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The Unauthorized Practice of Law in New Mexico

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THE UNAUTHORIZED PRACTICE OF LAW IN NEW MEXICO

Finding a working definition of what is and what is not the unauthorized practice of law has long eluded and frustrated scholars and the courts.[1] The courts more often than not assume no definition can encompass all situations,[2] and that there is a "twilight zone"[3] of activities that must be determined on a case by case approach.[4] In the recent case of *State Bar v. Guardian Abstract & Title Co.*,[5] the New Mexico Supreme Court dealt with the question of what constitutes the unauthorized practice of law by title insurance companies. Specifically, the court addressed the issue of whether it is the unauthorized practice of law for non-lawyers working for a title company to fill in the blanks of form instruments used in closing real estate transactions.[6]

STATEMENT OF THE CASE

Guardian Abstract insured titles to property in San Juan County. In conjunction with this activity, Guardian assumed responsibility for closing real estate transactions. This responsibility included the filling in of blanks in form instruments prescribed by statute. These

1. "We have declined to define what constitutes the practice of law because of the infinite number of fact situations which may be presented, each of which must be judged according to its own circumstances." State *ex rel.* Norvell v. Credit Bur. of Albuquerque, Inc., 85 N.M. 521, 526, 514 P.2d 40, 45 (1973). *Accord,* Harty v. Board of Bar Examiners, 81 N.M. 116, 464 P.2d 406 (1970); Sparkman v. State Bd. of Bar Examiners, 77 N.M. 551, 425 P.2d 313 (1967). As a good example of another state court's struggle to find a definition *see* State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, 83-84, 366 P.2d 1, 8-9 (1961), *modified,* 91 Ariz. 293, 371 P.2d 1020 (1962), *partially nullified* by constitutional amendment. For a collection of other cases *see* Perry, *Unauthorized Practice of Law by Realtors and Title Insurance Companies,* 36 Temp. L.Q. 334, 335 (1963); Pelletier, *Unauthorized Practice of Law by Real Estate Brokers and Title Insurance Companies,* 36 Notre Dame Law. 374, 376 (1961); Payne, *Title Insurance and the Unauthorized Practice of Law Controversy,* 53 Minn. L. Rev. 423, 425 (1969); Annot., 111 A.L.R. 19 (1937), *supplemented* in Annot., 125 A.L.R. 1173 (1940) and Annot., 151 A.L.R. 781 (1944).

2. Creekmore v. Izard, 236 Ark. 558, 367 S.W.2d 419 (1963); Denver Bar Ass'n. v. Public Util. Comm'n., 154 Colo. 273, 391 P.2d 467 (1964); Sparkman v. State Bd. of Bar Examiners, 77 N.M. 551, 425 P.2d 313 (1967).

3. State v. Indiana Real Estate Ass'n., Inc., 244 Ind. 214, ____, 191 N.E.2d 711, 714 (1963).

4. Sparkman v. State Bd. of Bar Examiners, 77 N.M. 551, 425 P.2d 313 (1967).

5. 91 N.M. 434, 575 P.2d 943 (1978), *enforced,* 92 N.M. 327, 587 P.2d 1338 (1978).

6. *Id.* at 436, 575 P.2d at 945.

statutory forms included warranty and special warranty deeds, mortgages, mortgage releases, partial releases of mortgages, promissory notes, and similar documents. Guardian performed the above services only when it issued title insurance policies on property. Abstract and title companies, including Guardian, handled ninety percent of all real estate closings in San Juan County at the time suit was initiated against Guardian. This practice had occurred for approximately twenty years.[7] The State Bar Association knew of such activities for sixteen of those years.[8] Although there was no indication that Guardian had caused injury to anyone in the ast or was likely to do so in the future, the State Bar Association, three individual lawyers, and others sued Guardian to enjoin it from engaging in the unauthorized practice of law. The trial court enjoined Guardian from filling in blanks on form documents and giving legal advice. The supreme court reversed the lower court on the issue of filling in blanks on form instruments and affirmed as to the giving of legal advice.

