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“CUSTOM AND PRACTICE” UNMASKED: THE LEGAL HISTORY OF MASSACHUSETTS’S EXPERIENCE WITH THE UNAUTHORIZED PRACTICE OF LAW

By Alexis Anderson



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In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society....If I were asked where I place the American aristocracy, ... it occupies the judicial bench and the bar.²

INTRODUCTION

The professionalization of the American bar mirrors the history of our nation's great industrial endeavors: it is the story of the

creation of a monopoly.³ Educational barriers, occupational licensing, and exclusive bar associations, are the most familiar barriers that have helped preserve the practice of law for an anointed few. However, one additional—admittedly lesser-known—tool has contributed mightily to making the practice of law a members-only club: the unauthorized practice of law doctrine. Under this rubric, all three branches have partnered to enforce restrictions on the lay practice of law.

Massachusetts's history in this area is typical of many jurisdictions. Rather than a long, linear march toward clearly defined territory where only lawyers dare to tread, this history instead reveals that the state's unauthorized practice of law (“UPL”) movement took hold comparatively recently. Its evolution has been marked by fits and starts, by active proponents and by equally determined naysayers, by headline grabbing politicians and bar leaders, and by increasingly assertive judges. Perhaps most important, this account raises doubts about the efficacy of judicial decision making in regulating lay practice.

This history demonstrates that the judiciary has carved out for itself the constitutional duty of defining the practice of law.⁴ It examines the key premises cited by the Massachusetts Supreme Judicial Court (“SJC”) for restricting practice to members of the bar: protection of the public welfare and custom.⁵ This review reveals a tradition which has attempted to reconcile the public's access to

1. The author wishes to thank Dean Rougeau and the Law School Fund for generous support for this project. In addition, the critical feedback of colleagues Professors Michael Cassidy and Paul Tremblay helped immeasurably in clarifying the article's principal themes. Lastly, searching out the primary sources for this project required significant energy and many field trips to local repositories and microfiche collections. Special thanks go to Research Assistants Jason Canne, Russell Smith and Franklin Triffletti. We also wish to extend our appreciation to the very helpful staff at the Massachusetts Archives in Dorchester, Massachusetts for assistance in accessing their extensive legislative collection.

2. I ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 278 (PHILLIPS BRADLEY ED. (1990)).

3. See generally CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* (1916); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW, THE LAW MAKERS* (1950); ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* (1953); ERWIN GRISWOLD, *LAW AND LAWYERS IN THE UNITED STATES* (1964); ANTON-HERMANN CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* (1965). For reappraisals of the status of lawyers in the colonial period, see Mary Sarah Bilder, *The Lost Lawyers: Early American Legal Literates and Transatlantic Legal Culture*, 11 *Yale J. of L. & Humanities* 47 (Winter 1999) (using Rhode Island's experience as a case study, Bilder concludes that a more functional definition of “attorney” demonstrates that lawyers were a significant presence in colonial America); Daniel Coquillette, *Introduction: The “Countenance*

*of Authority,” in LAW IN COLONIAL MASSACHUSETTS, 1630-1800, AT XXI, XXV (Daniel R. Coquillette ed. 1984). For a review of the development of bar associations in Massachusetts, see ROBERT BRINK, *FIAT JUSTITIA, A HISTORY OF THE MASSACHUSETTS BAR ASSOCIATION, 1910-1985* (1987).*

4. The SJC first decreed that determining who has the right to practice law was a judicial prerogative in *Opinion of the Justices*, 279 Mass. 607, 611 (1932). The Court relied on the MASSACHUSETTS CONSTITUTION: “In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.” ARTICLE XXX.

5. *Real Estate Bar Association, Inc. (“REBA”) v. National Real Estate Information Services, Inc. (“NREIS”)*, 459 Mass. 512, 517 (2011) (hereafter “*REBA-SJC*”). The SJC has noted that other states do not restrict laypersons from conducting real estate closings. *Id.* at 532. See generally VA. CODE § 55-525.18 (B) (1) (SUPP. 2010). The scope of this Article does not include an empirical analysis of the extent of any consumer harm related to unauthorized practice. *But see* Joyce Palomar, *War Between Attorneys and Lay Conveyancers—Empirical Evidence Says “Cease Fire!”*, 31 *CONN. L. REV.* 423, 520 (1999) (reporting on one empirical study on consumer harm in real estate conveyancing conducted by laypersons and finding no statistically material injury: “the evidence does not

services against lawyers' demands for protectionism,⁶ but which has left the UPL principles in a confused muddle. Moreover, its few clear precedents provide insufficient guidance for application to modern social needs and economic realities.

Massachusetts's experience with defining the practice of law has recently come to the forefront in one hotly contested field—real estate conveyancing. In 2011, the SJC interpreted the Commonwealth's UPL statutes⁷ in litigation that remains currently unresolved.⁸ After acknowledging that the “practice of law” is difficult to define, the court invoked “custom and practice” as a critical benchmark by which courts should undertake a fact-based inquiry necessary to determine whether certain conduct by laypersons constitutes unauthorized practice.⁹ The underlying litigation is a useful example of the inherent limitations of the kind of case-by-case adjudication that has marked the recent Massachusetts experience with UPL.

