Volume 83
Issue 3 *Dickinson Law Review - Volume 83, 1978-1979*

3-1-1979

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I. Introduction

The legal profession has long enjoyed the protection of statutes, case law and professional standards that tend to insulate the practicing bar from competition. While the maintenance of well-articulated standards of conduct and competence undeniably redounds to the good of a public that generally has little comprehension of legal intricacies and that, consequently, reposes its trust in the offices of its counselors, the effect of this complex of precepts is commonly the economic aggrandizement of a select interest and the bestowal of an equivocal benefit upon the diverse interests that are purportedly served. Furtherance of the public welfare, a concept that necessarily defies classification, has nevertheless been equated frequently with the expansion of the role of the legal profession.[1] This inversion and

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1. Professor Johnstone, quoting numerous examples of what has developed into an unauthorized practice rhetoric, noted the evolution of a "rather clear-cut bar ideology on unauthorized practice. . . ." Johnstone, *The Unauthorized Practice Controversy, A Struggle Among Power Groups*, 4 KAN. L. REV. 1, 44-46 (1955). The general outlines of this "ideology" are depicted as follows:

> The public utterances of bar leaders on the subject of unauthorized practice contain much that is emotional and unobjective, and customarily associate the good of the public with the good of the bar. Part of this can be attributed to exuberant advocacy, part of it to a deepseated human desire to be on the side of the good and the

confusion of interests[2] is evidenced most clearly by the efforts of the organized bar to implement the mandate of Canon 3 of the American Bar Association Code of Professional Responsibility that "[a] lawyer should assist in preventing the unauthorized practice of law."[3]

The crux of the unauthorized practice controversy is not whether lay persons should be permitted to engage in the practice of law, since few would venture such a radical proposition, but the appropriate scope of the formula "practice of law." Two questions inevitably arise from this definitional problem: what acts comprise the practice of law and who decides what constitutes the practice of law? Traditionally, it has been stated that "those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries must constitute 'the practice of law.' "[4] In effect, the practice of law is what lawyers do. The resolution to the second query logically follows from the answer to the first: lawyers have defined the bounds of their own monopoly. Opposition of potential competitors to this self-definition of exclusive roles has struck some responsive chords with the judiciary[5] and may result in a definition of "practice of law" that more perfectly accommodates the diversity of interests represented by the public.

The restrictive pattern of self-regulation and exclusion of alternative services from the performance of selected tasks has encountered increasingly staunch opposition, particularly in the subject

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righteous no matter what the facts. The same kind of self-serving emotionalism characterizes public comments of businessmen on unauthorized practice.

Id. at 6 (footnotes omitted).

2. *See* Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L REV. 702, 704 (1977). Professor Morgan considers the prohibition of the unauthorized practice of law "[p]erhaps the clearest example of a Code standard which operates primarily for the benefit of lawyers . . . ." *Id.* at 707.

3. The Ethical Considerations clarifying and further defining the principles expressed in the corresponding canon justify the prohibition against the unauthorized practice of law as a regulatory mechanism. EC 3-3 articulates this rationale most clearly as follows:

> A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards.

Notwithstanding this perceived public need, the Ethical Considerations concede that the proper function of the legal profession is to educate the public about the need for legal assistance and to make legal representation *available*. See EC 3-7. For an excellent explication of Canon 3, see Note, *A Lawyer's Duty Not to Aid the Unauthorized Practice of Law—Canon 3 and the Code of Professional Responsibility*, 79 DICK. L. REV. 701 (1975).

4. State Bar v. Arizona Land Title & Trust Co., 90 Ariz 76, 37, 366 P.2d 1, 9 (1961), *supplemented*, 91 Ariz. 293, 371 P.2d 1020 (1962); *accord*, Grievance Comm. v. Payne, 128 Conn. 325, 22 A.2d 623 (1941).

5. *See, e.g.*, Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977), *order vacated pending resolution of state law question*, 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978); State Bar v. Guardian Abstract & Title Co., 91 N.M. 434, 575 P.2d 943 (1978).

areas of tax counseling,[6] conveyancing,[7] debt collection,[8] and the preparation and sale of legal forms.[9] Of this host of potential competitors, the commercial title insurance companies have excited perhaps the most commentary. The reaction of the organized bar to the activities of title insurers has assumed several common forms; it has fostered court actions for injunctive relief[10] and contempt proceedings for the alleged unauthorized practice of law,[11] the promulgation of unauthorized practice of law opinions[12] and the establishment of bar-related or lawyer-controlled title insurance companies[13] that

6. *See, e.g.*, Creekmore v. Izard, 236 Ark. 558, 367 S.W.2d 419 (1963) (court in declaratory judgment action concluded that a notary public does not engage in practice of law by preparing income tax returns); Agran v. Shapiro, 127 Cal. App.2d 807, 273 P.2d 619 (1954) (although preparation of return by C.P.A. did not constitute practice of law, accountant, by preparing application for carry-back adjustment of loss suffered by taxpayer and resisting additional assessments, engaged in unauthorized practice); *In re* New York Co. Lawyers Ass'n (*In re* Bercu), 273 App. Div. 524, 78 N.Y.S.2d 209 (1948), *aff'd*, 299 N.Y. 728, 87 N.E.2d 451 (1949) (C P.A. found in contempt for furnishing legal advice unconnected with accounting work); Annot., 9 A.L.R.2d 797 (1950) (cataloging cases dealing with unauthorized practice of law in matters of taxation).

7. *See, e.g.*, Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977), *order vacated pending resolution of state law question*, 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978); State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), *supplemented*, 91 Ariz. 293, 371 P.2d 1020 (1962); Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957); State Bar v. Guardian Abstract & Title Co., 91 N.M. 434, 575 P.2d 943 (1978); Bar Ass'n of Tennessee, Inc. v. Union Planters Title Guar. Co., 326 S.W.2d 767 (Tenn. Ct. App. 1959); Hamner, *Title Insurance Companies and the Practice of Law*, 14 BAYLOR L. REV. 384 (1962); Hill, *Real Estate Brokers and the Courts*, 5 LAW & CONTEMP. PROB. 72 (1938); Houck, *Drafting of Real Estate Instruments: The Problem from the Standpoint of the Bar*, 5 LAW & CONTEMP. PROB. 66 (1938); Marks, *The Lawyers and the Realtors: Arizona's Experience*, 49 A.B.A.J. 139 (1963); Nelson, *Drafting of Real Estate Instruments: The Problem from the Standpoint of the Realtors*, 5 LAW & CONTEMP. PROB 57 (1938); Editorial, *Lay Assaults on the Practice of Law*, 49 A B.A.J. 162 (1963); Annot., 85 A.L.R.2d 184 (1962) (collecting cases questioning activities of lending institutions, insurance companies and title and abstract companies incident to the examination and perfection of title to realty); Annot., 53 A.L.R.2d 788 (1957) (analyzing cases litigating conduct of real estate agents, brokers or managers in completing instruments relating to conveyance of real estate).

8. *See, e.g.*, State *ex rel* Porter v. Dun & Bradstreet, 352 F. Supp. 1226 (N.D. Ala. 1972), *aff'd*, 472 F.2d 1049 (5th Cir 1973) (sending of collection notices that threatened enforcement, but did not mention suit or legal proceedings, did not constitute unlawful practice); State *ex rel.* Norvell v. Credit Bureau of Albuquerque, 85 N.M. 521, 514 P.2d 40 (1973) (although issuance of collection letters did not constitute unauthorized practice, collection agency could not take assignments of creditors' claims and prosecute them in its own name); Annot., 27 A.L.R.3d 1152 (1969) (collecting cases that consider whether collection agency has engaged in unauthorized practice of law).

9. *See, e.g.*, New York Co. Lawyers Ass'n v. Dacey, 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422 (1967) (providing legal forms does not, in itself, constitute unauthorized practice); Oregon State Bar v. Gilchrist, 538 P.2d 913 (Ore. 1975) (defendants could not be enjoined from merely publishing or selling divorce kits so long as they had no personal contact with customers), *noted in* 1976 DET. C. L. REV. 293. *See generally* Buesser, *The "Kit" Age and Unauthorized Practice*, 39 UNAUTH. PRAC. NEWS 12 (1974).

10. *See, e.g.*, Land Title Co. v. State *ex rel.* Porter, 292 Ala 691, 299 So.2d 289 (1974); The Florida Bar v. McPhee, 195 So.2d 552 (Fla. 1967); State Bar v. Guardian Abstract & Title Co., 91 N.M. 434, 575 P.2d 943 (1978).

11. *See, e.g.*, Kentucky State Bar Ass'n v. First Fed. Sav. & Loan Ass'n, 342 S.W.2d 397 (Ky. 1961).

12. *See, e.g.*, Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977), *order vacated pending resolution of state law question*, 571 F 2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978).

13. Reacting to what they perceived as the diminishing role of the lawyer in the real

raise a panoply of antitrust[14] and ethical[15] questions.

estate settlement, attorneys in a number of states sought to improve their competitive positions by forming title companies of their own. The first, the Florida Lawyers' Title Guaranty Fund, was created in 1947 as a Massachusetts business trust. *See*, Carter, *A New Role for Lawyers: The Florida Lawyers Title Guaranty Fund*, 45 A.B.A.J. 803 (1959); Carter, *Lawyers' Title Guaranty Fund*, 8 U. FLA. L. REV. 480 (1955). Its operation is illustrative of the fund concept. Membership in the fund is limited to lawyers. On becoming a member each lawyer makes an initial contribution of a prescribed amount, which is credited to his account. Thereafter, each time he issues a fund guarantee he makes an additional contribution that constitutes, in effect, a premium, which is similarly credited to his account. At the conclusion of each year the attorney is credited with his share of the fund's income on investments and charged with his share of its expenses, which share is proportioned to the amount of additional annual contributions. Credit balances are distributed periodically. The organizational features of various bar-related funds are diagrammed in a pamphlet recently published by the American Bar Association Standing Committee on Lawyers' Title Guaranty Funds to promote the cause of bar-related title assurance. HOW-TO-DO-IT: MISSING BAR-RELATED TITLE ASSURING ORGANIZATIONS 6-7 (1976) [hereinafter referred to as HOW-TO-DO-IT].

The purpose of the bar-related assuring organizations is readily discernable: to enhance the competitive position of the attorney in real property transactions. The economic basis for these funds is emphasized in a further brochure distributed by the Standing Committee to explain the principles of the bar-related movement. This brochure opens with the following set of queries entitled "A Test for Every Lawyer Regarding the Extent of His Real Property Practice":

> Survey your practice for a few weeks, tabulating daily your answers to these questions:
>
> 1. What is your gross revenue from real property work? Has it diminished because your former clients are patronizing lay agencies?
> 2. What percentage of your closings produce a fully adequate fee?
> 3. What percentage of your clients do you confidently expect to represent in future real property transactions?
>
> Now, based on the survey data, make up your own mind as to how important the bar-related title movement is—or can be—to you.

MISSING BAR-RELATED TITLE ASSURING ORGANIZATIONS 2 (1976).

Although several reasons have been propounded for the existence of the bar-related organization, most authorities concur that the purpose is to affirm the role of the attorney in the real estate transaction. *See* Kellogg, *Bar-Related Title Insurance*, 14 PRAC. LAWYER 13, 16 (1968); Lancaster, *Title Insurance—A Survey Inquiry*, 1 GLENDALE L. REV. 28, 42-44 (1976); Payne, *The Restoration of Conveyancing*, 15 ALA. L. REV. 371, 385 (1963). Professor Payne, however, has noted a further purpose for the fund concept; he would promote its implementation as a means to streamline and reform substantially the traditional conveyancing process. Payne, *Title Guaranty Funds: Symptom, Cure or Nostrum?* 46 IND. L.J. 208 (1971). The need for such reform was discussed in Payne's earlier essay entitled *In Search of Title*, 14 ALA. L. REV. 11, 278 (1961). One of the most fervent proponents of the bar-related movement has characterized the concept as "a milestone in the fight against unauthorized law practice," Balbach, Title Assurance: *A New Approach to Unauthorized Practice*, 41 NOTRE DAME LAW. 192, 198 (1965), although a commentator has noted more correctly that the movement is an alternative method and not a weapon in the unauthorized practice arsenal. Comment, *Title Insurance*, 13 ALA. L. REV. 381, 405 (1961) ("the activities of the title companies which are most economically damaging to the attorneys are not unlawful. For these reasons, a second method of attack is being used, viz., competition").