In support of its position, Guardian argued six main points: (1) it was necessary to fill in the forms to carry out its other activities; (2) it did not charge for this service; (3) it did not advertise or promote itself as capable of giving legal advice, nor did it advertise or promote its form filling activities; (4) title insurance companies have a code of ethics; (5) using a lawyer to fill in the blanks would be slower, uneconomical, and inefficient; and, (6) the public had not and would not be harmed.[9] The State Bar argued that the selection and preparation of forms necessarily entailed a legal judgment as to the sufficiency of the instruments, and that the exercise of such judgment by non-lawyers involved the unauthorized practice of law.[10]

The New Mexico Supreme Court held that the filling in of blanks in form instruments by laymen did not constitute the practice of law if the forms were prescribed by statute, drafted by an attorney, or used in conjunction with the closing of government-insured loans, and the filling in of the blanks required only common knowledge.[11] The court enumerated other acts and instances which would consti-

7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 436-37, 575 P.2d at 945-46.
11. *Id.* at 440, 575 P.2d at 949. The first time the Guardian case was decided the Supreme Court held that "filling in blanks in the legal instruments here involved, where the forms have been drafted by attorneys and where filling in blanks requires only the use of common knowledge . . . , does not constitute the practice of law." The case was remanded to the lower court to issue an order consistent with the Supreme Court opinion. The Supreme Court reviewed the order of the lower court in State Bar v. Guardian Abstract & Title Co., 92 N.M. 327, 587 P.2d 1338 (1978), and added that blanks in statutory forms and forms used to close government insured loans can be filled by non-lawyers.

tute the unauthorized practice of law.[12] The court concluded that if the filling in of blanks "affect[s] substantial legal rights," and if legal acumen greater than that possessed by the average person is needed to protect those rights, then such activity by a layman is the unauthorized practice of law.[13] If "legal judgment" is required to choose among competing forms, the court held that this is also the unauthorized practice of law.[14] Giving advice about actions concerning the parties, or about the legal effect or the language of any instrument, was found by the court to constitute the unauthorized practice of law if it was done by a layman.[15] Furthermore, the court held that even if one is an expert at closing real estate transactions, he may not hold himself out as an expert. Charging an additional fee to fill in the blanks also was considered by the court as the unauthorized practice of law.[16]

The New Mexico Supreme Court remanded the case to the trial court to issue an order consistent with the opinion.[17] The trial court issued its order, but in a negative rather than positive form.[18] Guardian Abstract again appealed to correct the description of what it could or could not do regarding filling in blanks on form instruments and giving legal advice to customers. In the second *Guardian* opinion,[19] the supreme court merely reiterated its holding in the original opinion, with minor changes in language. The second *Guardian* opinion, therefore, will not be discussed in this case note.

ANALYSIS

Purpose of Regulating the Practice of Law

In arriving at its decision, the court analyzed the purpose of regulating the licensing of attorneys and excluding non-lawyers from the legal field. The court reasoned that the primary purpose of such regulation was to prevent those persons unskilled in the law from

12. *Id.* In addition the Court held that the Board of Bar Commissioners and the Committee on Unauthorized Practice of Law had standing by statute to maintain and prosecute suits to prevent the unauthorized practice of law; by implication, the integrated Bar of New Mexico had standing to sue to protect the public from such practice; and lastly, individual lawyers had similar standing if the Bar Association or its various branches fail to act. *Id.* at 438, 575 P.2d at 947. This case note is limited to substance of the unauthorized practice issue, and the standing issue will not be discussed.

13. *Id.* at 440, 575 P.2d at 949.

14. *Id.*

15. *Id.*

16. *Id.* at 441, 575 P.2d at 950.

17. *Id.*

18. State Bar v. Guardian Abstract & Title Co. 92 N.M. 327, ____, 587 P.2d 1338, 1339 (1978).

19. *Id.*

harming or taking advantage of the lay public.[20] Early in its analysis, the court recognized that lawyers can perform many legal tasks better than non-lawyers. The court recognized, however, that this did not justify excluding non-lawyers from offering alternative services to those traditionally considered "legal" in nature. The court's reasoning implies that the public can be protected adequately by regulations which focus on fostering and insuring quality. This reasoning does not necessarily mean lawyers must be given exclusive province in all areas traditionally considered to be in their line of work.

Lawyers enjoy a monopoly which they have created for themselves through a licensing scheme in which those regulated do the regulating.[21] Presumably, lawyers justify this monopoly on the theory that it will insure the public of quality service by promoting competence, training, and integrity, and yet they disdain any notion that it is to be used to promote their own private economic interests.[22] Therefore, if lawyers attempt to place competitive barriers against other professions, these barriers should be erected only where they are necessary to protect the public, and they should be made as narrow as possible.[23] In an age when many Americans can neither find nor afford the legal services they need, a narrow circumscription of a lawyer's *exclusive* province is essential.