After reviewing the recent litigation over the application of the UPL statutes in the real estate conveyancing realm in Part I, this article proceeds chronologically. Part II traces the early Massachusetts experience with legal protectionism from the colonial period through the nineteenth century. Passage of the first UPL statutes becomes the focus of Part III; subsequent judicial and legislative interpretation of those provisions receives attention in Part IV. The article concludes with cautionary remarks about the consequences

substantiate the claim that the public bears a sufficient risk from lay provision of real estate settlement services to warrant blanket prohibition of those services under the auspices of preventing the unauthorized practice of law”), referred to in *REBA-SJC*; Michael Braunstein, *Structural Change & Inter-Prof'l Competitive Advantage: An Example Drawn from Residential Real Estate Conveyancing*, 62 Mo. L. Rev. 241, 274-75 (1997) (reporting on a 1989 Ohio study that “indicate(d) that increased lawyer involvement does not have a beneficial effect on outcomes of home purchase transactions”).

6. It is this intersection which most intrigues the author. As a clinical professor who regularly supervises student attorneys in a neighborhood legal services office, I see firsthand the adverse effects of society's failure to provide meaningful access to justice on a daily basis, a problem which the UPL doctrine exacerbates. However, I am also cognizant of the potential financial loss to existing legal services programs, including those in Massachusetts, were real estate closings no longer to be handled principally by attorneys. That change would drastically reduce the already diminished funding for legal services programs currently provided by interest on lawyer trust accounts (“IOLTA”). See generally amicus brief filed in the *REBA-SJC* case by several legal services offices: Brief of amici curiae Legal Assistance Corporation of Central Massachusetts, Neighborhood Legal Services, Inc., South Coastal Counties Legal Services, Inc., Metrowest Legal Services, Inc., and Community Legal Services and Counseling Center, *REBA-SJC* (filed October 20, 2010).

7. MASS. GEN. LAWS ANN. CH. 221, § 46 *et seq.* (West 2012). The key provisions prohibit lay practice by certain corporations as follows:

No corporation or association shall practice or appear as an attorney for any person other than itself in any court in the commonwealth or before any judicial body or hold itself out to the public or advertise as being entitled to practice law, and no corporation or association shall draw agreements, or other legal documents not relating to its lawful business, or draw wills, or give legal advice in matters not relating to its lawful business, or practice law, or hold itself out in any manner as being entitled to do any of the foregoing acts, by or through any person orally or by advertisement, letter or circular; provided, that nothing herein shall prohibit a corporation or association from employing an attorney in regard to its own affairs or in any litigation to which it is or may be a party or the insurer of a party. Any corporation or association violating this section shall be punished by a fine of not more than one thousand dollars; and every officer, agent or employee of any such corporation or association who, on behalf of the same, directly or indirectly, engages in any of the acts herein prohibited, or assists such corporation or association to do

of judicial control of the unauthorized practice doctrine.

I. REBA GOES ON THE OFFENSIVE

Touted as the fastest growing bar association in New England,¹⁰ the Real Estate Bar Association of Massachusetts (“REBA”) is currently positioned at the forefront of the UPL debate in the Commonwealth. Previously known as the Massachusetts Conveyancers' Association, Inc., REBA has a 150 year history, dedicated “to advanc[ing] the practice of real estate law by creating and sponsoring professional standards, actively participating in the legislative process, creating educational programs and materials, and demonstrating and promoting fair dealing and good fellowship among members of the real estate bar.”¹¹ REBA has filed a number of cases designed to expand the scope of Massachusetts's UPL statutes within the conveyancing field,¹² has lobbied the Legislature, and has urged bar associations to petition the SJC to amend its Massachusetts Rules of Professional Conduct to codify REBA's favored definition of the “practice of law.”¹³

Currently REBA is actively pursuing litigation to prevent “witness” real estate closings, where non-attorneys would conduct the closing and witness the execution of the closing documents, but where these witnesses (often lay notaries) would not provide any legal guidance.¹⁴ In addition, REBA seeks a binding state precedent that conveyancing is an integrated legal process.¹⁵

such prohibited acts, shall be punished by a fine of not more than five hundred dollars. MASS. GEN. LAWS ANN. CH. 221, § 46 (WEST 2012).

Section 46A prohibits practice of law by non-lawyers:

No individual, other than a member, in good standing, of the bar of this commonwealth shall practice law, or, by word, sign, letter, advertisement or otherwise, hold himself out as authorized, entitled, competent, qualified or able to practice law; provided, that a member of the bar, in good standing, of any other state may appear, by permission of the court, as attorney or counselor, in any case pending therein, if such other state grants like privileges to members of the bar, in good standing, of this commonwealth. MASS. GEN. LAWS ANN. CH. 221, § 46A (WEST 2012).

8. *REBA-SJC*.

9. *Id.* at 517 (citing *Lowell Bar Association v. Loeb*, 315 Mass. 176, 180 (1943) (hereinafter *Loeb*)).

