorized practice questions. The permanent conference groups are similar to those that initially adopted the agreements in that they are composed of representatives of the American Bar Association and the businesses involved. Each national conference group ordinarily meets once or twice a year. The groups interpret and amend the agreements, make recommendations for publicizing them, and consider complaints of violation. The state and local conference groups perform similar functions for their own localities.

Why have lay businesses been willing to cooperate on unauthorized practice through conference groups and agreements? One reason is that by this means they will probably be less restricted in the legal-type services they may perform than if the courts fix and enforce unauthorized practice standards as a result of suits brought by the bar

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114 Id. at 567-569.
115 The national conference groups are National Conference of Lawyers and Certified Public Accountants; National Conference of Lawyers and Representatives of American Bankers Association, Trust Division; National Conference of Lawyers and Realtors; National Conference of Lawyers and Life Insurance Companies; National Conference of Lawyers and Life Underwriters; National Conference of Lawyers and Adjusters. There are no conference groups of lawyers and publishers or lawyers and collection agencies although statements of principles have been approved by these groups.
117 Brief summaries of the work of the conference groups appear in the annual reports of the American Bar Association Standing Committee on Unauthorized Practice of the Law, printed in the annual A.B.A. Reports.
associations. Compromises resulting from friendly negotiation may be better than taking chances with the courts. Litigation is also expensive and can damage the reputation of a business. It cost the accountants $79,800 to defend the Bercu case; but the expenses of the bar associations that brought suit were small because attorneys for the associations contributed their time.\(^{118}\) The bar has a tactical advantage in unauthorized practice matters because the bar associations often obtain their legal services gratuitously from members. Unauthorized practice suits can also hurt the reputations of defendant businesses because the bar’s charges and decrees adverse to defendants are well publicized.\(^{119}\) One understanding behind the agreements is that they will make litigation less necessary. Agreements have a further advantage to businessmen in that provisions have been inserted prohibiting lawyers from encroaching on the legitimate functions of the businesses involved. Business seems to hope that cooperation with the bar will bring more referrals from lawyers and a growing recognition that business has the exclusive right to perform some legal-type services.

The agreements entered into vary considerably. These variances reflect both the different form that unauthorized practice takes from business to business, and also the differences among businesses as to how much they are willing to concede to the bar as being improper conduct by laymen. The statement of principles entered into with the accountants is the best example of a business reluctant to give in to the bar on any unauthorized practice issue.\(^{120}\) And the lawyers and accountants negotiated off and on for sixteen years before even this vague understanding could be reached.\(^{121}\)

\(^{118}\) 16 Unauthorized Practice News, no. 4, p. 10 (1950). It is reported that the accountants spent $105,000 to defend Gardner v. Conway, the appellate opinion of which appears in 234 Minn. 468, 48 N.W.2d 788 (1951).

\(^{119}\) For example, see Case, Favorable Local Publicity for the Suppression of Unauthorized Practice, and How to Secure It, 23 A.B.A.J. 941 (1937), which describes the publicity obtained by a St. Louis bar association committee in relation to a suit against a life insurance adjuster engaged in unauthorized practice.

\(^{120}\) In editorializing on the approval of the statement of principles, The Journal of Accountancy said:

"It does not detract from the magnitude of the achievement to recognize that the adoption of the Statement of Principles is only a beginning of the effort to resolve the differences which have arisen. The statement is necessarily general in its terms. It does not provide specific answers to any of the multifarious questions that have been raised as to what lawyers and certified public accountants may or may not properly do in particular circumstances. At first reading some accountants may be disappointed with what may appear to be the statement’s pious generalizations." 91 J. Accountancy 802 (1951).

\(^{121}\) On the early history of the negotiations between the American Bar Association and the American Institute of Accountants see Maxwell, Techniques in Preventing the Unauthorized Practice of the Law, The National Standards and Methods, 31 Iowa L. Rev. 301 (1946); and Maxwell and Charles, Joint Statement as to Tax Accountancy and Law Practice, 32 A.B.A.J. 5 (1946).
Each agreement covers some or all of these matters: conduct by the business that constitutes unauthorized or at least improper practice;\footnote{For example, collection agencies shall not, in dealing with debtors, "employ instruments simulating forms of judicial process"; insurance adjusters shall not "deal directly with any claimant represented by an attorney without the consent of the attorney"; trust institutions shall not "draw wills or other legal documents"; publishers shall not "represent to the public that by subscription or membership, the employment of personal counsel is unnecessary."} conduct by the business that it may legitimately perform;\footnote{For example, a trust institution "has an inherent right to advertise its trust services in appropriate ways"; it is a proper function of a certified public accountant to prepare federal income tax returns; insurance adjusters "may properly interview any witnesses, or prospective witnesses, without the consent of opposing counsel or party."} conduct by lawyers that is improper;\footnote{For example, "an attorney should respect and not interfere with the business relationship existing between a trust institution and its customer"; "when a lawyer prepares a return in which questions of accounting arise, he should advise the taxpayer to enlist the assistance of a certified public accountant"; a lawyer should not "for any reason other than in the interest of or for the protection of his client express an opinion discouraging the consumption of a real estate transaction, where the parties have been brought together by the real estate broker."} conduct by lawyers that is proper;\footnote{For example, lawyers may prepare federal income tax returns or claims for refunds.\footnote{Trade journals have reprinted and discussed the principles. See, for example, Barker, The Life Insurance Agent and the Practice of Law, The Eastern Underwriter, Oct. 5, 1951 (part 2), p. 26; The "Practicing Law" Allegation—Views of Insurance Business Given, The Eastern Underwriter, Oct. 6, 1950 (part 2), p. 24; Otterbourg, New National Statement of Principles Between Life Underwriters and Lawyers, 86 Trusts and Estates 291 (1948); Redeker, Some Guideposts for Cooperation Between Lawyers and Life Insurance Representatives, 8 American Society of Chartered Life Underwriters Journal 86 (1953), this article was proposed by the National Conference of Lawyers and Life Insurance Companies; Bruns, A Policy for Cooperation Between Lawyers and Trust Institutions, 82 Trusts and Estates 291 (1946), discussing a treaty between the bar and trust companies in California; Statement of Policies for Trust Institutions and Bars, 73 Trusts and Estates 381 (1941); 91 J. Accountancy 802, 869 (1951). Instruction concerning the statements of principles is given at life insurance agents' training courses. Report of the Standing Committee on Unauthorized Practice of the Law, 78 A.B.A. Rep. 275, 281 (1953). The Conference of Lawyers and Life Insurance Companies has recommended that "all agents' training courses conducted by life insurance companies and life underwriters' associations should include instructions concerning the National Statement of Principles and the objectives of this Conference." Martindale-Hubbell Law Directory 113A (1955). The Association of Casualty and Surety Companies has had 15,000 copies of the adjusters' agreement printed for distribution to insurance and adjusting companies. 18 Unauthorized Practice News, no. 2, p. 44 (1952). The American Bar Association also has copies of the agreements available for distribution.}} and organization and duties of a national conference group. Emphasis in the agreements is on conduct prohibited to laymen.

From the bar's point of view, probably the greatest value of the agreements has been an educational one. With the assistance of the participating trade associations, the agreements have been well publicized among the affected businesses.\footnote{For example, collection agencies shall not, in dealing with debtors, "employ instruments simulating forms of judicial process"; insurance adjusters shall not "deal directly with any claimant represented by an attorney without the consent of the attorney"; trust institutions shall not "draw wills or other legal documents"; publishers shall not "represent to the public that by subscription or membership, the employment of personal counsel is unnecessary."} This has meant that far more of the hundreds of thousands of businessmen in the affected businesses have become aware of the unauthorized practice problem and some of the major restrictions on laymen. A sizeable percentage of businessmen will readily comply with the rules as to unauthorized practice when brought to their attention. One difficulty is that many businessmen be-
long to no trade associations and some trade associations in fields that
compete with lawyers are parties to no agreements. This has limited
the scope of trade association publicity. The agreements have also been
helpful to the bar because they encourage voluntary compliance and
there are far too many competing business enterprises for compliance
to be obtained by the lawyers relying primarily on litigation. In addi­
tion, the agreements are an advantage in litigation. In determining
what constitutes unauthorized practice, the courts are impressed with
what business trade groups have agreed is unauthorized practice.127 But
there has not been unanimity in bar support for the agreement ap­
proach. For example, the powerful Chicago Bar Association has op­
posed the agreement idea and in recent years has refused to enter into
any statements of principles. Those lawyers who oppose agreements
argue that agreements with laymen as to what is the unauthorized
practice of law usurp the court’s power to make such determinations;
and insofar as the agreements are inconsistent with judicial rulings,
and they must be or there is no incentive to lay organizations approving
them, the bar associations are participating in unauthorized practice.

Compliance with the agreements has been left largely to the good
faith of businessmen and lawyers. But the conference groups do con­
sider complaints of non-compliance and seek to obtain adherence with
the agreements when violations exist. In violation cases, the national
conference groups apparently have neither applied any sanctions
against violators nor instigated the application of sanctions. Instead,
they have attempted to secure voluntary compliance after the nature
of the violations has been pointed out to the violators. Although they
have publicly declared that they are available to consider evidence of
violations, comparatively few complaints have been brought before
them. Not more than one or two complaints per year have been made
to some of the conferences. No efforts have been made by conference
groups or unauthorized practice committees to investigate for violations
except in response to complaints. Ambiguity in the agreements has
hampered their enforcement.128

127 See, for example, Agran v. Shapiro, 127 Cal. App.2d 807, 273 P.2d 619, 630 (1954);
and In re Rothman 12 N.J. 528, 97 A.2d 621 (1953).
128 “Our committee of the Ohio State Bar Association is in agreement with the so-called
conference method, with declaration of principles, but when it comes to applying same to
the specific situations that are constantly arising in Ohio, it finds these national agreements
are too general to meet the problems that harass practically every local bar association in this State.
We find that when attempts have been made to work out similar agreements with state organi-
In some businesses covered by agreements, there apparently are many violations. Compliance seems to be best among the trust companies, which is not surprising as bar-business cooperation on unauthorized practice is highly developed in the trust field. Perhaps this is because the trust companies have more to gain, in the way of increased business, if they cooperate. Perhaps it is because they are particularly vulnerable to effective unauthorized practice litigation, as they are relatively few in number, and this makes enforcement of court decrees easier, and because their business reputations require that they be law-abiding institutions. The accountants and realtors seem to be the most frequent agreement violators. Relations between the lawyers and accountants have so deteriorated that official rescission of the statement of principles in this field is possible, as well as disbanding of the conference group. Some lawyers fear that the accountants will gradually try to take over all kinds of office practice work now performed by lawyers. This is a partial explanation for the great concern that many bar groups are showing in accountants' activities.

