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Unauthorized Practice of Law--The Full Service Bank That Was: Bank Cashier Enjoined from Preparing Real Estate Mortgages to Secure Bank Loans

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Comments

UNAUTHORIZED PRACTICE OF LAW—THE FULL SERVICE BANK THAT WAS: BANK CASHIER ENJOINED FROM PREPARING REAL ESTATE MORTGAGES TO SECURE BANK LOANS

To the uninitiated, law and the legal profession have long been somewhat akin to the world Alice confronted when she stepped through the Looking Glass. Words often have a meaning quite detached from their generally accepted usage with definitions notoriously short-lived and subject to modification as the law adjusts to meet changes in the social and economic order. Nowhere is this more apparent or of greater potential danger to the bar and our system of justice than in the field of unauthorized practice of law. As courts alter accepted definitions of the "practice of law" or extend old principles to cover new applications, the bar is assailed by accusations of self-serving and monopoly-building by those whose activities have been enjoined. The danger arises when the public, for whose ultimate protection these laws exist, comes to view the courts as arbitrarily interpreting the law for the benefit of the legal profession. The guiding principle, the sine qua non of this equation, must be the protection of the public and the legal order. To accomplish this end, we need clearly delineated boundaries specifying precisely what is and is not the practice of law together with reasons justifying the categorization.

Concept of Unauthorized Practice

The concept of unauthorized practice of law arose as a counterpart to the existence of an organized bar.[1] The practice of law became "authorized" as the privilege to appear before the courts was granted to a limited few to counter widespread evils which resulted from the unqualified practice of law.[2]

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[1] Vom Baur, *Unauthorized Practice, Corporations, and Ethics*, 25 Unauthorized Practice News 125 (1959).

[2] Note, *Conveyancing—The Roles of the Real Estate Broker and the Lawyer in Ordinary Real Estate Transactions—Wherein Lies the Public Interest*, 19 DePaul L. Rev. 319 (1969). *See also* Vom Baur, *What You Should Know About the Unauthorized Practice of Law*, 4 The Student Lawyer 20 (Oct. 1958).

In England, the practice of law began to develop in 1178 when Henry II created a central court and appointed five clerks to serve as justices in litigation.[3] By 1292, however, because of:

> [A] condition, intolerable to the king's people, [that grew] up by the promiscuous practice around the king's courts of persons unskilled in the law. . . . , Edward I was forced to limit the practitioners, and in so doing, vested in the Court of Common Pleas the power to appoint 'attornies and lawyers of the best and most apt for their learning and skill, who might do service to his court and people; that those so chosen only, and no others' should practice.[4]

The bar arose, therefore, from the need to protect the public from the abuses of unqualified legal representation. The courts were charged with the responsibility of establishing and maintaining minimum standards and excluding those persons unqualified, and hence "unauthorized" to practice. Similar statutes were enacted in 1402[5] and 1454.[6] These statutes, designed to protect the public, effectively conferred upon the bar a legal monopoly which has been the basic source of criticism of subsequent efforts to enjoin unauthorized practice by laymen and lay agencies. Critics point out that those who determine what is authorized have too great a personal stake in the determination—a charge that has, on occasion, contained more than a shadow of truth.[7] However, this monopoly was conferred, not to enhance the interests of the legal profession, but rather to

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[3] 1 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 133 (1st ed. 1895).

[4] *Id.* at 194.

[5] An Act for the Punishment of an Attorney Found in Default, 4 Hen. IV, ch. 18 (1402). *See* F. POLLACK & F. MAITLAND, *supra* note 3, at 194. This statute provided that all attorneys should be examined by the justices, and at their discretion only those found to be good and virtuous, and of good fame, learned and sworn to do their duty be allowed to be put upon the roll and all others be "put out."

[6] *See* W. HERBERT, ANTIQUITY OF THE INNS OF COURTS AND CHANCERY 167 (1804).

[7] Llewellyn, *The Bar's Troubles, and Poultices—And Cures?*, 5 LAW & CONTEMP. PROB. 104 (1938). The author asserts that the bar has defaulted in its obligation to provide legal services with the speed and efficiency commensurate with the needs of modern society, characterizing the bar as operating in "horse and buggy" fashion in a superhighway world. Corporations have stepped in to fill the vacuum with mass-produced form contracts for routine legal work at a cost far below that charged by the bar. Llewellyn characterizes some attempts to prosecute unauthorized practice as efforts to regain the business without curing the underlying reasons for its flight. He proposes a reorganization of the bar to insure qualified, universally available legal counsel to the public at a reasonable cost by adopting the efficiency techniques of industry and through intra-bar cooperation.

protect the public by limiting the practice of law to persons of ability and character who were subject to judicial supervision.[8]

The legal profession in this country was founded by lawyers who had been trained in the common law of England. Dean Pound points out that in Colonial times because of Puritan hostility to English lawyers, lack of printed information regarding English law, the supremacy of the clergy in the colonies, and interference by royal governors, there were four stages in the early development of the profession: (1) the attempt to get along without lawyers, (2) the stage of irresponsible filling out of writs by court officials and pettifoggers, (3) the era of admitted practitioners in permanent judicial organizations, and (4) the era of trained lawyers—the bar on the eve of the Revolution.[9] The period between the Revolution and the Civil War was crucial to the development of the legal profession in this country. Economic and political considerations created hostility toward the English law and caused the public to view with suspicion privileges granted to any special class. The monopoly conferred upon the bar came to be viewed as "undemocratic" and was seen merely as a means of safeguarding a private, money-making occupation.[10] The effect of this attitude was to "deprofessionalize" the practice of law as legislation was enacted in many states to permit any person of "good moral character" to practice law.[11] Throughout this period, the bar remained unorganized and complacent.[12] Then, around 1913,

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[8] Beach Abstract & Guaranty Co. v. Arkansas Bar Ass'n, 326 S.W.2d 900 (Ark. 1959); State v. Sperry, 140 So.2d 587 (Fla. 1962), *rev'd on other grounds*, 373 U.S. 379 (1963), *decree modified*, 159 So.2d 229 (Fla. 1963); Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 203 N.E.2d 131 (Ill. App. 1964), *modified on other grounds*, 214 N.E.2d 771 (Ill. 1966); Hoffmeister v. Tod, 349 S.W.2d 5 (Mo. 1961); New Jersey State Bar Ass'n v. N. N.J. Mortgage Associates, 161 A.2d 257 (N.J. 1960), *modified in part*, 169 A.2d 150 (N.J. 1961); Pioneer Title Ins. & Trust Co. v. State Bar, 326 P.2d 408 (Nev. 1958); West Virginia State Bar v. Earley, 109 S.E.2d 402 (W. Va. 1959).

[9] E. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 135-63 (1953).

[10] Representative of this attitude is the statement of the Indiana Supreme Court in 1893:

> Whatever the objections of the Common Law of England, there is a law higher in this country, and better suited to the rights and liberties of American citizens, that law which accords to every citizen the natural right to gain livelihood by intelligence, honesty, and industry in the arts, sciences, the professions, or other vocations.

In re Leach, 34 N.E. 641, 642 (Ind. 1893).

[11] The effects of this general attitude are noted by Pound, who states:

> [T]he harm that this deprofessionalizing of the practice of law did to the law, to legal procedure, to the ethics of practice and to forensic conduct has outlived the era in which it took place and still presents problems to the promoters of more effective administration of justice.

E. POUND, *supra* note 9, at 232.

[12] *See* Wigmore, *The Spark That Kindled the White Flame of Progress*, 20 J. AM. JUD. SOC'Y 176 (1937).

lawyers became increasingly apprehensive over the "unauthorized practice" situation as corporations began to usurp many of the lawyers' traditional functions.[13] This led to scattered, sporadic activities on a local level, primarily centered in New York, to prevent specific instances of unauthorized practice. In 1930, the American Bar Association appointed a Special Committee on Unauthorized Practice which became permanent in 1933. This Committee became and remains today the directing force behind the campaign against unauthorized practice.[14]

Coexistent with the drive to prohibit unauthorized practice of law, there began a revival of the professional nature of the practice of law. Emphasis was increasingly placed upon the responsibilities of the legal profession to the administration of justice in a spirit of public service with the earning of a livelihood deemed "incidental." Justice Cardozo observed: "[One is] received into that ancient fellowship [the bar] for something more than private gain. [The lawyer becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."[15] As the concept of public service returned to the legal profession, the courts resumed the role begun in 1292, assuming the responsibility of determining qualifications and imposing discipline upon those members of the profession who violated this spirit of public service as embodied in the Canons of Ethics. As public service became paramount to the profession, efforts to combat the unauthorized practice of law, both within and without the bar, became imperative. In the words of Samuel Tilden, speaking to a group which that night became the Association of the Bar of New York City in an effort to correct the appalling conditions which prevailed throughout the legal system, "[T]he Bar, if it is to continue to exist—if it would restore itself to the dignity and honor which it once possessed—must be bold in defense, and, if need be, bold in aggression."[16] In attempting to cope with the continuing problem

[13] Bristol, *The Passing of the Legal Profession*, 22 YALE L.J. 590 (1913).