14. The goal of bar-related and lawyer-controlled companies is ultimately to restore to the legal profession a monopoly in real estate conveyancing and to exclude commercial title companies, realtors and lawyers not engaged in the private practice of law from most aspects of the process. A forceful argument can be advanced that the organization of the bar-related companies to effect this purpose results in combinations that violate sections 1 and 2 of the Sherman Act, a tying arrangement in violation of section 1 of the Sherman Act and illegal rebates that result in reverse competition. This latter concept is addressed in passing in a recent study of the title insurance industry. Quiner, *Title Insurance and the Title Insurance Industry*, 22 DRAKE L. REV. 711, 723 (1973). The tying aspect is quite apparent from the following description by a leading advocate of the bar-related movement of the availability of title assurance:

> Title assurance should be available only from lawyers. To allow members of the public to purchase insurance without the representation by counsel is in violation of

II. The Title Insurance Industry

A. The Concept Defined

Numerous attempts have been made to reduce the concept of "title insurance" to a workable definition. The importance of such a formulation should be readily apparent if one considers that the elemental functions of a commercial title insurer cannot constitute the

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the principle of providing a complete professional service—a lawyer's advice plus title insurance.

Balbach, *supra* note 13, at 202. *See generally* BAR-RELATED TITLE ASSURING ORGANIZATIONS 8 (1976) ("the fund member who today permits his client to leave his office after a real estate closing without a fund guarantee is in effect inviting his client to take his next closing to a lay agency).

That the practices of the legal profession in general, and bar associations in particular, are amenable to antitrust scrutiny was established in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), in which case the United States Supreme Court found that the promulgation of a minimum fee schedule by a state bar association constituted price-fixing in violation of the Sherman Act. The nature of the "learned profession" alone does not insulate from the federal antitrust laws. Nor did the Court deem the state action immunity doctrine articulated in Parker v. Brown, 317 U.S. 341 (1943), applicable, since the price-fixing activity had not been compelled by the state acting as sovereign. While Bates v. State Bar of Arizona, 433 U.S. 350 (1977), acknowledged, in principal, the amenability of the legal profession to the antitrust laws, the *Bates* court discerned the requisite compulsion in pervasive state supreme court supervision of the advertising ban. For a discussion of the antitrust standards applicable to the organized bar, see 24 WAYNE L. REV. 1061 (1978) (noting Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977)).

15. A lawyer who is affiliated with a bar-related company receives from the company what constitutes, in effect, rebates, commissions or dividends depending on the nature of the fund organization. Since the amount of return is proportionate to the amount of business referred to the company, the lawyer will gain financially through the company only to the extent that he refers business to it. This direct monetary interest of the attorney who would represent a party to the real estate transaction and also be an owner of or investor in the title company provides an added incentive to consummate the transaction notwithstanding remote defects in title. The lawyer also has an interest in limiting the company's loss by securing various exceptions to coverage not only as a principal of the company, but because, under some plans, his account will be charged for the loss attributable to the claim and will offset his share of earnings and profits while, under another system, the value of his ownership interest is reduced to the extent of successful claims. In states in which title policies vary in coverage the attorney who is personally interested in a title company will be motivated to restrict the sources of insurance available to his client

Few attempts have been made to come to terms with the conflicts inherent in the operation of bar-related or lawyer-controlled title companies, and most commentators seem to be content with the rationale that all attorneys inevitably will place their clients' interests ahead of their own. *See, e.g.*, Balbach, *supra* note 13, at 202-03; Kellogg, *supra* note 13, at 16-17. This same sentiment is echoed in the two recent ABA publications advertising the bar-related title movement, HOW-TO-DO-IT, *supra* note 13, and BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* note 13. The former publication notes the circumstance that "[a] favorite attack upon the concept of bar-related title assurance is to charge the lawyer who provides title insurance, along with his legal opinion, with a conflict of interest." HOW-TO-DO-IT, *supra* at 2. The response to this challenge is the assurance that "[l]awyers are professionals who are required to place their clients' interests before their own. Commercial title insurance companies often find this proposition difficult to comprehend." *Id.* Similarly, the latter publication also offers the palliative that "[t]he position of trust occupied by lawyers is not based upon the absence of a conflict of interest but rather upon the ability of lawyers to resolve such conflicts by invariably placing the clients' interests ahead of their own." BAR-RELATED TITLE ASSURING ORGANIZATIONS, *supra* at 13. The numerous conflict of interest prosecutions and clarifying legal ethics opinions issued by various bar associations suggests that this structuring of interests often remains an aspiration, not an invariable practice. The suggestion has also been ventured that the Code of Professional Responsibility effects an inversion of the interests of the client and the practitioner. Morgan, *supra* note 2.

practice of law, however broadly construed, unless the issuance of either a title insurance commitment or a policy of insurance is deemed to be an opinion of title that represents the application of legal judgment to a complex of facts. Even the staunchest opponents of commercial title insurance find this conclusion difficult to accept.[16] Professor Payne, for example, who has long championed the cause of thoroughly revamping the conveyancing process and who regards title insurance as an inevitable barrier to reform[17] offers the following synopsis of the lawyer-insurer debate:

> A consideration of what is required must have as its starting point the clear recognition that we are not dealing with an unauthorized practice controversy. Title insurance companies, in carrying out title search and examination, are not practicing law, and it would seem unlikely that the bar could induce state legislatures or the courts to hold otherwise. Where an unauthorized practice charge has been leveled against the companies it has generally been directed to their peripheral activities. . . .[S] o long as title companies are permitted to do business at all they can issue policies of insurance, and, as a prerequisite thereto, may determine from the contents of their title plants the nature of the risk assumed.[18]

Thus, unlike the title examination conducted by the attorney or at his request on the client's behalf for the purpose of preparing a certificate or opinion of the state of title, the search undertaken by the insurer is intended to define the risks that the latter is willing to assume and serves a self-protective purpose. The insurance policy is not an assurance to the homebuyer of peaceful enjoyment of the property acquired, but merely creates a contractual obligation for a sum equal to the face amount of the policy in the event that enjoyment of the premises is disturbed.[19] In practical effect, however, the

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16. The contention that issuing title insurance constitutes the rendering of a title opinion and, therefore, the practice of law was, however, the apparent basis for the unauthorized practice opinions challenged in Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977).

17. Payne, *supra* note 13, notes that

> Title insurance was conceived of in an effort to meliorate some of the worst of [the inefficiency of the conveyancing process]. But it is designed to keep the patient alive, not to cure him, and has the inherent vice that it institutionalizes existing ills. It should not be treated as creating a vested interest in the inefficiencies of the land records. The public requires, to the contrary, that means be devised to make conveyancing more efficient and more certain. The very existence of title insurance stands in the way of such an objective.

Id. at 387.

18. *Id.* at 374-75.

19. *See, e.g.*, McKillop, *Title Insurance*, 8 U. FLA. L. REV. 447 (1955):

> Although a contract of title insurance partakes of the nature of a covenant of warranty or a covenant against encumbrances, it is in fact essentially and solely a contract of indemnity and not a wagering policy or an expression of opinion backed by a forfeiture. Companies issuing contracts guaranteeing titles are in the insurance business . . . .

Id. at 457-58.

This point has been the subject of considerable controversy, although most commentators would concur that a commitment or binder for title insurance is a statement of insurability and

title company is not only an insurance issuer, but fulfills a further social need by clearing certain defects to title, which enhances the marketability of real estate.[20]

The principal function of the commercial title insurer is two-fold: to delineate the apparent defects in title to determine the extent of insurability by the performance of a title examination and, based upon the results of this examination, to issue a policy insuring the applicant against losses caused by a variety of risks that are hidden, voluntarily assumed or negligently overlooked by the insurer. Depending on the character[21] and rate structure[22] of the insurer, the search might also be conducted by the insured's privately retained attorney who forwards to the title company a certificate of title upon which insurance will issue.

In contrast to other, more conventional forms of insurance, title insurance protects against a future loss that has been caused by pre-existing conditions. The title insurer is not a casualty insurer,[23] and his potential liability is not actuarily predictable. The premium is

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not an opinion of title that is intended to counsel the prospective insured about the state of title. See notes 76-104 and accompanying text *infra*. *See also* Title Ins. & Trust Co. v. City of Los Angeles, 61 Cal. App. 232, 214 P. 667 (1923), holding that a title company's certificate constitutes a contract of insurance.

20. Haley, *An Explanation of Title Insurance*, 40 NEB. L. REV. 342 (1960); Johnstone, *Title Insurance*, 66 YALE L.J. 492, 494, 513 (1957); Note, (The Title Insurance Industry and Governmental Regulation, 53 VA. L. REV. 1523, 1543 (1967).

21. It is commonly noted in discussions of the structure of the commercial title insurance industry that two common forms predominate: the national or lawyer-title company and the local or title plant company. *See, e.g.*, New Jersey State Bar Ass'n v. Northern New Jersey Mtg. Assocs., 34 N.J. 301, 169 A.2d 150 (1961); Payne, *Title Insurance and the Unauthorized Practice of Law Controversy*, 53 MINN. L. REV. 423, 430, 477-80 (1969). Payne, *In Search of Title* (pt. 1), 14 ALA L. REV 11, 37 (1961); Comment, *Title Insurance*, 13 ALA. L. REV. 381, 393 (1961). Neither of these latter two sources perceives the national company as a threat to the role of the attorney in the real estate transaction, since this type of insurer issues its policies predicated upon a certificate issued by an independent attorney. The local company, however, issues its policies after having the abstracts prepared in its own title plant.

22. Commercial title insurance companies generally adhere to a bifurcated rate structure: all-inclusive rates encompass title examination, ancillary closing services and the insurance policy while policy-only or approved-attorney rates exclude examination closing and ancillary services. Under the latter system the attorney's certification of title is relied upon by the underwriter to issue a policy and the attorney remits a fee that represents only a sum for the assumption of the insurance risk. B.A. MONYER & J.J.D. LYNCH, PENNSYLVANIA TITLE INSURANCE THEORY AND PRACTICE 92 (1976).

23. If broadly applied, the typical casualty insurance approach to risk assumption could have a disastrous effect on titles. If title insurance generally were written on a risk basis only, without search or examination, there would be a gradual deterioration in the certainty of titles. It is the curative action taken by owners upon receiving examination reports from insurers that maintains the high degree of record title certainty of insured titles. Elimination of the search and examination would remove the basis for curative action, and as titles become more uncertain, losses would increase and insurance rates would go up.

Johnstone, *supra* note 20, at 516; *cf.* Quiner, *supra* note 14, at 714-15 ("Although an argument could possibly be made for writing title insurance on a casualty basis, this would tend to undermine the risk elimination facet"). *See also* Haley, *supra* note 20, at 343. Several states specifically require that title insurance policies issue only after title examination, and thereby statutorily eliminate the casualty aspect. (See, *e.g.*, PA. STAT. ANN. tit. 40, § 910.7 (Purdon 1963). *See also* FLA. STAT. ANN. § 627 784 (West 1972) (prohibiting writing of title insurance on casualty basis).

paid but once—when the policy becomes effective—although the policy remains in effect until the insured can no longer incur loss from the risks that have not been excepted.[24] Title insurance can, on the basis of these characteristics, be defined as a contract of indemnity relating to a specific parcel of realty described in the policy issued for a valuable consideration, which contract evidences an undertaking to indemnify the insured against loss in a specified amount by reason of defects of title, liens or encumbrances upon the realty existing at the date of the policy and not expressly excepted by the language of the policy.[25]

B. The Evolution of the Commercial Title Industry

Although it long has been evident that purchasers cannot receive adequate protection of their interests in the premises they seek to acquire without some guaranty that title is good and marketable, the title insurance industry did not develop until late in the history of conveyancing and grew only slowly at first. The traditional means of securing title to realty had been the laborious examination of documents relating to title by attorneys and the issuance by them of opinions or certificates based on this examination.[26] The lawyer's

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24. These distinctions between the risks of title insurers and those of carriers in other conventional insurance fields have been noted in numerous commentaries. *See, e g.*, E. ROBERTS, PUBLIC REGULATION OF TITLE INSURANCE COMPANIES AND ABSTRACTERS 4-5 (1961); McKillop, *supra* note 19, at 458 (citing Trenton Potteries Co. v Title Guar. &. Trust Co., 176 N.Y. 65, 68 N.E. 132 (1903)). Payne, in his article entitled *Title Insurance and the Unauthorized Practice of Law Controversy*, 53 MINN. L. REV. 423 (1969), doubts that the term "insurance" can be invoked to legitimize the conduct of commercial title companies and urges the rejection of "the verbal trap created by the word 'insurance.' " *Id.* at 441. *But see* Title Ins. & Trust Co. v. City of Los Angeles, 61 Cal. App. 232, 214 P 667 (1923).

25. *See* Foehrenbach v. German-American Title & Trust Co., 217 Pa. 331, 333-34, 66 A. 561 —, 562 (1907); Craig, *What is Title Insurance?*, 25 LAWY. & BANK. & CENT. L J. 134 (1932); Pelkey, *The Law of Title Insurance*, 12 MARQ. L REV. 38, 42-43 (1927); Quiner, *supra* note 14, at 714; Comment, *Title Insurance*, 13 ALA. L. REV. 381, 385, 384-85 n. 28 (1961).