Even if the conference groups or associations that approved the agreements sought to impose sanctions for agreement violations, they would be restricted in what they could do. Dismissal from association membership would not be much of a deterrent, and many lawyers and businessmen do not belong to supporting associations. It is unlikely that the statements of principles could be enforced as contracts against either the associations or their members. Judicial proceedings could be brought if the agreement violations also were infractions of the law of unauthorized practice. But this would be inconsistent with one purpose of the agreements which is to avoid litigation by mediating differences.180

129 Dean Griswold seems to believe that the American Institute of Accountants has in substance and effect repudiated its statement of principles with the lawyers. Griswold, Lawyers, Accountants, and Taxes, 10 The Record 52, 66 (1955), reprinted in 18 Tex. B.J. 109, 180 (1955), and 99 J. Accountancy 33, 39 (1955).

130 For an example of a national conference group mediation offer that was declined by local bankers and which led to a bar association decision to file an unauthorized practice suit, see Report of the Standing Committee on Unauthorized Practice of the Law, 69 A.B.A. Rep. 263, 265 (1944).
If the agreement device is to be a substitute for litigation in the unauthorized practice field, not only must there be compliance with the agreements, but there must be many rulings as to what the agreements mean when applied to particular fact situations. These rulings or interpretations must be made by bodies carrying so much authority that they will be obeyed. The experience of the conference groups so far gives little indication that this necessary interpretation function can be performed. Few interpretations have been requested, which indicates poor compliance; and there has been difficulty, notably in the lawyer-accountant conference groups, in securing agreement on interpretations. A good guess is that the agreement device will diminish in importance as a means for regulating unauthorized practice.

III. EFFORTS TO INCREASE SERVICE

The legal profession is making some efforts to improve the services that lawyers provide their clients. One purpose behind these efforts is to enable lawyers to better compete with non-lawyers in the struggle for business. And strides are made in this direction even when the motive for improving service is something other than advancing the profession's competitive position.

The law schools are the most aggressive and creative force striving to develop a more competent bar. For many years, law school education has consisted of a highly developed and intensive program requiring three to four years for completion after pre-law requirements have been met. The pre-law requirements vary from two to four years of college, and the trend is for an increasing number of law schools to insist on a bachelor's degree as a prerequisite to admission. There is no consensus in the profession as to how legal education can be improved, although there is constant experimentation by the law schools. An example of the lack of agreement on what the law schools should be teaching is the current controversy between law teachers and some practitioners over "practical" legal education.132

131 See, for example, Postwar Plan for the Suppression of Unauthorized Practice of Law, 70 A.B.A. REP. 258 (1945).

Llewellyn puts great stress on improved service as the approach the bar should take to unauthorized practice. Llewellyn, The Bar's Troubles, and Poultices—and Cures?, 5 LAW & CONTEMP. PROB. 104 (1938).

There have been recent changes in legal education that have a direct bearing on unauthorized practice. An increasing proportion of the law school curriculum is being devoted to public law courses, including administrative law; more legal writing is being required; and more and better courses in taxation and accounting are being offered. The result of these developments is better trained lawyers in some of the key areas of lay competition: representation of clients before administrative agencies, drafting of legal instruments, and taxation.

Post-admission educational opportunities for lawyers are increasing. They take the form of bar association and law school institutes and conferences, and law school courses for practitioners. But only a very small proportion of the bar materially increases its knowledge or skill by these means. Post-admission education has been most effective in the field of taxation.

Another means for increasing the quality of service performed by the bar through increasing the competence of lawyers is the licensing of lawyers only after they have fulfilled certain educational prerequisites and passed a bar examination. The usual educational requirements are two or more years of college plus three years of law school. Some states permit applicants to substitute private study for law school attendance, but the number of persons in recent years who have sought admission to the bar with only law office or other private law study is probably less than 1 per cent of all applicants. In a few states, graduates of certain law schools are licensed without additional examination, although most states require that all applicants take a state-administered examination after completing their formal legal education. There is considerable variation from state to state in the percentage that pass these examinations, but the national average is about 60 per cent. Once an attorney is licensed, he need not pass an addi-
ional examination to maintain his license. But an attorney licensed in one state cannot practice in another without securing a license in the second state. And it is becoming increasingly common to require such attorneys to pass a difficult written examination in the second state as a condition to admission there. At the time of their admission, attorney applicants must be of good character, and some character investigation of applicants is made by the bar examiners of most states. The few figures available indicate that rejections on character grounds are less than \( \frac{1}{2} \) of 1 per cent of all applicants.\(^{135}\)

After admission, professional canons of ethics have some beneficial effect on the quality of service provided by the bar.\(^{136}\) They deter some unconscionable activity by low-principled lawyers; and as a verbalized creed of service, they aid in educating new lawyers in the professed moral standards of the bar. Their enforcement through imposition of sanctions is not rigorous, but persistent and flagrant violators are likely to face formal disbarment proceedings.\(^{137}\) The shyster lawyer has more effective in-group opposition to his behavior than does the shyster businessman. Several of the canons of ethics, including the prohibitions on advertising, incorporating law practices, and fee-splitting with laymen, have great effect on the kind of service provided by the bar. It is arguable whether or not this effect has been entirely to the public’s good, but the bar shows no inclination to change these policies.\(^{138}\)

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135 Brenner, Bar Examinations and Requirements for Admission to the Bar 255 (1953).
136 The basic canons of ethics for the legal profession are those adopted by the American Bar Association. They have frequently been interpreted by an American Bar Association Committee. The canons and opinions both appear in American Bar Association, Opinions of the Committee on Professional Ethics and Grievances (1947). Interpretive opinions since 1947, as well as earlier ones, appear in the American Bar Association Journal.
137 Records are poor as to the number and types of disciplinary proceedings against lawyers in the United States, including the extent to which the disciplinary powers of the courts have been used. Phillips and McCoy, Conduct of Judges and Lawyers c. 6 (1952). But a study made of grievance cases in Illinois shows that from 1928 to 1948, the Illinois Supreme Court disbarred 141 lawyers and suspended 54 others. During the same period, the two major bar associations in Illinois received 18,566 complaints against lawyers, of which 9,166 were referred to a committee for investigation. Id. at 114. From 1928 to 1948, the Supreme Court of California disbarred 141 lawyers and suspended 244, and the Board of Governors of the State Bar of California reproved 223 lawyers who presumably were not disbarred or suspended. Id. at 101. The bar is as diligent in enforcing its code of ethics as any profession or economic group with similar standards, and far more diligent than most.
138 The American Bar Foundation is making a study of the canons of ethics, looking toward possible revisions and amendments. 79 A.B.A. Rep. 122, 274 (1954). But it is unlikely that any change in the bar’s policies toward advertising, incorporation, or fee-splitting will result from this study.
In modern times, a vast increase in efficiency has taken place in the production of goods and performance of services. Even office procedures have benefited. New mechanical equipment, increased specialization of labor, and intensive marketing activity have been largely responsible for this added efficiency. What about lawyers, have they made similar advances? Are legal services being performed with less effort and at less cost? Lawyers have not matched most businesses in increasing efficiency. The average lawyer does things in much the same way as did his counterpart of fifty or one hundred years ago. But there have been some developments worth mentioning. Marvelous advances have been made in publications that digest and report legal source material. The loose-leaf services, advance sheets, key system, citators, annotated statutes, *The Federal Register*, digests, and form books now available to lawyers are effective and ingenuous. They have enabled the legal profession to continue the old traditions of stare decisis and rule by statute and executive order even though government is far more complex than ever before and the volume of authoritative material has become mountainous. But these printed materials have not reduced the lawyer's efforts over former times; they have merely prevented him from being overwhelmed by the authoritative accumulation. Despite the aids available, legal research and drafting are generally more difficult and time consuming than in previous eras.\(^{189}\)

The cost of legal research to the practitioner has been kept down in large cities and some small towns by the development of law libraries open at little or no charge to all members of the local bar. These libraries, operated by bar associations, the county, the state, or subscription organizations, make it unnecessary for a lawyer to maintain a vast research library of his own, even assuming he could afford to do so. Micro-filming of legal materials is beginning and promises increased library efficiency through savings of space and in cheaper acquisitions.

Strides have been made in judicial administration and procedure that have tended to simplify litigation at the trial level. Modern pleading and procedure codes have helped in this. Juries are used in a smaller proportion of cases,\(^{140}\) and whatever their advantages, jury cases

\(^{189}\) For a suggestion that I.B.M. electrical selector machines be used to speed up legal research see Kelso, *Does the Law Need a Technological Revolution?*, 18 Rocky Mt. L. Rev. 378 (1946).

take more time and preparation than do non-jury ones. More cases proportionately are now being settled, either without any complaint being filed or after filing but before trial. This too may have disadvantages, but it generally means less cost in disposing of disputes.

Although the bar has made some strides in improving service, so have the bar's competitors. And the pattern of improvement is much the same for non-lawyers as for lawyers. College and university courses in accounting, insurance, banking, real estate, credit, and business law attract an increasing number of students. Most of these students have not as yet started to earn a living, although evening courses are available in most large cities and are attended by many who wish an academic background in the businesses which they have already entered. Except for a few graduate schools of business and courses for prospective certified public accountants, academic programs in business do not approach those in law for difficulty, thoroughness of coverage, or educational prerequisites to entering the professional programs. But some businesses have done more than the legal profession in formal educational training of those already actively engaged in their fields. In-training programs of many banks and insurance companies, for example, are much superior to formal post-admission legal training programs. But those taking business in-training are for the most part beginners with little or no experience or background in their vocations.