10. REBA website, <http://www.reba.net/page/about> (last visited June 5, 2012).

11. REBA website: http://www.reba.net/page/mission_statement (last visited June 5, 2012). While this Mission Statement essentially mirrors the organization's Statement of Purpose filed with its Articles of Incorporation, it is noteworthy that the current version of REBA's mission statement has deleted the phrase “serving the public interest.” Articles of Incorporation of Massachusetts Conveyancers Association, Inc., dated December 2, 1994, p. 3 (“The purpose for which the corporation is formed is as follows: To advance the practice of real estate law and serving the public interest by creating and sponsoring professional standards, . . .”).

12. See generally discussion in Part III, *infra*; see also *Mass. Conveyancers Assoc., Inc v. Colonial Title & Escrow, Inc.*, 2001 WL 669280 (Mass. Super. Ct. 2001); *Mass. Assoc. of Bank Counsel, Inc. v. Closings, LTD*, 1993 WL 818916 (Mass. Super. Ct. 1993).

13. See generally *REBA v. NREIS*, 608 F.3d 110, 115-16 (1st Cir. 2010) (hereinafter “*REBA-1st Cir.*”). Rule 5.5 of the Massachusetts Rules of Professional Conduct currently codifies the state ethical restrictions on unauthorized practice. MASS. R. PROF. C. 5.5. See generally HENRY DRINKER, *LEGAL ETHICS* (1953) at 66-67 (regarding information on the American Bar Association's revision of the ABA Canon of Ethics in 1937 to include a bar on aiding unauthorized practice).

14. *REBA v. National Loan Closers, Inc.*, Civ. No. 12-1609 (Suffolk Sup. Ct. April, 2012).

15. *REBA v. NREIS*, *supra* note 13.

In 2006, REBA commenced major litigation against a Pennsylvania corporation, NREIS, which had been providing real estate closing services and acting as a title insurance agent in Massachusetts, principally for mortgage lenders.¹⁶ REBA claimed that NREIS's actions should be enjoined as constituting the unauthorized practice of law under chapter 221, section 46A.¹⁷ Specifically, REBA sought to stop NREIS's Massachusetts-based activities on three grounds: 1). NREIS, as a lay organization, handled aspects of real estate closings that could only be undertaken by lawyers (or laypersons under lawyers' guidance); 2). NREIS orchestrated impermissible witness closings; and 3). NREIS, by issuing title insurance, was engaging in UPL. NREIS countered by asserting that it never held itself out as practicing law, and asserted that it did not employ any attorneys, but rather appropriately contracted with licensed attorneys to conduct real estate closings on behalf of its mortgage lender clients and with a title search firm to prepare title abstracts.¹⁸

After NREIS removed the action to federal court, the parties presented Federal District Court Judge Joseph Tauro with cross motions for summary judgment on stipulated facts.¹⁹ The trial judge reviewed the sparse Massachusetts precedents regarding UPL doctrine in the field of real estate closings before concluding that the SJC had yet to rule decisively on whether all aspects of real estate closings required a lawyer's oversight. Ultimately, the District Court rejected REBA's attempt to bar lay control of real estate closings, finding that there was no support for REBA's attempt to define all aspects of closings as the practice of law.²⁰ As to REBA's claim that NREIS had violated the governing UPL statute by facilitating witness closings, the trial judge ruled that REBA had not met its evidentiary burden.²¹ Lastly, REBA's final claim—that NREIS had engaged in the practice of law by issuing title insurance—also failed, as Judge Tauro held it well-settled in Massachusetts that the title insurance business was not the practice of law.²² Thus the District Court granted NREIS's Motion for Summary Judgment and entered judgment against REBA on its claims.²³

On REBA's appeal, the First Circuit Court of Appeals reversed, concluding that the key state law questions needed to be interpreted

in the first instance by the SJC (*“REBA-1st Cir.”*).²⁴ The court could find “no controlling precedent that establishes a definition for ‘conveyancing’ or the extent of activities that constitute conveyancing.”²⁵ Therefore, the First Circuit certified two questions to the SJC:

1. Whether NREIS's activities, either in whole or in part, based on the record in this case and as described in the parties' filings, constitute the unauthorized practice of law in violation of Mass. Gen. Laws ch. 221, §§ 46 et seq.; and
2. Whether NREIS activities, in contracting with Massachusetts attorneys to attend [real estate] closings, violate Mass. Gen. Laws ch. 221, §§ 46 et seq.²⁶

A year later, the SJC issued its long-awaited statement on the scope of the Commonwealth's unauthorized practice of law statutes (*“REBA- SJC”*).²⁷

To the extent that REBA hoped that this litigation would prompt the SJC to define the practice of law conclusively, its goal remains unmet. While the SJC did offer some general guidance on the scope of the state's current UPL regulatory scheme, the SJC concluded that the evidentiary record was so lean as to preclude clear analysis of which activities of NREIS, if any, encroached on the sole domain of lawyers.²⁸ The SJC conjectured that certain of NREIS's activities as described in the record likely did not violate chapter 221, section 46 et seq., answering the first certified question with a “probable no.”²⁹ As to the second question, the SJC declined to hazard an opinion, given the incomplete evidentiary record.³⁰ Furthermore, the SJC rejected REBA's key analytical structure: i.e., that conveyancing can only be viewed as an integrated whole for purposes of UPL analysis. Rather than find “conveyancing” to be “a unitary, indivisible activity that constitutes the practice of law,” the SJC explicitly rejected REBA's preferred approach and instead adopted a more functional analysis.³¹