[14] The creation of the Committee on Unauthorized Practice of Law resulted in a flurry of legal action in the 1930's against a variety of offenders. The extent and effectiveness of this activity can be judged from a perusal of G. BRAND, UNAUTHORIZED PRACTICE DECISIONS (1937), a compilation of virtually every case in the field, some of which are unreported elsewhere. All the decisions prior to 1930 are reported in the first 98 pages whereas the rest of the 838 pages contains cases between 1930-1937. The Committee publishes UNAUTHORIZED PRACTICE NEWS, a quarterly, which reports the latest decisions and activities in the field and often files amicus curiae briefs on behalf of the ABA in proceedings it considers particularly significant. These briefs are kept on file and are available to the practitioner upon request.

[15] Karlin v. Culkin, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928). *See also* E. POUND, *supra* note 9, at 6, 10.

[16] Reported by Vom Baur, *supra* note 1, at 131.

of the unauthorized practice of law, the bar sought to inform the public of the dangers inherent in condoning such practice and to develop coercive remedies to alleviate the problem.[17]

POWER OF THE COURTS TO PREVENT UPL

The courts have, with rare exceptions,[18] held that the judiciary has absolute control over the licensing and disciplining of attorneys.[19] This plenary power is derived from either, or both, of two sources: the doctrine of inherent power of the common law judiciary[20] and

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[17] Note, *Remedies Available to Combat the Unauthorized Practice of Law*, 62 COLUM. L. REV. 501 (1962). *See also* Adler, *The Bar's Campaign Against Unauthorized Practice*, 11 ARK. L. REV. 320 (1957); Maxwell, *Techniques in Preventing the Unauthorized Practice of the Law–The National Standards and Methods*, 31 IOWA L. REV. 301 (1946); Resh, *Safeguarding the Administration of Justice from Illegal Practice*, 42 MARQ. L. REV. 484 (1959); Sanders, *Procedures for the Punishment or Suppression of Unauthorized Practice of Law*, 5 LAW & CONTEMP. PROB. 135 (1938); Note, *The Bar and Unauthorized Practice of Law: A Survey*, 26 IND. L.J. 558 (1951).

[18] Maryland, New York, North Carolina and Vermont recognize legislative supremacy regarding admissions. *See* Bastian v. Watkins, 187 A.2d 304 (Md. 1963); *In re* Cooper, 22 N.Y. 67 (1860); *In re* Applicants for License, 55 S.E. 635 (N.C. 1906); Bolton v. Day, 132 S.E.2d 292 (Va. 1963). Additionally, in some jurisdictions regulation of the practice of law is a legislative matter and the judiciary's power over the bar is limited to that expressly granted by statute. *See In re* McKenna, 16 Cal.2d 610, 107 P.2d 258 (1940); *Ex parte* Ross, 26 S.E.2d 880 (Ga. 1943); *In re* Bercu, 262 App. Div. 56, 27 N.Y.S.2d 797 (1st Dept. 1948), *aff'd without opinion*, 299 N.Y. 728, 87 N.E.2d 451 (1949); North Carolina *ex rel.* Seawell v. Carolina Motor Club, 184 S.E. 540 (N.C. 1936). In most of these jurisdictions, the legislative power is delegated to the judiciary but the question of ultimate control becomes significant in respect to whether, in the absence of statute, courts may punish unauthorized practice with contempt. *See generally* Payne, *Title Insurance, The Legislatures and the Constitution*, 21 ALA. L. REV. 25 (1968); Note, 62 COLUM. L. REV. 501, *supra* note 17.

[19] *See, e.g.*, State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1 (Ariz. 1961), *modified on rehearing*, 371 P.2d 1020 (Ariz. 1962); Heiberger v. Clark, 169 A.2d 652 (Conn. 1961); People *ex rel.* Ill. State Bar Ass'n v. People's Stock Yards Bank, 176 N.E. 901 (Ill. 1931); Kentucky State Bar Ass'n v. Holland, 411 S.W.2d 727 (Ky. 1967); *In re* Opinion of the Justices, 194 N.E. 313 (Mass. 1935); Hulse v. Criger, 247 S.W.2d 855 (Mo. 1952); *In re* Integration of Nebraska State Bar Ass'n, 275 N.W. 265 (Neb. 1937); *In re* Baker, 85 A.2d 505 (N.J. 1951); West Virginia State Bar v. Earley, 109 S.E.2d 420 (W. Va. 1959).

[20] This inherent power concept is generally supported on the basis of two theories. First, the courts were forced to undertake numerous powers ancillary to their adjudicative function (*i.e.*, regulation procedure, providing for judicial personnel, enforcing decrees, etc.) so as to "fill a legal vacuum" caused by the nonassertion of regulatory power vested in Parliament but unexercised by that body. Once this power had been exercised over a period of time, as in the case of admissions to practice, the courts then relied on "immemorial custom" to sustain its continued exercise. This view stresses that such inherent power grew out of necessity. The second theory traces the origin of inherent power to express grants of authority beginning with the 1292 statute enacted by Edward I. *See* note 4 *supra* and accompanying text. This and subsequent grants reaffirmed the premise that ultimate control over admissions rested in the judiciary. Therefore, because of necessity, "immemorial custom", express grants and reaffirmation, the judiciary came to have inherent power over admissions to practice. Payne, *supra* note 18. *See also* Cheadle, *Inherent Power of the Judiciary Over Admittance to the Bar*, 7 WASH. L. REV. 233 (1932).

the doctrine of separation of powers.[21] The rationale for the exercise of this exclusive power was commented upon by the Illinois Supreme Court in *In re Day*:[22]

> That power [to pass upon learning and fitness to practice law] belongs to the court by virtue of its being a court of justice, and one of the departments of state into which, under the constitution, the power falls. Without such power by which the courts can protect themselves against ignorance and want of skill, they cannot properly administer justice.

Having asserted their inherent power to license and discipline attorneys, the courts inferred, as a corollary to that power, the power to prevent unauthorized practice,[23] usually by injunction[24] or contempt proceeding.[25] The rationale behind this extension of power to the

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[21] The doctrine of separation of powers is used to assert plenary power over admissions as derived from the grant of the whole judicial power to the judicial department. The doctrine provides:

> [A]ll the powers entrusted to government, whether state or national, are divided into three grand departments, the executive, the legislative and judicial. . . . [T]he functions appropriate to each of these branches of government shall be vested in a separate body of public servants. . . . [Whomever is] entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others. . . . [E]ach shall by the law of its creation be limited to the exercise of the powers appropriate to its department and no other. Kilbourne v. Thompson, 103 U.S. 168, 190 (1880).

See Lee, *The Constitutional Power of the Courts Over Admission to the Bar*, 13 HARV. L. REV. 233 (1924); Payne, *supra* note 18.

[22] 54 N.E. 646, 652 (Ill. 1899).

[23] *See, e.g.*, Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 312 P.2d 998 (Col. 1957); Connecticut State Bar Ass'n v. Connecticut Bank & Trust Co., 140 A.2d 863 (Conn. 1958); People *ex rel.* Ill. State Bar Ass'n v. People's Stock Yards State Bank, 176 N.E. 901 (Ill. 1931); Bump v. District Court, 5 N.W.2d 914 (Iowa 1942); Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 782 (Ky. 1965); *In re* Opinion of the Justices, 180 N.E. 725 (Mass. 1932); Gardner v. Conway, 48 N.W.2d 788 (Minn. 1951); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 179 A. 725 (R.I. 1935); *In re* Morse, 126 A. 550 (Vt. 1924); Washington State Bar Ass'n v. Washington Ass'n of Realtors, 251 P.2d 619 (Wash. 1953).