Some of the bar's competitors, following a national trend common to many occupational groups, have sought and obtained licensing and state-administered examinations as means for improving the quality of their service by preventing incompetents from entering their occupations. There are monopoly as well as public service objectives behind these measures. Abstracters are licensed in 3 states; certified

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142 'Not long ago the Governor of a midwestern state was approached by representatives of a particular trade anxious to enlist the Governor's support in securing passage of legislation to license their trade.

'Governor,' the men said, 'Passage of this licensing act will ensure that only qualified people will practice this occupation; it will eliminate charlatans, incompetents or frauds; and it will thereby protect the safety and welfare of the people in this state.'
public accountants in 48 states;\textsuperscript{144} public accountants in at least 20 states;\textsuperscript{146} insurance brokers, agents and solicitors in 26 states;\textsuperscript{148} and real estate brokers and salesmen in 40 states.\textsuperscript{147} Successful completion of an examination is usually required to secure a license to engage in these occupations. Licenses can be revoked for misconduct, but such revocation is rare, although complete statistics on the matter for the above occupations are unavailable. In Kansas, since 1921, only one certified public accountant license has been revoked for misconduct. One informed source estimates that the annual total number of certified public accountant revocations for all states is about six.

To become licensed as a certified public accountant, all but four states require a year or more of experience in accounting work.\textsuperscript{148} This is in addition to educational and examination requirements. Only five states have apprenticeship prerequisites for admission to the bar, and the duration of the apprenticeship nowhere need be more than nine months long.\textsuperscript{149}

Rules of professional conduct, similar to those of the bar, have been developed by at least one of the bar’s competitors, the accountants.\textsuperscript{150} The professional accounting societies have the power to discipline their members who violate these rules.\textsuperscript{151} Accurate statistics on the frequency of such disciplining are unavailable, but in 1954 the American Institute of Accountants had two members of the Institute before its trial board; one was expelled, and the case of the other postponed for consideration in 1955. The Institute has a membership of 25,000.

One advantage that laymen who perform legal services have over lawyers is the high degree of the laymen’s specialization. Although some lawyers specialize in one very narrow field of law and do all of their

\textquotesingle{The Governor, from long experience, was somewhat skeptical. ‘Gentlemen,’ he asked, ‘are you concerned with advancing the health, safety and welfare of the people under the police powers of this state, or are you primarily interested in creating a monopoly situation to eliminate competition and raise prices?’

‘The spokesman for the occupational group smiled and said, ‘Governor, we’re interested in a little of each.’” THE COUNCIL OF STATE GOVERNMENTS, OCCUPATIONAL LICENSING LEGISLATION IN THE STATES 1 (1952).

\textsuperscript{148} Ibid. at 64.
\textsuperscript{146} Ibid.
\textsuperscript{148} Ibid.
\textsuperscript{147} Ibid. at 79.
\textsuperscript{150} Ibid. at 80.
\textsuperscript{149} Ibid. at 50.

\textsuperscript{144} BRENNER, BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR 107 (1952). The apprenticeship states are Delaware, New Jersey, Pennsylvania, Rhode Island, and Vermont.
\textsuperscript{150} Carey, The Ethics of Public Accounting, 297 THE ANNALS 1 (1955); Rules of Professional Conduct of the American Institute of Accountants, 95 J. ACCOUNTANCY 465 (1953).
\textsuperscript{150} Carey, supra note 150 at 4.
work in that field, most lawyers are general practitioners. Most lay practitioners, on the other hand, perform their legal services in only one field, the field closely related to their occupation. This provides a greater experience background than many general practitioners of law have in the layman's field, particularly if the layman does a large volume of legal-type work. Of course many lay persons have no legal training and little knowledge of the law, even that related to their occupation. But others, such as accountants, trust officers, and some laymen authorized to appear before administrative agencies, do have a fair grasp of the legal principles in their fields. These men are frequently more efficient in performing legal tasks for clients than are many lawyers, even though the laymen's advice may at times be wrong because of ignorance of legal principles and practices outside the scope of their specialty. Constitutional law, evidence, contracts, negotiable instruments, corporation law, and any other field of law may frequently be controlling in legal problems before a lay specialist, and he will rarely be competent to deal with or even recognize issues of law outside his specialty.

This problem of specialization is a serious one today in all kinds of human activity. It is acute in the professions. How much general education and experience should a physician, engineer, teacher, or lawyer have? What proportion of the profession should be specialized in its work and how sub-divided should this specialization be? What should be the working relationships between the specialist and the general practitioner? Could the bar give better service and hence better cope with lay competition if it were more highly specialized? Does specialization threaten an imbalance in legal service with consequent

\footnote{For an analysis of lawyers' specialization in a large city see Kent, Economic Status of the Legal Profession in Chicago, 45 ILL. L. REV. 311, 330 (1950). The specialists earn more than general practitioners, reach the median income level for the profession as a whole more rapidly, and the decline in their income is reached later in their careers. \textit{Ibid}.}

\footnote{"The prevention of unauthorized practice . . . is all to the good, provided that the bar recognizes that it is not simply keeping incompetence out of the practice of law. For not all of our unauthorized competitors are incompetent. Some of them are quite as competent as we are, and some of them cost less to the client." Curtis, \textit{The General Practitioner and the Specialist}, Conference on the Profession of Law and Legal Education, U. of Chicago Conference Series, no. 11, p. 7 (1952).}

\footnote{This problem is discussed in Curtis, \textit{The General Practitioner and the Specialist}, Conference on the Profession of Law and Legal Education, U. of Chicago Conference Series, no. 11 (1952). Curtis believes that there should be more cooperation among specialists, in and out of the bar, and between specialists and general practitioners. He thinks that the lawyers' canons of ethics should be revised to permit closer collaboration between lawyers and lay specialists, and should permit fee-splitting between lawyers and lay specialists. Somewhat similar ideas have recently been expressed by Morris Ernst. Ernst, \textit{The Lawyer's Role in Modern Society}, 4 J. PUB. L. 1 (1955).}
harm to the public at large by concentrating too much skill in representing big business? Does it lead to a loss of perspective by specialists that dulls their impact for the good of society as a whole?\textsuperscript{155}

Some lawyers feel that steps should be taken to increase specialization in the legal profession as a means of fighting unauthorized practice. One proposal is to follow the lead of the medical profession and establish certification boards that would certify certain lawyers as particularly well qualified to act in various specialized fields of law.\textsuperscript{156} Only those lawyers would be certified who passed written examinations in their specialty or otherwise showed themselves particularly well qualified. Certification would have only a reputation advantage; those not certified could still handle any kind of legal problem. The American Bar Association has under consideration plans to establish a series of specialized societies or boards, each one consisting of lawyers in a recognized specialty who voluntarily wish to join and can meet approved standards of proficiency.\textsuperscript{157} As yet, no decision has been made on the standards for admission to the societies or the specialties that will be recognized.

IV. EFFORTS TO INCREASE REPUTATION

Public relations and publicity programs have been used by the organized bar in an effort to increase the legal profession's reputation with outsiders and advertise the merits of the bar. In part, the reason for these programs is to strengthen the competitive position of the bar and ward off further encroachments by those whom the bar labels as unauthorized practitioners.\textsuperscript{158} References to competing businesses or to unauthorized practice are rare in these association-sponsored promo-

\textsuperscript{155} Llewellyn years ago called attention to this threat of imbalance from specialization. Llewellyn, The Bar Specializes—With What Results?, 167 The Annals 177 (1933).

\textsuperscript{156} Kegan and Melchoir, Certification—A Proposal to the Bar, 42 Ill. L. Rev. 413 (1947); Report of Special Committee on Specialization and Specialized Legal Education, 79 A.B.A. Rep. 582 (1954). The specialized boards in the medical profession are described in Joiner, Specialization in the Law? The Medical Profession Shows the Way, 39 A.B.A.J. 539 (1953).


\textsuperscript{158} The American Bar Association Committee on Unauthorized Practice of Law has made a written statement to the Board of Governors of the American Bar Association opposing the creation of specialist legal societies, and giving reasons for its opposition. This statement appears in 20 Unauthorized Practice News, no. 4, p. 4 (1954). Also see Report of the Standing Committee on Unauthorized Practice of the Law, 79 A.B.A. Rep. 296 (1954).

\textsuperscript{159} For example, see the post-war program for the suppression of unauthorized practice of law recommended by the American Bar Association's Unauthorized Practice of Law Committee, Postwar Plan for the Suppression of Unauthorized Practice of Law, 70 A.B.A. Rep. 258 (1945). This is a three-point plan involving the education of lawyers, the public, and groups whose businesses involve a knowledge of law.
But the inference is often left that it is dangerous to have someone other than a lawyer perform legal services. Stress is placed on the difficulties that a person can get into if he does not retain a lawyer, such as purchasing property having a defective title, leasing premises under unfavorable rental terms, and making wills that are invalid. Attention is directed to the services available from lawyers; how to employ a lawyer; and the moderateness of legal fees. The organized bar has also sponsored citizenship programs. These create a favorable impression as to the patriotic character of the sponsoring

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159 The following are examples of bar advertising and promotions specifically referring to unauthorized practice:

The Lubbock County (Texas) Bar Association has posted signs in banks, with their consent, stating that the banks are cooperating to stamp out unauthorized practice and do not draft legal instruments. 15 UNAUTHORIZED PRACTICE NEWS, no. 2, p. 13 (1949). Similar postings have been made in Wisconsin, 17 UNAUTHORIZED PRACTICE NEWS, no. 3, p. 31 (1951).

The Butler County (Missouri) Bar Association has published newspaper warnings under the heading “Notice to Unauthorized Persons Practicing Law.” 12 UNAUTHORIZED PRACTICE NEWS, no. 1, p. 1 (1946). Similar warnings have been published by the Weatherford County (Texas) Bar Association. id. at 56. The Texas State Bar sent a notice summarizing a Texas Supreme Court decision on unauthorized practice to all real estate agents, abstracters, accountants, county clerks, banks, and building and loan associations. 11 id., no. 1, p. 51 (1945).