The court then proceeded to analyze NREIS's activities in two realms: as a vendor manager for mortgage lenders and as a title insurance agent.³² After acknowledging that there is no simple

16. *REBA v. NREIS*, 609 F. Supp. 2d 135 (D. Mass. 2009) (hereinafter *REBA I*), *vacated*, 608 F. 3d 110 (1st Cir. 2010). REBA sued two corporations, referred to collectively in this article as NREIS: National Real Estate Information Services, Inc., a Pennsylvania corporation which is the general partner of the second defendant, National Real Estate Information Services, a Pennsylvania limited partnership. Judge Tauro subsequently awarded NREIS fees and costs, which also became an issue on appeal. *REBA v. NREIS (“REBA II”)*, 642 F. Supp. 2d 58 (2009), *vacated*, 608 F. 3d 110 (1st Cir. 2010).

17. For a more detailed account of this ongoing litigation, see summaries of the procedural history contained in the First Circuit Court of Appeals decision, *REBA v. NREIS*, 608 F. 3d 110 (1st Cir. 2010) and the SJC decision, *REBA –SJC*. This article does not purport to analyze all aspects of this litigation, such as NREIS's counterclaim under the Dormant Commerce Clause, the attorneys' fee award, or the positions of the various amici.

18. REBA's business activities are further described in the REBA -1st Circuit decision: “(1) obtaining valuations of a property and third-party reports such as tax certifications and flood reports; (2) obtaining title searches from a third-party vendor; (3) drafting the settlement statement; (4) scheduling the closing with a Massachusetts attorney who will attend and transmitting the lender's documents to that attorney for the closing; (5) disbursing settlement funds, held by NREIS in its own bank account until the mortgage has been executed by a borrower; and (6) ensuring that the transaction documents were completed properly and properly recorded.” *REBA – 1st Cir.*, 608 F. 3d at 116.

19. *REBA I*, 609 F. Supp. 2d at 136. REBA originally filed the action in state court requesting both declaratory and injunctive relief. NREIS responded by removing the action to federal court and filing a counterclaim. *Id.* at 137.

20. *Id.* at 141-42.

21. *Id.* at 143.

22. *Id.* at 143-44, citing Mass. R. Prof. C. 5:7(b) and cmt. 9 (expressly listing issuance of title insurance as a “law-related service” which does not constitute the practice of law).

23. *Id.* at 144. Judge Tauro subsequently awarded NREIS fees and costs, which also became an issue on appeal. *REBA v. NREIS (“REBA II”)*, 642 F. Supp. 2d 58 (2009).

24. *REBA v. NREIS*, 608 F. 3d 110 (1st Cir. 2010).

25. *Id.* at 118.

26. *Id.* at 119-20.

27. *REBA v. NREIS*, 459 Mass. 512 (2011).

28. *Id.* at 514, 537.

29. *Id.* at 537.

30. *Id.* at 522.

31. *Id.* at 519, 520 n.12. For examples of REBA's support for conveyancing as an integrated legal activity, see Brief filed November 17, 2010 in *REBA-SJC* by plaintiff-appellant REBA, at 21; see also a recent Complaint filed by REBA against another entity which it believes is engaged in unlawful practice, *REBA v. National Loan Closers, Inc.*, Civ. No. 12-1609 (Suffolk Sup. Ct. April, 2012), Complaint Paragr. 2. The SJC clearly rejected that approach, concluding that the “talismanic invocation of the word ‘conveyancing’ is not sufficient to require that all of [the discrete real estate closing activities] be performed by or under the supervision of an attorney.” *REBA-SJC*, 459 Mass. 512, 520 (2011)..

32. *Id.* at 520.

definition in Massachusetts of what constitutes legal practice,³³ the SJC proceeded to categorize the activities inherent in a real estate closing as follows:

- a. Tasks Generally Not the Practice of Law³⁴
 1. Conducting title examinations;
 2. Preparing title abstracts and reports;
 3. Ordering title examinations and abstracts;
 4. Obtaining public records and third party reports;
 5. Drafting settlement statements and mortgage related forms for others' use at closings;
 6. Reviewing closing documents for valid execution;
 7. Delivering closing documents to the appropriate Registry of Deeds;
 8. Disbursing mortgage funds;
 9. Providing title insurance policies and commitments;
 10. Identifying title defects and encumbrances.
- b. Tasks Clearly the Practice of Law
 1. Rendering a legal opinion on the marketability of title;
 2. Drafting real property deeds for others' use;
 3. Directing and managing the enforcement of legal claims;
 4. Participating in closings involving real property conveyances.
- c. Tasks Which Might be Practice of Law
 1. Clearing title;
 2. Drafting and preparing documents, other than real property deeds, for others' use at closings;
 3. Conducting a post-closing "rundown" to ensure no new encumbrances;
 4. Clearing title defects.