The court in *Guardian* went beyond the primary purpose for regulating the practice of law and stated a secondary reason. In the court's words:

> [T]here must also be sufficient stability to protect the lawyers in the practice of their profession. If this is not done, it would be less likely that persons of character and ability would spend the years of intensive preparatory training to acquire the skill and proficiency to become lawyers.[24]

This approach, at least implicitly, suggests that the exclusive province of lawyers must be kept broad to protect the pocketbooks of the increasing numbers of practicing attorneys. Such a notion, although

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20. 91 N.M. at 438, 575 P.2d at 947.

21. B. Reeves, *Unauthorized Practice of Law: The Lawyers' Monopoly under Attack* (June 16, 1977) (Remarks before the Florida Bar Convention).

22. Felbinger, *Conveyancing–the Roles of the Real Estate Broker and the Lawyer in Ordinary Real Estate Transactions–Wherein lies the Public Interest?*, 19 De Paul L. Rev. 319, 323 (1969); *see also* State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, ____, 366 P.2d 1, 5-8 (1961) for an interesting discussion of the development of and purpose behind regulating the legal profession.

23. Reeves, *supra* note 21.

24. 91 N.M. at 439, 575 P.2d at 948.

perhaps realistic, not only violates the premise of not placing self-protecting barriers against competition from other professions, but has been condemned universally by the commentators.[25]

Defining the Practice of Law

The practice of law is not a concept susceptible to precise definition. This lack of definition may be desirable since changes in the economic, social, and business climates mandate a flexible approach to what is and what is not the practice of law. New Mexico does not have a statutory definition of the practice of law,[26] nor is the New Mexico case law helpful. In *Sparkman v. State Board of Bar Examiners,*[27] the supreme court held that one who had adjusted insurance claims in New Mexico for five years but who had not generally held himself out as an attorney nor actually and continuously practiced law for seven or eight years was not unjustly denied admission to practice law in this state by the Board of Bar Examiners. In dicta, the court fashioned a case-by-case approach to the definition of the practice of law:

> We do not propose to submit a definition of the practice of law that may be employed to fit all situations. . . . We consider that each case must be examined in the light of its own facts.[28]

In *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.,*[29] which involved an allegation that a collection agency was engaging in the unauthorized practice of law by bringing suit and garnishing wages in its own name, the court approved the case by case approach announced in *Sparkman.* The court stated that "preparing instruments and contracts by which legal rights are secured" is indicative of the practice of law.[30] A strict interpretation of the quoted phrase seems to clearly include the filling in of form instruments which have legal effect such as those involved in *Guardian.* The court in *Guardian* evaded this obstacle by distinguishing *Norvell* on its facts.[31]

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25. *E.g.,* Hamner, *Title Insurance Companies and the Practice of Law,* 14 Baylor L. Rev. 384, 386 (1962); Felbinger, *Conveyancing–the Roles of the Real Estate Broker and the Lawyer in Ordinary Real Estate Transactions–Wherein Lies the Public Interest?, supra,* note 22 at 323; State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, ____, 366 P.2d 1, 8 (1961).

26. N.M. Stat. Ann. § § 36-2-27 to 28 (1978).

27. 77 N.M. 551, 425 P.2d 313 (1967).

28. *Id.* at 554, 425 P.2d at 315. *Accord* State *ex rel.* Norvell v. Credit Bureau of Albuquerque, Inc., 85 N.M. 521, 526, 514 P.2d 40, 45 (1973).

29. 85 N.M. 521, 514 P.2d 40 (1973).

30. *Id.* at 526, 514 P.2d at 45.

31. 91 N.M. at 439, 575 P.2d at 948.

However, the *Norvell* language in any context is overly inclusive and meaningless as an analytical tool. There is an inadequacy in the "legal effect" test used in *Norvell* because

> [o]bviously the illegal practice doctrine cannot be invoked in every instance where an instrument having legal effect is drafted by a person not a party thereto. Nor does it apply whenever advice predicated upon legal assumptions is given. As a practical matter, the world's business, including a large percentage of its commercial transactions, could not be carried on if the courts were to hold otherwise, since every businessman cannot perpetually carry a lawyer in his hip pocket.[32]

If the language in *Norvell* were strictly construed, the accountant who prepared a tax return, the bank which made a loan, and the businessman who drew up a sales contract would be guilty of the unauthorized practice of law.