The Minnesota State Bar Association briefly discusses unauthorized practice in a pamphlet distributed to the public entitled MEET YOUR LAWYER.

Bar representatives frequently issue press releases in connection with unauthorized practice suits. Otterbourg makes this recommendation for such releases:

"Whenever any litigation is instituted by a bar association, the publicity in respect thereto should always stress that the litigation is not merely brought to punish a particular offender, but that it is part of a general bar program brought for the purpose of protecting the public from harm and injury. Whenever possible, the publicity should give examples or explanations of the likelihood of public injury unless the practices complained of are stopped." OTTERBOURG, A STUDY OF UNAUTHORIZED PRACTICE OF LAW 47 (1951). To the same effect see BLAUSTEIN AND PORTER, THE AMERICAN LAWYER 129 (1954).

160 Under "don't's" for bar association speakers, AMER. BAR ASSN., PUBLIC RELATIONS FOR BAR ASSOCIATIONS 88 (1953) states:

"Do not criticize other professions by name. To illustrate: it might be proper to point out the various pitfalls in estate planning and the legal fields involved—without the obvious implication that a lawyer should be consulted, but it would be improper to level an accusing finger at bankers or insurance agents. The statutory warranties given by the grantor in a deed, and the potential liability for failure to recite an exception or encumbrance, might indicate that one should never have a realtor draw a deed—but leave it for inference."

An example of an advertisement with such an inference is this one that The Unauthorized Practice News notes as being "one of the best advertisements in the public interest that has reached our attention recently:"

"ONLY A SURGEON . . .
ONLY A SURGEON can cut off a nose and improve a face . . .
ONLY A LAWYER may safely interpret the law, write a contract, or draw a will.
"Saving $50 at a cost of $5,000, or more, is like cutting off your own nose to spite your face.
"If a will is the matter at issue, for instance, your entire estate may go to pay for a mistake your attorney's fee would have prevented.
"Your attorney—trained to assist you—is your best protection against mistakes and possible frauds and deceptions of others. See your lawyer first."

This is an advertisement by the Florida State Bar Association, 16 UNAUTHORIZED PRACTICE NEWS, no. 4, p. 19 (1950).
organization, and point up the great value of the legal institutions which the bar interprets, protects, and administers. Such programs have described the court system, the legislative process, and the United States Constitution.

State and local bar associations have carried out most of the public relations programs for the bar, with the American Bar Association giving advice, urging action, and correlating activities of the state and local groups. A Committee on Public Relations, established by the American Bar Association in 1939, has spearheaded the national organization’s public relations efforts. The Committee recently published a detailed manual, *Public Relations for Bar Associations*, suggesting methods that local and state bar groups can use and citing many examples of programs that these groups have carried out in the past.

Most media of communication have been resorted to by the bar in its promotional efforts: pamphlets, press releases, newspaper advertisements, radio, television, films, speakers, contest awards, and letters of protest to publishers of materials considered objectionable by the bar. Some bar associations have even hired professional public relations experts. Both lawyer reference plans and legal aid have received strong bar association support, in part because they are “a most effective means of indicating to the public the need of a lawyer.” Lawyer reference services, it is argued, will reduce unauthorized practice by making it easier for those persons to locate lawyers who otherwise might have their work done by laymen. The same claim is made

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161 It was a special committee from 1939 to 1946, and in 1946 was made a standing committee. Sunderland, *History of the American Bar Association* 208 (1953).

162 An early report of the Special Committee on Public Relations stated: “Public Relations should refer to the relation of the organized bar with its own members, with the members of the profession generally, and with the public in its concept of public service rendered by the profession, and there should be excluded from the definition any attempt to improve the legal business of the individual lawyer or as a group or a profession or any specific attempt at innovation of Association advertising for or in behalf of the profession.” 65 A.B.A. Rep. 94 (1940).


164 Bar associations in at least thirteen states have employed professional public relations assistance. Amer. Bar Assn., *Public Relations for Bar Associations* 30 (1953).


for the neighborhood law office of the kind developed in Philadelphia. The statements of principles entered into with related businesses and the conference groups that implement them are also considered by the bar to be important public relations accomplishments.

The amounts spent by the bar on public relations and publicity have nowhere been great when measured by advertising programs of large business enterprises. And many state and local bar associations have done nothing in the way of conscious public relations programs. It is difficult to gauge the total effect of the bar public relations programs, but they probably have had little influence in counteracting unauthorized practice. If expenditures are increased and efforts are persisted in over a long period of time, the bar may achieve everything it wants from these programs. The medical profession, in its vigorous and expensive drive against public health insurance, has shown what a professional organization can do in molding public opinion. But until the bar feels that it is as seriously threatened as the medical profession has believed it has been threatened, nothing as big as the American Medical Association program is to be expected from the bar associations.

One public relations idea that the bar in this country has so far refused to adopt is the indemnification of clients, through a bonding or bar association reimbursement scheme, when lawyers have been guilty of fraud or embezzlement. The purpose of such a scheme is to increase public confidence in the bar. Client indemnification plans of this kind have been adopted in England, New Zealand, and five Canadian provinces. The American Bar Association has a special committee on lawyers' indemnity studying the problem with the object of possibly recommending that lawyers in this country bring themselves under an indemnification plan. Opponents feel that this sort of public relations would be harmful to the bar by giving the public an impression

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170 For an account of organized medicine's campaign against compulsory health insurance see Comment, The American Medical Association: Power, Purpose, and Politics in Organized Medicine, 63 Yale L.J. 938, 1010-1018 (1954). For this campaign, the AMA assembled a $3,500,000 fund from member assessments; in one year distributed 55 million pieces of literature to 100 million people. Before the 1950 Congressional elections, every newspaper in the United States carried AMA advertisements and 1600 radio stations broadcast spot commercials. Much of this was paid for by banks, insurance companies, utilities and druggists. State and local medical societies were also very active in support of the campaign. Ibid.
172 Ibid.
that lawyers' misconduct is much more prevalent and serious than it really is.

Bar association promotions are of particular importance to the legal profession because individual practitioners and law firms may not advertise. The canons of legal ethics flatly prohibit it. Some subtle forms of self-publicizing are permitted, such as running for public office and becoming active in volunteer community affairs. In some small towns, lawyers advertise in the newspapers by listing merely their names, office addresses, and telephone numbers. The propriety of this is at best questionable. In all states, the bar has occasionally been plagued, at one time or another, with a few lawyers who illegally solicit automobile accident, criminal, or divorce cases by offering their services to prospective clients either personally or through intermediaries. This chasing problem is most serious in big cities but is engaged in by only a minute fraction of the bar. It is done surreptitiously and has frequently met with disbarment proceedings.

Despite the self-laudatory practices by lawyers that actually exist, the bar has generally been effective in cutting off private practitioners from acquiring clients by the normal business methods of personal solicitation and advertising. The only way for lawyers to lawfully use advertising in their fight against unauthorized practice is by bar association advertising that stresses the merits of lawyers as a group without naming individual members of the bar. This has been done, and it is ethical.

Most businessmen who compete with lawyers engage in extensive promotional activities, including advertising and solicitation. These efforts affect the bar by drawing some customers for whom legal services are then performed, often incidentally to the main business services offered. The advertising and solicitation that affects the bar is done mostly by individual businesses; for example, newspaper advertising by realtors, personal calls by life insurance salesmen, and radio

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178 A.B.A. CANONS OF PROFESSIONAL ETHICS, Canon 27.
174 Ibid; A.B.A. Opinions of Committee on Professional Ethics and Grievances, opinions 69 and 182; DRINKER, LEGAL ETHICS 241 (1953). The practice of publishing legal cards in newspapers is common in many Kansas counties. The legality of this practice has never been passed on by the Supreme Court of Kansas.
170 Supra note 163.
176 The American Bar Association has held bar association advertising to be ethical which acquaints the lay public with the expert service the legal profession is able to render. A.B.A. Opinions of Committee on Professional Ethics and Grievances, opinions 179 and 227; DRINKER, LEGAL ETHICS 254 (1953).
and television commercials by automobile clubs. Rarely are legal services mentioned in this promotional work. The laws as to unauthorized practice appear to be the main reason why the non-lawyers who perform legal services do not advertise them. If it were clearly permissible for them to do legal work, no doubt it would be stressed in their promotional efforts.

Accountants, who have similar advertising restrictions to those of lawyers, have done some group institutional advertising comparable to that of the bar associations. The societies of certified public accountants have distributed pamphlets and brochures to businessmen stressing the services that accountants perform, with emphasis on tax services, and have also sought to instill the idea that accounting is a profession. The accountants seem particularly interested in reaching the small businessman. No direct reference is usually made to the unauthorized practice question, but the stress on tax services apparently is designed to attract tax work away from lawyers. Recently, in its efforts to secure support for passage of federal legislation favorable to accountants, the American Institute of Accountants has widely distributed to laymen, as well as accountants, literature advocating the accountant's position on unauthorized practice and attacking the position taken by the bar associations. The accounting societies have also prepared printed

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178 The titles of some of the pamphlets and brochures directed at businessmen are Your CPA’s Responsibility, distributed by the American Institute of Accountants; About a Profession, Its People and the Public Interest, published by The California Society of Certified Public Accountants; Taxes, published by the National Association of Master Plumbers in cooperation with the American Institute of Accountants; and How Much Do You Know About Your Income Tax? A pamphlet entitled A Career in Public Accounting, published by the American Institute of Accountants, apparently is directed at students and prospective accountants.

Typical provisions are these:

"Most businessmen and many individuals need the advice and assistance of an expert who knows both accounting methods and tax regulations. Naturally, many CPA’s find the calculation of income for tax purposes and the preparation of tax returns an important part of their work." A Career in Public Accounting, p. 7.

"The public accounting profession developed because bankers, credit managers, stockholders, and business, large and small, needed it. As is true of all professions, public accounting exists because people need the services it can provide." About a Profession.

"The holder of a CPA certificate has passed a three-day examination in accounting practice, theory of accounts, auditing, and commercial law, and must complete at least two years experience before the certificate can be granted." Ibid.