26. In a study of title insurance and the adequacy of the then current insurance coverage, a Minnesota county bar association offered the following introductory statement:

> Title insurance is a natural result of the defects inherent in our recording acts, and of the economic waste perpetuated by a system which requires the laborious examination of a whole chain of title by a lawyer each time title is transferred. In addition, there is some truth, at least, in the claim that the services of some title attorneys are unsatisfactory and redress against them difficult to obtain.
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> These fundamentals must be faced. It is useless to 'howl down' the truth. One of the duties of the legal profession is to consider what is best for the public in a given situation; and it cannot take a wholly selfish view bottomed on the idea that lawyers are traditionally entitled to prevail in certain fields of endeavor to the exclusion of all other persons. The legal profession must be prepared to demonstrate that its services really are superior, and that it gives to the public as much, or more, than some other competing service can. In the end, the public will get what it wants and deserves, and competition cannot be eliminated by a combination of noise, vituperation, anger and bad judgment.
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> It can be demonstrated that we lawyers can compete legitimately in the title field, although we may not be its only occupants, and this is the course which should be followed.

Young, MacGregor & Solether, *Report of the Special Committee of the Hennepin County Bar Association Appointed to Study Title Insurance*, 19 MINN. L. REV. 354, 355 (1935). The report then continues with the following summation:

opinion, however, offered protection only against patent defects of title[27] that could have been ascertained by a careful search of the public registries. The purchaser's protection was, therefore, quite limited since the examining attorney was not a guarantor of title and the injured party's only recourse was an action for a negligent or otherwise defective search of title. Hidden or latent defects, thus, would escape detection and leave the purchaser or mortgagee remediless. A contract of insurance, in contrast, would assure indemnification for all losses from defects in or clouds on title predating the time of issuance, unless the cause of injury had been specifically excepted, notwithstanding that the claimant might be unable to prove a negligent act or omission.[28]

Title insurance is believed to have its origins in the creation in 1853 of the Law Property Assurance and Trust Society of Philadelphia for the purpose of insuring defective titles and guaranteeing repayments on loans and mortgages.[29] Commonly acknowledged as the motivating force inspiring the further development of the idea of

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> In short, it is the inherent defects of the recording acts, both legal and economic, plus the poor service given by some attorneys, plus the desire to have the correctness of an opinion on title backed by a corporation of sound financial strength, that gives rise to the demand for 'something better.'

Id. at 356. In addressing the circumstances permitting the rapid expansion of the commercial title industry and the concomitant displacement of the attorney from the function of searching and certifying title, Professor Karl Llewellyn offered the following observation:

> [S]ome of these encroachments on the practitioner's ancient fields are like the encroachments of the white man on the Indian: neither right nor law, nor tradition nor stubborn fighting by the gathered tribe, will over long hold up the dispossession. A title company simply can more effectively gather records than the ordinary lawyer can; and over the years it *can* therefore organize to do a job both more quickly, more effectively and more cheaply. . . .

Llewellyn, *The Bar's Troubles and Poultices—and Cures?*, 5 LAW & CONTEMP. PROBS. 104, 112 (1938); *cf.* Payne, *Title Insurance and the Unauthorized Practice of Law Controversy*, 53 MINN. L. REV. 423, 468 (1969) ("Corporate conveyancing came into existence largely because of legitimate dissatisfaction with the inefficiency of traditional land transfers").

27. In noting the deficiencies of the title opinion method of title assurance, McKillop lists the following considerations:

> (2) The title opinion covers only that segment of title rights reflected by the public records.
>
> (3) Title examiners make mistakes. Liability under a title opinion is limited to losses arising from failure to exercise a reasonable degree of care and professional skill.

McKillop, *supra* note 19, at 455; *accord*, Kellogg, *supra* note 13, at 14; Lancaster, *supra* note 13, at 30. Compilations of latent defects that could not be detected from an examination of public records can be found in the following sources: Johnstone, *supra* note 20, at 494-97; Lancaster, *supra* note 13, at 29; McKillop, *supra* note 19, at 452.

28. The liability of the title insurer is predicated on the contract of indemnity, for the breach of which the law provides a remedy without regard to the insurer's observance of due care. Title Ins. & Trust Co. v. City of Los Angeles, 61 Cal. App. 232, 214 P. 667 (1923). Thus, althouqh it is frequently noted that a lawyer's certificate protects the assured against patent title defects and that the title insurer insures only against the lesser risk of latent defects, *see, e.g.*, Lancaster, *supra* note 13, at 30, the practical effect of the title policy is also to guarantee the accuracy of the examination of title, which will reduce the claimant's burden of proof in the event of a covered loss. *See* Roberts. *Title Insurance: State Regulation and the Public Perspective*, 39 IND. L.J. 1, 2 (1963); Note, *The Title Insurance Industry and Governmental Regulation*, 53 VA. L. REV. 1523, 1525 (1967).

29. Lancaster, *supra* note 13, at 31; Young, MacGregor & Solether, *supra* note 26, at 357.

title insurance[30] was the Pennsylvania Supreme Court's opinion in *Watson v. Muirhead*,[31] in which the court reached the unassuming conclusion that a conveyancer does not guarantee the titles he reviews.[32] Subsequently a plan for the insurance of titles and mortgages by the Title Warranty Company was published.[33] Pursuant to the first enabling legislation providing for the formation of corporations for the specific purpose of insuring titles to realty,[34] several progressive conveyancers in 1876 obtained a franchise from the governor of Pennsylvania authorizing the conduct of business by the Real Estate Title Insurance Company whose contracts guaranteed the accuracy of title examinations and indemnified against loss.[35] From Pennsylvania the concept of title insurance as a commercial venture was transplanted into New York and Washington, D.C., and ultimately throughout the major metropolitan centers of the nation.

Apparently, real estate attorneys initially offered little resistance to the intrusion of the commercial title insurers into their practice and were quite willing to surrender the less remunerative aspects of conveyancing.[36] With the passage of time institutional lenders and

30. Professor Gage characterized the effect of Watson v. Muirhead, 57 Pa. 161 (1868), *see* notes 30 and 31 *infra*, as bringing "forcibly to the attention of the public the inherent weakness of the then existing methods of assuring title." D.D. GAGE, LAND TITLE ASSURING AGENCIES 80-81 (1937).

31. 57 Pa. 161 (1868). The defendant in the *Watson* case was a lay conveyancer employed by the purchaser to ascertain whether the property he sought to acquire was free of encumbrances. Relying on the opinion of counsel to whom he had submitted an abstract of title, the defendant represented to the purchaser that the subject tract was free of encumbrances and that a certain outstanding judgment did not constitute a lien. The Pennsylvania Supreme Court rendered the following opinion concerning the scope of the title examiner's liability:

> If the defendant had undertaken to act upon his own opinion that the judgment, which appeared in the searches, was not a final one, and therefore not a lien upon the ground-rent, the title of which it was his duty to examine, could we say that . . . the mistake was one which could only result from the want of ordinary knowledge and skill or the failure to exercise due caution? . . . We think the court below was right in refusing to charge as requested in the plaintiff's points; all of which assume as a matter of law that to pass the title with such an encumbrance upon it was evidence of want of ordinary knowledge and skill and of due caution.

Id. at 168.

32. *Id.* The effect of the Pennsylvania court's opinion was to subject the lay conveyancer to a standard of care corresponding to the standard applicable to attorneys. *Id.* at 167. While this conclusion might have been anticipated and should not have come as a shock to anyone, the court's opinion had a decided effect on the movement for more adequate title assurance because of the contemporary boom in land development, which necessitated greater certainty in the marketability of title. GAGE, *supra,* note 30, at 81.

33. GAGE, *supra* note 29, at 81 n.11 (citing J. JOYCE, LAWS OF INSURANCE 59 (2d ed. 1917)).

34. Pa. P.L. Act No. 32, § 29 (1874) provided, in pertinent part, for the formation of corporations for the specific purpose of "insuring owners of real estate, mortgages and others interested in real estate against loss by reason of defective titles, liens and encumbrances."

35. Craig, *supra* note 25, at 134.

36. Roberts, *supra* note 28, offers the following commentary on the evolution of the market for commercial title insurance:

> In the urban centers, given the time needed to search titles, conveyancing was ceasing to pay its way in large law firms. Concomitantly, given the fact that conveyancing had become a profitless chore, the industrial development was creating new types of

real estate investors who engaged in the exchange of real estate securities on a national scale found the services offered by title insurance companies particularly appealing because of their uniformity of practice and since investing institutions lacked both the time and the personnel to ascertain reliable and financially responsible abstractors and attorneys wherever they sought to invest.[37] These investors have since come to play a pivotal role in the growth of the commercial title insurance industry.[38] Local lending institutions have also come to require title insurance if they contemplate reselling in the secondary market or if the mortgaged premises secure a loan of substantial proportion.[39] Precisely at what point during the evolution of their industry title insurers began to prepare abstracts of title, draft documents of conveyance and hold closings in transactions in which they would issue insurance and sought to enter the small town and rural markets has not been documented, but presumably that is when attorneys began to perceive title insurers as a competitive force.[40]

III. The Unauthorized Practice of Law Controversy

A. The Scope of the Concept "Practice of Law"

Ever since they began to consider the expanding role of the title insurance industry a threat to their own real estate practices, attorneys have in many states sought to enjoin the performance of activities by commercial companies incident to the issuance of insurance. Their success has depended primarily on the expansiveness of the locally accepted definition of unauthorized practice, which has varied greatly from one jurisdiction to another. At one end of the spectrum is Pennsylvania, where the unauthorized practice of law is a misdemeanor entailing the pretense of possessing legal credentials[41]

> business for lawyers. As a result conveyancing simply atrophied in the urban firms. Title insurance companies . . . were more than willing to take over conveyancing and create their own efficient record systems . . . .

Id. at 7. Roberts adds, "Given the other avenues of business opened by the boom period the lawyers hardly noticed the loss of the conveyancing trade." *Id.* at 9. *See generally* Payne, *In Search of Title* (pt. 1), 14 ALA. L. REV. 11, 58 (1961). *But cf.* Oshe, *Title Insurance as Protection to Investors in Real Estate and Real Estate Securities*, 5 NOTRE DAME LAW. 237, 238 (1930) ("The commencement of this business everywhere met with very strenuous opposition from the lawyers").

37. *See* Johnstone, *supra* note 20, at 502-05; Payne, *The Restoration of Conveyancing*, 15 ALA. L. REV. 371, 383 (1962).

38. Johnstone, *supra* note 20, at 518.

39. *Id.* at 503.

40. *See generally id.* at 518; Lancaster, *supra* note 13, at 40; Payne, *The Restoration of Conveyancing*, 15 ALA. L. REV. 371, 372-73 (1963); Comment, *Title Insurance* 13 ALA. L. REV. 381, 404-05 (1961).

41. PA. STAT. ANN. tit. 17, § 1608 (Purdon 1962), provides, in pertinent part, that it is "unlawful for any person . . . to practice law [or] to hold himself . . . out to the public as being entitled to practice law . . . without having first been duly and regularly admitted to practice law in a court of record of any county in this Commonwealth."

or practicing law without having been admitted to the bar.[42] To establish a violation of the unauthorized practice statutes, the prosecuting party must establish that the lay practitioner engaged in a course of conduct requiring the abstract understanding and concrete application of complex legal principles[43] that is not ancillary to a recognizable business venture[44] or purported to be a duly admitted member of the legal profession.[45] Accordingly, Pennsylvania courts have defined the pivotal question in terms of whether the accused has engaged in the legitimate pursuit of its business or proposes to function as a lawyer representing and advising his client.[46]

Invoking this standard, the state supreme court in *LaBrum v. Commonwealth Title Company of Philadelphia*[47] clearly distinguished between drawing documents of conveyance[48] and holding oneself out as a lawyer practicing law. Noting that the conduct that gave rise to the suit was merely incidental to the defendant's business transactions,[49] the court cited the following passage from the earlier decision in *Childs v. Smelzer*[50] as controlling authority:

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42. "Any person who shall practice law, within this Commonwealth, without being a member of the Bar of a Court of Record, shall be guilty of a misdemeanor . . . ." PA. STAT. ANN. tit. 17, § 1610 (Purdon 1962).

43. Dauphin Co. Bar Ass'n v. Mazzacaro, 465 Pa. 545, 351 A.2d 229 (1976). The Pennsylvania Supreme Court posited the caveat, however, in the *Mazzacaro* case that

> The threads of legal consequences often weave their way through even casual contemporary interactions. There are times, of course, when it is clearly within the ken of lay persons to appreciate the legal problems and consequences involved in a given situation and the factors which should influence necessary decisions. No public interest would be advanced by requiring these lay judgments to be made exclusively by lawyers.

Id. at 553, 351 A.2d at 233. *See generally* Shortz v. Farrell, 327 Pa. 81, 85, 193 A. 20, 21 (1937).

