



Volume 9 | Issue 2

Article 17

1964

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Thomas M. Twardowski

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Recommended Citation

Thomas M. Twardowski, *Unauthorized Practice of Law - Corporation and Layman Enjoined from Preparing Estate Plans Embodying Legal Analysis Either as Separate Service or as Incident to Selling Insurance*, 9 Vill. L. Rev. 353 (1964).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol9/iss2/17>

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clear violation of a statutory limitation²¹ and when there are no other means within the control of the aggrieved parties to enforce their rights.²² It is submitted that these cases are indicative of the cautious manner in which courts are exerting their authority. The fear that *Leedom v. Kyne* would open the door to extensive judicial intervention and delay has not been realized; instead it has acted as a safeguard against arbitrary administrative activity.

Joseph F. Busacca

UNAUTHORIZED PRACTICE OF LAW—CORPORATION AND LAYMAN ENJOINED FROM PREPARING ESTATE PLANS EMBODYING LEGAL ANALYSIS EITHER AS SEPARATE SERVICE OR AS INCIDENT TO SELLING INSURANCE.

Oregon State Bar v. John Miller & Co. (Ore. 1963)

The Oregon State Bar Association brought suit to enjoin the defendants, a corporation and an individual, from engaging in the unauthorized practice of law in violation of an Oregon statute.¹ Defendant Miller, an insurance salesman, is the principal stockholder and president of defendant Executive Estate Planners, Inc. The corporation is primarily a service organization which provides financial and estate planning assistance to individuals, irrespective of their insurance needs.² The trial court entered a decree enjoining defendants from carrying on certain activities related to the business of preparing estate plans such as counselling on the preparation of legal documents (wills and trusts), and from giving any legal opinion or advice as to tax consequences, except as the same relate to life insurance. The decree permitted the lay group to collect information, advise as to tax consequences of life insurance, and prepare insurance policies. The Oregon Bar appealed the case, praying for a modification of the decree on the grounds that it was vague and inconsistent and that it permitted defendants to practice law by allowing them to estimate the cash require-

21. U.N.A. Chapter, *Flight Eng. Int'l Ass'n v. NMB*, 294 F.2d 905, 908 (D.C. Cir. 1961).

22. *United States v. Mills*, 185 F. Supp. 709, 710 (D. Md. 1960).

1. ORE. REV. STAT. § 9.160 (Supp. 1961): "Except for the right reserved to litigants by ORS 9.320 to prosecute or defend a cause in person, no person shall practice law or represent himself as qualified to practice law unless he is an active member of the Oregon State Bar."

2. This business is solicited through salesmen who are paid a percentage of the fee charged for an analysis of a client's estate..

ments for estate tax purposes and to advise customers on the tax consequences of life insurance.

The Oregon Supreme Court, noting that many factors reflecting upon tax liability are considered in preparing these estate analyses, *held* that defendants were enjoined from preparing estate plans either as separate service or as an incident to the business of selling insurance, since such advice involves the application of legal principles, and therefore constitutes the practice of law. *Oregon State Bar v. John Miller & Co.*, 385 P.2d 181 (Ore. 1963).

The ageless fight against unauthorized practice is today one of the most serious problems confronting the American legal profession.³ Organized efforts in the field of unauthorized practice reform began during the 1929 depression.⁴ In 1930, the American Bar Association created its Unauthorized Practice Committee which has become the centralizing force in the efforts that followed to bring about needed reforms.⁵ The reasons most commonly advanced by the bar for battling unauthorized practice are to insure that legal advice is given to the public by persons legally educated and therefore deemed reasonably competent to give such advice and to protect the public from "advisers" who are not bound to the lawyers' high standards of conduct and ethics.⁶ The underlying consideration implicit in these reasons is the Bar's role as protectress of the public.⁷ Unfortunately, the Bar's position is misunderstood by some lay groups who hold that the real reason for prohibiting the unauthorized practice of law is to provide lawyers with more business, thereby enabling them to insure their monopoly.⁸ These lay groups also assert that they are being

3. The leading unauthorized practice "offenders" are 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. WINTERS, *BAR ASSOCIATION ORGANIZATION AND ACTIVITIES* 150 (1954).

4. Johnstone, *The Unauthorized Practice Controversy, A Struggle Among Power Groups*, 4 KAN. L. REV. 1 (1955).

5. *Ibid.*

6. The underlying philosophy of the UPL Committee reflecting the beliefs of the ABA is that unauthorized persons, no matter how great their technical skill, have no more right to engage in the practice of law, completely free of the standards and discipline of the profession, than an unlicensed physician has to perform surgery; that the public, more than the lawyers, suffers harm from unauthorized practice of law; and the fight to stop such unauthorized practice is the public's fight.