[24] *See, e.g.*, State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1 (Ariz. 1961), *modified on rehearing*, 371 P.2d 1020 (Ariz. 1962); State Bar Ass'n v. Connecticut Bank & Trust Co., 140 A.2d 863 (Conn. 1958); People *ex rel.* Ill. State Bar Ass'n v. People's Stock Yards State Bank, 176 N.E. 901 (Ill. 1931); Bump v. District Court, 5 N.W.2d 914 (Iowa 1942); Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 782 (Ky. 1965); Lowell Bar Ass'n v. Loeb, 52 N.E.2d 27 (Mass. 1943); Fitchette v. Taylor, 254 N.W. 910 (Minn. 1934); Hulse v. Criger, 247 S.W.2d 855 (Mo. 1952); New Jersey State Bar Ass'n v. N. N.J. Mortgage Associates, 123 A.2d 498 (N.J. 1956), 150 A.2d 496 (N.J. Super. 1959), 169 A.2d 150 (N.J. 1961); Land Title & Abstract Co. v. Dworken, 193 N.E. 650 (Ohio 1934); Childs v. Smeltzer, 171 A. 883 (Pa. 1934); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 179 A. 139 (R.I. 1935); Stewart Abstract Co. v. Judicial Comm'n, 131 S.W.2d 686 (Tex. Civ. App. 1939); Commonwealth v. Jones and Robins, Inc., 41 S.E.2d 720 (Va. 1947); Paul v. Stanley, 12 P.2d 401 (Wash. 1932); West Virginia State Bar v. Earley, 109 S.E.2d 420 (W. Va. 1959).

[25] *See, e.g.*, Chicago Bar Ass'n v. Goodman, 8 N.E.2d 941 (Ill. 1937), *cert. denied*, 302 U.S. 728 (1937); People *ex rel.* Ill. State Bar Ass'n v. People's Stock

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prevention of unauthorized practice is contained in the oft-quoted opinion of the Illinois Supreme Court in *People ex rel. Illinois State Bar Association v. People's Stock Yards State Bank*:[26]

> [Having inherent power to control admissions] it necessarily follows that this court has the power to enforce its rules and decisions against offenders, even though they have never been licensed by this court. Of what avail is the power to license in the absence of the power to prevent one not licensed from practicing as an attorney? In the absence [of such power] the power to control admissions would be nugatory.

Similarly, in *West Virginia State Bar v. Earley*,[27] the West Virginia Supreme Court of Appeals said:

> It would indeed be an anomaly if the power of the courts to protect the public from the improper or unlawful practice of law were limited to licensed attorneys and did not extend or apply to incompetent and unqualified laymen and lay agencies. Such a limitation of the power of the courts would reduce the legal profession to an unskilled vocation, destroy the usefulness of licensed attorneys as officers of the courts, and substantially impair and disrupt the orderly and effective administration of justice by the judicial department of the government; and this the law will not recognize or permit.

The weight of authority supports this extension of the courts' inherent power to control and prevent unauthorized practice irrespective of statutory penalties.[28]

In the majority of states, the courts have available to them established penalties for the unauthorized practice of law through misdemeanor statutes,[29] which have been upheld as valid exercises of

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Yards State Bank, 176 N.E. 901 (Ill. 1931); Bump v. District Court, 5 N.W.2d 914 (Iowa 1942); Kentucky State Bar Ass'n v. Tussey, 476 S.W.2d 177 (Ky. 1972); Kentucky State Bar Ass'n v. First Fed. Sav. & Loan Ass'n, 342 S.W.2d 397 (Ky. 1961); Clark v. Austin, 101 S.W.2d 977 (Mo. 1937); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 179 A. 139 (R.I. 1935); *In re* Welch, 185 A.2d 458 (Vt. 1962). *See* Sanders, *supra* note 17, for an analysis of injunction and contempt proceedings to prevent unauthorized practice and a discussion of the alternative methods for special application (*i.e.*, quo warranto, declaratory judgments, and mandamus and prohibition).

[26] 176 N.E. 901, 906 (Ill. 1931).

[27] 109 S.E.2d 420, 440 (W. Va. 1959).

[28] Note, 19 DEPAUL L. REV. 319, *supra* note 2.

[29] ALA. CODE tit. 46, § 31 (1958); ALASKA STAT. § 08.08.230 (Supp. 1968); ARIZ. REV. STAT. ANN. § 32-261 (1956); ARK. STAT. ANN. § 25-207 (1947) (corp. only); CONN. GEN. STAT. REV. § 51-88 (1958); FLA. STAT. ANN. § 454.23 (1965); GA. CODE ANN. § 9-9903 (1936); HAWAII REV. STAT. § 605-17 (1968); IDAHO CODE § 3-420 (1948); KY. REV. STAT. § 30.990 (1971); LA. REV. STAT. ANN. §

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the states' police power.[30] Penal sanctions have rarely been invoked, however, because most unauthorized practice actions involve parties who were unaware of the illegality of their act. This is particularly true in the case of business organizations who are otherwise performing a useful service to the community. Under such circumstances, criminal prosecution has rarely been thought appropriate.[31] Considered merely as additional remedies, the existence of penal sanctions in no way restricts the inherent power of the courts to proceed with contempt or injunction proceedings.[32]

PRACTICE OF LAW

It is universally conceded that attempts to define precisely the "practice of law" so as to prescribe practical limits to the scope of that activity are doomed.[33] As the law reflects changes in society, so must concepts of the practice of law reflect changes in the lawyers' role. Early statutes and decisions equated practice of law with litigation.[34] As efforts to prevent unauthorized practice expanded, courts found it necessary to redefine practice of law to include giving legal advice and drafting legal instruments.[35] Perhaps the most

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37.213 (1964); ME. REV. STAT. ANN. tit. 4, § 807 (1964); MD. ANN. CODE art. 10, § 32 (1957); MASS. ANN. LAWS ch. 221, § 41 (1955); MINN. STAT. ANN. § 481.02(8) (1962); MISS. CODE ANN. § 2332 (1957); MO. ANN. STAT. § 484.020 (1952); NEB. REV. STAT. § 7-101 (1970); NEV. REV. STAT. § 7.285 (1967); N.H. REV STAT. ANN. § 311:9 (1966); N.Y. JUDICIARY LAW §§ 478, 485 (1968); N.C. GEN. STAT. § 84-8 (1965); N.D. CENT. CODE § 27-11-01 (1960); OHIO REV. CODE ANN. § 4705.99 (1954); ORE. REV. STAT. § 9.990 (1971); PA. STAT. ANN. tit. 17, § 1610 (1962); R.I. GEN. LAWS ANN. § 11-27-41 (1956); S.C. CODE § 56-141 (1962); TENN. CODE ANN. § 29-303 (1955); UTAH CODE ANN. § 78-51-25 (1953); VA. CODE ANN. § 54-44 (1972); WASH. REV. CODE ANN. § 2.48.180 (1961); W. VA. CODE ANN. § 30-2-4 (1971); WIS. STAT. ANN. § 256.30 (1970).

[30] *See, e.g., In re* Mundy, 11 So.2d 398 (La. 1942); Hoffmeister v. Tod, 349 S.W.2d 5 (Mo. 1961).

[31] *See* Sanders, *supra* note 17, for a detailed discussion of the difficulties of applying criminal statutes to prevent unauthorized practice. *See also* Note, 62 COLUM. L. REV., *supra* note 17, at 503, n.12, for the twenty-five cases that have involved criminal prosecution for unauthorized practice through 1962.

[32] *See, e.g.*, Hobson v. Kentucky Trust Co., 197 S.W.2d 454 (Ky. 1946); Fitchette v. Taylor, 254 N.W. 910 (Minn. 1934); Rhode Island Bar Ass'n v. Automobile Service Ass'n, 179 A. 139 (R.I. 1935); Paul v. Stanley, 12 P.2d 401 (Wash. 1932); West Virginia State Bar v. Earley, 109 S.E.2d 420 (W. Va. 1959).

[33] *See, e.g.*, Bump v. District Court, 5 N.W.2d 914 (Iowa 1942); Clark v. Austin, 101 S.W.2d 977 (Mo. 1937); State *ex rel.* Johnson v. Childe, 23 N.W.2d 720 (Neb. 1941); Auerbacher v. Wood, 59 A.2d 863 (N.J. Eq. 1948); West Virginia State Bar v. Earley, 109 S.E.2d 420 (W. Va. 1959).

[34] *See, e.g.*, Dunlap v. Lebus, 65 S.W. 441 (Ky. 1901).