44. Childs v. Smelzer, 315 Pa. 9, 14, 171 A. 883, 885-86 (1934) (dictum).

45. LaBrum v. Commonwealth Title Co., 358 Pa. 239, 56 A.2d 246 (1948); Childs v. Smelzer, 315 Pa. 9, 171 A. 883 (1934).

46. The state supreme court in LaBrum v. Commonwealth Title Co., 358 Pa. 239, 56 A.2d 246 (1948), exonerated the defendant title insurance company of the unauthorized practice charges and concluded that all of the company's activities were performed in pursuit of its conveyancing business. In its answer to plaintiff's bill in equity, the title company had admitted to preparing

> for a compensation deeds, mortgages, assignments of mortgages, agreements (but relating solely to real estate matters), releases of real estate and declarations of no setoff, and no other legal instruments, but we have prepared the foregoing instruments only for persons to or for whom applications for title insurance had been issued or were contemplated to be issued by us, and then only in situations, instances, and circumstances in which such instruments were incidental to the insuring by us of titles to real estate.

Id. at 241, 56 A.2d at 247. Defendant further disclaimed having advised or consulted any applicant for insurance concerning the applicability of statutes or case law and stated, in conclusion, that any services proferred were performed "solely as an incident of and concomitant with our title insurance business and in connection with our title insurance transactions. We do not hold ourselves out to the public as willing, able or authorized to do any business except title insurance business." *Id.* at 242, 56 A.2d at 247. Because of the procedural posture of the suit, all relevant averments in defendant's answer were accepted by the court as true.

47. 358 Pa. 239, 56 A.2d 246 (1948).

48. *See* note 46, *supra* for an enumeration of the classes of documents in controversy in *LaBrum*.

49. 358 Pa. at 244, 247, 56 A.2d at 248.

50. 315 Pa. 9, 171 A. 883 (1934).

> There can be no objection to the preparation of deeds and mortgages or other contracts by [defendants] so long as the papers involved pertain to and grow out of their business transactions and are intimately connected therewith. The drafting and execution of legal instruments is a necessary concomitant of many businesses and cannot be considered unlawful. Such practice only falls within the prohibition of the act when the documents are drawn in relation to matters in no manner connected with the immediate business of the person preparing them, *and* when the person so drafting them is not a member of the bar *and* holds himself out as specially qualified and competent to do that type of work.[51]

Although the *LaBrum* case would, thus, appear to reserve to the legal profession a realm that reasonably accounts for diverse competing interests without intruding upon the proper business interests of numerous other enterprises, the inherent limits of the case cannot be ignored. Pennsylvania has always adhered to the doctrine that conveyancers and lawyers are engaged in two different professions, a distinction adopted from English real estate practices.[52] Furthermore, the court did not address generally the concept "unauthorized practice of law," but predicated its conclusion on a strict interpretation of a penal statute.[53] Nevertheless, the court did emphasize that the defendant title company was engaged in the "art" of conveyancing incidental to the insurance of titles,[54] which suggests that the result would not have been different in the absence of statute.[55]

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51. 358 Pa. at 246-47, 56 A.2d at 249 (emphasis added).

52. The *LaBrum* court considered this distinction so fundamental that it concluded that the legislature, in enacting the unauthorized practice proscriptions, intended to exclude conveyancers from the force of the statute.

> From the earliest days in this Commonwealth, justices of the peace, aldermen and local magistrates have drawn and still continue to draw leases, deeds and mortgages without holding themselves out as lawyers or engaging in the practice of law in the sense condemned by the statute. . . . All this the legislature must have known . . . but notwithstanding such knowledge, it is significant that the legislature gave no expression of intention to prohibit those practices. We must regard the legislature as having recognized that in this jurisdiction conveyancers and lawyers have been dealt with in separate classes. . . . A strict construction of the statute excludes the conveyancer; he does not hold himself out as a lawyer engaged in practicing law; he is engaged in practicing conveyancing.

Id. at 244-46, 56 A.2d at 248-49 (citing 2 JOHNSON'S ENGLAND 287).

53. *Id.* at 242-46, 56 A.2d at 248-49.

54. *Compare id.* at 244, 56 A.2d at 249, *and id.* at 247, 56 A.2d at 250.

55. Notwithstanding the language of the statute, it is a widely accepted principle that the legislature cannot constitutionally encroach upon the judiciary's inherent regulatory power and reserved authority under the separation of powers doctrine to define the bounds of the practice of law. *See, e.g.*, Land Title Co. of Alabama v. State *ex rel.* Porter, 292 Ala. 691, 697, 299 So.2d 294, 291 (1974); Beach Abstract & Guar. Co. v. Bar Ass'n, 230 Ark. 494, 498, 326 S.W.2d 900, 902 (1959); New Jersey State Bar Ass'n v. Northern New Jersey Mtg. Assocs., 32 N.J. 430, 436-37, 161 A.2d 257, 260, 266 (1960); Grievance Comm. v. Dean, 190 S.W.2d 126, 128-29 (Tex. Civ. App. 1945); Payne, *Title Insurance, the Legislature and the Constitution*, 21 ALA. L. REV. 25 (1968); Resh, *What Remains of the Practice of Law?*, 39 UNAUTH. PROC. NEWS 43, 45 (1974). Comment, *Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power*, 28 U. CHI. L. REV. 162 (1960). Thus, if the court had deemed the defendant's activities an instance of unauthorized practice it could have properly enjoined defendant from following those pursuits.

It is worthy of some note, however, that the judiciary's inherent powers were limited in Arizona by a constitutional amendment promoted by licensed local real estate brokers that was

At the other end of the spectrum are provisions of jurisdictions such as Kentucky that characterize the practice of law as "any service rendered involving legal knowledge or legal advice."[56] Liberally construed, this latter prototype of definition reserves to the legal profession matters that are not embraced within the policies underlying the unauthorized practice rule[57] and permits a court to catalogue certain activities that entail some vestige of legal knowledge and then to ascertain the source of payment, whether immediate or ultimate, to determine the identity of the perceived client. This mode of analysis can lead to unpredictable results and makes little allowance for activities that constitute a mere incident of doing business. It should be evident that, whatever the nature of the particular act, it is one matter to purport to be qualified to practice law and to discourage, either implicitly or explicitly, the intercession of independent legal counsel and another matter to furnish services ancillary and subordinate to the primary pursuit of a legitimate enterprise.

Nevertheless, the Kentucky Court of Appeals in *Kentucky State Bar Association v. First Federal Savings and Loan Association*[58] seized upon the broad language of its own rule of court defining the practice of law and found that unauthorized practice included a title examination on the property to be mortgaged performed by a staff attorney employed on a salary basis by the prospective mortgagee. Since loans would not be extended unless, in the opinion of an attorney, title was clear and since the mortgagee chose to have its own attorney examine the various indices, the court concluded that a ben-

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carried by a four-to-one margin in a popular vote. ARIZ. CONST. Art. 26, § 1. *See generally* Riggs, *Unauthorized Practice and the Public Interest: Arizona's Recent Constitutional Amendment*, 37 S. CALIF. L. REV. 1 (1964).

56. While the practice of law in Kentucky is defined by court rule, Ky R.C.A. 3.020, unauthorized practice is prohibited by statute, KY. REV. STAT. ANN. § 30.010 (Baldwin 1963). The pertinent rule of the Court of Appeals provides, rather expansively, "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 services." An exception is made for natural persons who draw instruments to which they are a party and for which they receive no compensation

57. The reasons commonly recited for the prohibition on unauthorized practice are that the intensive preadmission educational and licensing requirements will insure that all lawyers will meet at least a minimum standard of competence and that the high professional standards of ethics will protect the clients' interests. *See, e.g.*, Hamner, *supra* note 7, at 386-87; Johnstone, *supra* note 1, at 17; Resh, *Safeguarding Administration of Justice from Illegal Practice*, 42 MARQ L. REV. 484, 487 (1959); Note, *Unauthorized Practice of Law by Realtors and Title Insurance Companies*, 49 KY. L.J. 384, 389 (1961). It is difficult to understand how these jusitifications are served by, for example, denominating the performance of a title search by an attorney employed by a savings and loan association the performance of legal service for a borrower simply because a clear title was one of the conditions upon which the loan would be made. *See* Kentucky State Bar Ass'n v. First Fed. Sav. & Loan Ass'n, 342 S.W.2d 397 (Ky. 1961). Even assuming that the employing corporation was not the sole beneficiary of the captive attorney's services, this would not seem to be an adequate basis for the conclusion that, since a title examination entails legal knowledge, the corporation furnished legal services to another.

58. 342 S.W.2d 397 (Ky. 1961).

efit had redounded to the borrower who would not have been eligible for the loan absent those services.[59] A closer analysis would suggest, however, that the benefit to the borrower was only incidental. Having determined that a title examination has the characteristics of a legal service and that a charge for the service is passed through to the borrower, the court found that the case against the lending institution was complete. No penalty was imposed "since the violation is not of a flagrant nature."[60]

These two cases, *LaBrum*[61] and *Kentucky State Bar*,[62] mark the termini between which the unauthorized practice controversy waged by the commercial title insurance industry and the organized bar has taken form. *LaBrum* would permit title insurers to perform wide-ranging ancillary services while the *Kentucky State Bar* case would prohibit even the most fundamental activities except the issuance of a title policy on an independent attorney's certificate.

B. Application of Theory to Practice

1. The Indicia of Unauthorized Practice.—Restrictions on the practice of law address three primary activities—litigation, advice concerning matters affecting legal relations and the preparation and drafting of legal instruments. The scope of the practice of law within the range of these categories is so vaguely defined that, in most instances, the accepted definitions provide little assistance for the resolution of unauthorized practice cases. Statutory provisions usually state merely that no person shall practice law unless he has been admitted to the state bar.[63] Consequently, the local judiciary has of necessity developed various tests for determining, in the individual case, what constitutes the practice of law and which acts, though they entail a command of legal principles and affect legal rights, should not be characterized as unauthorized practice.[64] While the practicing bar and the judiciary may be content with the uncertainty that this case-by-case analysis introduces, some attempt should be made to reach greater uniformity in application and to establish clearer lines of demarcation.[65]

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59. *Id.* at 398.

60. *Id.* at 400.

61. *See* notes 41-55 and accompanying text *supra*.

62. *See* notes 56-60 and accompanying text *supra*.

63. *See, e.g.*, CAL. BUS. & PROF. CODE § 6125 (West 1974); KY. REV. STAT. ANN. § 30.010 (Baldwin 1963); PA. STAT. ANN. tit. 17, § 1610 (Purdon 1962).

64. One commentator has noted that the appropriate test for unauthorized practice cannot be whether the documents in question affect the legal status of the parties since the layman would virtually always be violating the unauthorized practice restriction. Note, *Oregon State Bar v. Gilchrist: The Legality of Unauthorized Practice*, 1976 DET. C. L. REV. 293, 306.

65. Morgan, *supra* note 2, in addressing the purported social benefits of the unauthorized practice rule questions

> [w]hether these theoretical benefits from unauthorized practice rules are ever realized . . . . But in any event, the scope of the 'practice of law' which would be necessary to

The tests traditionally invoked by courts assessing the unauthorized practice charge can be classified under the following rubrics:[66]

(1) the incident-to-business test,[67]
(2) the simple-complex test,[68]
(3) the legal skill test,[69]

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achieve such benefits would be small indeed compared to the broad and ambiguous definition currently adopted by the Code. . . . Indeed, not only does this . . . formulation fail to accommodate the public interests involved, but the ambiguity itself creates a 'chilling effect' on potential competition because of the penalties associated with overstepping the lines. Because the ambiguity tends to expand the scope of the lawyers' monopoly, it seems fair to view it as further confirmation of the fact that the prohibition of unauthorized practice is primarily for the benefit of lawyers.

Id. at 711-12; *accord*, Reeves, *UPL: The Lawyers' Monopoly Under Attack*, 51 FLA. B.J. 600, 601 (1977). Even more significantly, Jackson, *New Developments in Unauthorized Practice Cases*, 57 TITLE NEWS 11 (1978), argues that

decisions in the courts 'on a case-by-case' basis is a thing of the past. Such case-by-case determination . . . denies due process of law. . . . [I]t would seem that a definition of the practice of law constitutionally enforceable contained in a prohibiting statute would have to be nondiscriminatory, and would have to be sufficiently clear and precise that it could be understood with reasonable certainty. The mere use of the words 'practice of law' as a prohibited activity is too vague and would be insufficient.

Id. at 12-13. *But see* Note, *Unauthorized Practice of Law by Real Estate Brokers and Title Insurance Companies*, 36 NOTRE DAME LAW. 374, 387 (1960).