Weisman, *The National Conference of Lawyers and Collection Agencies*, 29 UNAUTHORIZED PRACTICE NEWS, No. 2, p. 157 (1963).

7. In 1942 the Supreme Court of Iowa, in *Bump v. District Court*, 5 N.W.2d 914 (Iowa, 1942), remarked:

The public, far more than the lawyers, suffers injury from the unauthorized practice of law. The right to stop it is the public's fight. No man is required to employ a lawyer if he does not wish to. But every man is entitled to receive legal advice from men skilled in law, qualified in character, sworn to maintain a high standard of professional ethics, and subject to the control and discipline of the court. Not only this, he must be served disinterestedly by a lawyer who is his lawyer, not motivated or controlled by a divided or outside allegiance.

8. Weisman, *supra* note 6, at 157.

enjoined from legitimate business pursuits and that in many instances the public suffers since in many communities there are too few lawyers available to give service to the public which competent laymen can give.

In recent years some of the most common offenders in the unauthorized practice field have been corporations and individuals engaged in so-called estate planning. Traditionally, this has been recognized as one field where there exists a need to protect the public by intelligent and careful planning. For an individual, the utilization of his assets during his lifetime, and the planning for the distribution of his estate upon death is a highly important matter, for that plan will chart the financial welfare of loved ones and other beneficiaries. Since a substantial amount of tax law is involved, it is imperative that careful planning be accomplished through a trained attorney.

In this respect, the instant case bears a two-fold significance: (1) it is of great importance to the organized bar because it is the first to go to the highest court of any state on the subject of estate planning as practiced by life insurance underwriters; (2) it enunciates more clearly the limits of permissible activity which may be engaged in by lay groups in the field of estate planning.

The first and most obvious question confronting the court was: precisely what constitutes the unauthorized practice of law, especially in the estate planning field? The definition attempted by the Oregon legislature was too elusive and general.⁹ It would be impossible for any statute to contain definite prohibitions sufficient to cover every area of the law.¹⁰ Having no precise statutory language on which to base its decision, the court set forth certain explicit limits on permissible lay activities.¹¹ The Oregon Bar sought to enjoin both the corporation and the layman, Miller, in this case. The court no doubt had a far easier time enjoining the defendant corporation since the corporation has historically been considered a far greater threat to the bar than an individual. Also it is a well-settled doctrine that a corporation cannot practice law.¹² A factor simplifying their decision was that the corporation engaged in estate planning activities as a separate service from selling life insurance. The argument of the layman, Miller, was more difficult to meet because he claimed to be dealing in estate planning activities merely as an incident to his primary business

9. The present statute contains no definition of the practice of law. See wording of ORE. REV. STAT. § 9.160 (Supp. 1961), *supra* note 1. From 1919 to 1937 there was a statutory definition; see Ore. Code 1930, § 32-505, repealed by Ore. Laws 1937, ch. 343.

10. Only a few legislatures have attempted a comprehensive definition of the practice of law. See, *e.g.*, GA. CODE ANN. § 9-401 (Supp. 1958); TENN. CODE ANN. § 29-302 (1955).

11. Since the great weight of authority asserts that the power to control the unauthorized practice of law lies primarily with the judiciary, it logically follows that the courts also have the power to define in a particular case what constitutes the unauthorized practice of law. This is especially true in cases like the present where the legislature has remained silent.

12. Arkansas Bar Ass'n v. Union Nat'l Bank, 224 Ark. 48, 273 S.W.2d 408 (1954); State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 140 A.2d 863 (1958); Groninger v. Fletcher Trust Co., 220 Ind. 202, 41 N.E.2d 140 (1942); Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 596, 179 S.W.2d 946 (1944).

of selling life insurance. This then brought the court to its second obstacle—the “incidental-to-business” test.

The incidental test, simply stated, is that in certain situations a layman may engage in “legal” activities such as preparing legal instruments or giving legal advice, provided the activity is incidental to his regular business.¹³ This incidental test is employed mainly in cases involving real estate brokers or title companies which are engaged in preparing legal instruments. The landmark case to reject this test was *Hexter Title & Abstract Co. v. Grievance Comm.*¹⁴ Later in *Gardner v. Conway*,¹⁵ another court discarded this test when raised by a tax consultant, the court stating “that the danger to the public arising from the unauthorized practice of law is not lessened by the mere fact that it is carried on as an incident to another business.”¹⁶ The first Oregon case to reject the incidental test was *Oregon State Bar v. Security Escrows, Inc.*,¹⁷ in which that court enjoined private escrow companies from preparing conveyances and other specified instruments.