33. *Id.* at 517-18.

34. *Id.* at 521-36.

35. See *REBA – SJC*, 459 Mass. at 518 ("custom and practice may play a role in determining whether a particular activity is considered the practice of law"), citing *Lowell Bar Assoc. v. Loeb*, 315 Mass. 176 (1943). The SJC makes six other similar references to tradition in its opinion, including that corporations have "long issued" title insurance; similarly that such non-lawyer title work is "long-standing custom and practice;" that attorney involvement at closings was both "common" and "long-standing practice;" that such attorney involvement is "established practice;" and that the scope of legal practice is shaped by "practices of the community," again citing *Loeb*.

36. *REBA-SJC*, 459 Mass. 512, 528 (2011).

37. *Id.* at 532.

38. Following receipt of the SJC's analysis, the First Circuit remanded the case to the Federal District Court for more factual development of the record. Judgment entered December 14, 2011, No. 09-1809 (1st Cir. 2011). Note that

As this breakdown makes abundantly clear, the SJC's choice of a fact-based approach to the UPL statutes prevents bright line categorization.

The SJC frequently invoked the Commonwealth's history with the practice of law frequently in reaching its responses to the First Circuit's certified questions. The court repeatedly cited "custom and practice" as key factors in the court's assessment, not just of NREIS's closing activities, but also of the practice of law more generally.³⁵ Interestingly, the court did so in support of both sides of the debate. On the one hand, the SJC defined issuance of title insurance policies as outside the ambit of the practice of law given the long custom of non-lawyer corporations providing such services.³⁶ On the other hand, the court was just as adamant that the state's tradition of attorney involvement at real estate closings rendered that issue beyond dispute.³⁷

The court has left the litigants and the federal courts without definitive precedent to apply in construing the Commonwealth's UPL statutes in the pending litigation. In calling for a fact-based inquiry, the SJC has encouraged the parties and the judges to interpret NREIS's activities in the context of the state's historical experiences with lay practice and industry custom. However, to the extent that the SJC's UPL precedents offer little predictive guidance, the litigants face additional expense and delay as the case is remanded to the federal district court for further discovery, potential trial, and the attendant risks of unknown outcomes.³⁸

In addition, the court has failed to correlate its professed goal of protecting the public welfare with its "custom and practice" standard.³⁹ The experience from other states suggests that consumers might well elect to have more choice in the marketplace.⁴⁰ Indeed the court in *REBA-SJC* acknowledged the experience of other states and a recent empirical study of the consequences of lay conveyancing which found no material evidence of consumer harm, but declined to follow that path.⁴¹

Whether these disputes over lay practice could be resolved more efficiently and predictably is an open question. However, the Commonwealth has a rich UPL history which provides important data upon which to judge alternative approaches to these issues. As will be developed more fully in subsequent sections, attempts to resolve the UPL debate by the legislative and executive branches, as well as by business and bar leaders, have complemented the courts' decision-making at various junctures in Massachusetts's past. Knowledge of that history would help inform future efforts to address UPL issues.

the litigation has been re-assigned to Judge Richard G. Stearns. In addition, Judge Stearns denied REBA's Motion to transfer the current remanded litigation back to state court. Order dated March 19, 2012, No. 1:07-cv-10224 (D. Mass. 2012). As this Article is released for distribution, the parties are engaged in further pre-trial proceedings, with a discovery deadline of October 22, 2012. Order dated July 10, 2012, No. 1:07-cv-10224 (D. Mass. 2012).

39. *Id.* at 517, citing favorably *Loeb*, 315 Mass. at 176.

40. The Arizona experience is instructive. There, the state's highest court ruled that title insurance companies and real estate brokers were impermissibly engaged in the practice of law. Following a successful initiative effort, the popular vote demonstrated that citizens resoundingly approved a broad role for lay real estate brokers in conveyancing. The Arizona experience is well described in *JOHNSTONE AND HOPSON, JR LAWYERS AND THEIR WORK* (1947) at 170; *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz. 76 (1961), *rehearing*, 91 Ariz. 293 (1962); *ARIZONA CONSTITUTION, ARTICLE 26, §1* (effective Nov. 26, 1962).

41. *REBA-SJC*, 459 Mass. 512, 532 (2011).

II. THE HERITAGE OF CO-EXISTENCE: LAWYER AND LAYMAN

Until the twentieth century, the practice of law in Massachusetts was far from protected turf. Both traditionally trained lawyers⁴² and laymen,⁴³ who often functioned with significant legal literacy,⁴⁴ practiced law. Indeed, the Massachusetts Legislature enacted a number of laws after the Revolution that protected the rights of laymen to appear in court without being admitted to practice. In 1785, Massachusetts recognized the right of litigants to proceed pro se, as an alternative to being represented: “the parties may plead and manage their own causes personally, or by the assistance of such counsel as they shall see fit to engage.”⁴⁵

Then, on March 6, 1790, the legislature passed a new statute which not only reconfirmed the propriety of pro se litigants, but also provided that any person of acceptable moral character could represent a party, regardless of admission to the bar. The Preamble made clear that the legislative intent was to support a dual system of representation: that by lawyers admitted to the Bar, and that by laymen acting as agents under powers of attorney.⁴⁶ The Act protected

42. Harvard Law School is considered the oldest, continually operating law school in the country, having opened its doors in 1817. See <http://www.law.harvard.edu/about/history.html> (last visited June 11, 2012). However, as early as 1781, the SJC had outlined bar admission criteria: 1. taking of an oath; 2. proof of good character; 3. evidence of “sufficient Learn[ing]”. HOLLIS BAILEY, ATTORNEYS AND THEIR ADMISSION TO THE BAR OF MASSACHUSETTS 31 (1907).