66. This general classification scheme has been cited in several commentaries. *See, e.g.*, Q. JOHNSTONE & D. HOPSON, JR., LAWYERS AND THEIR WORK: AN ANALYSIS OF THE LEGAL PROFESSION IN THE UNITED STATES AND ENGLAND, 165-68 (1967); Johnstone, *supra* note 1, at 15-16; Lancaster, *supra* note 13, at 45; Payne, *Title Insurance and the Unauthorized Practice of Law Controversy*, 53 MINN. L. REV. 423, 445-48 (1969); Note, *Unauthorized Practice of Law by Realtors and Title Insurance Companies*, 49 KY. L.J. 384, 385-88 (1961); Note, *Unauthorized Practice by Real Estate Brokers and Title Insurance Companies*, 36 NOTRE DAME LAW. 374, 377-84 (1960).

67. *See, e.g.*, Childs v. Smelzer, 315 Pa. 9, 171 A. 883 (1934):

The drafting and executing of legal instruments is a necessary concomitant of many businesses and cannot be considered unlawful. Such practice only falls within the prohibition of the act when the documents are drawn in relation to matters in no manner connected with the immediate business of the person preparing them . . . .

Id. at 14, 171 A. at 885; *accord*, Cooperman v. West Coast Title Co., 75 So.2d 818 (Fla. 1954); 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). *See generally* Bar Ass'n of Tennessee, Inc. v. Union Planters Title Guar. Co., 46 Tenn. App. 100, 326 S.W.2d 767 (1959):

[W]hile some of the activities of the defendants constitute 'practice of law' or the doing of 'law business', they are all legitimately incidental to the main or principle business of defendants, which is title insurance; and, consequently they should not be adjudged to constitute unlawful practice of law, nor enjoined as such.

Id. —, 326 S.W.2d at 781.

68. *See* State Bar v. Guardian Abstract & Title Co., 91 N.M. 434, 575 P.2d 943 (1978):

We hold that filling in blanks in the legal instruments here involved, where the forms have been drafted by attorneys and where filling in the blanks requires only the use of common knowledge regarding the information to be inserted, does not constitute the practice of law.

Id. at 440, 575 P.2d at 949; *accord*, Gardner v. Conway, 234 Minn. 468, 48 N.W.2d 788 (1951); Hulse v. Criger, 363, Mo. 26, 247 S.W.2d 855 (1952). *But see* People v. Title Guar. & Trust Co., 227 N.Y. 366, 379, 125 N.E. 666, 670 (1919) (Pound, J., concurring) ("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"). The simple-complex test is implicit in those decisions permitting nonlawyers to complete standard form instruments of conveyance. *See* Cooperman v. West Coast Title Co., 75 So.2d 818 (Fla. 1954).

69. *See* Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935):

Practice of law . . . 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. . . . [T]hese trans-

(4) the public policy test,[70]
(5) the compensation test,[71]
(6) the traditional-practice test,[72] and
(7) the pretense of legal credentials test.[73]

None of these indicia alone yields a satisfactory standard for conduct, and generally courts have acknowledged their complementary character. The ancillary-to-business and simple-complex tests are essentially exceptions to the legal skill analysis. Furthermore, it has been noted that the simple-complex distinction is an implicit limitation on the incident-to-business defense[74] as is the compensation test.[75] Although the public policy mode of analysis is at first appearance most appealing because it permits the fullest consideration of the competing interests, it still offers no clear guidance and leaves demarcation of the perimeters of the practice of law to the whims of the court sitting in post-factum deliberation. Nevertheless, it adds another dimension to the traditional tests and should be viewed as a useful adjunct in the unauthorized practice inquiry. Whether the nonlawyer has been compensated is not particularly revealing since some element of remuneration, either explicit or implicit, can ultimately be allocated to almost any commercial activity. The most

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actions require in many respects a high degree of legal skill, a wide experience with men and affairs, and great capacity for adaptation to difficult and complex situations.

Id. at 613, 194 N.E. at 317; *accord*, Gustafson v. V.C. Taylor & Sons, Inc., 138 Ohio St. 292, 35 N.E.2d 435 (1941).

70. *See* Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940):

> 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. Viewing the problem before us in that light, we do not think it would be in the interest of the public welfare to restrain brokers from drafting the ordinary instruments necessary to effectuate the closing of the ordinary real estate transaction in which they are acting.

Id. at 647, 290 N.W. at 797; *accord*, Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 855 (1952); Bar Ass'n of Tennessee, Inc. v. Union Planters Title Guar. Co., 46 Tenn. App. 100, 326 S.W.2d 767 (1959). *See also* Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957).

71. Underlying this test is the fundamental rule that the nonlawyer may represent himself and that he is forbidden to engage in activities otherwise constituting the practice of law only when they are performed for another. Therefore, some courts have undertaken the search for the source of compensation. *See* Kentucky State Bar Ass'n v. First Fed. Sav. & Loan Ass'n, 342 S.W.2d 397, 398 (Ky. 1961) ("If respondent . . . is actually rendering a legal service to members of the public and particularly if it is making a charge for such service, it is engaged in the unauthorized practice of the law"); *accord*, New Jersey State Bar Ass'n v. Northern New Jersey Mtg. Assocs. 32 N.J. 430, 161 A.2d 257 (1960).

72. *See* text at note 4, *supra*. *See also* Grievance Comm. v. Payne, 128 Conn. 325, 22 A.2d 623 (1941).

73. *See* PA. STAT. ANN. tit. 17, § 1608 (Purdon 1962), *construed in* LaBrum v. Commonwealth Title Co., 358 Pa. 239, 56 A.2d 246 (1948). This test is, in effect, a misrepresentation test and deems the attempt to deceive the public as the essence of the unauthorized practice violation. The justification is apparent, since by such conduct those seeking legal services are induced to procure the services of a nonlawyer believing he is trained in the law and forego the assistance of counsel.

74. *See* Note, *Unauthorized Practice by Real Estate Brokers and Title Insurance Companies*, 36 NOTRE DAME LAW. 374, 382 (1961).

75. *Id.* n. 74.

practical analytical structure, taking into account the currently fashionable indicia, would, thus, question first whether legal expertise is required and then whether the activity is ancillary to a bona fide business venture and requires only relatively simple and routine skills. To the extent that these latter questions are answered affirmatively, performance of the activity by a nonlawyer should be condoned unless evidence can be adduced that it would operate to the public's detriment. Finally, to state that only lawyers may undertake the performance of services that are commonly understood as the practice of law is hopelessly inadequate and would permit the legal profession to establish its exclusive bounds solely by tradition.

2. The Concept of Title Insurance under Unauthorized Practice Scrutiny.—The primary function of the title company is to determine the scope of the risk posed, recommend curative action and issue a policy of insurance excepting the defects of title that have not been removed. The evaluation of risk is predicated either on an independent attorney's certificate of title or upon an abstract prepared or examination undertaken by the insurer itself.[76] In the former instance it is unlikely that a contention of unauthorized practice would even be ventured. Payne notes, for example,

> When a national title insurance company issues a policy predicated on a certificate furnished by an independent attorney, the company's officials may exercise some legal judgment. . . . Generally, the title insurer performs purely ministerial duties in issuing the policy, thereby providing protection against errors made by the examining attorney and defects not of record. Purely national insurers are not engaged in unauthorized practice. To hold otherwise would be to hold title insurance illegal *in toto*, a result fraught with far ranging and deleterious consequences.[77]

The tests for unauthorized practice simply do not encompass the insurance function.

Payne's concluding remark acknowledges an awareness that title insurance serves a vital societal function in the present system of conveyancing, a conclusion that is acknowledged virtually without exception.[78] Since no examination of title, no matter how thorough or carefully conducted, can reveal all matters relating to title and since no opinion of title will offer protection against defects that a reasonable inspection would not have disclosed, the traditional system of title assurance was necessarily incomplete.[79] The evolution of the title insurance industry, thus, was a response to the inadequacy

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76. *See* notes 21 and 22, *supra.*

77. Payne, *Title Insurance and the Unauthorized Practice of Law Controversy*, 53 MINN. L. REV. 423, 430 (1969). *See also id.* at 436.

78. *See, e.g., Oshe*, supra note 36, at 248; Note, *The Title Insurance Industry and Governmental Regulation*, 53 VA. L. REV. 1523, 1523 (1967).

79. *See* notes 26 and 27 and accompanying text *supra.*

of the recording system.[80] With the growing discontent over the extent of assurance, the rapid turnover of real estate occasioned by the surge in private ownership, the increase in industrial and land development, and the rising demand for purchase money financing security, the need for a more comprehensive and uniform commitment guaranteed by corporate assets became apparent.[81] Title insurance was also perceived as making property ownership more attractive, since the insurer generally assumes the burden and expense of defending against adverse claims, and as enhancing marketability by offering coverage notwithstanding some insignificant defect[82] that an examining attorney, out of an excess of caution, would except from certification.[83] Though it has been contended that such insurance thrives upon and perpetuates the inadequacies of the title record system,[84] to declare title insurance unlawful in its essence would eliminate a valuable service for which no feasible replacement has yet been developed.[85]

If it is conceded, either on the basis of logic or public policy, that a title insurer that limits itself to the mere issuance of an insurance policy does not engage in unauthorized practice, then the activities of a title company that searches title, provides no ancillary services, but can only be enjoined if the conduct of the title examination by the company or the proffer of the commitment to insure based on the examination improperly infringe on the lawyer's do-

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80. *See* notes 26-28 and accompanying text *supra*.

81. *See generally* Payne, *The Restoration of Conveyancing*, 15 ALA. L. REV. 371, 383 (1963). See text at note 37 *supra*.

82. *See* Note, *The Title Insurance Industry and Governmental Regulation*, 53 VA. L. REV. 1523, 1543 (1967).

83. Payne compares the services offered by real estate attorneys and the title insurer in relation to four elements: (1) cost; (2) speed; (3) adequacy of the examination; and (4) sufficiency of the assurance given. Conceding the extent and reliability of assurance given by the title company, he makes the following observation:

> Unfortunately the land records preserve all defects of title indefinitely and in many cases the title examiner must determine whether or not such defects may be waived as creating no substantial current risk. As the individual attorney is not an insurer he cannot assume some business risks which might be acceptable to a title company and may, therefore, be compelled to insert exceptions into his opinion which would be waived by his corporate competitor.

Payne, *The Restoration of Conveyancing*, 15 ALA. L. REV. 371, 383 (1963). *See also* Cooperman v West Coast Title Co., 75 So.2d 818, 821 (Fla. 1954).

84. *See* note 17 *supra*.

85. Payne, *In Search of Title* (pt. 2), 14 ALA. L. REV. 278, 278 (1962), formulates the threshold inquiry in the unauthorized practice controversy as "who shall be the participants in the conveyancing process and to what extent?" Four possibilities are presented: (1) the installation of the Torrens system; (2) the strengthening of the abstract system; (3) the adoption of universal title insurance; and (4) the return to direct search of the records. He discounts the first two and concludes that the most reasonable alternatives are corporate title insurance and reform of the recording system, a process that has yet to see substantial progress. For further commentary on the viability of the Torrens registration and the abstract systems, see Johnstone, *supra* note 20, at 513-15; McKillop, *supra* note 19, at 453-55. Concerning the efficacy of the Torrens system, *see* B.C. SHICK & I.H. PLOTKIN, TORRENS IN THE UNITED STATES: A LEGAL AND ECONOMIC HISTORY AND ANALYSIS OF AMERICAN LAND-REGISTRATION SYSTEMS (1978).

main. On a purely pragmatic plane, attorneys should not be faulted if they seek to reserve unto themselves perhaps the most remunerative aspect of the real estate practice: certification of title.[86] It is significant to note, however, that title examination has become essentially a lay activity; the task of collecting the pertinent data is not uncommonly assigned by lawyers to abstracting companies or to lower paid nonprofessionals or even to stenographers.[87]

The organized bar is unwilling to surrender the data assembly function to title companies over which it has no control in part because such deference disturbs the economic balance of the conveyancing practice. Permitting local title companies to issue policies based on their own examination is objectionable, it is contended.

> The objection—not simply a selfish one—is that it excludes the attorney from the most profitable aspect of title work. Traditionally the price paid for title examination has probably been too high. At the same time fees for the ancillary services rendered by attorneys have been too low. But the two balanced out, and the public obtained adequate service at a reasonable price. This arrangement will be upset if the lawyer loses his fees for title examination but continues to perform ancillary services, and he would be forced either to charge larger fees or to abandon this segment of practice.[88]

While courts may be sympathetic to the attorney's plight to the extent that it affects the administration of justice, the economics-of-practice objection is unlikely to gain popular support.[89]

A statement of opinion concerning the state of title requires facility with complex legal principles and presents an entirely different question. For example, the Kentucky Supreme Court in *Kentucky State Bar Association v. First Federal Savings & Loan Association*[90] held that the lending institution engaged in the unauthorized practice of law by conditioning the extension of loans on a favorable title report from its salaried staff attorney. Since the title examination entailed both an analysis of recorded interests in the land and an

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86. *See generally* Payne, *In Search of Title* (pt. 1), 14 ALA. L. REV. 11, 58 (1961); Payne, *(The Restoration of Conveyancing*, 15 ALA. L. REV. 371, 371 (1963); Payne, *Title Guaranty Funds: Symptom, Cure or Nostrum?*, 46 IND. L.J. 208, 212 (1971).