The court examined the possibility of constructing its own definition of the unauthorized practice of law and admitted that no simple blackletter proposition or neatly phrased definition can adequately answer the question of whether a title insurance company is practicing law without authority.[33] The court dispensed with the requirement of defining the practice of law as "an extremely difficult task which we find unnecessary to undertake at this time."[34] Paradoxically, the court then proceeded to construct a test.

> [W]henever, as incidental to another transaction or calling, a layman, as part of his regular course of conduct resolves legal questions for another at his request and for and on his behalf, the layman is "practicing law," but only if difficult or doubtful legal questions are involved, which to safeguard the public, reasonably demand the application of a trained legal mind.[35]

The court recognized, however, that no definition or test may be applied mechanically without practical justifications.[36]

Elements of the Practice of Law

The court in *Guardian* struggled to define the practice of law. As elusive as this task may be, the court had to answer the basic question of when the Bar is unjustified in defining the exclusive scope of its own activities. To answer this basic question, the court needed

32. Payne, *Title Insurance and the Unauthorized Practice of Law Controversy*, 53 Minn. L. Rev. 423, 428 (1969).
33. 91 N.M. at 439, 575 P.2d at 948.
34. *Id.*
35. *Id.*
36. *Id.*

some concrete scheme to analyze whether a group of non-lawyers was engaging in an area of endeavor which should be restricted as the exclusive territory of attorneys. In the court's view, such a scheme must be rooted in the concept of public interest.[37] Two facts persuaded the court that a paramount public interest was not violated when a title company completed form instruments used in real estate closings: (1) no harm or inconvenience was shown to have resulted to the public; indeed, the use of attorneys slowed land closing transactions and was more costly;[38] (2) the Bar did not bring any action against title companies for sixteen years even though it was fully aware of their activities.[39] While recognizing that there is no prescriptive right to practice law without authority, the court viewed the State Bar's tolerance of the land closing practices for some sixteen years as persuasive evidence that the citizens of San Juan County were not suffering adverse consequences.

> [T]he fact that the practice became a long-standing custom without court action being taken by the attorneys is a circumstance to be considered in appraising whether the practice was of any great harm to the public. If dire consequences were being suffered by the citizens, it could be expected that the officers of the court would step forward to rectify the wrong.[40]

Although the court reached its specific holding by balancing public convenience against public harm, the various concepts the court used to categorize certain endeavors as the practice of law are not always clear. If these elements can be identified, however, a more meaningful framework with which to predict and understand other unauthorized practice of law dilemmas may be constructed.

If *Guardian* and other New Mexico cases offer a somewhat confusing rationale, the legal precedents from other jurisdictions are even less revealing. There is a vast but inconsistent body of case law. While some cases have allowed laymen to fill out form documents relating to land, with varying restrictions depending on the particulars of the case,[41] there are a substantial number of cases which have

37. *Id.* at 440, 575 P.2d at 949. Justice Easley stated: "We first must consider the paramount interest of the public in determining who should perform the service of completing the forms."

38. *Id.* at 440.

39. *Id.*

40. *Id.*

41. *E.g.*, Creekmore v. Izard, 236 Ark. 558, 367 S.W.2d 419 (1963); Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n., 135 Colo. 398, 312 P.2d 998 (1957); Title Guaranty Co. v. Denver Bar Ass'n., 135 Colo. 423, 312 P.2d 1011 (1957); State *ex rel* Indiana State Bar Ass'n. v. Indiana Real Estate Ass'n. Inc., 244 Ind. 214, 191 N.E.2d 711 (1963); Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 855 (1952); Pioneer Title Ins. & Trust Co. v. State Bar of Nev., 74 Nev. 186, 326 P.2d 408 (1958); La Brum v. Commonwealth Title Co. of Phil., 368 Pa. 239, 56 A.2d 246 (1948).

not allowed laymen to fill out form documents relating to land.[42] Commentators and scholars generally agree that there are several elements gleaned from the case law which traditionally have been important in deciding if laymen are engaging in the unauthorized practice of law by filling in the blanks of legal instruments or giving advice as a consequence thereto.[43] The elements most often mentioned are whether "additional consideration" is charged; whether "legal advice or judgment" is rendered; whether "public policy" is violated; whether the activity is harmful to the public; whether the activity is an "incident of business"; or whether the activity is for the "public convenience."[44] These elements, with the exception of "incident of business," are all mentioned in *Guardian*, with varying degrees of clarity, either in the court's proposed test of the practice of law or in its holding.[45]