[35] *See, e.g.*, Eley v. Miller, 34 N.E. 836 (Ind. 1893); People *ex rel.* Ill. State Bar Ass'n v. People's Stock Yards State Bank, 176 N.E. 901 (Ill. 1931); *In re* Opinion of the Justices, 194 N.E. 313 (Mass. 1935); *In re* Duncan, 65 S.E. 210 (S.C. 1909).

celebrated exposition of what constitutes legal practice is found in *In re Opinion of the Justices*:[36]

> Practice of law under modern conditions consists in no small part of work performed outside of any court and having no immediate relation to any proceeding in court. It embraces conveyancing, the giving of legal advice on a large variety of subjects, and the preparation and execution of legal instruments covering an extensive field of business and trust relations and other affairs. . . . No valid distinction can be drawn between that part of the work of the lawyer which involves appearance in court and that part which involves advice and drafting of instruments in his office. The work of the office lawyer is the groundwork for future possible contests in courts. It has profound effect on the whole scheme of the administration of justice. It is performed with that possibility in mind, and otherwise would hardly be needed.

The criterion thus became the nature of the act performed rather than the place it was done.[37] In *People v. Alfani*,[38] the court discussed the importance of extending the practice of law to include work done outside the court, pointing out that hazards to the public were reduced to a minimum in court proceedings "where the proceedings are public and the presiding officer is generally a man of judgment and experience. . . . Not so, in the office. Here the client is with his attorney alone, without the impartial supervision of the judge. Ignorance and stupidity may here create damage which the courts of the land cannot undo."[39] Note the emphasis on public protection. The sole justification for excluding from the practice of law persons not admitted to the bar and for limiting and restricting such practice to members of the legal profession is not for the protection of the members of the bar from competition or the creation of a monopoly for the members of the legal profession, but is instead for the protection of the public from being advised and represented in legal matters by unqualified and undisciplined persons over whom the judiciary can exercise little or no control.[40]

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[36] 194 N.E. 313, 317 (Mass. 1935). This same language has been adopted by other courts. *See, e.g.*, Arkansas Bar Ass'n v. Block, 323 S.W.2d 912, 915 (Ark. 1959); State Bar Ass'n v. Connecticut Bank & Trust Co., 140 A.2d 863, 870 (Conn. 1958).

[37] *See, e.g.*, Grievance Comm. v. Dacey, 222 A.2d 339 (Conn. 1966); Chicago Bar Ass'n v. Goodman, 8 N.E.2d 941 (Ill. 1937), *cert. denied*, 302 U.S. 728, *rehearing denied*, 302 U.S. 777 (1937); State v. Butterfield, 111 N.W.2d 543 (Neb. 1961); People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919); Stack v. P. G. Garage, Inc., 80 A.2d 545 (N.J. 1951); Shortz v. Farrell, 193 A. 20 (Pa. 1937); Washington State Bar Ass'n v. Washington Ass'n of Realtors, 251 P.2d 619 (Wash. 1953).

[38] 227 N.Y. 334, 125 N.E. 671 (1919).

[39] *Id.* at —, 125 N.E. at 673.

[40] West Virginia State Bar v. Earley, 109 S.E.2d 420 (W. Va. 1959). *Accord,*

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The judiciary has the inherent and exclusive power to define the practice of law.[41] The legislature cannot restrict or impair this power of the courts; neither can it authorize laymen or lay agencies to engage in the practice of law.[42] This allows the courts flexibility to alter their

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e.g., State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1 (Ariz. 1961), *modified on rehearing*, 371 P.2d 1020 (Ariz. 1962); Beach Abstract & Guar. Co. v. Arkansas Bar Ass'n, 326 S.W.2d 900 (Ark. 1959); State v. Sperry, 140 So.2d 587 (Fla. 1962), *rev'd on other grounds*, 373 U.S. 379 (1963), *decree modified*, 159 So.2d 229 (Fla. 1963); Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 203 N.E.2d 131 (Ill. App. 1964), *modified on other grounds*, 214 N.E.2d 771 (Ill. 1966); Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 782 (Ky. 1965); Meunier v. Bernich, 170 So. 567 (La. App. 1936); Hoffmeister v. Tod, 349 S.W.2d 5 (Mo. 1961); State *ex rel.* Wright v. Barlow, 268 N.W. 95 (Neb. 1937); New Jersey State Bar Ass'n v. N. N.J. Mortgage Associates, 123 A.2d 498 (N.J. 1956), 150 A.2d 496 (N.J. Super. 1959), 169 A.2d 150 (N.J. 1961); Auerbacher v. Wood, 59 A.2d 863 (N.J. Eq. 1948); Pioneer Title Ins. & Trust Co. v. State Bar, 326 P.2d 408 (Nev. 1958); State *ex rel.* Daniel v. Wells, 5 S.E.2d 181 (S.C. 1939).

[41] *E.g.*, State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1 (Ariz. 1961), *modified on rehearing*, 371 P.2d 1020 (Ariz. 1962); State Bar Ass'n v. Connecticut Bank & Trust Co., 140 A.2d 863 (Conn. 1958); Application of Kaufman, 206 P.2d 528 (Idaho 1949); Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 203 N.E.2d 131 (Ill. App. 1964), *modified on other grounds*, 214 N.E.2d 771 (Ill. 1966); Bump v. District Court, 5 N.W.2d 914 (Iowa 1942); Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 782 (Ky. 1965); Kentucky State Bar Ass'n v. First Fed. Sav. & Loan Ass'n, 342 S.W.2d 397 (Ky. 1961); Meuiner v. Bernich, 170 So. 567 (La. App. 1936); *In re* Opinion of the Justices, 194 N.E. 313 (Mass. 1935); Hulse v. Criger, 247 S.W.2d 855 (Mo. 1952); New Jersey State Bar Ass'n v. N. N.J. Mortgage Associates, 123 A.2d 498 (N.J. 1956), 150 A.2d 496 (N.J. Super. 1959), 169 A.2d 150 (N.J. 1961); Richmond Ass'n of Credit Men v. Bar Ass'n, 189 S.E. 153 (Va. 1937); West Virginia State Bar v. Earley, 109 S.E.2d 420 (W. Va. 1959). *Contra, In re* Cooper, 22 N.Y. 67 (1860); *In re* Applicants for for License, 55 S.E. 635 (N.C. 1906).

[42] *See* the cases compiled in note 41, *supra*. Statutes providing that the judiciary shall, by general or special rules, regulate admissions of attorneys are declaratory of power inherent in the judiciary to supervise, regulate and control generally the practice of law. *E.g.*, Chicago Bar Ass'n v. Goodman, 8 N.E.2d 941 (Ill. 1937), *cert. denied*, 302 U.S. 728 (1937). However, any statute that seeks to control the judiciary in the performance of its duty to decide who shall engage in the practice of law is void and without force. *See In re* Opinion of the Justices, 194 N.E. 313 (Mass. 1935). *Contra*, cases compiled in note 18, *supra*. Statutes that undertake to specify qualifications for admission to the bar are regarded as fixing the minimum and not as setting bounds beyond which the judiciary cannot go. *E.g.*, *In re* Keenan, 47 N.E.2d 12 (Mass. 1943). Similarly, penal statutes, *supra* note 29, are seen as an aid to and not a limitation upon the exercise by the judiciary of its power to regulate the practice of law. *E.g.*, New Jersey State Bar Ass'n v. N. N.J. Mortgage Associates, 123 A.2d 498 (N.J. 1956), 150 A.2d 496 (N.J. Super. 1959), 169 A.2d 150 (N.J. 1961). The general theory underlying judicial-legislative separation is expressed in Creditors Serv. Corp. v. Cummings, 190 A. 2 (R.I. 1937):

> Although the legislature may not subvert the power of the judiciary, yet it may, in the exercise of the police power, pass laws which are in aid of the judicial power that it deems necessary or expedient. In the exercise of this power, the legislature may properly enact a statute designed to protect the public against imposition, incompetency and dishonesty, but it has no power to pass a law granting the right to anyone to practice law. The former type of enactment tends to strengthen the judicial authority to regulate the practice of law and so assists the courts in protecting the public against practices that are not tolerated from members

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concept of the practice of law, and hence, the unauthorized practice of law, and to conform to the needs of a dynamic society and meet new forms of unauthorized practice.

The primary problem the courts face in preventing unauthorized practice is largely a result of the need to define the practice of law in broad, all-encompassing terms. The very broadness of the definition precludes its application except on a case by case basis. This results in an absence of concrete guidelines that would allow laymen and lay agencies to determine exactly what they are allowed to do and breeds litigation in an effort to clarify boundaries. This has been particularly evident in cases involving unauthorized practice by corporations.