87. Payne, *The Restoration of Conveyancing*, 15 ALA. L. REV. 371, 380 (1963). *See generally* Grievance Comm. v. Payne, 128 Conn. 325, 331, 22 A.2d 623, 626 (1941) (distinguishing title abstract and title certificate); Florida Bar v. McPhee, 19 So.2d 552 (Fla. 1967). The courts, however, have with some consistency found that a title examination is an attorney's function. *See* Beach Abstract & Guar. Co. v. Bar Ass'n, 230 Ark. 494, 326 S.W.2d 900 (1959) (title examination and curative work, when done for another, constitutes the practice of law in the strictest sense); *accord*, Kentucky State Bar Ass'n v. First Fed. Sav. & Loan Ass'n, 342 S.W.2d 397 (Ky. 1961). *But see* State Bar v. Arizona Land Title & Trust Co., 91 Ariz. 76, 366 P.2d 1 (1961), *supplemented*, 91 Ariz. 293, 371 P.2d 1020 (1962).

88. Payne, *Title Insurance and the Unauthorized Practice of Law Controversy*, 53 MINN. L. REV. 423, 469 (1969).

89. *See* Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977), *order vacated pending resolution of state law question*, 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978).

90. 342 S.W.2d 397 (Ky. 1961).

opinion of the state of title, the court assumed that it constituted a legal service. Finding that the borrower was a beneficiary of the examination and had paid a charge, the court concluded that the service was rendered for another in violation of statute.[91] Whether the same analysis can be applied to the title search activities of an insurer is questionable, since the primary beneficiary of the report is the insurer itself, which must evaluate the risk it is insuring. Two aspects of the *Kentucky State Bar* case are troublesome, however: the lending institution was also assessing the value of its security and the court ventured the cryptic dictum that "[e]ven when a company is engaged in the *title insurance* business, it cannot sell to the public, though [sic] a relatively insignificant part of the transaction, the legal services of its own salaried attorney."[92]

The risk evaluation function has, on occasion, been equated with title certification and is a further aspect of commercial title insurance that has been alleged to violate the unauthorized practice rules. Title companies, upon completion of the record search, prepare a commitment or binder to insure, which enumerates as exceptions to coverage various title defects. The insured will either negotiate for the removal of exceptions, which would generally require curative measures, or accept the commitment with the stated exceptions, which would limit the extent of his coverage. The question has been raised in this context whether the commitment and the consequent title policy comprise contracts of insurance[93] or primarily opinions of title that only an attorney is authorized to circulate.[94]

In the most recent case directly confronting this issue, *Land Title Company of Alabama v. State ex rel. Porter*,[95] the court formulated the pivotal inquiry as whether, regardless of any statutory provision

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91. *See* text at notes 56-60 *supra*.

92. 342 S.W.2d at 400. The Kentucky court cited the case of Pioneer Title Ins. & Trust Co. v. State, 74 Nev. 186, 326 P.2d 408 (1958), as authority for the quoted passage, although the *Pioneer Title* opinion considered the propriety of a title company's employees passing on the sufficiency of legal instruments on behalf of real estate purchasers.

93. *See* Balbach, *supra* note 13, at 193 n.5, notes "A title insurance company does not primarily concern itself with the marketability or validity of one's title, but rather with its insurability." *See also* Comment, *Title Insurance*, 13 ALA. L. REV. 381, 384-85 (1961), in which the writer emphasizes the contractual nature of the insurance and characterizes title insurance as a contractual undertaking to indemnify against loss. *See generally* Quiner, *supra* note 14, at 714.

94. Payne, *Title Insurance and the Unauthorized Practice of Law Controversy*, 53 MINN. L. REV. 423, 439 (1969), in which the author contends that a title policy should not be classified as a policy of insurance, but should be deemed merely an opinion of title. *Id.* at 438-44. Payne maintains, "The intention is that [the policy] be relied upon by the assured. Whether the potential purchaser or mortgagee of land will complete the contemplated transaction depends upon what the policy indicates about the state of the title. Thus, the policy has no other purpose than to induce action by the person to whom it is issued." *Id.* at 439-40. *See also* Lewis, *Corporate Capacity to Practice Law - A Study in Legal Hocus Pocus*, 2 MD. L. REV. 348-49 (1938); Payne, *Title Guaranty Fund: Symptom, Cure or Nostrum?*, 46 IND. L.J. 208, 217-18 (1970).

95. 292 Ala. 691, 299 So.2d 289 (1974).

authorizing the title insurer's conduct, the title company by issuing commitments for insurance engaged in the practice of law. By framing the question in this fashion, the court acknowledged its inherent power[96] to supervise the practice of law. Noting that "a title insurance company must be allowed to review public records and specify any curative work to be done before it will issue a policy," Justice Harwood determined that the ensueing commitment "merely specifies the estate to be covered in a title policy to be later issued, and specifies the owner of the property as of the date of Commitment. . . . This falls far short of a title opinion."[97] In essence, if a company is entitled to engage in the business of title insurance, it may also examine the registries for documents relating to title and assess its risk.

The underlying rationale, articulated most concisely in the Florida case of *Cooperman v. West Coast Title Company*,[98] is evident from the nature of the risk-evaluation function:

> [I]n the search for intelligence upon which must depend the decision either to issue or decline a commitment, the corporations cannot be said to be engaging in the practice of law, for to practice law one must have a client and in such instances their clients are themselves.[99]

Upon considering the title company's procedure in a typical transaction, the Florida court determined that the entire effort of the insurer is to determine the risk for which the policy would provide indemnification, a function different from an attorney's certification of merchantability. Because the company's sole remuneration consisted of the premium, which could only be earned upon an insurable transfer, it had a sufficient interest in consummating the conveyance to justify its supervision. Even after commitment, the court concluded, the insurer was still representing itself and, thus, its conduct could not constitute the practice of law.[100]

Certain limitations on this doctrine have been defined. First, if a charge is imposed for the service of examining title the examiner might be deemed to have done the work for another and, therefore,

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96. *See* note 55 *supra*.

97. 292 Ala. at 698-99, 299 So.2d at 295; *accord*, Wollitzer v. National Title Guar. Co., 148 Misc. 529, 533, 266 N.Y.S. 184, 189 (Sup. Ct. 1933), *aff'd mem.*, 241 App. Div. 757, 270 N.Y.S. 968 (1934).

98. 75 So.2d 818 (Fla. 1954). The *Cooperman* court held that, to the extent that its acts are indispensable to the determination of insurability and no additional charge is imposed, a title insurer may examine public records to ascertain state of title and may evaluate the data to determine whether to issue a commitment for insurance.

99. *Id.* at 820. *See also* People v. Title Guar. & Trust Co., 191 App. Div. 165, 181 N.Y.S. 52, *aff'd mem.*, 230 N.Y. 578, 130 N.E. 901 (1920) (Kelly, J. dissenting) (searching and insuring titles "is important work, and in itself very profitable. It involves knowledge of the law, but that legal knowledge is a matter between the corporation and its employes").

100. *Id.* at 821; *accord*, Florida Bar v. McPhee, 195 So.2d 552 (Fla. 1967). *See also* Bar Ass'n of Tennessee, Inc. v. Union Planters Title Guar. Co., 46 Tenn. App. 100, —, 326 S.W.2d 767, 780-81 (1959) (quoting from opinion of Chancery Court).

to have violated the unauthorized practice prohibition.[101] Second, the charge for abstracting may not exceed the actual cost to the insurer of performing the services.[102] Although compensation is not determinative, courts have considered it indicative and useful in discounting the self-representation defense.[103] Third, the results of the search may not be furnished to the purchaser except in conjunction with, and as part of, the guarantee of title.[104] Last, by necessary inference, if no bona fide application for insurance is pending it would be beyond the authority of the title company to prepare abstracts and certificates of title for sale.[105] Subject to these conditions, the principal functions of the title company, examination of title and issuance of the commitment to insure, would seem not to violate the unauthorized practice prohibition.

3. Ancillary Services of Title Insurers.—Unlike the relatively consistent results when the activities of corporate insurers before the time of commitment have been challenged, no consensus has emerged concerning the propriety of such ancillary activities as the completion of form instruments, curative measures, supervision of the real estate closing and escrow services. Courts have differed about the applicable tests, and although the result is not always predictable and the reasoning often inadequate, their conclusions have yielded specific examples of unauthorized conduct that offer some guidance within the particular jurisdictions. The result generally de-

101. *See* Beach Abstract & Guar. Co. v. Bar Ass'n, 230 Ark. 494, 326 S.W.2d 900 (1959).

102. New Jersey State Bar Ass'n v. Northern New Jersey Mtg. Assocs., 32 N.J. 430, 443, 161 A.2d 257 (1960) (citing Title Guaranty Co. v. Denver Bar Ass'n, 135 Colo. 423, 312 P.2d 1011 (1957); Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 179 S.W.2d 946 (1944)). On certified appeal the New Jersey Supreme Court defined "cost" to include a "reasonable allocation of the direct and overhead expenses" incurred incident to reading the abstract. 34 N.J. 301, 169 A.2d 150, 152 (1961), *noted in* Comment, *Unauthorized Practice of Law by Title Companies*, 7 N.Y.L.F. 191 (1961).

103. *See* Kentucky State Bar Ass'n v. First Fed. Sav. & Loan Ass'n, 342 S.W.2d 397 (Ky. 1961). *See also* Beach Abstract & Guar. Co. v. Bar Ass'n, 230 Ark. 494, 326 S W.2d 900 (1959). In both Cooperman v. West Coast Title Co., 75 So.2d 818 (Fla. 1954), and LaBrum v. Commonwealth Title Co., 358 Pa. 239, 56 A.2d 246 (1948), the court in refusing to find justification for the unauthorized practice charges noted the absence of a charge for the allegedly unlawful activity. *See generally* Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 516-17, 179 S.W.2d 946, 952 (1944), in which the court held that a "loss leader" constituted "a part of the total service for which the customers pay. There is therefore 'a consideration, reward, of pecuniary benefit' flowing to the defendant for the legal services so rendered."

104. Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 32-33 193 N.E. 650, 654 (1934). In a subsequent case, it was charged that the title company acted improperly in contracting to perform various "title services," including examining title, recommending curative measures, preparing title reports and keeping records for the State Turnpike Commission, even though a policy of insurance might never be issued. Following the rule articulated in *Dworken*, the Court of Common Pleas of Franklin County, Ohio, entered judgment against the insurer for "the bartering, for a price, of legal opinions on title on the market." Steer v. Land Title Guar. & Trust Co., 113 N.E.2d 763, 767 (Ohio C.P. 1953). *See generally* Florida Bar v. Columbia Title, 197 So.2d 3 (Fla. 1967), adopting the referee's report that no insurance was applied for in the subject transaction in which the company rendered title services.

105. *See generally* Steer v. Land Title Guar. & Trust Co., 113 N.E.2d 763 (Ohio C.P. 1953).

pends on whether the court recognizes the defenses that the services are incidental to underwriting the title risk and do not entail a mastery of complex principles of law or perceives some justifying public benefit. Consequently, in some jurisdictions title companies may complete simple form documents of conveyance, though courts have limited such practices to instances in which the company has not exercised discretion in choosing the appropriate form[106] and has not imposed a separate charge,[107] while in other jurisdictions drafting and filling out blanks in instruments of conveyance are strictly an attorney's function that laymen are precluded from undertaking unless they are parties to the transaction.[108] Title companies are commonly permitted to provide escrow services[109] and to recommend that curative documents be executed,[110] but are often denied further

106. *See, e.g.*, Florida Bar v. McPhee, 195 So.2d 552 (Fla. 1967); State Bar v. Guardian Abstract & Title Co., Inc., 91 N.M. 434, 575 P.2d 943 (1978); Bar Ass'n of Tennessee, Inc. v. Union Planters Title Guar. Co., 46 Tenn. App. 100, 326 S.W.2d 767 (1959); *cf.* Pioneer Title Ins. & Trust Co. v. State Bar, 74 Nev. 186, 326 P.2d 767 (1958) (court did not object to clerical preparation of form instruments, but found that examination constituted rendering of legal opinion by corporation). *See also* Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 855 (1952) (real estate broker may, in transactions in which he is acting as broker, use standardized form of deeds, notes, mortgages and leases prepared or approved by counsel and may complete them by filling in blank spaces to show the parties, descriptions and term). *But see* Washington State Bar Ass'n v. Washington Ass'n of Realtors, 41 Wash.2d 697, 701, 251 P.2d 619, 621 (1952) ("The fact that the form of deed he used may have been proper or approved by statute or counsel, is not a justification for defendant's action").