A. Consideration

The court in *Guardian* held that to avoid engaging in the unauthorized practice of law, title insurance companies must not charge additional compensation for filling out instruments involved in closing real state transactions.[46] Courts have shown preoccupation with the presence or absence of compensation as a determinant of the unauthorized practice of law by title insurance companies and realtors.[47] Such preoccupation tends only to confuse the actual issues

42. *E.g.*, State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961); Title Guaranty Co. v. Denver Bar Ass'n., 135 Colo. 423, 312 P.2d 1011 (1957); Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 179 S.W.2d 946 (1944); Rattikin Title Co. v. Grievance Comm., 272 S.W.2d 948 (Tex. Civ. App. 1954).

43. *See*, Comment, *The Unauthorized Practice of Law–Completion of Standardized Forms by Real Estate Brokers*, 1962 U. of Ill. L.F. 457 (1962); Pelletier, *Unauthorized Practice of Law by Real Estate Brokers and Title Insurance Companies, supra* note 1; Note, *Unauthorized Practice of Law by Real Estate Brokers in New Jersey: A Call for Compromise*, 2 Rutgers-Camden L. J. 322 (1970); Payne, *Title Insurance and the Unauthorized Practice of Law Controversy, supra* note 1; Dishman, *Unauthorized Practice of Law by Realtors and Title Insurance Companies*, 49 Ky. L.J. 384 (1961); Perry, *Unauthorized Practice of Law by Realtors and Title Insurance Companies, supra* note 1; Annot., 53 A.L.R.2d 788 (1957); Annot., 85 A.L.R.2d 184 (1962).

44. *Id.*

45. In the court's proposed test, the following elements are mentioned: legal advice; additional consideration; and public interest. 91 N.M. at 439-40, 575 P.2d at 948-49. In the court's holding, the following elements take prominence: simplicity, legal advice, consideration, and public policy. 91 N.M. at 440-41, 575 P.2d at 949-50. The element of public policy pervades the entire case and is the backbone of the court's opinion.

46. 91 N.M. at 440, 575 P.2d at 949. This holding is well established in other jurisdictions. *Contra*, La Brum v. Commonwealth Title Co. of Phil., 358 Pa. 239, 56 A.2d 246 (1948).

47. *E.g.* Kentucky State Bar Ass'n. v. First Fed. Sav. & Loan Ass'n., 342 S.W.2d 397 (Ky. Ct. App. 1961); Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940); Hexter Title

by tempting the courts away from meaningful analysis and toward the application of a mechanistic formula.[48] If an activity is not the practice of law, a layman should be able to engage in the activity and charge a reasonable price for his time and energy. The question is one of unauthorized practice. If a non-lawyer is engaged in unauthorized practice, he should not be allowed to engage in the activity at all. Whether he charges compensation is irrelevant.

In *State Bar v. Arizona Land Title & Trust Co.*,[49] the Arizona court found that absence of a specific fee for the preparation of various legal documents by realtors and title insurers did not mean the defendants were not engaged in the unauthorized practice of law. The court went on to state that the "receipt of compensation is not the feature which determines whether a given act is the practice of law."[50] Failure to charge a fee does not permit a layman to practice law. The focus of inquiry should be on the activity itself. If the performance of the activity by laymen is in the general public interest, then the pressures of the market, not the courts, should dictate whether a charge is made for the activity.

In addition, the compensation argument ignores reality. Whether or not a title company charges a specific fee, it prepares legal instruments to induce people to pay the company to insure titles. Title companies are always receiving a form of consideration, however indirectly. As the court said in *Grievance Committee v. Dacey*, title work is "not done as a favor to a friend."[51]

Justice Easley justified the compensation holding in *Guardian* on the theory that allowing separate compensation would draw too much attention on conveyancing and legal drafting as a business rather than on the main business of a title insurance company.[52] The court recognized that it is in the public interest to allow title companies to fill out form documents because they are efficient and economical at so doing. It is perplexing that the court would want to distract attention from the efficient and economic nature of the service offered by title insurance companies by focusing on compensation for services.

& Abstract Co. v. Grievance Comm., 142 Tex. 506, 179 S.W.2d 946 (1944). *Contra,* La Brum v. Commonwealth Title Co., 358 Pa. 239, 56 A.2d 246 (1948).