"The logical man to help with your tax problems, as we have indicated, is the Certified Public Accountant.

"Engaging a Certified Public Accountant is easy. Your bank or business friends may be able to recommend a CPA. You can, of course, simply choose any Certified Public Accountant from the classified section of your phone book and still be assured that you are getting a competent accountant." Taxes, p. 15.

179 See, for example, Helping the Taxpayer, a 19-page brochure.
public relations materials for their members, similar to those distributed to bar association members, stating the importance of public relations programs, the media that should be used for them, and what should be said.¹⁸₀

V. EFFORTS TO INCREASE GROUP INTEGRATION

Action by members of a group on matters that pertain to the whole group is more apt to be successful if there is general and vigorous support within the group for the program of action. This support is likely if the program of action is consistent with the group ideology, that system of beliefs widely held by group members. The larger the percentage of group members who hold to these beliefs and the more intensely they feel about them, the more vigorous their support of the

¹⁸₀ Pamphlets and brochures prepared by the accounting organizations for distribution to accountants include: Cooperation for Professional Advancement Through the American Institute of Accountants, distributed by the American Institute of Accountants; You and Public Relations, published by The Committee on Public Information of the California Society of Certified Public Accountants; and Public Opinion and the Accounting Profession, distributed by the American Institute of Accountants.

These are examples of the contents of these publications:

"How then do we organize the facts and ideas we want people to know?
"People on the whole will not stand still to be educated. They haven't time. So, if the future of the profession depends on what people think of us, then what are the basic facts and ideas we want to get over?
"The Committee on Public Information studied this question and came up with ten basic themes:

"Accounting is a Profession.
"The Accountant Serves the Public Interest.
"The Accountant Helps Management.
"Accounting is Creative.
"Accounting is Progressive.
"Accounting is a Language for Business.
"The CPA is Independent.
"The Accountant has a Code of Ethics.
"Accountancy is an Expanding Profession.
"The Accountant is a Good Citizen." Public Opinion and the Accounting Profession.

"For good reasons, certified public accountants, like the members of other professions, have agreed that it is unethical and undesirable for the individual practitioner or firm to advertise. Instead, the members of the profession as a group tell their story through the public relations programs of their state societies and the American Institute.

"Public relations programs developed as part of the Institute's program include:
"Network radio shows and transcriptions for presentation on local stations.
"Pattern speeches available for delivery by individual members.
"Pamphlets designed for distribution to bankers, small businessmen, students, investors, candidates for the CPA examination and others.
"Articles in national magazines and the trade press.
"Newspaper publicity, including stories in the hometown papers of new members and those who attend annual and regional meetings.
"A speakers bureau, serving both state societies and non-accounting organizations.

"The public relations program is not only a means of disseminating information about the profession, it is also tied in very closely to specific objectives such as federal and state legislation, relations with other professions, attracting qualified young men and women into public accounting, and many other goals selected for emphasis by the membership from time to time through the Institute's Council and Committees." Cooperation for Professional Advancement, p. 7.
the program of action. Stated differently, the more integrated or united a group is on ideological questions, the greater the chance that acts can be carried out in furtherance of the ideology.

Individual lawyers are inclined to be complacent about unauthorized practice. Business inroads have come gradually and the bar has become accustomed to many of them. Most lawyers have regular, friendly dealings with businesses that on occasion perform legal services for others. A large percentage of the bar represents businesses of this kind, is employed full-time by them, or regularly has clients referred from them. Fifteen or twenty years ago, the unauthorized practice movement was actively opposed by many lawyers, including some leaders of the organized bar. There was even important opposition to the movement within the American Bar Association; and members of the Committee on Unauthorized Practice of Law were under severe criticism from some other committee and section members. Opposition in the American Bar Association apparently was centered in the tax and insurance sections. But active opposition within bar associations has almost entirely disappeared, although fear of it has toned-down the unauthorized practice programs of some bar associations.

The organized bar, under the leadership of the American Bar Association, has tried to shatter practitioners' complacency about unauthorized practice, and to substitute a militant and unified attitude. These efforts have met with considerable success in spreading knowledge of the ideology and adherence to it, but with only moderate success in developing intensity of feeling about unauthorized practice. Much of the bar remains complacent. More intensive and sustained bar association efforts at convincing the average lawyer of the seriousness of the unauthorized practice threat would change the feelings of some. More time spent on unauthorized practice problems by full-time paid bar association staff members is needed if the program is to be intensified.

The statement of principles approach to unauthorized practice has resulted in some lawyers' giving limited support to the bar on the unauthorized practice question who otherwise would not give it any

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181 During the Thirties when some state and local bar groups sought to restrict the activities of insurance adjusters as unauthorized practice of law, the American Bar Association was attacked by local bar leaders for not supporting their efforts. For an account of an incident in this controversy, see Boyle Clark Calls Bar Leaders "Stuffed Shirts," The National Underwriter, March 30, 1939, p. 3.
support on the matter. These lawyers are afraid to offend businesses 
that compete with the bar; but backing a program of cooperation 
through statements of principles does not offend business interests.

The usual way in which the organized bar has sought to influence 
professional thinking on lay practice of law is through articles in asso­ 
ciation publications and law reviews and speeches at association gath­ 
erings. The American Bar Association publishes a quarterly bulletin, 
Unauthorized Practice News, that is widely distributed within the 
profession without charge, and goes to all state and local bar associa­ 
tion committees on unauthorized practice.\(^{182}\) It gives surprisingly broad 
coverage to unauthorized practice developments, including both trial 
and appellate court litigation. During the past several years, it has 
distributed thousands of copies of a Survey of the Legal Profession 
study on unauthorized practice that was written by a former American 
Bar Association Unauthorized Practice Committee chairman.\(^{183}\) The 
Survey of the Legal Profession, which was sponsored by the American 
Bar Association, has turned out to be a significant medium for spread­ 
ing the bar's ideology on many matters, including unauthorized prac­ 
tice.

Leaders of the organized bar, and particularly members of unaу­ 
thorized practice committees, are generally crusaders on the subject of 
unauthorized practice, and assert that there is no good reason for not 
giving lawyers the sole right to perform legal services. Their articles 
and speeches directed at lawyers reflect an ideology similar to the ad­ 
vocate position taken by the bar before the courts in unauthorized 
practice cases, except that greater stress is placed on loss of business 
when addressing lawyers.\(^{184}\) Due largely to the efforts of bar associa­

\(^{182}\) The Unauthorized Practice News has a mailing list of 3600 lawyers. Report of the 

\(^{183}\) Otterbourg, A Study of Unauthorized Practice of Law (1951).

\(^{184}\) The following are examples of statements on unauthorized practice by bar association 
leaders:

"The fight against unlawful practice of law is the public's fight in which the bar 
is rendering a public service. Every man is entitled to receive legal advice from men 
skilled in law, to be served disinterestedly by a person not motivated or controlled by 
a divided or outside interest. Whenever those members of the newer professions, busi­
ness men and the public generally, understand this salient fact, then cooperation and 
support are accorded to the bar. Unless the profession of law continues to call to its 
ranks our finest and ablest young men, unless we continue to have a strong and vigorous 
legal profession, the United States cannot hope to obtain a government of laws and not 
of men; and in its private contact with lawyers, our public will not receive the honest 
and disinterested legal advice to which it is entitled. These young men are exhorted 
throughout their years of study to live up to the ethics and high ideals of the profession 
and upon graduation and afterwards in the practice of law are required to do so. Can 
anything be more demoralizing to them and therefore to the profession itself and to the
administration of justice than to permit illegal and unauthorized practice of law."


"Actually, unauthorized practice of law is a swindle upon the public. Whenever it takes place, some person receives either incompetent or unqualified advice, or advice which cannot be honestly disinterested. Such advice in many instances can deprive the person so advised of protections to which the law entitles him. Reliance upon such advice may result in irreparable injury and loss." Otterbourg, A Study of Unauthorized Practice of Law 4 (1951). In addition to being a former chairman of the American Bar Association Committee on Unauthorized Practice of the Law, Mr. Otterbourg is a former president of the New York County Lawyers Association.

"The entire bar program for the prevention of unauthorized practice of law must be based upon the public need for competent, qualified, disinterested and responsible legal services. Whenever and in whatever way there may be brought home to the public the knowledge of the character of lawyers' services and their special qualifications therefor, this, although incidentally in the economic interest of the bar, is nevertheless paramount for the benefit of the public itself." Id. at 46.

"The prevention of unauthorized practice is part of the public service of the bar. Many lawyers seem to regard the effort as something necessary merely to prevent competition. This misguided attitude is often expressed in the charge that laymen are 'taking the bread and butter' of the lawyers, as though that alone were the reason for prosecuting them. Strongly to the contrary, it is the public, not the lawyers, which is entitled to the protection." Blaustein and Porter, The American Lawyer 126 (1954).

"During the past year your committee has been continuing its efforts to secure the passage of an Administrative Practitioners' Act which is necessary in the public interest and will eliminate the present evils of practice before administrative agencies. For some time there has been a tremendous growth of administrative agencies, and bureaucrats have run roughshod over the liberties of the people and there has grown up in Washington a group of so-called practitioners who are not guided by any ethical principles and are to a great extent not subject to the control of agencies. In many respects they are 'fixers' rather than practitioners and they sell their services on the basis of alleged influence rather than ability. This situation has resulted in inestimable harm to the public and in the interest of the public should be stopped." Report of the Standing Committee on Unauthorized Practice of the Law, 74 A.B.A. Rep. 249 (1949).

"Here in New York, you know something of the economic status of the American lawyer due to the overcrowding of the Bar. The survey made by the New York County Lawyers Association revealed some startling facts. We cannot but be astonished that the average lawyer in New York City nets less than $3,000 a year; that about 40% make less than will decently support a family. Yet all the while laymen, who have not spent the time and money in preparation and who do not adhere to the profession's ethical standards, are collecting fees which normally would flow to these needy members of the Bar." Stecher, Unauthorized Practice and the Public Relations of the Bar, 23 A.B.A.J. 606, 608 (1937). Mr. Stecher is now Secretary of the American Bar Association.