107. *See, e.g.*, State Bar v. Guardian Abstract & Title Co., Inc., 91 N.M. 434, 575 P.2d 943 (1978); *cf.*, Creekmore v. Izard, 236 Ark. 558, 367 S.W.2d 419 (1963) (real estate broker, when the person for whom he is acting has declined to employ a lawyer to prepare the necessary documents and has authorized the broker to do so, may fill in blanks on simple standardized real estate forms previously approved by a lawyer when no charge has been imposed for the service and the transaction arose in the usual course of broker's business). Ingham Co. Bar Ass'n v Walter Neller Co., 342 Mich. 214, 69 N.W.2d 713 (1955) (realtors do not engage in practice of law by completing and filling out printed forms of deeds, land contracts, leases and notices determining tenancy incident to consummating transactions in which they act as brokers when no compensation is exacted); Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 855 (1952) (real estate broker may not make separate charges for completing any standardized forms, and he may not prepare forms in transactions in which he is not a broker).

108. *See, e.g.*, Beach Abstract & Guar. Co. v. Bar Ass'n, 230 Ark. 494, 326 S.W.2d 900 (1959); Title Guar. Co. v. Denver Bar Ass'n, 135 Colo. 423, 312 P.2d 1011 (1957); Boykin v. Hopkins, 174 Ga. 511, 162 S.E. 796 (1932); New Jersey Bar Ass'n v. Northern New Jersey Mtg. Assocs., 32 N.J. 430, 161 A.2d 257 (1960); Guardian Abstract & Title Co. v. San Antonio Bar Ass'n, 278 S.W.2d 613 (Tex. Civ. App. 1955), *rev'd on other grounds*, 156 Tex. 7, 291 S.W.2d 697 (1956); Rattikin Title Co. v. Grievance Comm., 272 S.W.2d 948 (Tex. Civ. App. 1954); Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 179 S.W.2d 946 (1944); Stewart Abstract Co. v. Judicial Comm. of Jefferson Co., 131 S.W.2d 686 (Tex. Civ. App. 1939). *See also* People v. Lawyers Title Corp., 282 N.Y. 513, 27 N.E.2d 30 (1940). *See generally* Comment, *Unauthorized Practice of Law by Title Companies*, 7 N.Y.L.F. 191 (1961).

109. *See, e.g.*, State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), *supplemented*, 91 Ariz. 293, 371 P.2d 1020 (1962); Florida Bar v. McPhee, 195 So.2d 552 (Fla. 1967); Cooperman v. West Coast Title Co., 75 So.2d 818 (Fla. 1954); Pioneer Title Ins. & Trust Co. v. State Bar, 74 Nev. 186, 326 P.2d 408 (1958); Bar Ass'n of Tennessee, Inc. v. Union Planters Title Guar. Co., 46 Tenn. App. 100, 326 S.W.2d 767 (1959). *But see* Title Guar. Co. v. Denver Bar Ass'n, 135 Colo 423, 429-30, 312 P.2d 1011, 1014-15 (1957).

110. *See, e.g.*, Land Title Co. v. State *ex rel.* Porter, 292 Ala. 691, 299 So.2d 289 (1974); Cooperman v. West Coast Title Co., 75 So.2d 818 (Fla. 1954); Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650 (1934); LaBrum v. Commonwealth Title Co., 358 Pa. 239, 56 A.2d 246 (1948); Bar Ass'n of Tennessee, Inc. v. Union Planters Title Guar. Co., 46

participation in the consummation of the transfer.[111]

Since many of these services are conceptually simple or mechanical and the purchaser has a recognizable interest in reducing the expense of conveyance, the trend of more recent opinion seems to be that attorneys' services are costly, or even extraneous, and should not be imposed on the homebuyer. Expressing this current public sentiment, President Carter recently remarked,

> In a great number of cases there is no sound reason for a lawyer to be involved in land transfers or title searches. Simplified procedures and use of modern computer technology can save consumers needless fees.[112]

One recent study of home transfer costs similarly emphasized the inefficiency that results from requiring attorney representation in the less complex aspects of the real estate conveyance.[113] Nevertheless, each party should be encouraged to secure independent legal counsel and it is the function of the organized bar to educate the public about the legitimacy of the attorney's role in the real estate settlement.[114] Alternative sources of assistance should not be foreclosed, however, when the purchasers might reasonably prefer the less expensive to the most sophisticated service.[115]

IV. In Search of Public Policy: *Guardian Abstract* and *Surety Title*

As the two recent cases of *State Bar of New Mexico v. Guardian Abstract & Title Co.*[116] and *Surety Title Insurance Agency, Inc. v. Vir-*

Tenn. App. 100, 326 S.W.2d 767 (1959); Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 179 S.W.2d 946 (1944). *But see* Beach Abstract & Guar. Co. v. Bar Ass'n, 230 Ark. 494, 326 S.W.2d 900 (1959) (title examination and curative work, when done for another, constitute the practice of law).

111. *See, e.g.*, State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), *supplemented*, 91 Ariz. 293, 371 P.2d 1020 (1962); Pioneer Title Ins. & Trust Co. v. State Bar, 74 Nev. 186, 326 P.2d 408 (1958); New Jersey Bar Ass'n v. Northern New Jersey Mtg. Assocs., 32 N.J. 430, 161 A.2d 257 (1960); Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 179 S.W.2d 946 (1944).

112. Address by President Carter, Remarks of the President at the 100th Anniversary Lunch of the Los Angeles Bar Association, in Los Angeles (May 4, 1978).

113. Whitman, *Home Transfer Costs: An Economic and Legal Analysis*, 62 GEO. L.J. 1311 (1974):

> A major factor in the inefficiency of present real estate transfers is the concept that attorneys should search titles and conduct closings. The use of legally trained professionals to perform these routine tasks constitutes an enormous waste of skill and causes increased overall costs to parties. . . . The more reasonable system would be one in which laymen conducted the mechanical work of title transfers, but under which each party could determine his own need for legal representation.

Id. at 1334. *See also* Creekmore v Izard, 236 Ark. 558, 367 S.W.2d 419 (1963); State Bar v. Guardian Abstract & Title Co., 91 N.M. 434, 575 P.2d 943 (1978).

114. EC 3-7 of the Code of Professional Responsibility explains that the duty to help the public recognize legal problems is intended to aid nonlawyers "understand why it may be unwise for them to act for themselves in matters having legal consequences." *See* note 3 *supra*.

115. *See generally* Morgan, *supra* note 2, at 708-09.

116. 91 N.M. 434, 575 P.2d 943 (1978).

ginia State Bar[117] suggest, the force of these arguments has not been lost on the judiciary. The precise impact of these two decisions is difficult to assess, although it is safe to conclude that the courts in unauthorized practice cases will examine more closely the extent to which the policies underlying the prohibition would be promoted by granting the relief requested.[118] Presumably the contention will be raised that the *Guardian Abstract* case is distinguishable in unauthorized practice controversies arising in jurisdictions other than the forum state because of the singular nature of the statutorily approved forms.[119] The immediate import of the New Mexico case was that title insurers who merely fill in the blanks of attorney-drafted, standard legal forms required in real estate sales or loans in instances when an application for insurance had been submitted, do not engage in the unauthorized practice of law.[120] If substantial legal rights are affected and protection of those rights requires legal skill and knowledge that the average citizen could not be deemed to possess, then the particular practice must be limited to the legal profession.[121] Unlike its predecessors, however, the New Mexico court was not content with merely reciting the incidental and the simple-complex criteria, but contrasted the policy underlying the unauthorized practice restriction with the practical effect of the restraint.[122]

In accordance with the current jurisprudence,[123] the court declined to render a comprehensive definition of the "practice of law" and adopted an ad hoc approach instead. Rather than undertake the "onerous task" of formulating such a definition, the court limited the exclusive "practice" to those instances in which "doubtful legal ques-

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117. 431 F. Supp. 298 (E.D. Va. 1977), *order vacated pending resolution of state law question*, 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978).

118. Although earlier cases had also employed a public policy analysis, see note 70 *supra*, they seemed to suggest that the defendant's conduct would not be condemned if the lay activities served the public interest or convenience. *See* Creekmore v. Izard, 236 Ark. 558, 367 S.W.2d 419 (1963); Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P. 2d 998 (1957); Ingham Co. Bar Ass'n v. Walter Neller Co., 342 Mich. 214, 69 N.W.2d 713 (1955); Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1950); Bar Ass'n of Tennessee, Inc. v. Union Planters Title Guar. Co., 46 Tenn. App. 100, 326 S.W.2d 767 (1959). *Guardian Abstract*, in contrast, appears to impose the obligation to establish public injury on the prosecuting party. *See* 91 N.M. at 440, 575 P.2d at 949. In the same vein, the lower court in *Surety Title*, an antitrust action, refused to find the state action immunity applicable to the Virginia State Bar because the unauthorized practice opinion process was not proved sufficiently to promote the underlying policy and had not been ordered by the state courts or legislature. 431 F. Supp at 308.

119. *See* State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), *supplemented*, 91 Ariz. 293, 371 P.2d 1020 (1962), where the court discounted the applicability of State *ex rel.* Reynolds v. Dinger, 14 Wis.2d 193, 109 N.W.2d 685 (1961), because of the Wisconsin legislature's approval of various standard real estate forms.

120. 91 N.M. at 440, 575 P.2d at 949.

121. *Id.*

122. *Id. See* note 118 *supra*.

123. *See, e.g.*, State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 87, 366 P.2d 1, 8-9 (1961), *supplemented*, 91 Ariz. 293, 371 P.2d 1020 (1962); State *ex rel.* Norvell v. Credit Bureau of Albuquerque, 85 N.M. 521, 526, 514 P.2d 40, 45 (1973).

tions are involved, which, to safeguard the public, reasonably demand the application of a trained legal mind."[124] It then determined that the test must be applied in a manner that would protect primarily the public interest. In applying the test that it had propounded, the court noted the long acquiescence of the bar in the title companies' activities and concluded,

> There was no convincing evidence that the massive changeover in the performance of the service from attorneys to the title companies during the past several years has been accompanied by any great loss, detriment or inconvenience to the public. The uncontroverted evidence was that using lawyers for this simple operation considerably slowed the loan closings and cost the persons involved a great deal more money. . . .
>
> It seems eminently clear that it would be a burden on the public for us to now decree that such acts constitute the unauthorized practice of law. We would be asserting impractical and technical restrictions that have no reasonable justification.[125]

Because the sixteen-year interim during which the title insurers had engaged in the challenged activities had inflicted no demonstrable harm on the public,[126] the court reasoned that now to require the assistance of attorneys would only complicate the transaction and would be impractical, technical and unreasonable.

Though the court permitted title insurers to complete forms for real estate closings, it imposed four restrictions. First, the insurer may not exercise legal judgment concerning which form would be appropriate. Second, separate charges may not be imposed for completing forms since this would emphasize conveyancing and legal drafting. Third, a layman may not represent to have legal expertise in the field of conveyancing. Last, employees of title companies who obtain information from parties for purposes of offering legal advice are engaging in the practice of law. The express result of the *Guardian Abstract* case is, therefore, that compelling attorney representation in the routine completion of standard forms cannot be grounded in public policy, but that the public's interest might best be served by permitting title companies to perform such services incident to their insurance function. The attorney, however, still plays an essential role when legal expertise is required.

The *Surety Title*[127] case, although conceptually related to *Guardian Abstract*, was not a traditional unauthorized practice prosecution, but an antitrust action instituted by the title company, a rare

124. 91 N.M. at 439, 575 P.2d at 948.

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

126. The court carefully noted, however, that the prolonged abstention of legal practitioners created no prescriptive rights, but was a factor in the appraisal of whether the public had been injured.

127. Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977), *order vacated pending resolution of state law question*, 571 F.2d 205 (4th Cir.), *cert. denied*, 436 U.S. 941 (1978).

reversal of roles.[128] Nevertheless, the analysis employed is instructive in the wake of the New Mexico case. At issue was the process by which the state bar issued advisory opinions relating to ethics and the unauthorized practice of law,[129] which, in conjunction with the threat of disciplinary proceedings against attorneys who disobeyed the stated principles, resulted in a boycott of the title company's services.[130] The various opinions, in combination, required intervention of an attorney at some stage of the insurance commitment procedure and, thus, precluded the possibility that a title company could issue a policy directly to a purchaser upon his application.[131] While the opinions did not purport to regulate directly the conduct of the insurer, they had a decided chilling effect on attorneys who were employed by or affiliated with the title insurer.[132] Since in Virginia the preparation of deeds constitutes the practice of law,[133] plaintiff, who sought otherwise to eliminate the services of an attorney from the

128. Subsequent to institution of the antitrust action, the Attorney General of Virginia filed a complaint against plaintiff with the Circuit Court of Virginia Beach charging the unauthorized practice of law. 431 F Supp. at 300 n.2.

129. The district court emphasized,

> Plaintiff does not challenge either the definition of the practicce of law as enunciated by the Supreme Court of Virginia nor the correctness of any particular ethical or unauthorized practice of law opinion. Rather, it is the method by which these opinions are issued that is alleged to be in violation of the federal antitrust laws.