The rule is well established that a corporation may not practice law.[43] Corporate usurpation of a legal practice had become so complete that the Illinois Supreme Court in *People v. People's Stock Yards State Bank*[44] noted that the bank "transacted for its customers and others almost every form of legal business except the handling of divorce cases." The principle underlying the prohibition of corporate practice was well expressed in *State Bar Association of Connecticut v. Connecticut Bank and Trust Co.*[45] where the court stated:

> The practice of law is open only to individuals proved to the satisfaction of the court to possess sufficient general knowledge and adequate special qualifications as to learning in the law and to be of good moral character. A dual trust is imposed on attorneys at law. They must act with fidelity both to the courts and to their clients. They are bound by canons of ethics which are enforced by the courts. The relation of an attorney to his client is pre-eminently confidential. It demands on the part of the attorney undivided allegiance, a conspicuous degree of faithfulness and disinterestedness, absolute integrity and utter renunciation of every personal advantage conflicting in any way directly or indirectly with the interest of his client. Only a human being can conform to these

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of the bar, while the latter is an encroachment upon the judicial power and invalid because it is in derogation of the inherent and exclusive prerogative of the court.

[43] *E.g.*, State Bar v. Arizona Land Title & Trust Co. 366 P.2d 1 (Ariz. 1961), *modified on rehearing*, 371 P.2d 1020 (Ariz. 1962); Chicago Bar Ass'n v. Quinlan and Tyson, Inc., 203 N.E. 131 (Ill. App. 1964), *modified on other grounds*, 214 N.E.2d 771 (Ill. 1966); People *ex rel.* Ill. State Bar Ass'n v. People's Stock Yards State Bank, 176 N.E. 901 (Ill. 1931); Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 782 (Ky. 1965); Kentucky State Bar Ass'n v. First Fed. Sav. & Loan Ass'n, 342 S.W.2d 397 (Ky. 1961); Kendall v. Beiling, 175 S.W.2d 489 (Ky. 1943); *In re* Opinion of the Justices, 194 N.E. 313 (Mass. 1935); New Jersey State Bar Ass'n v. N.N.J. Mortgage Associates, 123 A.2d 498 (N.J. 1956), 150 A.2d 496 (N.J. Super. 1959), 169 A.2d 150 (N.J. 1961); Green v. Huntington Nat'l Bank, 209 N.E.2d 228 (Ohio App. 1964), *aff'd*, 212 N.E.2d 585 (Ohio 1965); West Virginia State Bar v. Earley, 109 S.E.2d (W. Va. 1959).

[44] 176 N.E. 901, 903 (Ill. 1931).

[45] 140 A.2d 863, 870 (Conn. 1958).

> exacting requirements. Artificial creations such as corporations or associations cannot meet these prerequisites and therefore cannot engage in the practice of law.

Theory and application soon part, however, as the courts confront the problem created by the nebulous nature of "practice of law." The result has been a line of decisions consistent only in their inconsistency as the courts have sought to accommodate the need for public protection through restricting the practice of law to members of the bar with the economic and practical realities of modern society. As the Minnesota Supreme Court recognized in *Cowern v. Nelson*:[46]

> The line between what is and what is not the practice of law cannot be drawn with precision. Lawyers should be the first to recognize that between the two there is a region wherein much of what lawyers do every day in their practice may also be done by others without wrongful invasion of the lawyers' field. . . . It is the duty of this court so to regulate the practice of law and to restrain such practice by laymen in a common sense way in order to protect primarily the interest of the public and not to hamper and burden such interest with impractical technical restraints no matter how well supported such restraint may be from the standpoint of pure logic.

The problem with common sense, of course, is that it depends entirely upon one's perspective.

Restricting our analysis to the rule that drafting legal instruments constitutes the practice of law, we find a number of qualifications resulting from attempts to "draw the line." Based on the argument that public policy requires convenience in commercial transactions and that attorneys cannot be present at all times, some courts have permitted simple drafting that is "incidental" to what is otherwise lay work,[47] whereas others have denied any such limitation upon the general prohibition against lay practice.[48] The confusion created by

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[46] 290 N.W. 795, 797 (Minn. 1940).

[47] *See, e.g.*, Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 312 P.2d 998 (Colo. 1957); Lowell Bar Ass'n v. Loeb, 52 N.E.2d 27 (Mass. 1943); State Bar v. Kupris, 116 N.W.2d 341 (Mich. 1962); Childs v. Smeltzer, 171 A. 883 (Pa. 1934); Bar Ass'n v. Union Planters Title Guar. Co., 326 S.W.2d 767 (Tenn. App. 1959); State v. Dinger, 109 N.W.2d 685 (Wis. 1961); *cf.* Creekmore v. Izard, 367 S.W.2d 419 (Ark. 1963); Commonwealth v. Jones & Robins, Inc., 41 S.E.2d 720 (Va. 1947).

[48] *E.g.*, State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1 (Ariz. 1961), *modified on rehearing*, 371 P.2d 1020 (Ariz. 1962); Arkansas Bar Ass'n v. Block 323 S.W.2d 912 (Ark. 1959); Agran v. Shapiro, 127 Cal. App.2d 807, 273 P.2d 619 (1954); Grievance Comm. v. Dacey, 222 A.2d 339 (Conn. 1966), *appeal dismissed*, 386 U.S. 683 (1967); Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 203 N.E.2d 131 (Ill. App. 1964), *modified*, 214 N.E.2d 771 (Ill. 1966); Pioneer Title Ins. & Trust Co. v. State Bar Ass'n v. N.N.J. Mortgage Associates, 123 A.2d 498 (N.J. 1956), 150 A.2d 496 (N.J. Super. 1959), 169 A.2d 150 (N.J. 1961).

this conflict has been further complicated by attempts to distinguish between "simple" instruments, generally printed on forms which the layman completes by adding information relevant to the particular transaction, and those which are "complex." Some courts concluded that the completion of the former does not constitute the practice of law, generally adding that the forms must have been prepared by an attorney and that there be no compensation to the layman.[49] However, if any legal judgment is required, either in the selection of the form or in the solicitation or recording of the information, the act is prohibited.[50] On the other hand, many courts have entirely rejected the "simple instrument" rule holding that even the completion of standard forms is illegal,[51] following the reasoning first espoused by Judge Pound in his concurring opinion in *People v. Title Guarantee & Trust Co.*[52] where he concluded: "I am unable to rest any satisfactory test on the distinction between simple and complex instruments. The most complex are simple to the skilled, and the simplest often trouble the inexperienced." Some courts seek to draw the line at compensation. The payment of separate compensation for the preparation of even instruments considered "incidental" constitutes the unauthorized practice of law.[53] Courts have also been quick to reject the contention that services are free when, in fact, they constitute an inducement for other, compensated work or when the customer is charged a "service

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[49] *E.g., In re* Matthews, 79 P.2d 535 (Idaho 1938); State v. Indiana Real Estate Ass'n, 191 N.E.2d 711 (Ind. 1963); Lowell Bar Ass'n v. Loeb, 52 N.E.2d 27 (Mass. 1943); Cain v. Merchants Nat'l Bank & Trust Co., 268 N.W. 719 (N.D. 1936); Goodman v. Beall, 200 N.E. 470 (Ohio 1936); State v. Dinger, 109 N.W.2d 685 (Wis. 1961).

[50] *E.g.*, People v. Sipper, 61 Cal. App.2d 844, 142 P.2d 960 (1943); Grievance Comm. v. Dacey, 222 A.2d 339 (Conn. 1966), *appeal dismissed,* 386 U.S. 683 (1967); State Bar Ass'n v. Connecticut Bank & Trust Co., 140 A.2d 863 (Conn. 1958); People v. Schafer, 87 N.E.2d 773 (Ill. 1949); Pioneer Title Ins. & Trust Co. v. State Bar, 326 P.2d 408 (Nev. 1958); Crawford v. McConnell, 49 P.2d 551 (Okla. 1935); Commonwealth v. Jones & Robins, Inc., 41 S.E.2d 720 (Va. 1947).

[51] *E.g.*, Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 203 N.E.2d 131 (Ill. App. 1964), *modified on other grounds,* 214 N.E.2d 771 (Ill. 1966); People v. Schaefer, 87 N.E.2d 773 (Ill. 1949); People v. Lawyer Title Corp., 282 N.Y. 513, 27 N.E.2d 30 (1940); Martineau v. Gressner, 182 N.E.2d 48 (Ohio C.P. 1962); Hexter Title & Abstract Co. v. Grievance Comm., 179 S.W.2d 946 (Tex. 1944).