43. In Part II, this article refers to “layman/laymen” intentionally. Boston University Law School claims that it graduated the first woman lawyer in 1881, who later was admitted to practice, Lelia Josephine Robinson. See <http://www.bu.edu/today/2005/bu-graduated-the-first-woman-lawyer-in-massachusetts> (last visited June 11, 2012). The first Massachusetts law school devoted exclusively to training women lawyers was the Portia Law School established in 1908 (now New England Law—Boston). BRINK, *supra* note 3 at 11.

44. BILDER, *supra* note 3.

45. Act Regulating The Admission of Attorneys, ch. 23, s. 2, 1784-1785 Mass. Acts 475, 476 (1889 rep.) (October Session, 1785) (first printed as ch. 5, 1785 Mass. Acts 318, 319, available at <http://www.heinonline.org.proxy.bc.edu/HOL/Page?handle=hein.ssl/ssma0275&id=1&collection=ssl&index=ssl/ssma>). Until 1935, the Massachusetts Legislature continued to reaffirm the right of non-lawyers to represent a litigant. See Mass. Rev. Stat. tit. 1, ch. 88, §27 (1836); Mass. Gen. Stat. 1869 ch. 121 §36; Public Statutes of Massachusetts ch. 159, §41 (1882); Revised Laws of the Commonwealth of Massachusetts, ch. 165, §47 (1902); An Act Relative To The Unauthorized Practice Of Law, ch. 346, §2, 1935 Mass. Acts 388, 389. The 1785 provision also capped the number of attorneys the parties could engage to manage their matters at two and included the criteria for bar admission, including an oath. *Id.*, ch. 23, §2. Subsequently, the SJC construed the portion of the 1785 Act which regulated bar admission strictly to prohibit a lawyer admitted elsewhere, but who then moved to Massachusetts, from collecting a fee where he had not been admitted to practice in the Commonwealth. *Ames v. Gilman*, 51 Mass. 239 (1845). For a description of administration of the attorney’s oath, see POUND, *supra* note at 148-59. While Massachusetts’s colonial legal history is beyond the scope of this Article, the right of a litigant to proceed pro se had been established during that period. See St. 1701-02, ch. 7 §1, p. 467, which provided that: “the plaintiffe [sic] or defendant in any suit may plead or defend his cause by himself in his proper person...”.

46. Acts & Resolves, St. 1789, ch. 58:

Preamble: Whereas it has been represented to this Legislature, that doubts have arisen in some of the Courts of Judicature within this Commonwealth, respecting the right of persons to constitute Attornies [sic] in certain cases, other than those which have been admitted in the usual form prescribed by Law, For the removal of which doubts,

Text: Be it enacted by the Senate and House of Representatives in

the rights of lay advocates, providing:

That every Citizen be & hereby is authorized to appear in any Court, and before any Tribunal; Judge, Justice of the peace, or Magistrate, to prosecute and defend his suit or action, by himself or by any person of a decent and good moral character whom he shall call to his aid, or appoint for that purpose...⁴⁷

As will be seen in Part III, *infra*, this provision remained good law until 1935.⁴⁸ As long as the bar and the courts lacked final say on who could practice law, there could be no meaningful unauthorized practice.⁴⁹ Parties, not the courts, decided who would represent them.⁵⁰

III. BIRTH OF UNAUTHORIZED PRACTICE

By the beginning of the twentieth century, a variety of forces gave momentum to lawyer organization. Legal historians⁵¹ and bar association studies⁵² have identified catalysts which coalesced to enhance professionalism of the bar. Specialization became increasingly common as lawyers embraced new “law as business”⁵³ pressures, while business corporations and administrative agencies were on the

General Court assembled and by the authority of the same: That every Citizen be & hereby is authorized to appear in any Court, and before any Tribunal; Judge, Justice of the peace, or Magistrate, to prosecute and defend his suit or action, by himself or by any person of a decent and good moral character whom he shall call to his aid, or appoint for that purpose; and that any person of such decent and good moral character, who shall produce in Court, a Power or Letter of Attorney specially for that purpose, from any person whomsoever, shall have full authority, though his principal be absent, to prosecute and defend any suit or matter, wherein his principal shall be concerned, to final judgment and execution; & to plead, implead or manage the same case, as fully as if such person so authorized was an Attorney of such Court, and admitted and sworn in usual form as prescribed by Law, and agreeably to the rules of such Court.