The present court went a step further than that earlier case and ruled that the activity in question must be so insubstantial as to call into play the maxim of *de minimus non curat lex*. The court then concluded that one who plans another person’s estate does not employ the law in such an insubstantial way. Thus, the court seems to have adopted a new test to supplement the incidental test—a test of substantiality based upon both the type and quantum of activity. However, such a test does not appear to be sound, as any distinction based on the amount or type of activity is weak. Although this new test may be no worse than the incidental one, it can hardly be said to contribute to the solution of the unauthorized practice controversy. It remains to be seen whether the Oregon Court in later cases reaffirms this insubstantial test and also whether other state courts will adopt this test in the estate planning area or related areas of unauthorized practice.¹⁸

The court lastly considered the plaintiff Bar’s contention that the decree by the trial court was inconsistent in that it permitted defendants

13. Some courts have upheld the preparation and execution of legal instruments on this “incidental-to-the-business” test. *Ingham Co. Bar Ass’n v. Walter Neller Co.*, 342 Mich. 214, 69 N.W.2d 713 (1955); *Hulse v. Criger*, 363 Mo. 26, 247 S.W.2d 855 (1952). This incidental test, however, has not been accepted as yet in any case dealing with estate planning activities.

14. 142 Tex. 596, 179 S.W.2d 946 (1944). In this case the title company was enjoined from having its staff attorneys draw deeds, notes, mortgages and the like in conjunction with a sale of insurance.

15. 234 Minn. 468, 48 N.W.2d 788 (1951).

16. “Any rule which holds that a layman who prepares legal papers or furnishes other services of a legal nature is not practicing law when such services are incidental to another business or profession completely ignores the public welfare.” *Id.* at 479, 48 N.W.2d at 795.

17. 377 P.2d 334 (Ore. 1962).

18. *Cf.* 29 UNAUTHORIZED PRACTICE NEWS, No. 2, p. 235, for a list of important California cases pending which deal with the problem of estate planning practices by laymen.

to estimate the cash requirements for estate tax purposes¹⁹ and allowed defendants to advise customers on the tax consequences of life insurance.²⁰ The court upheld plaintiff's position and ruled that an insurance salesman may advise a prospective customer in general terms as to alternative methods of disposing of assets, including life insurance; however, he is prohibited from giving advice as to a client's specific need for life insurance as against some other form of disposition of his estate. The only exemption from this prohibition exists when an insurance salesman can explain the basis for making the choice of alternatives without the use of legal principles. In so holding, the court referred to the case of *Chicago Bar Ass'n v. Financial Planning, Inc.*,²¹ in which a Chicago businessman was enjoined on similar reasoning from organizing a corporation which would solicit estate planning work.²²

In retrospect, it might be asked whether the Oregon Court's decision in the present case was a correct and desirable one. The answer to that question depends largely on the purposes behind the unauthorized practice movement generally, and whether this court has given effect to those purposes. If the purpose of the movement is to safeguard the legal profession by protecting its "monopoly" as some would contend, the solution is fairly simple—outlaw all unfavorable practices per se. However, if the true purpose is to benefit and protect the public as a whole, the solution becomes more difficult.²³ It is this writer's opinion that the Oregon Court has given effect to this true purpose and has therefore reached the desirable result. The court's conclusion is based largely on the common sense notion that an insurance salesman, no matter how conscientious, will have a difficult time resolving his conflict of interest when attempting to make a sale. The non-lawyer estate planner has two interests: advising what is best for his client and consummating a sale of life insurance to that client. These interests may be completely antagonistic. Hence there is a need to protect the public by allowing such estate planning advice to be given only by a licensed attorney having only one interest (his client's), and presumably one who has a knowledge of the pertinent legal principles.

Since the ultimate concern of the organized bar and lay groups alike should be to benefit the public through competent and readily available service, it should be noted that any decision which enjoins laymen from

19. Part 1(c): "Defendants are declared not to be engaged in the unauthorized practice of law when they advise the customer as to his life insurance requirements, amount, kind, etc., including approximate estate cash requirements brought about by taxes."

20. Part 1(d): "Defendants are declared not to be engaged in the unauthorized practice of law when they advise customers on the tax consequences of life insurance and on methods of premium payments and settlement options and other matters affecting the tax consequences of the insurance."

21. No. 53-S 10001, Super. Ct., Cook County, Ill., March 1, 1958, reported in 24 UNAUTHORIZED PRACTICE NEWS, No. 2, p. 29.

22. The court held that estate planning involved the giving of legal advice on some of the most important problems which can arise during a man's lifetime, and hence the necessity that the practice of law be confined to lawyers without the interposition of unauthorized practitioners to solicit business directly or indirectly.