[52] 227 N.Y. 336, 379, 125 N.E. 666, 670 (1919). *Accord,* Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 203 N.E.2d 131 (Ill. App. 1964), *modified on other grounds,* 214 N.E.2d 771 (Ill. 1966); Gardner v. Conway, 48 N.W.2d 788 (Minn. 1951); New Jersey State Bar Ass'n v. N.N.J. Mortgage Associates, 123 A.2d 498 (N.J. 1956), 150 A.2d 496 (N.J. Super. 1959), 169 A.2d 150 (N.J. 1961); Oregon State Bar v. Security Escrows, Inc., 377 P.2d 334 (Ore. 1962); Hexter Title & Abstract Co. v. Grievance Comm., 179 S.W.2d 946 (Tex. 1944); Washington State Bar Ass'n v. Washington Ass'n of Realtors, 251 P.2d 619 (Wash. 1952).

[53] *See, e.g.*, Fink v. Peden, 17 N.E.2d 95 (Ind. 1938); Bump v. District Court, 5 N.W.2d 914 (Iowa 1942); Fitchette v. Taylor, 254 N.W. 910 (Minn. 1934); Hulse v. Criger, 247 S.W.2d 855 (Mo. 1952); Cain v. Merchants Nat'l Bank & Trust Co., 268 N.W. 719 (N.D. 1936); Haverty Furniture Co. v. Foust, 124 S.W.2d 694 (Tenn. 1939); State *ex rel.* Junior Ass'n v. Rice, 294 N.W. 550 (Wis. 1940).

fee" which can be directly linked to the performance of legal services.[54] The landmark case in the rejection of the incident-to-business theory is *Hexter Title & Abstract Co. v. Grievance Committee*[55] wherein the court pointed out that, if carried to its logical extreme, "most legal work . . . would be performed by corporations and others not licensed to practice law. The law practice would be hawked about as a leader or premium to be given as an inducement for business transactions." Most jurisdictions now reject the incident-to-business theory as permitting layman or lay agencies to draft legal instruments although a few, while expressly rejecting the theory, continue to allow the practice due to public policy considerations.[56]

The other major exception to the rule that drafting instruments constitutes the unauthorized practice of law is the "substantial interest" theory. Far more restricted than the incidental-to-work theory, it is based on the universally accepted rule that any person may represent himself in "propria persona" in matters wherein his legal rights or obligations may be substantially affected. As applied to drafting legal instruments, this exception requires that the person preparing the document have a "direct interest" in the transaction which is the subject matter of the document. The mere assertion in the document of contractual rights growing out of the *negotiation* of the transaction is not sufficient to make one a party with an interest sufficient to invoke this exception since his interest is not in the subject matter of the transaction but in the fees for his services for bringing it about. The Court of Appeals of Kentucky enunciated this principle in *Carter v. Trevathan*[57] wherein it said:

> [O]ne, who is not a lawyer, must not only act without consideration for his services in drawing the paper but he must be a party

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[54] *E.g.*, Grievance Comm. v. Dacey, 22 A.2d 339 (Conn. 1966), *appeal dismissed*, 386 U.S. 683 (1967); Rosenthal v. Shepard Broadcasting Serv., Inc., 12 N.E.2d 819 (Mass. 1938); State v. St. Louis Union Trust Co., 74 S.W.2d 348 (Mo. 1934); New Jersey State Bar Ass'n v. N.N.J. Mortgage Associates, 123 A.2d 498 (N.J. 1956); People v. Peoples' Trust Co., 180 App. Div. 494, 167 N.Y.S. 767 (1917); Cain v. Merchants Nat'l Bank & Trust Co., 268 N.W. 719 (N.D. 1936); Green v. Huntington Nat'l Bank, 209 N.E.2d 228 (Ohio App. 1964), *aff'd* 212 N.E.2d 585 (Ohio 1965); Hexter Title & Abstract Co. v. Grievance Comm. 179 S.W.2d 946 (Tex. 1944).

[55] 179 S.W.2d 946, 953 (Tex. 1944).

[56] Notable among these is Colorado. In Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 312 P.2d 998 (Colo. 1957), the court rejected the incidental-to-work theory but declined to enjoin the preparation of legal instruments by laymen because it felt that the public interest was best served by allowing the continuance of a practice that had for many years afforded convenience to the public. The court noted the scarcity of lawyers in some sections of the state and felt that it would be more harmful than beneficial to require that all documents be prepared by attorneys.

[57] 309 S.W.2d 746, 748 (Ky. 1958).

> to, or his name appear in, the instrument as one to be benefitted thereby. Merely having a pecuniary interest, direct or indirect, in the transaction covered by the instrument he draws will not suffice to relieve of the charge of unauthorized practice of law unless he is a party to, or his name appears in, the paper as one of the beneficiaries thereof.

This requirement has served to restrict the application of the substantial interest exception to real parties in interest and insures that it cannot be used as an entry into the practice of law by laymen through drafting instruments for others.

The substantial interest exception is generally held to apply to corporations as well as to individuals insofar as the preparation of legal instruments is concerned.[58] In *State Bar of Arizona v. Arizona Land Title & Trust Company*,[59] the Arizona Supreme Court said:

> As the trial court illustrated, a person or corporation owning an interest in real estate has an interest in property and may prepare his or its own contracts or other instruments in relation to that property provided such person or corporation is a party to such instruments; a person or corporation lending money has an interest in the transaction and may prepare those documents necessary in connection with such loan.

Similarly, in *Title Guaranty Co. v. Denver Bar Association*,[60] the Supreme Court of Colorado held: "It is elementary that a layman or a corporation may prepare instruments to which he or it is a party without being guilty of the unauthorized practice of law." It is fundamental that the acts of agents or employees of a corporation, acting within the scope of their employment, are the acts of the corporation itself.[61] When they prepare legal documents, the corporation prepares them. Consequently, as the North Carolina Supreme Court reasoned in *State v. Pledger*:[62]

> A person who, in the course of his employment by a corporation, prepares a legal document in connection with a business transaction in which the corporation has a primary interest, the corporation

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[58] *E.g.*, State Bar v. Arizona Land Title & Trust Co., 366 P.2d 1 (Ariz. 1961), *modified on rehearing*, 371 P.2d 1020 (Ariz. 1962); Title Guar. Co. v. Denver Bar Ass'n, 312 P.2d 1011 (Colo. 1957); New Jersey State Bar Ass'n v. N.N.J. Mortgage Associates, 161 A.2d 257 (N.J. 1960), *modified in part*, 169 A.2d 150 (N.J. 1961); Pioneer Title Ins. & Trust Co. v. State Bar, 326 P.2d 408 (Nev. 1958); State v. Pledger, 127 S.E.2d 337 (N.C. 1962).

[59] 366 P.2d 1, 12 (Ariz. 1961), *modified on rehearing*, 371 P.2d 1020 (Ariz. 1962).

[60] 312 P.2d 1011, 1014 (Colo. 1957).

[61] *E.g.*, Mack v. Saars, 188 A.2d 863 (Conn. 1963). *See also* 19 C.J.S. *Corporations* §§ 933, 993, 999 (1940).

[62] 127 S.E.2d 337, 339-40 (N.C. 1962).

> being authorized by law and its charter to transact such business, does not violate the statute, for his act in so doing is the act of the corporation in the furtherance of its own business.

To hold otherwise would be to negate the substantial interest exception as applied to corporations and would require an attorney to draft any document which gives rise to legal obligations. In this era of implied warranties, a sales slip gives rise to legal obligations. To impose such a burden upon corporations would seem untenable.

KENTUCKY REJECTS SUBSTANTIAL INTEREST DOCTRINE FOR CORPORATIONS

Against this general overview of the unauthorized practice of law as applied to the drafting of legal instruments, the Court of Appeals of Kentucky recently rendered a decision in the case of *Kentucky State Bar Association v. Tussey.*[63] Mr. Tussey, a lay officer in a rural bank, had been ordered to show cause why he should not be held in contempt of court for the unauthorized practice of law for having prepared nine real estate mortgages to secure loans made by the bank out of its own funds to its customers, the mortgagors.[64] It was stipulated that Mr. Tussey prepared the mortgages for and on behalf of the bank, that the bank was a party to each of the instruments in a non-fiduciary capacity (*i.e.*, was a real party in interest) and that neither he nor the bank received any consideration or remuneration for the preparation of the real estate mortgages.[65]

The Court, in the exercise of its judicial power, has defined the practice of law in Rule 3.020 of the Rules of the Court of Appeals[66] which at the time this proceeding arose read as follows:

> 'The practice of law' is any service rendered involving legal knowledge or legal advice, whether of representation, counsel, or advocacy in or out of court, rendered in respect to the rights, duties, obligations, liabilities or business relations of one requiring the service. *But nothing herein shall prevent any person not holding himself out as a practicing attorney from drawing any*

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[63] 476 S.W.2d 177 (Ky. 1972).