"As I have heretofore suggested, the fact that we are attempting in every possible way to persuade lay groups to refrain from practicing law and are attempting to point out to such lay groups that the public will suffer irreparable harm because of the unauthorized practice of law by laymen, should not cause us to abandon litigation. If we cannot persuade them, then it is our duty to fight." Randall, Unauthorized Practice, 13 Tex. Bar J. 382, 391 (1950). When this statement was made, Mr. Randall was Chairman of the American Bar Association Committee on the Unauthorized Practice of the Law. He is now Chairman of the American Bar Association House of Delegates.

"The lawyer pays. The public pays. Everybody loses. Yet an age-old profession is semi-dormant today, and the public at large insensible to the price paid annually for unauthorized legal services.

In the past, the lawyers assumed that such practice would multiply mistakes and litigation would surely follow, but that no financial loss to the lawyers would result. The former assumption is correct; the latter is a fallacy. Today's lawyers at the year's end find an ever-decreasing percentage of income from small fees for office practice in the preparation of contracts, deeds, mortgages, leases, wills, and so on, and the giving of advice in their frequent smaller business transactions.

The only field of the law not invaded today by those unauthorized is the court room, and even its sanctity has been disturbed by laymen liquidating agents of broken banks. The lawyer has too long thought his license preserved his business. A law
tion leaders, a rather clear-cut bar ideology on unauthorized practice has evolved. The precepts of this ideology are that performance of legal services by non-lawyers is contrary to the public good; only lawyers should perform legal services as they are the only ones sufficiently skilled or trustworthy to do so; the canons of legal ethics, as enforced, and the lawyers' long tradition of being officers of the court, insure the trustworthiness of the bar; when non-lawyers perform legal services, they are depriving lawyers of income to which they have a right, and this deprivation threatens the moral standards of the bar by creating a group of needy lawyers who are tempted to violate the canons of ethics in order to make a living; the Federal Government should not interfere with the states in the regulation of unauthorized practice; and in seeking to eliminate unauthorized practice, the voluntary cooperation of business groups should be sought before unauthorized practice litigation is started. This ideology is so well established that, excluding briefs in unauthorized practice cases, few written expressions by private practitioners of law can be found inconsistent with it. It has been questioned by businessmen who also are members of the bar but are mostly influenced by the ideologies of business. It has also been questioned by a few law teachers who in their non-practitioner roles as impartial observers have disagreed with it in some respects. But it is generally subscribed to by members of the

license is not a protective tariff. The profession must be awakened to self-preservation.

"The heretofore prevalent idea among the bar that the unauthorized practice of law only applied to matters of trivial consequence cannot now prevail. The volume of unauthorized practice of law in Texas is the lawyer's annual profit. It is the unrealized swelling headache and disappointment of the public unwarrantly filched." Brown, While the Lawyer Sleeps—the Public Pays the Filcher, 2 Tex. Bar J. 125 (1939). Mr. Brown was Chairman of the Texas Bar Association Committee on Unauthorized Practice of the Law when this article was written.

In support of this argument, Maitland is sometimes quoted to the effect that the law is a seamless web. See Maitland, A Prologue to a History of English Law, Association of American Law Schools, 1 Select Essays in Anglo-American Legal History 7 (1907).

Articles written by private practitioners that are contrary to the bar position on unauthorized practice include Ernst, The Lawyer's Role in Modern Society, 4 J. Pub. L. 1 (1955); Rembar, The Practice of Taxes, 54 Col. L. Rev. 338 (1954); Studer, The Lawyer and the Accountant, 77 J. Accountancy 368 (1944).

For example, Hurst asserts that the unauthorized practice drive by the bar resulted from the hard times of the 1930's rather than simply "regard for protecting the public against the incompetent or unscrupulous." Hurst, The Growth of American Law 323 (1950). Llewellyn claims that the bar's difficulties in the unauthorized practice area are due in part to the effectiveness of some lay businesses, such as title companies; by the high cost of lawyers' services; and by the incompetency of many lawyers. Llewellyn, The Bar's Troubles, and Poults— and Cures?, 5 Law & Contemp. Probs. 104 (1938). Gelhorn thinks that some non-lawyer practitioners are well qualified to appear before administrative agencies in a representative capacity, even at the hearing stage, and although lawyers are subject to certain ethical constraints, this does not mean that non-lawyers cannot come up to the same level of ethical behavior. Gelhorn, Qualifications for Practice Before Boards and Commissions, 15 U. of Cin. L. Rev. 196, 200 and 203 (1941).
bar in all branches of the profession: private practice, the bench, government practice, teaching, and corporate legal department work. Lawyers who make statements that do not correspond with the bar's unauthorized practice ideology are likely to be publicly criticized by bar leaders.\(^ {188}\)

One disadvantage that bar associations have in influencing lawyers on unauthorized practice or any other subject is that, except in states which force universal bar association membership by integrated bar rules,\(^ {189}\) many lawyers belong to no bar association. Only about one-fourth of the 225,000 lawyers in the United States are members of the American Bar Association, and membership in some state bar associations is less than one-half of all licensed attorneys in those states. Failure to acquire larger memberships is a financial handicap in combating unauthorized practice, and it greatly limits the number of lawyers who are reached by association publicity on the subject. But even with this handicap, bar associations have been very effective in creating an unauthorized practice ideology.

In their pre-admission legal education, lawyers receive little information or attitude conditioning on unauthorized practice. The bar associations have recently made efforts to change this.\(^ {190}\) The schools have generally ignored bar association concern with unauthorized practice, for they have never been much interested in including, within their curricula, problems of professional economics and organization.\(^ {191}\)

\(^ {188}\) Even the title of a law review note has been adversely commented on. "Yet in the September, 1947, issue of Yale Law Journal on page 1438 there appears an article entitled 'Attorney Versus Accountant: A Professional Jurisdictional Dispute in the Field of Income Tax Practice.' This title was no doubt an arresting one, and well worthy of headlines anywhere, but to me it indicated an alarming lack of understanding on the part of those who have supervision over the policy of the Yale Law Journal as well as the Yale Law School. Perhaps the fault should be at least partially that of our Committee [American Bar Association Committee on the Unauthorized Practice of the Law] for ignoring the students in the law schools and in failing to see that they are aware of the unauthorized practice problems and what the Bar associations are doing to combat it." Randall, Unauthorized Practice, 13 Tex. Bar J. 382, 389 (1950).

\(^ {189}\) The bar is integrated in twenty-four states. Winters, Bar Association Organization and Activities 9 (1954).

\(^ {190}\) A Joint Conference on Professional Responsibility was established in 1952. The conference group consists of five representatives of the American Bar Association and five representatives of the Association of American Law Schools. One purpose of this conference is to obtain, in law school courses, greater consideration of unauthorized practice. Report of the Standing Committee on Unauthorized Practice of the Law, 77 A.B.A. Rep. 270, 271 (1952); 76 id. 280, 281 (1951).

\(^ {191}\) The subject of unauthorized practice is considered in these student casebooks: Cheatham, Cases and Other Materials on the Legal Profession (2d ed. 1955); Costigan, Cases and Other Authorities on the Legal Profession and its Ethics (1933); Pirigie, Cases and Materials on Judicial Administration (1946). But these casebooks are not extensively used by the law schools.
Probably they would devote as much attention to unauthorized prak-
tice as they now do to legal ethics if the boards of bar examiners would
include the subject on their examinations. 192

Whether a lawyer likes the bar position on unauthorized practice
or not, he is bound to comply with it in his dealings with laymen or
face the danger of disbarment. In this respect, group integration is
forced. By the canons of ethics a lawyer cannot assist a layman to en-
gage in the unauthorized practice of law. 193

Although the bar associations are primarily responsible for sharpen-
ing and publicizing the bar's unauthorized practice ideology, during
the past twenty years the courts have also done much in this direction.
If the courts had consistently held against the bar associations in un-
authorized practice cases, the bar ideology would probably be much
different from what it is now, because the bench is an important force
in molding bar opinion. But the bench has in general been consistent
in reflecting bar ideology; 194 and bar leaders often back-up their state-
ments on unauthorized practice ideology with quotations from judi-
cial opinions. 195

The trade associations representing businesses that compete with
lawyers have performed a similar function to the bar associations in
developing group ideologies about unauthorized practice consistent
with the interests of the group. The business ideology has been that
business is performing skilled services that are to the public good;
businessmen are skilled because they are highly specialized; the state
should not regulate business so as to prevent reputable businessmen
from performing services that they are well qualified to perform; and
and business must oppose efforts by lawyers to unfairly extend their
monopoly. 196 But in recent years, concurrent with the movement for

192 In at least one state, Washington, the bar examination covers unauthorized practice. 16
UNAUTHORIZED PRACTICE NEWS 27 (1950).
193 A.B.A. CANONS OF PROFESSIONAL ETHICS, Canon 47. One reason for the adoption of Canon
47 was to restrict the unauthorized practice of competing businesses acting through their gen-
eral counsel and other employed lawyers. For examples of cases in which lawyers improperly
aided laymen in the unauthorized practice of law, see supra note 25.
194 In responding to the argument that the bench is prejudiced in favor of the bar in un-
authorized practice cases, Judge Edgerton says: "But there are no special tribunals for such
conflicts, and courts must resolve them as best they can." Merrick v. American Security & Trust
Co., 107 F.2d 271 (1939).
195 See, for example, WINTERS, BAR ASSOCIATION ORGANIZATION AND ACTIVITIES 148 (1954),
quoting from Judge Alexander's opinion in Hexter Title and Abstract Co. v. Grievance Com-
mittee, 142 Tex. 506, 179 S.W.2d 946 (1944); and OTTERBOURG, A STUDY OF UNAUTHORIZED
PRACTICE OF LAW (1951), in which there are quotations from a number of appellate opinions.
196 The following are excerpts from an editorial in 98 J. ACCOUNTANCY 161 (1954) on Agran
v. Shapiro:
"The conclusion seems inescapable that a purposeful minority within some of the bar associations is making a conscious effort to take away from accountants a substantial part of the tax practice in which they have traditionally engaged, and make it a monopoly for lawyers—whether taxpayers want lawyers to serve them or not.