23. Johnstone, *supra* note 4, at 56.

the unauthorized practice of law might benefit the public in one community, while it injures the public in another community of the same state.²⁴ For example, a situation might arise in a small community in which there is an insufficient number of "tax lawyers" to serve the needs of the public adequately. Yet, a number of certified public accountants are available and competent to advise on tax matters. Also it might well be the established practice in such a community for the lawyers themselves seek tax advice from qualified accountants.²⁵ In this context the choice seems to be up to the public, and the challenge up to the legal profession. The public, desirous of such service, might understandably choose to rely upon the advice of an accountant until such time as more "tax lawyers" appear to handle such matters.

The doctrine of *stare decisis* will severely limit the courts, since they will not feel free to allow a certain practice in one community of the state in view of a prior decision of the same court prohibiting that identical practice in another community. Perhaps the unauthorized practice controversy is an area of the law in which each case should be deemed unique and decided solely on its individual merits, taking into account all possible factors. But our system of jurisprudence does not permit such an approach. It may be inevitable that as the law becomes more and more specialized and lawyers in any one community limit their interests, the public will benefit best by allowing qualified laymen to engage in certain "legal" activities which do not encroach too far into the lawyers domain. A limited practice could be effected by giving lay groups "referral work" from attorneys rather than by permitting them to solicit legal work from clients who consistently bypass the lawyer's office. Such a course of

24. In the case of *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n*, 135 Colo. 398, 312 P.2d 998 (1957), the court decided that to enjoin the activity complained of would be more harmful than beneficial since there were only twenty-four lawyers in twenty counties of the state.

25. Interview With Jerome A. LaManna, Certified Public Accountant, in Bryn Mawr, Pennsylvania, Dec. 5, 1963. Mr. LaManna emphasized this practical aspect of the unauthorized practice controversy typical of smaller communities. He argued that many businessmen "practice a little law" daily as an adjunct to a particular calling. Such activities should not be termed "unauthorized practices" per se, since the public freely acquiesces in them and is far less injured by them than it would be by a total lack of such services caused by the shortage of specialized lawyers. The only injury comes to a layman's valid business pursuits by prohibitions against such menial encroachments. Also, conscientious laymen realize the limits of their permissible activities and fully understand that certain practices such as drafting or executing legal documents are clearly tasks for the lawyer alone. Mr. LaManna noted the difficulty, however, in determining where to draw the line between minor and major encroachments. To him, therefore, the solution to the unauthorized problem does not lie in litigated controversies in the courts in which arbitrary line drawing techniques are inevitably employed. A workable solution might be reached through a greater degree of co-operation between lawyers and laymen at the community level. The groundwork for such a solution, he says, has already been laid. For, at least where accountants are concerned, there usually exists a very amicable relationship between lawyers and accountants with regard to tax matters. In fact, a fair percentage of an accountant's work today is referral work from attorneys. The result of such co-operation is the achievement of two objectives: (1) better service to the public generally; (2) fair division of work between lawyers and accountants. Hence, Mr. LaManna's view is substantially in accord with the rationale behind the creation of estate planning teams mentioned in note 26, *infra* and the accompanying text.

action, however, will not solve the present dilemma of the courts in fixing a line between permissible and prohibited activities. Thus, it is evident that easy solutions will not be found in litigated controversies in the courts.

In conclusion, the Oregon Supreme Court has outlined in very precise terms and more clearly than ever before the limits placed upon life underwriters and corporations in the estate planning field. This statement is, for the most part, a wise guide to the laymen's course of conduct. However, the most desirable solution in this area is found in co-operation between the bar and lay groups in the form of an estate planning team.²⁶ Such an approach would serve the interests of the public by affording them adequate service; furthermore, the autonomy of both the legal profession and lay businesses would be safeguarded through an equitable distribution of work and profits.

As to the problem of unauthorized practice of law generally, the challenge for the future is succinctly stated in the following words:

Solutions to these problems, of course, will not be found in words, issuing either from lay groups or from lawyers. The solution will only be found by cooperative effort in the Conferences, or by litigated controversies in the Courts. One thing is clear—the growth and development of our society has thrust these problems upon us, and such problems can be solved only by work and more work.²⁷

Thomas M. Twardowski

26. For an excellent discussion of these estate planning teams, their advantages and disadvantages, see National Conference of Lawyers and Life Insurance Companies, *Guideposts Revisited — Cooperation Between Life Underwriters and Lawyers*, 29 UNAUTHORIZED PRACTICE NEWS, No. 1, p. 27 (1963).

27. Perry, *Report of the Standing Committee on Unauthorized Practice of Law*, American Bar Association, February, 1962, 28 UNAUTHORIZED PRACTICE NEWS, No. 1, p. 3 (1962).