An Act Authorizing Particular Persons in Certain Cases, To Prosecute And Defend Suits At Law, ch. 58, 1788-1789 Mass. Acts 511 (1894 rep.) (January Session, 1790) (first printed as ch. 31 1790 Mass. Acts 71, available at <http://www.heinonline.org.proxy.bc.edu/HOL/Page?handle=hein.ssl/ssma0302&id=1&collection=ssl&index=ssl/ssma>).

47. *Id.*

48. See Section III, *infra*. See also Rev. Stat. 1836 ch. 88, §27; Gen. Stat. 1869 ch. 121, §36; Pub. Stat. 1902 ch. 165, §47 (continuing Massachusetts practice of non-attorney representation); and An Act Relative To The Unauthorized Practice Of Law, ch. 346, §2, 1935 Mass. Acts 388, 389 (ending authorized lay practice in 1935). *But see* Opinion of the Justices, 279 Mass. 607, 611 (1932) (which called into question the constitutionality of such laws to the extent that St. 1789, ch. 58 encroached on the judicial prerogative to define practice), *infra*.

49. See generally CHARLES WOLFRAM, MODERN LEGAL ETHICS 824 (1986) (“Without a limited admission process, obviously, there could be no meaningful unauthorized practice system. Similarly, without a meaningful unauthorized practice doctrine, there could be no meaningful restrictions on admission.”).

50. Given that the thrust of this article is on the ability of non-lawyers to practice law, it is beyond the scope of this piece to analyze the state of the legal profession in Massachusetts. Several works set out the standard historiography by describing scathing public outcry against “pettifoggers.” See generally 2 CHROUST, *supra* note 2 at 28; WARREN *supra* note 3 at 218-20; GRISWOLD, *supra* note 3 at 15-16.

51. See generally HURST, *supra* note 3 at 319-322; DEREK DENCKLA, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and ethical Parameters*, 67 Ford. L. Rev. 2581, 2583-86 (1999).

52. See, e.g., BRINK, *supra* note 3.

53. See JULIUS COHEN, THE LAW: BUSINESS OR PROFESSION? (1916). See also

rise.⁵⁴ Elsewhere active bar associations began lobbying for restrictions on unauthorized practice. Frequently cited as the first organized effort to restrict lay activity, the New York County Lawyers Association began its campaign in 1914 to limit competition; the American Bar Association followed suit in 1930, forming a standing committee on unauthorized practice.⁵⁵

A. The Prelude

By World War I, Massachusetts was ready to step hesitantly into the unauthorized practice of law business.⁵⁶ The first evidence of a concerted effort to limit legal practice came in 1916, but the resulting legislation limited only certain business corporations from practicing law.⁵⁷ Thus the new statute was far from a comprehensive bar preventing all UPL.⁵⁸

The ban did not prohibit all corporations from practicing law, but rather explicitly exempted a host of business entities from its scope. For example, certain bank and trust companies achieved express legislative permission to provide “legal information or legal advice with respect to investments, taxation, or an issue or offering for sale of stocks, bonds, notes or other securities or property.”⁵⁹ The legislature carved out other exemptions, recognizing that public service corporations, non-profit organizations, collection agencies, insurance businesses, and civil legal aid societies should be permitted to continue to engage in legal work.⁶⁰ Newspapers’ “legal advice” columns were also given the green light. Perhaps the most notable

legislative exemption dealt with integral aspects of real estate conveyancing. The Act did not apply to entities “lawfully engaged in the examination and insuring of titles to real property.”⁶¹

One wonders whether the 1916 compromise bill actually provided the Massachusetts bar any meaningful protection.⁶² Indeed, no reported cases can be found that interpreted this statute until it was next amended in 1935.⁶³ However, the legislature proved that it could take the lead in defining which stages of conveyancing could be handled by lay businesses—a leadership role which the judiciary did not immediately challenge.

Passage of the 1916 statute also deserves our attention for what it did not accomplish. As the statutory history demonstrates, the House of Representatives envisioned a much more sweeping provision than what was ultimately adopted in Conference Committee.⁶⁴ Indeed, the original House version of the Act, titled “An Act to Prohibit the Practice of Law by Persons and Corporations Not Regularly Licensed,” called for significantly greater restrictions on the unauthorized practice of law. Specifically, it would have established criminal penalties for a layperson (including someone operating with a power of attorney) to practice law.⁶⁵ Given the sparse legislative history available, the exact reasons for defeat of this broader UPL provision will remain a mystery. However, we do know that such a statute would not be enacted in the Commonwealth until 1935, a history to which we now turn.

THOMAS MORGAN, *THE VANISHING AMERICAN LAWYER* (2010) (recent critique which suggests that the concept of law as a profession is self-serving protectionism).

54. HURST, *supra* note 3 at 309-11; REGINALD HEBER SMITH, *JUSTICE AND THE POOR* 90-91, 96-97 (1919); Frederick Hicks and Elliott Katz, *The Practice of Law by Laymen and Lay Agencies*, 41 Yale L. J. 69 (1931).