[64] Brief for Complainant at 1, Kentucky State Bar Ass'n v. Tussey, 476 S.W.2d 177 (Ky. 1972).

[65] *Id.* at 2.

[66] Hereinafter cited as RCA. RCA 3.020 was adopted pursuant to KY. REV. STAT. § 30.170 (1971) [hereinafter cited as KRS] which provides that the court shall adopt and promulgate rules defining the practice of law and prescribe a code of professional conduct for attorneys and prohibits the adoption of a rule which prevents a person not holding himself out as an attorney from writing a deed, mortgage, or will, or prevents a person from drawing any instrument to which he is a party.

instrument to which he is a party without consideration unto himself therefor. (emphasis added).[67]

The Court has held specifically that the drawing of mortgages constitutes the practice of law.[68] Thus, Mr. Tussey is guilty of the unauthorized practice of law unless he comes within the "substantial interest" exception of RCA 3.020. This depends, in turn, upon whether a corporation is a "person" within the meaning of RCA 3.020. For, if the corporation is a "person" and the acts of an employee, acting within the scope of his employment, are the acts of the corporation, then Mr. Tussey's preparation of the mortgages was the *corporation's* preparation of the mortgages and would be permitted under the substantial interest exception for it is stipulated that the bank was a real party in interest. On the other hand, if a corporation is *not* a "person" within the context of RCA 3.020, then neither the bank nor, by derivation, Mr. Tussey fall within the exception and both would be guilty of the unauthorized practice of law. This situation is not expressly covered by the Rules of the Court.

The precedent is clearly established in Kentucky, as elsewhere, that a corporation may not practice law, even where it employs attorneys to perform the acts which constitute the practice of law.[69] Thus, it is clear that the bank could not prepare mortgages, even through attorneys, with or without compensation, directly or indirectly, to secure a loan agreement between third parties. However, if the corporation falls within the substantial interest exception its preparation of mortgages does not constitute the unauthorized practice of law.[70]

A somewhat similar situation had been presented to the Court in *Carter v. Trevathan.*[71] There, a bank officer was charged with the unauthorized practice of law for preparing, without consideration, four

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[67] RCA was subsequently amended to read: "But nothing herein shall prevent any *natural* person not holding himself out as a practicing attorney from drawing any instrument to which he is a party without consideration into himself therefor." RCA 3.020 (1970).

[68] Howton v. Morrow, 106 S.W.2d 81 (Ky. 1937). *"Practicing law* is not confined to performing services in actions or proceedings in courts of justice, but *includes* giving advice and *preparing* wills, contracts, deeds, *mortgages* and other instruments of a legal nature." *Id.* at 82 (emphasis added).

[69] Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1965); Kentucky State Bar Ass'n v. First Fed. Sav. & Loan Ass'n, 342 S.W.2d 397 (Ky. 1961); Kendall v. Beiling, 175 S.W.2d 489 (Ky. 1943); Mut. Bankers Corp. v. Covington Bros. & Co., 125 S.W.2d 202 (Ky. 1938).

[70] It serves little purpose to attempt to decipher whether, when one acts on his own behalf, the preparation of legal instruments is considered not the practice of law or rather not the *unauthorized* practice of law. The result is the same. To engage in semantical acrobatics obscures the real issue– whether in the public interest the given act should be allowed in the circumstances indicated.

[71] 309 S.W.2d 746 (Ky. 1958).

deeds for customers of the bank. The bank did not own nor did it acquire any interest in the property covered by the deeds but rather had only a pecuniary interest in the transactions which were the subject matter of the documents. The Court applied the substantial interest test, found neither Mr. Trevathan nor the bank to be a real party in interest to the documents, and consequently ruled that Mr. Trevathan's preparation of the deeds constituted the unauthorized practice of law. The Court then went on to explain the application of the substantial interest exception to officers of the corporations which are real parties in interest:

> However, if one, who is not a lawyer, is an officer of a corporation or a member of a firm or partnership, not acting in a fiduciary capacity, he may under RCA 3.020, draw a legal instrument for or on behalf of the corporation, firm or partnership if it is a party to the instrument, provided he receives no remuneration for that particular service.[72]

This language was clearly applicable to Mr. Tussey if still valid. The Court, however, said it "must give way to the fundamental principle of *Frazee*".[73] In *Frazee v. Citizens Fidelity Bank & Trust Co.*[74] the Court had extended its opinion to include a declaration of policies specifying precisely those acts a bank was permitted to perform in the administration of trusts.[75] Specifically included was a prohibition against the preparation of mortgages by a fiduriary in the course of administering an estate.[76] In *Tussey* the Court stated:

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[72] *Id.* at 748. *Accord,* Hobson v. Kentucky Trust Co., 197 S.W.2d 454 (Ky. 1946). *See also* 1956 OP. ATT'Y GEN. 39, 130, which stated that a bank could, without consideration therefor, draw any instrument to which it was a party and this would include a mortgage given to the bank to secure a real estate loan. However, the bank could not draw any deed in which it was not named as either grantee or grantor.

[73] Kentucky State Bar Ass'n v. Tussey, 476 S.W.2d 177, 179 (Ky. 1972). The Court is referring to Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778 (Ky. 1965).

[74] 393 S.W.2d 778 (Ky. 1965).

[75] These policies were incorporated from the Statement of Policies adopted by a Conference Committee composed of the Standing Committee on Unauthorized Practice of Law of the American Bar Association (*see,* note 14 *supra,* and accompanying text) and the Executive Committee of the Trust Division of the American Bankers Association. These conferences are the result of the Unauthorized Practice Committee's efforts to cooperate with other groups (*i.e.,* realtors, bankers, life insurance companies, accountants, etc.) to delineate the boundaries of the unauthorized practice of law in the respective fields. This approach is one of the most effective means of educating the public and curbing unauthorized practice as it allows the conference groups to eliminate those controversies which breed misunderstanding and litigation between the bar and the lay or professional group involved.

[76] Frazee v. Citizens Fidelity Bank & Trust Co., 393 S.W.2d 778, 784 (Ky. 1965).

> The reason a trustee cannot do the things prohibited to it under *Frazee* is that unless it is a beneficial party to the instrument drawn, it is not the real party in interest and therefore is drawing the instrument for someone else who is. This distinction is not obscured by the close relationship between trustee and beneficiary.[77]

This, of course, is fundamental to the substantial interest exception. The excepted party must be a real party in interest. The Court then goes on to say:

> Neither may it be obscured by the relationship between . . . corporation and officer. If the nonprofessional trustee may not prepare an instrument for his or its beneficiary, the nonprofessional officer or employe may not prepare it for his employer.[78]

But does the same relationship exist between trustee and beneficiary as exists between officer and corporation? Are the acts of the trustee the acts of the beneficiary? Patently not. When the trustee prepares a mortgage or other instrument for the beneficiary of the trust he is clearly acting for a third party. On the other hand, the corporate officer, acting within the scope of his employment, *is* the corporation. His acts are the acts *of the corporation.* The separate identities merge. Not so, according to the Court.

> In the case before us the bank was a party to the mortgages in question and would have the right to prepare such instruments if it were physically possible for it to do so. But a corporation is an artificial person, not capable of performing any act except through the agency of others, and for that reason it cannot come within the meaning of a "person" as the word is used in KRS 30.170 (3) and RCA 3.020.
>
> This proceeding is not against the bank. It is against an individual, and it is only because the Respondent [*i.e.*, Tussey], *as an individual* not authorized to practice law, cannot draw real estate mortgages *for others* without being engaged in the practice of law that *in practical effect his corporate principal cannot have them so drawn for itself.* Hence the statement in *Trevathan* to the contrary is unsound, and . . . it is overruled. *(emphasis added).*[79]

We must amend previous conceptions. The acts of a corporate officer, acting within the scope of his employment, are *not* the acts of the corporation; rather, they are the acts of an individual *for* the corporation. Thus, the relationship between an officer and his corporation is the same as that of any third party to the corporation. Therefore, the substantial interest exception to the unauthorized practice of law

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[77] Kentucky State Bar Ass'n v. Tussey, 476 S.W.2d 177, 179 (Ky. 1972).
[78] *Id.* at 179.
[79] *Id.* at 179.

is defunct as regards corporations. The ramifications of this change in the structural relationship between corporation and officer are mind-boggling when extended beyond this narrow application but are vastly beyond the scope of this discussion.