"Since the success of their efforts would immediately and substantially enrich thousands of lawyers, it is not surprising that many lawyers are easily persuaded that these elements in the bar are right.

"Fortunately for the accounting profession, however, it is not the bar associations that will settle this matter. The court of public opinion will be the final arbiter.

"Apparently, if certified public accountants or other non-lawyers wish to continue to serve the public in tax matters as they have done for the past forty years, they are going to have to fight. No time should be lost in taking the following steps:

"1. Inform businessmen that they may be deprived of the right to select their own tax advisers and representatives, and be forced to employ lawyers.

"2. Inform friendly lawyers—a great majority of whom it is believed would not wish to be identified with any effort to establish a lawyer monopoly of tax practice—of what their bar groups are doing and ask them to go on record in opposition.

"3. Talk to United States Senators and Representatives . . .

"4. Talk with state legislators. . . ."

In discussing lawyers' efforts to restrict accountants' tax activities as unauthorized practice of law, Mark Richardson, an accountant and co-chairman of the National Conference of Lawyers and Certified Public Accountants, concludes:

"Because the matrix is accounting,' the accountant has a natural and fundamental place in the tax field. Any effort to remove him now after decades of capable, honorable service will not merely inflict an injury upon him; it will deprive the nation's taxpayers of a source of dependable tax advice. A campaign that attempts such results must be indicted as a demonstration of blind self-interest. It is also certain to fail." Richardson, The Accountant's Position in the Field of Taxation, 98 J. ACCOUNTANCY 166, 172 (1954).

A resolution adopted at the 1937 Convention of the National Association of Credit Men provided:

"Whereas, the National Association of Credit Men was established forty-two years ago for the primary purpose of promoting sound credit practices in the commercial and industrial life of this country, to the end that all forms of credit waste be eliminated from the cost of business; and

"Whereas, the general welfare of our people has been served by such a policy, as is evidenced by the growth of this Association, which now numbers approximately 20,000 wholesalers, jobbers, manufacturers and banks; and

"Whereas, this Association has always sought to serve the public generally. . . ; and

"Whereas, . . . this Association has developed during the past forty-two years an extremely efficient and economical method for handling collections of commercial debts and for settling involved commercial estates. . . ; and

"Whereas, certain members of the legal profession have recently attempted to prohibit the rendering of these services by our Association and to monopolize such services for themselves; and

"Whereas, such monopoly would not be for the best interests of industry and commerce, nor for the public welfare.

"Now, Therefore, We . . . do hereby resolve that we deplore the actions taken by certain members of the legal profession in some states and we protest any further efforts by any members of the legal profession to prohibit this efficient and economical handling of collections and adjustment problems. . . ; and

"We Do Further Resolve that where and when necessary our Association espouse legislation designed to preserve for commerce and industry these valuable tools which have been developed through the National Association of Credit Men and to regulate the performance of similar services when rendered by members of the legal profession, to the end that our nation's commercial life may continue to enjoy the efficient and economical handling of these problems." CREDIT AND FINANCIAL MANAGEMENT, p. 31 (August, 1937).

CREDIT AND FINANCIAL MANAGEMENT, p. 27 (December, 1937), which is the official publication of the National Association of Credit Men, shortly after printing the above resolution, reprinted an editorial from the St. Louis Post-Dispatch criticizing the lawyers' stand on unauthorized practice and concluding:
statements of principles and conference groups, this ideology has changed somewhat. Much of the militancy against the bar has been displaced by expressions of cooperation.\textsuperscript{107} It recommends cooperation with the bar and stresses the monetary advantages to business and the improved service advantages to the public from working with lawyers.\textsuperscript{108} This cooperative ideology is reflected not only in statements of

"Let the public be on guard against this effort to introduce a system of monopoly dominated by lawyers into many of the simplest transactions. If it succeeds, the public will pay and pay plenty not only in money, but in endless red tape, inconvenience and inefficiency.

"In my mind there will always repose the definite fact that the adjustment of claims is not the practice of law. There is a very definite point of separation between the work of the claim man, and that of the lawyer.

"From my observation, I can say frankly that my choice for a claims representative is always the independent adjuster in preference to the lawyer.

"As is my sincere hope that the legal profession will recognize the adjuster as a necessary adjunct to our business and be content to handle the legal matters. It has seemed to me on occasions that the lawyers were trying to get into the claim adjusting business, rather than the claim men trying to practice law." \textsuperscript{179}Kelly, \textit{Analysis Services of Adjuster and Lawyer}, 144 \textit{The Weekly Underwriter} 962 (1941), reprinted from \textit{The Bulletin}, publication of the National Association of Independent Adjusters.

In a speech before the Pennsylvania Claims Men's Association, a Pennsylvania insurance commissioner had this to say about the bar's attacks on insurance adjusters for unauthorized practice:

"This is a throw-back to the old guild system of the Middle Ages when various types of learning and skill called themselves 'mysteries' and carefully excluded everyone from their practice excepting a chosen few. . . . We can only solve our problems by permitting all available skill and experience to be used whenever it can contribute most to the general welfare. We should not shut out anybody who can do a good job in any particular field. The question should be what does a man know, and not where or how did he learn it." \textsuperscript{179}Reported in 139 \textit{The Weekly Underwriter}, no. 3, p. 101 (July 16, 1938).

On business ideology in the unauthorized practice field, also see \textit{supra} note 179.


\textsuperscript{108}The complicated nature of so-called 'estate planning' clearly dictates the necessity for complete cooperation among the specialists whose skills can be directed toward the solution of the human and financial problems involved in any estate. Whenever a task requires the skills and joint efforts of several specialists, there is always the danger of overlapping in the work.

"Each of the specialists engaged in estate planning conscientiously desires the ultimate in cooperation, knowing that his client will be best served, and that he accordingly will receive eventually the greatest income, monetary and psychic. It is for this reason that a concerted effort is being made to more carefully define the functions of each specialist." \textsuperscript{179}Kellam, \textit{Underwriter's Viewpoint}, 89 \textit{Trusts and Estates} 436 (1953).

A New York bank has an estate planning service for lawyers in which lawyers buy the skilled services of a trust department for their clients. \textsuperscript{179}MacNeill, \textit{The Lawyer in Estate Planning}, 86 \textit{Trusts and Estates} 307 (1948).

"Men of goodwill in both professions regret the controversies that have arisen between official representatives of the bar and the accounting profession over the rights of the two professions in the field of tax practice. The great majority of both professions, we believe, would prefer cooperation to controversy. Everyone agrees that both legal and accounting questions are present in tax practice, and that they are often difficult to separate and define. The sensible policy, obviously, is one which would require a certified public accountant to call in a lawyer to deal with important legal questions, and a lawyer to call in a certified public accountant to deal with important accounting questions.

HeinOnline -- 4 U. Kan. L. Rev. 50 1955-1956
principles and conference group participation, but also in business advertising. Some banks, trust companies, life insurance companies, and title companies have featured in their advertising the value of lawyers’ services. The ideological conflict between business and the bar has lessened; and this change is making it possible for a program of cooperative action to make some headway.

But the bar has had little success in resolving its differences with the accountants through cooperation. Currently the two groups, in their bitter opposition over proposed Federal legislation favorable to the accountants, are seeking increased integration of their members so as to more effectively bring pressure on Congress. The American Institute of Accountants has distributed to all its members a carefully prepared statement of its position on the legislation, with a covering form letter stressing that the legislation is needed to protect the accountants’ tax practice and urging that accountants and their clients express their views to their Congressmen. Bar association journals

The public interest, and the interests of both professions, would be well served by full, frequent, and friendly cooperation. But there are several obstacles to wider adoption of the ideal cooperative procedure. One is the indisposition of some taxpayers to pay the fees of two professional advisers. Another is the ignorance of some practitioners in each profession of their own limitations in the arts of the other. Such men will take on anything, serenely unaware of the pitfalls. Another obstacle to cooperation is professional jealousy.

These obstacles could easily be overcome if the tax men of both professions joined forces—that is, associated themselves in partnership, or employed each other as staff assistants, or qualified themselves as members of the other profession. But this solution is regarded with horror, especially by the Bar, as a kind of miscegenation. Editorial in 86 J. Accountancy 180 (1948). Also see 84 J. Accountancy 177 (1947).


This statement is entitled Helping the Taxpayer, and concludes with a discussion of the bill introduced in the 83rd Congress by Congressman Reed and Senator Carlson. The accountants have been very disturbed by the Agran case and have kept their members informed on the progress and effect of that case and of the accounting associations’ attitude toward it. See, for example, Eaton, What Did Mr. Agran Do?, 99 J. Accountancy 33 (June, 1955).

The form letter is as follows:

American Institute of Accountants

November 15, 1954

To Practitioners and Firms Represented in the Membership of the American Institute of Accountants

Protection of CPA’s Tax Practice

Gentlemen:

Under date of September 28th, Mr. Foye, as president, sent Institute members a statement entitled ‘Helping the Taxpayer.’

We think it important that as many business men as possible, and other influential people, read this statement.
and meetings have kept the bar informed on developments in the current controversy, and have sought to make the bar associations' position clear to lawyers. 202

CONCLUSIONS

Present conditions and trends indicate that vigorous conflict will continue between lawyers and non-lawyers over who is to provide legal services. And this conflict will involve continued efforts by each group to obtain a larger share of available legal work by securing expanded legal privileges as well as by providing better service and obtaining a greater reputation with those who want such service. Due to the strength of the major participants, it is unlikely that the conflict will be resolved by any voluntary agreements that will seriously weaken the economic wellbeing of any one of them. The accountants, for example, will not voluntarily make any important concessions to the bar without winning important concessions in return. Nor is the bar likely to voluntarily make such concessions.

Lawyers perform two major functions: representation of others in matters before courts, and assistance of others in difficult unlitigated legal matters. With minor exceptions, lawyers have a legally protected and enforced monopoly over the first kind of service. This monopoly exists no matter how trivial, simple, or repetitive is the problem or the

"Free copies will be provided by the Institute on request to send to clients and friends whom you would be willing to urge to read this material. Personal talks with them, or personal letters urging them to read the statement, will be most effective.