48. Baier, *The Developing Principles in the Law of Unauthorized Practice re Real Estate Brokers,* 9 Saint Louis U. L.J. 127, 130 (1964).

49. 90 Ariz. 76, 366 P.2d 1 (1961), *modified* in 91 Ariz. 293, 371 P.2d 1020 (1962), *partially nullified* by constitutional amendment.

50. *Id.* at ____, 366 P.2d at 9.

51. 154 Conn. 129, ____, 222 A.2d 339, 343 (1966), *appeal dismissed,* 386 U.S. 683 (1967).

52. 91 N.M. at 440, 575 P.2d at 949.

B. Legal Advice and Judgment

The court in *Guardian* held further that employees of title companies could not exercise legal judgment or give legal advice.[53] This is nearly a universal rule,[54] although it presents an immediate dilemma. If the meaning of the "unauthorized practice of law" has eluded definition for so long, there is no more reason to expect that the term "legal judgment" is any more susceptible of definition. Yet, this is somewhat unavoidable.

The court recognized that each case must be examined on its particular facts to determine if it fits within the elusive parameters of the practice of law. The prohibition against legal advice is designed to protect the public interest. Limitations on who may fill out form documents are designed to protect individuals when property rights are not clear and may be shaped and defined along distinct alternative lines. When such is the case, the person whose rights will be affected should have the benefit of knowledgeable counsel who has incentive to favor the individual's interests over those of the title company's.

C. Public Policy

The key analytical element in the unauthorized practice issue is public policy. This was the most influential factor in the *Guardian* decision. Consideration of public policy involves a balancing between public protection and public convenience. It is often suggested that unwary and unknowledgeable laymen must be protected from the incompetent and unscrupulous.[55] This rationale was used by the court in *Guardian.*[56] The regulation of the practice of law, with high admission standards, a code of ethics, and the courts as supervising and sanctioning bodies, was seen as the tool to accomplish protection of the public. The problem with this approach is that it allows a self-regulating group of professionals to become overly enamored with their own expertise and integrity at the expense of other groups and, more importantly, the general public.[57] It is easy to justify reserving an area to lawyers by indulging in self-serving platitudes about their nobility. Lawyers, however, are not the only professionals with integrity. The title insurance industry has a code of

53. *Id.* The element of legal advise is also a part of the Court's test of the practice of law.

54. *See* note 43 *supra.*

55. In addition to the authorities listed in note 43 *supra,* see State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961) for a lengthy discussion by the court of the public protection function behind regulating the practice of law.

56. 91 N.M. at 438-40, 575 P.2d at 947-49.

57. Hamner, *Title Insurance Companies and the Practice of Law, supra* note 25, is an example of an article which touts the legal profession with great zeal.

ethics.[58] Also, although probable, it is not necessarily true that lawyers are more competent and skillful at conveyancing than title companies.[59]

Nevertheless, the court held that only lawyers could prepare legal documents which involved substantial legal rights if protection of those rights required legal skill and knowledge greater than that possessed by the average citizen.[60] The court assumed that if more legal skill is involved than the skill possessed by the average layman, then only lawyers may engage in the activity. This assumption ignores the practical fact that title companies, realtors and others who work in real estate may have legal acumen and competence in the real estate area equal to that of lawyers. In any event the comparison should not be with the average citizen but with the average title insurer. Since title insurers work in the area of land conveyancing, they are apt to have more skill and knowledge as to property law than the average citizen. The court's standard would preclude title insurers from using this knowledge because it is a legal skill greater than the skill possessed by an average citizen. No public interest is served by carving out an area of endeavor as the exclusive province of one group of professionals and excluding another unless it can be shown that the professionals granted a monopoly are the only ones with sufficient skill and knowledge to serve the public adequately.

Even if it could be assumed that lawyers and title insurers have equal talents in regard to real estate conveyancing, the attorney-client concept may be a paramount justification for granting exclusive province to lawyers in order that the public be protected.[61] An employee of a title company, whether he be a lawyer or a knowledgeable layman, owes his first loyalty to the insurance company. In many instances, this may put pressure on employees to hasten the closing of real estate deals with the individual interests of the parties relegated to a secondary consideration.[62] The individual is left without loyal representation. It is sound law, therefore, to prohibit employees of title companies from giving advice or handling matters concerning substantial rights which would require some legal skill. Not only will this insure competence and integrity, but more importantly, it insures vigorous and loyal representation of the individual.