431 F. Supp. at 300. By attacking the process itself, plaintiff attempted to avoid raising a state law question and the doctrine of abstention.

130. Four Unauthorized Practice of Law Opinions were directly pertinent to the case. Opinion No. 17 recommended that the definition of practice of law not be amended to permit title companies to certify titles. Opinion No. 43 states that a title company that issues a title insurance policy based upon a title examination performed by a nonlawyer is engaged in the unauthorized practice of law. Opinion No. 44 permits the company, upon an attorney's request, to search title and furnish title information to the attorney and to issue the commitment to whomever the attorney designates. Opinion No. 46 endorses the forwarding of title search results directly to customers who have staff counsel. Furthermore, under the Virginia Supreme Court's decision in Commonwealth v. Jones & Robins, 186 Va. 30, 41 S.E.2d 720 (1947), only an attorney may prepare deeds. The effect is to interpose the presence of counsel in every title insurance transaction that contemplates transfer of title. Because plaintiff sought to issue commitments directly to the consumer, the inevitable result of this regulatory scheme was a boycott.

131. The title company sought to eliminate the attorney and, concomitantly, his fee from the insurance transaction. 431 F. Supp. at 302, 303. The court found that plaintiff's business approach would result in the consumer receiving greater services than presently offered at a substantially lower cost. *Id.* at 303.

132. The court noted,

> The defendant's opinions . . . raise the powerful specter of disciplinary action to any attorney who participates in a real estate transaction wherein the title insurance is obtained without the services of a lawyer. . . . The net effect, predictably, is that attorneys, who are essential to the plaintiff's business, refuse to prepare deeds in transactions where the plaintiff provides the title insurance under its proposed method of doing business. Indeed only ten of the approximately two hundred to three hundred attorneys contacted by the plaintiff expressed any interest in performing services for it.

Id. at 303.

133. Commonwealth v. Jones & Robins, 186 Va. 30, 44, 41 S.E.2d 720, 727 (1947) (preparation of deeds, deeds of trust, mortgages and deeds of release by real estate brokers constitutes the illegal practice of law); *accord*, Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298, 303 (E.D. Va. 1977).

insurance transaction, was constrained to conform to the dictates of the unauthorized practice opinions.

Fatal to the opinion format was the circumstance that only attorneys, who necessarily had a direct pecuniary interest[134] in an expansive definition of unauthorized practice, could invoke the mechanism.[135] No provision was made for judicial review of the opinions, and the layman, who had the greatest need for clarification of the bounds of unauthorized practice, had no access to the definitional process.[136] Recognizing that legitimate policies were served by restricting the practice of law to those licensed by the state, the court concluded,

> There is nothing in the instant record, moreover, that indicates that either the legislature or the Supreme Court of Virginia intended to restrain competition between lawyers and laymen in areas which arguably do not lie within the definition of the practice of law. The state policy behind restricting the practice of law to licensed attorneys is to protect the public and not . . . to financially benefit a particular segment of society. That intent is thwarted when, as here, the regulatory activity serves an anticompetitive end without necessarily improving the services rendered to the consuming public.[137]
>
> In summary, not only is the Unauthorized Practice of Law opinion process tenuously related to the state interest it purports to advance, but it operates in a decidedly anticompetitive fashion offensive to notions of basic fairness. It does not act to advance the consumer interest, but merely that of the attorney.[138]

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134. Judge Merhige, at various points in his opinion, cited the economic interest of the organized bar in reserving to its members the more lucrative aspects of the real estate practice. Alluding momentarily to the purpose of the opinion process, he offered the rather cynical statement,

> The Court, at this juncture, is not in a position to reach any conclusion with regard to the intent of the defendant. There are sufficient indications in the record, however, to question whether the UPL opinions concerning title insurance were based entirely on considerations of public interest.

Id. at 304 n.7. *See also id.* at 308.

135. The irony of the process did not escape the court, which presumed that the justification for the practice restraint was to advance the interests of the consuming public.

> The advisory opinion process . . . cannot reasonably be said to deter those from whom the public may need protection as only licensed attorneys may obtain these opinions. The layman contemplating conduct which might consitute the practice of law, and hence from whom the public needs protection, has no access to the defendant's advisory opinion process. Thus, it would appear that the persons who the State desires to deter and who have the greatest need for advisory opinions are excluded from the process presently under attack . . . . Attorneys as a class . . . should be the last segment of society in need of advisory opinions pertaining to the Virginia Supreme court's definition of the practice of law.

Id. at 308.

136. The Virginia Supreme Court Rules, Rule 6:IV, § 10, 216 Va. 1147 (1976), *quoted in* Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298, 301 (E.D. Va. 1977), authorizes any active member of the bar to solicit advisory opinions on matters concerning the professional conduct of the attorney. This prompted the court to epitomize the unauthorized practice opinion process as follows: "In short, advisory opinions are issued by lawyers in response to questions submitted by lawyers and no provision is made to inject the participation of non-interested parties into the process." *Id.* at 301. *See also* note 135 *supra.*

137. *Id.* at 307, 308.

138. *Id.* at 308-09.

Having found that the anticompetitive effects of the bar's issuance of these opinions outweighed the public interest in preventing uauthorized practice, the court refused to acknowledge the state action immunity exemption[139] and granted plaintiff's motion for summary judgment. The bar association was enjoined from issuing further opinions defining unauthorized practice and was advised to expunge from its records all related prior opinions.[140]

Once again, the limitations of the decision must be noted. The court did not have the benefit of the United States Supreme Court's pronouncements in *Bates v. State Bar of Arizona*[141] about the availability of state action immunity to professional organizations and should not, after deciding that the opinion process was state-compelled, have engaged in the further analysis whether the process served a legitimate state interest.[142] Moreover, the respective roles of the Virginia Supreme Court and the Virginia State Bar in the adoption and enforcement of advisory opinions and the scope of the State Bar's authority had not yet been clearly articulated as a matter of state law.[143] Finally, the court explicitly refused to deliberate the merits of any unauthorized practice opinion[144] and confined its commentary strictly to the immunity issue. It decided only that the process did not sufficiently promote the intended objectives because the persons most in need of advice were excluded. Nevertheless, the court's willingness to distinguish between the public welfare and the good of the legal profession and the court's reluctance to permit attorneys to dictate the bounds of their own monopoly[145] suggest the

139. *Id.* at 309.

140. The order entered by the district court is set forth in a footnote to the opinion of the circuit court on appeal. Virginia State Bar v. Surety Title Ins. Agency, Inc., 571 F.2d at 205, 206 n.4 (4th Cir. 1978) (vacating district court's order and remanding the case to withhold further action until the unauthorized practice charge against plaintiff, Surety Title, has been prosecuted to completion).

141. 433 U.S. 350 (1977).

142. The *Bates* analysis of the state action immunity would question only whether the action was state-compelled and supervised, but would not engage in the secondary inquiry into the relationship between the anticompetitive activity and the state interest it purports to advance. *See* 433 U.S. at 359-60. *See generally* 24 WAYNE L. REV. 1061 (1978), in which the commentator concludes that the court in *Surety Title* reached the correct result for the wrong reason and should have addressed the state bar's limited agency status.

143. The circuit court remanded for the sole purpose of obtaining a clarification whether the opinion process was state-compelled. By so ruling, the appellate court ignored the district court's finding of compulsion. Since resolution of this question depended on the state court's final disposition of the unauthorized practice prosecution against the title company, the doctrine of abstention was deemed applicable. Virginia State Bar v. Surety Title Ins. Agency, Inc., 571 F.2d 205, 207-08 (4th Cir. 1978).

See Cicalese & Cicalese, *The Unauthorized Practice of Law: Surety Title Insurance Agency, Inc. v. Virginia State Bar*, 83 COM. L.J. 575, 578 (1978), for a discussion of the options now available to the Virginia state courts as a result of the two federal court opinions.

144. 431 F. Supp. at 300, 308 n.17.

145. One notable, and recent, example of the efforts of the organized bar to preclude competition in the property transfer business was the adoption by the Allen County Indiana Bar Association of a resolution amending the Standards of Marketability of Abstracts of Title, which advise attorneys that a title insurance policy is acceptable only if an abstract of title is

advent of a more rational approach to the unauthorized practice doctrine.

V. Conclusions

Whether title companies will continue to play an important role in the conveyancing process or will decline as the inadequacies of the contemporary system of real estate recordation are remedied remains to be seen. While it is evident that the legal profession cannot eliminate a legitimate competitor for title services merely by either broadening or obscuring the definition of the practice of law, both bench and bar are disinclined to undertake the "onerous" task of formulating a definition of unauthorized practice that could be applied uniformly to eliminate much of the uncertainty along the periphery of the practice of law. Most appropriately, a comprehensive definition of the practice of law would be derived legislatively, since it is inevitably a matter in which the public interest must be consid-

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furnished the purchaser or a title policy had previously been issued on the same tract before a prescribed date. The resolution of May 17, 1978 adds the following proviso:

> Provided, however, that if title insurance is provided, then said title insurance shall only be acceptable if it is issued based upon a written opinion by an attorney licensed to practice in the State of Indiana which opinion is based on an examination of a current Abstract of Title, which current Abstract shall be furnished to the buyer and thereafter shall be the property of the buyer.

The purpose of the Bar Association's resolution is evident: to interject the presence of an attorney into every title insurance transaction unless the parties to the conveyance have specifically agreed otherwise.

The Allen County situation also evidences domination by an interested minority: only twenty-five of the Bar Association's four hundred members attended the meeting at which the resolution was proposed. Furthermore, of the fifteen members of the Abstract of Title Committee, which introduced the resolution, twelve were either directly or indirectly associated as counsel for lending institutions. The Journal-Gazette (For Wayne), June 16, 1978, at 1 C. As a consequence of the Bar Association's resolution, some commercial banks and savings and loan companies have apparently refused to accept title insurance absent lawyer approval and numerous realtors are hesitant to engage in real estate transactions without assuming the additional cost of an abstract and examination by an attorney. On February 21, 1979, the controversial rule was deleted by the Board of Directors of the Bar Association because of the public reaction and in an effort to abort the investigation by the United States Department of Justice into potential antitrust violations. The events occurring between the date of adoption and the date of deletion are chronicled in The Journal-Gazette (Fort Wayne), Sept. 9, 1978 and The Journal-Gazette (Fort Wayne), March 1, 1979, at 1 C.

Notwithstanding the withdrawal of this proviso, the Department of Justice filed its Complaint on March 2, 1979 against the Allen County Indiana Bar Association, Inc., alleging violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1976), and seeking injunctive relief. The Complaint charges that defendants have committed the following wrongful acts:

(a) Adopted, promoted and disseminated a resolution and a Statement of Principles intended to limit and restrict the sale of title insurance in lieu of abstract examination;
(b) Induced lending institutions not to lend money for the purchase of residential real estate except after examination by an attorney of an abstract of title;
(c) Discouraged the public, real estate brokers and other attorneys from participating in residential real estate transactions without the examination by an attorney of an abstract of title.

Complaint at 5, United States v. Allen County Indiana Bar Association, Inc., No. F-79-0042 (N.D. Ind., filed March 2, 1979). The Complaint further contends that the actions of the Bar Association have resulted in the maintenance of the cost of title certification at "artifically high levels" and the denial to consumers of the benefits of free and open competition. *Id.* at 6.

ered by a body not exclusively constituted of lawyers. Nevertheless, courts have the undoubted power to define and regulate the practice of law, and statutory provisions have been tolerated primarily out of comity or as an expression of public policy. Legislative efforts, thus, have remained mere guidelines. The judicial supremacy doctrine, however, has its limitations and would seem to apply in the unauthorized practice context only to matters directly related to the administration of justice in instances in which a mastery of complex legal principles is essential.

In the absence of clearly articulated guidelines, each jurisdiction has developed its own standards and indicia in response to individual instances of alleged unauthorized conduct, and the extent of the lawyer's monopoly varies correspondingly. The courts all agree on at least one point, however: restricting the practice of law to persons learned in the law, subject to professional ethical precepts and under judicial supervision serves a vital societal purpose. But, if enforcement of the prohibitions against unauthorized practice is to have any justification in public policy, the definition of the exclusive realm of practice must begin with the interests that the restraint is intended to serve. Accordingly, lay competition in matters intimately associated with a legitimate business venture should be proscribed only when evidence of a nonspeculative threat to the public welfare can be adduced and no offsetting social benefit can be demonstrated. The appropriate test, as articulated by the Supreme Court of New Mexico, must be whether the challenged activity entails a comprehension of legal principles that transcends the understanding of "a reasonably intelligent layman *who is reasonably familiar with similar transactions*. The test must be applied in a commonsense way which will protect primarily the interest of the public . . . ."[146]

146. State Bar v Guardian Abstract & Title Co., Inc., 91 N.M. 434, 439, 575 P.2d 943, 948 (1978) (emphasis added).