Method aside, what are the practical consequences of *Tussey* insofar as the drafting of instruments is concerned? Narrowly construed, the decision goes no further than holding that "the preparation of real estate mortgages for a bank by an officer of the bank, whether it be with or without remuneration from the mortgagee [sic] to the bank or to the officer, constitutes the practice of law."[80] And yet, if the substantial interest exception no longer operates in favor of corporations, then the drafting of *any* legal instrument by a corporate employee constitutes the practice of law. Carried to its illogical extreme it could, as noted earlier, require attorneys for the filling out of sales slips. The prospect of such a result is ludicrous, of course, and was answered by the Court as follows:

> Whether the principle of this case applies to certain other contracts and commercial papers . . . is a question we cannot appropriately decide here. Suffice it to say, however, that we accept Holmes' thesis that the life of the law has not been logic, but experience, and *it is not likely that we shall be disposed to ignore the practical facts of life. (emphasis added).*[81]

We have no guidance. The implication is that each instrument will be held up to the light and scrutinized to determine whether the "practical facts of life" dictate that it be allowed to remain among the corporate world or whether it may be entrusted only to the legal profession, What are the critical factors? Complexity? No, the Court rejected any distinction between simple and complex instruments in *Frazee*.[82] Custom? Unlikely. Incident-to-business? Again, rejected.[83] Credit instruments? Doubtful, considering the effect upon commerce. Instruments affecting real property? *Probably.* It may be that *Tussey* signals a campaign by the Court to insure that any instruments affecting interests in real property be prepared only by an attorney. If so, it may be viewed as a judicial extension of KRS § 382.335[84] which

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[80] *Id.* at 180-81.
[81] *Id.* at 181.
[82] 393 S.W.2d 778 (Ky. 1965).
[83] Kentucky State Bar Ass'n v. First Fed. Sav. & Loan Ass'n, 342 S.W.2d 397 (Ky. 1961).
[84] KRS 382.335 provides:
(1) No county clerk shall receive, or permit the recording of any instrument by which title to real estate or personal property,or any interest therein, or lien thereon, is conveyed, granted, encumbered, assigned or

(Continued on next page)

requires that any instrument to be recorded must be signed by the person who prepared it and which, when combined with the *natural person* amendment to RCA 3.020[85] which this action implicity tests, results in the requirement throughout the state that such instruments be signed by an attorney unless drafted by an individual who was himself a party to the instrument. Speculation? Completely.

And what is the status of individuals who are allowed to prepare those documents which the "practical facts of life" require be left with the corporations? The conclusion is inescapable. Without the substantial interest exception, the Court will be allowing the lay officers and employees to practice law "a little bit". And further, without the exception, what limitation can be placed upon the drafting of such instruments generally? If the drafting of specified instruments is considered not the practice of law, then *any* layman, with or without an interest, could draft them with impunity, a situation seemingly far more endemic of the public interest than the situation prior to *Tussey*. On the other hand, if such drafting is limited to the officers or employees of corporations which are "beneficially interested" in the subject matter of the transaction covered by the document, then we're back where we started with the substantial interest exception applying to corporations and, by derivation, their employees, with a few specified instruments excluded. It would seem far easier and more logically sound to merely exclude the offending instruments originally.

The criterion for the regulation of the practice of law must be the public interest. Construed broadly, *Tussey* provides more protection than the public can probably stand and, to the degree that it imposes a net burden on commercial transactions without a corresponding increase in *needed* protection, is actually detrimental to the public interest. If, on the other hand, *Tussey* is limited to real estate mortgages and, by implication, to other instruments affecting title to real property, the holding provides increased protection in a complex field which too often finds the property owner unable to protect himself. It can be said with a degree of confidence that the average layman involved in a real estate transaction finds himself engaged in a highly technical procedure about which he is inexperienced; that he dislikes lawyers, or at least lawyers' fees; and that he is therefore highly receptive to the suggestion that laymen carry out

(Footnote continued from preceding page)
otherwise disposed of; nor receive any instrument, or permit any instrument, provided by law, to be recorded as evidence of title to real estate; . . . unless such instrument has endorsed on it, a printed, type-written or stamped statement showing the name and address of the individual who prepared the instrument, and such statement is signed by such individual.

[85] *See* note 67 *supra*.

the entire transaction for him, particularly if some of the services are "free". He wants complete security with a minimum of expense and bother. At the least he should have the formal protection and the advice and assistance of disinterested and technically qualified legal counsel.[86] On the other hand, the mortgagee, concerned with the business of making loans on favorable terms, is indifferent to the mortgagor's legal problems, except insofar as his title is sufficient to secure the loan.[87] The elimination of the substantial interest exception for corporations and their officers and employees would seem too radical a procedure to provide this extended protection. A prohibition of the drafting of specifically enumerated legal instruments (*i.e.*, real estate mortgages, deeds, etc.) by other than licensed attorneys would provide this protection without the potential strangulation of commerce resulting from the abolition of the substantial interest doctrine and would preclude the mound of litigation which will be necessary to clarify *Tussey* as it applies to the myriad documents which affect "rights, duties, obligations, liabilities or business relations". This would satisfy our dual requirements of specificity as to what constitutes the unauthorized practice of law and, since the prohibited instruments would have to be excluded on the basis of policy considerations without the blanket rationale provided by the rejection of the substantial interest doctrine, justification for the categorization. The excellent and oft-cited opinion of the Court in *Frazee* is representative of the direction necessary in unauthorized practice decisions if the courts and the legal profession are to avoid the appearance of arbitrariness and monopoly-building, and establish meaningful guidelines for laymen and lay agencies. *Tussey,* unfortunately, represents a rather significant step backwards.

CONCLUSION

The sole justification for excluding from the practice of law persons not admitted to the bar and for limiting and restricting such practice to members of the legal profession is not for the protection of the members of the bar from competition or the creation of a monopoly for the legal profession, but is instead for the protection of the public from being advised and represented in legal matters by unqualified and undisciplined persons over whom the courts have little or no control. The judiciary has plenary power to define and regulate the practice of law to that end. Difficulties arise in the application of the

[86] Payne, *Title Insurance and the Unauthorized Practice of Law Controversy,* 53 MINN. L. REV. 423, 470 (1969).
[87] *Id.* at 475.

concept of "practice of law" to specific situations. Necessarily broad, practice of law too often has meaning only *ex post facto*. Recognizing that a region exists wherein the functions of attorney and layman overlap, the courts seek to regulate the practice of law in a common sense way so as not to unduly burden the public interest with impractical technical restraints no matter how sound logically. In the field of legal instrument drafting the overlap is particularly troublesome. One of the few, perhaps the only, valid, workable methods of defining the boundary which separates the authorized from the unauthorized has been the "substantial interest doctrine". A fixture insofar as individuals are concerned, the doctrine is currently defunct in Kentucky as applied to corporations. Whereas it is conceded that in a limited application the prohibition against corporate preparation of legal instruments is sound, the renunciation of the substantial interest exception creates more and greater problems than it cures.

Maxwell P. Barret, Jr.

ENFORCEMENT OF SUPPORT OBLIGATIONS: A SOLUTION AND CONTINUING PROBLEMS

Obtaining a judgment or settlement through litigation or negotiation in any legal matter is usually considered a satisfactory conclusion to the attorney's efforts; but, if the client is a wife and mother seeking a decree for child support from her husband, obtaining a judgment often marks the beginning rather than the end of difficulties. The wife is faced with the continuing problem of enforcing a child support decree against a father who has left the state and who refuses to support his minor children. In spite of legislation designed to remedy the situation, a husband can still, "by the simple method of crossing state lines . . . effectively prevent his dependents from enforcing family support obligations."[1] In *Hamilton v. Hamilton*,[2] the Kentucky Court of Appeals employs an unusual but effective means of collecting support payments from an affluent husband and father, living outside the state, who refuses to continue making these payments in the amount decreed by the Jefferson County Circuit Court. The opinion of the Court serves both as one solution to the problem and as a means of underscoring many additional difficulties one may

[1] Murphy, *Uniform Support Legislation*, 43 KY. L.J. 98, 111 (1954).
[2] 476 S.W.2d 197 (Ky. 1972).