"If you have not already planned such a distribution—as many members have done—wont you please do so now? Enclosed, as illustration of what might be done, is material sent by one large accounting firm to all its partners.

"The Federal legislation described in 'Helping the Taxpayer,' which is needed to protect your tax practice, can be enacted only if Congress sees evidence of widespread public support for it.

"Please communicate with your Congressman, and ask your friends to do so.

"And please let the Institute know what you are doing. We particularly want to know the names of Representatives and Senators with whom you are personally acquainted.

"Yours sincerely,

/s/ John L. Carey
Executive Director"

Printed on the back of the letter are two recommended form letters, one for an accounting firm to send to its partners and another to be used by accounting firm clients as a guide in writing to Congressmen and Senators. It is suggested that the clients' letters be personal and varied. One paragraph in the recommended client's letter states:

"The extent to which taxpayers have come to rely upon accountants is apparently bringing attacks from certain lawyers' organizations which institute suits in the state courts to have the accountants' activities declared to be contrary to common-law rules about illegal practice of law by laymen. If these attacks are successful the lawyers who achieve a monopoly in the field tax practice will be the only winners. The government and the taxpayers who have relied upon accountants for upwards of four decades to the eminent satisfaction of everyone concerned would be the losers."

202 Supra note 101.
work required, or how readily the work could be performed by an experienced layman. Lawyers also have had a near-monopoly over the difficult unlitigated type of service, to some extent because of legally enforced protection, but mostly because there have been few non-lawyers able to effectively give such service. The drafting of difficult legal instruments, advice on difficult problems of law, and even representation before administrative agencies in matters requiring a high degree of legal skill have normally been the work of lawyers and not of laymen. But the near-monopoly of lawyers in performing difficult legal tasks has become increasingly threatened in some fields by skilled lay specialists such as accountants, estate planners, and title companies; for these lay specialists are competent, clients are attracted to them, and they often can undercut lawyers' fees. In the future, this threat and encroachment will become greater as an ever more complex society produces more skilled lay specialists. Economists, labor relations experts, and lay government agents eventually may be included among those who provide serious competition to lawyers in performing difficult legal service tasks for others.

In the rapidly changing society of modern times, new areas of the law have frequently developed, as the law has responded to new conditions. Automobile law, the law of income taxation, the law of workmen's compensation, antitrust law, the law of cooperatives, the law of modern security transactions, and the regulations of an endless number of government agencies are examples of this development in recent years. Such a process will continue, probably at an accelerated rate, and will create new law business for lawyers. But there is a tendency for fields of law to become stabilized. What were difficult problems needing a lawyer become routine problems that a semi-skilled or unskilled layman can perform satisfactorily. Forms of deeds and leases are developed that any realtor can adequately fill in for the ordinary situation; large title insurance companies come into being with specialized routine procedures, many of which can be satisfactorily performed by lay personnel having much less skill and knowledge than the old-time lawyer-abstract examiner; government regulations become simplified and clarified so that laymen to whom they apply can understand them, and if these laymen have doubts, government clerks are available who can

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\[^{203}\text{The development of OPA regulations in retail sales is an example of this evolution.}\]
readily answer a multitude of common questions;\textsuperscript{204} the commonly used contracts of large business enterprises become standardized and whether oral or written are customarily entered into without legal advice; FHA procedures become standardized so that realtors and non-lawyer bank and mortgage company officials can apply the law and advise on it in the typical situation; sales tax returns become simplified so that a book-keeper or auditor can prepare them for the average retailer; and procedures in disposing of auto accident insurance claims become so standardized that lay adjusters can make settlements in some cases and take statements in most. Despite sporadic efforts of the courts in unauthorized practice cases to block this development,\textsuperscript{205} the trend is for performance of this type of legal service to drift out of the hands of lawyers into the hands of less skilled laymen as the novelty and difficulty of the problems disappear and they become routine and repetitive. But this is not so if the services are related to litigation or, as in the case of drafting wills, ultimately come under the scrutiny of courts. In these instances, the courts have been able and very willing to protect the lawyers' monopoly even though the matters are highly routine, as are such common court proceedings as divorce, administration of decedent’s estates, and suits to quiet title.

One outcome of the conflict between economic skill groups is absorption or amalgamation of competing groups. This has happened with some trade unions and has been common in business. It has even happened in medicine. Homeopathic physicians have been approved and absorbed by the medical profession, and there is some possibility that the same thing will happen to osteopaths.\textsuperscript{206} But there is no sign that the legal profession will absorb any of its competitors, and the bar is far too large and independent to be absorbed by any other group. Dual qualification, however, is increasing in some fields. More and more certified public accountants are also becoming lawyers, and a large percentage of corporate trust officers are lawyers.

The law of unauthorized practice will probably continue to be generally unfavorable to lay competition with lawyers. But despite this,\textsuperscript{207} for example, assistance given by lay government employees in explaining federal income tax regulations and federal and state social security and public welfare laws.\textsuperscript{208} For example, the cases holding it to be unauthorized practice to represent others before administrative agencies, even in routine matters, or to fill in simple legal forms for others. See notes 27 and 46 supra for citations to some of these cases.

much unauthorized practice, measured by legal standards, will actually take place. How wide this gulf will be between the law and its enforcement will depend in part upon how aggressive the bar associations are in forcing compliance, for they have become the instigating and prosecuting force in seeking compliance. Certainly they are far more aggressive in this than they were twenty-five years ago. Whether they will become still more aggressive remains to be seen. Their problem becomes much harder once lay legal practice by respectable business interests is well established. It is difficult to dislodge any strongly entrenched economic interest. And once established, the quality of lay service tends to become more skilled, more efficient, and more ethical, thereby weakening the arguments for dislodging it.

The courts, legislatures, and executive agencies will have continued opportunity to revise the law of unauthorized practice. As the law is the resultant of many forces, including the political power of affected interests, there will be limitations on the freedom of law making bodies to depart from the existing law. But in the realm of speculation free from the world of political reality, it is possible for the law of unauthorized practice to take a wide variety of forms. It can provide no legal restrictions or protections, except perhaps against fraud, and let the elements of the market place determine the fortunes of competing skill groups. At the other extreme it can give the legal profession an unqualified monopoly over the performance of all legal services, no matter how simple, and even prohibit a layman from performing such services for himself. Then there are in-between possibilities. These include giving highly skilled lay specialist groups authorization to perform extensive legal services within the areas of their specialties. Or the law can provide encouragement for lawyers and lay specialists to operate on a team basis: by partnerships between lawyers and lay specialists; by lay business enterprises, such as trust companies, realtors, and life underwriters, giving their customers a package service that includes legal work provided by lawyers employed by the business enterprises; or by permitting lawyers to operate businesses such as insurance, auditing, or small loans, as a side-line to their law practice and employing businessmen to provide specialized business skills. There is little chance that either of the extreme forms of possible unauthorized practice law will ever be adopted in the United States. But it is quite likely that some of the in-between possibilities that are not now part of the law will become such. Whether
or not any of these possibilities should be adopted depends upon the ultimate aim of the law in this area, upon the ends it should further.

If the aim of unauthorized practice law is merely to benefit one group over all others, the proper course is simple. Whatever will favor that group, be it the bar or a particular business, should be adopted. Much of what has been written on unauthorized practice has been motivated by such an aim although disguised in more public-spirited language. But if the aim of unauthorized practice law really is to benefit society as a whole, then the proper course is not easy to ascertain, and involves some factors generally ignored in discussions of the subject.

There are changes in the law that could materially weaken the legal profession. Would it be desirable to make these changes? What benefits are there to a strong legal profession? What would be the effect of seriously weakening the bar? In what ways does the legal profession influence American life? There have been no careful, objective fact studies of these questions. Much is unknown about the full impact of the legal profession. Even the advocates for and against the legal profession have made little effort to document their arguments with accurate data. Known facts about the profession are so meager that by any scientific standard conclusions concerning unauthorized practice must be tentative.

Even though there is a need for greatly increased scientific attention being given to study of the legal profession so that some important normative problems can be more intelligently solved, including those related to unauthorized practice, these highly generalized statements about the influence of the profession can probably be proven as factually accurate. The bar provides one of the best remaining opportunities in our society for vertical class mobility, and such mobility opportunities are essential if a stable democratic order is to be maintained. Related to this mobility is the decentralization of power and influence within the profession. The customary unit in the practice of law is the sole proprietor or two-man partnership, and this tends to spread authority widely within the profession. Decentralization of as important a power

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207 The Survey of the Legal Profession could have conducted extensive studies of this kind, but from lack of interest or fear of meaningful self-evaluation preferred a more superficial approach.

208 Of the 225,000 lawyers in the United States, 79 per cent are engaged in the private practice of law. Blaustein and Porter, The American Lawyer 41 (1954). And of the lawyers in private practice, 73.6 per cent are sole proprietors, and 14.8 per cent are in two-man firms. Id. at 11.
THE UNAUTHORIZED PRACTICE CONTROVERSY

1955] 57

group as the bar is a healthy situation, particularly so when the trend of most institutions in our society is toward the concentration of power and influence in the hands of large centrally controlled power blocks. The bar has provided a heavy share of the leadership in this country, both in men and ideas. This has been most noticeable in government, politics, and policy-making for big business. Protection of civil rights in and out of the courts has been largely the work of lawyers. Civil rights are an important phase of legal tradition stressed by the law schools, the bench, and leaders of the bar. Lawyers develop an understanding of these rights and a sensitivity to their violation which is a major source of their protection and development. Lastly, the legal profession as now organized and protected assures an adequate and readily available supply of comparatively skilled persons to provide all the varied legal services for which there is a demand. And the consumers of these services, both public and private, are generally willing to make use of them, something they are not willing to do with certain substitute service groups, including social scientists.

Any weakening of the bar by changes in the law should be done only with full understanding of all the implications of such a step. And this requires that the influences of lay groups should be well understood before they are given legal authorization to cut-in on the bar. Perhaps some of these groups can give better and cheaper service to clients than can the bar but if they exert no additional favorable influences, great caution should be shown in strengthening their position at the expense of the bar.