58. American Title Ass'n., *Code of Ethics,* 37 Title News, Jan., 1958, at 24.

59. No commentators or courts have expressly recognized this point. However, it is not unrealistic to predict that title insurers have a high degree of knowledge and skill in the area of conveyancing since this is an area of work in which they are closely involved each day.

60. 91 N.M. at 440, 575 P.2d at 949.

61. Hamner, *Title Insurance Companies and the Practice of Law, supra* note 25, at 390; Payne, *Title Insurance and the Unauthorized Practice of Law Controversy, supra* note 1, at 426.

62. *Id.*

Complexity of the Documents

Guardian concerned the filling in of rudimentary type information into the blanks of statutory form documents.[63] Some courts have found that whether the instrument to be filled in is "simple" or "complex" is determinative of whether a layman is engaging in the unauthorized practice of law.[64] The simplicity notion is really a part of the public protection analysis. If a case involves the mere clerical work of filling out standardized forms with basic rudimentary information, there is no competency question and no need for an attorney to sort out an individual's conflicting alternatives and rights. But, if the instrument is to be shaped from a mass of facts which must be sorted and examined, and which may have substantial and varying effects on a person's property rights, the need for competence and loyal representation becomes more acute. The holding of *Guardian* recognizes these principles: the court allows the mere clerical completion of form documents drawn by a lawyer, but when substantial legal rights are involved, or complex information is gathered by the title insurance company, only a lawyer may advise and prepare the documents.[65]

Public Protection

Another factor in analyzing which activities constitute the unauthorized practice of law concerns the actual harm that has or may occur to the public from the performance of quasi or wholly legal activities on the part of the title companies.[66] Perhaps this is "the quintessential question raised by the merits of any unauthorized-practice dispute."[67] Surprisingly, some courts have ignored the actual harm that has occurred from disputed activities of title insurance companies and real estate brokers but have mechanistically focused on the "inherent evils" of the situation irrespective of whether they have surfaced or not.[68] The holding of *Guardian* is based substantially on the lack of actual harm. A finding that Guardian Abstract had operated for 20 years without apparent mischief

63. 91 N.M. at 436, 575 P.2d at 945.

64. *See* note 43 *supra.*

65. 91 N.M. at 440, 575 P.2d at 949. In addition, it should be noted that standardized instruments incorporated in statutes or prepared by lawyers are made with the purpose of simplifying real estate transactions. If only lawyers were allowed to fill in the blanks of such instruments, the purpose behind standardization would be partially defeated.

66. Baier, *The Developing Principles in the Law of Unauthorized Practice re Real Estate Brokers, supra* note 48.

67. *Id.* at 129.

68. *E.g.* State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961).

persuaded the court that filling in of form blanks was not the unauthorized practice of law.[69] The court's reasoning is sound. If the public interest is paramount, it should be shown that the general public has been injured or at least is in danger of concrete injury in the future before an activity that has long been practiced is enjoined.

Related to the element of harm is the idea that long standing custom can negate a contention that an activity is the unauthorized practice of law. In *Guardian,* the court recognized that there is no prescriptive right to practice law. What is unlawful cannot become lawful by custom. The court, on the other hand, recognized that long standing practice without action by the Bar indicated a lack of past harm. If no harm has occurred for 16 years, it seems quite likely that little harm will occur in the future. In contrast, an Arizona court rejected evidence of long standing custom on the grounds that this would be tantamount to saying "we have been driving through red lights for so many years without serious mishap that it is now lawful to do so."[70] The Arizona court found it irrelevant that no harm had occurred in the past.[71]

The New Mexico approach seems to be preferable because it emphasizes a key element of the public interest—actual harm. The Arizona court preferred to preoccupy itself with the "inherent evil" of allowing title companies to fill out form documents, and it ignored the fact that these "evils" had not surfaced for decades. Furthermore, the mere showing that some harm has occurred from the activities of laymen should not be enough to brand such activities as the unauthorized practice of law. Certainly, even lawyers do some injury to the public through malpractice and negligence. The harm that results from laymen's activities would have to go beyond that which could be expected if lawyers had exclusive province.[72]

Incident of Business

A further factor involved with public interest is what some courts have termed the "incident of business" theory.[73] Title companies

69. 91 N.M. at 440, 575 P.2d at 949.

70. State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. at ____, 366 P.2d at 13.

71. *Id.*

72. Baier, *The Developing Principles in the Law of Unauthorized Practice re Real Estate Brokers, supra* note 48, at 129.

73. In the test adopted in Guardian, the court mentions that an activity that is incidental to a non-lawyer's business can be the unauthorized practice of law. However, the Court does not really use this element in any way. I include a discussion of it for completeness and because it is a fairly recurrent theme in unauthorized practice decisions in other jurisdictions; *see e.g.,* State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961); Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n., 135 Colo. 398, 312 P.2d 998

argue that the services they render, such as preparation of documents, are only incidental to their main function, and therefore, do not constitute the practice of law. Some courts have been overly mechanistic in responding to the "incident" argument. These courts often reject the argument when applied to title companies on the grounds that they are in the business of insuring titles, and the conveyancing and filling out of forms to close transactions are neither necessary nor incidental to insuring title.[74] Such a rigid approach does little more than confuse the issue. The essential meaning of the "incident to business" theory is economic. The focus should be on the value to the commercial world of allowing title companies to continue performing certain activities. As one commentator stated:

> [T]he "incident theory" recognizes that an overlapping area of activities exists between the commercial and professional sections of our economy wherein acts, legal in nature, are performed by both sectors concurrently. This theory acknowledges that certain activities inherently essential to the continued existence and operation of a legitimate business, and to preclude such acts would effectively disable the function of the business in the commercial world and would destroy its value to society.[75]

Guardian Abstract and Title Company and others handled ninety percent of the form completion necessary to close real estate transactions in San Juan County. The court recognized in *Guardian,* perhaps implicitly, that to enjoin such activity would only destroy the commercial economic value of an on-going business. While value to commerce is not a conclusive factor in deciding if an activity is or is not the practice of law, the commercial well-being of a community should underscore the public interest and should at least be considered.

Public Convenience

The facts in *Guardian* suggest that title companies in New Mexico can handle the completion of form documents as an incident of closing real estate transactions more efficiently, economically, and expeditiously than a lawyer. The average land buyer may be unwill-

(1957); Grievance Comm. v. Dacey, 154 Conn. 129, 222 A.2d 339 (1966), *appeal dismissed,* 386 U.S. 683 (1967); Pioneer Title Ins. & Trust Co. v. State Bar of Nev., 74 Nev. 186, 326 P.2d 408 (1958); State v. Dinger, 14 Wis.2d 193, 109 N.W.2d 685 (1961).

74. Title Guaranty Co. v. Denver Bar Ass'n., 135 Colo. 423, 312 P.2d 1011 (1957); Pioneer Title Ins. & Trust Co. v. State Bar of Nev., 74 Nev. 186, 326 P.2d 408 (1958); Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 179 S.W.2d 946 (1944).

75. Baier, *The Developing Principles in the Law of Unauthorized Practice re Real Estate Brokers, supra* note 48, at 128.

ing and unable to pay the extra premium demanded for an attorney's services if that attorney is needed in all aspects of real estate transactions. It is easy to ignore what the public itself thinks of title insurance companies handling clerical matters involved in real estate matters. People would like most simple transactions handled with a minimum of fuss.[76] The more a court restricts the possibility of laymen handling certain clerical "legal" activities the less able the public will be to obtain cheaper, more efficient service. Even assuming that a lawyer can perform all tasks better than a non-lawyer, a restrictive approach may force an individual to go without any services because he cannot afford the lawyer's fee and there is no cheaper alternative available. This would restrict the choice of the individual who would "prefer to sacrifice a bit of quality for a lower price."[77]

CONCLUSION

What activities constitute the unauthorized practice of law by title insurance companies is a question that depends on the facts of the particular case and the law of the given jurisdiction. The analysis used by the courts offers only mechanical answers which more often than not obscure the actual issues and factors rather than lead to realistic solutions. The New Mexico Supreme Court in *Guardian* took a significant step in the right direction by focusing on the "public interest" as the main criterion for determining the activities permitted title companies. The court articulated several factors used to establish a framework of analysis to guide in future determination of permissible activities by non-lawyers. The conflict between the title insurance companies and the Bar should not be an economic one. The moderate approach adopted in *Guardian* combined with a realistic analysis of the public interest can permit the two professions to circumscribe their respective spheres of legitimate activity.

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76. State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961) is perhaps the most restrictive view on preparation of standard form instruments. The people of Arizona reacted overwhelmingly by voting by a margin of 132,492 to 34,451 to pass a constitutional amendment to allow real estate brokers to prepare legal instruments.

77. B. Reeves, *supra* note 21, at 6.