55. Denckla, *supra* note 51, at 2583-84.

56. BRINK, *supra* note 3, at Chapter II, last 3 pages. However, Massachusetts courts had approved unauthorized practice prosecutions in another profession—midwifery— as early as 1907. See *Commonwealth v. Porn*, 196 Mass. 326 (1907) (upholding conviction of a trained midwife for practicing medicine without a license over constitutional challenge). See generally Lawrence Friedman, *Freedom of Contract and Occupational Licensing 1890-1910: A Legal and Social Study*, 53 Cal. L. Rev. 487, 516 (1965). Furthermore, the SJC had enacted rules governing both bar admission and conduct of disbarred lawyers. It is beyond the scope of this article to analyze the provisions governing bar admission and discipline. *But see* Rev. St. 1902 ch. 165 §45, construed in *Casey v. Wait*, 229 Mass. 200 (1918) (denying relief to a disbarred attorney who sought to act as counsel).

57. Act To Prohibit The Practice Of Law By Corporations, ch. 292, §1, 1916 Mass. Acts 308 provided in relevant part: “It shall be unlawful for any corporation to practice or appear as an attorney-at-law for any person other than itself in any court in this commonwealth or before any judicial body or to hold itself out to the public or to advertise as being entitled to practice law; it shall further be unlawful for any corporation to draw agreements, or other legal documents not relating to its lawful business, or to draw wills, or to practice law.” The statute provided criminal penalties, including a corporate fine not to exceed \$1000 and individual constituent liability for a misdemeanor punishable by a fine not to exceed \$500.

58. Analyzing similar acts in other jurisdictions, contemporary observers viewed these statutes as attempts to prevent erosion of the sacred attorney-client relationship. Courts reasoned that a corporation’s attorney would be beholden to his employer (the corporation) rather than to the true client, thus prompting the need for provisions like the 1916 Act. See generally, Note, *What Constitutes the Practice of Law?*, 31 Harv. L. Rev. 886 (1918) (and cases cited therein).

59. St. 1916, ch. 292, §1. In addition, the Act did not prohibit a corporation from employing in-house counsel or from retaining litigation counsel. *Id.*, at §3.

60. *Id.*, at §4.

61. *Id.*

62. Shortly before passage of the more sweeping prohibitions against UPL in 1935, bar leaders decried that the existing laws “give the corporations great latitude,” since the 1916 Act expressly permitted title examination and insurance companies, newspaper advice columns, and other business efforts which are clearly “practicing law, and yet under that statute [MASS. GEN. LAWS ANN. ch. 221, §47] they have a right to do it”). Remarks of the President of the Massachusetts Bar Association, *Discussion of the Activities of Banks and Trust Companies and Other Corporations*, 16 Mass. L. Q. 28-29 (1930-31). *In accord*, Remarks of Nathan Avery, *Discussion of the Activities of Banks and Trust Companies and Other Corporations*, 16 Mass. L. Q. 15 (1930-31) (noting the “weakness” of the 1916 legislation and proposing a new legislative initiative).

63. See MASS. GEN. LAWS ANN. ch. 221, §46 (West 2012) (no cases cited which construed the statute before the 1935 amendments). Creditors’ National Clearinghouse, Inc. v. Bannwart, 227 Mass. 579 (1917), is not to the contrary. There, the SJC affirmed a jury award against a Rhode Island debt collection corporation which had tried to collect an annual fee from one of its subscribers in a non-statutory, contract action. The court rejected the corporation’s grounds for appeal, finding that the collection agency had misrepresented itself as legally qualified to practice law in Massachusetts. *Id.* at 583. Cf. *Commonwealth v. Grant*, 201 Mass. 458 (1909) and *Browne v. Phelps*, 211 Mass. 376 (1912) (both confirming impropriety of misrepresenting oneself as a lawyer admitted to practice in Massachusetts under Rev. L. ch. 165, §45 (1902)).

64. See An Act to Prohibit the Practice of Law by Persons and Corporations Not Regularly Licensed, House Bill No. 1383 (March, 1916); see also House Bill No. 1911, An Act to Prohibit the Practice of Law by Corporations (substituted for House Bill, no. 1383) (1916).

65. House Bill No. 1383 contained the following provisions barring practice by laymen:

Section 1: It shall be unlawful for any person to practice or appear as an attorney-at-law or as attorney and counselor-at-law for another in a court of record in this Commonwealth or in any court in the county of Suffolk, or to make it a business to practice as an attorney-at law or as an attorney and counselor-at-law for another in any of said courts, or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, or to assume to be an attorney or counselor-at-law, or to assume, use or advertise the

B. Defining the Balance of Power

1. *The Opinions of the Justices*

While the House's efforts in 1916 to pass a comprehensive ban on lay practice came to naught, the seeds for change had been sown. Subsequent legislative sessions saw renewed efforts to restrain lay practice.⁶⁶ Then, as the Depression took its financial toll, the pressures to preserve business for lawyers proved overwhelming.⁶⁷ If the legislature had its way, only individuals licensed to practice would henceforth be permitted to engage in legal work.

By 1931, the Massachusetts House had received several petitions from its members seeking legislation aimed at reining in lay competition.⁶⁸ Certain House members urged the legislature to limit lay practice generally, or by specific players.⁶⁹ The House's efforts to restrict all lay practice failed in the Senate,⁷⁰ as did amendments introduced in both houses designed to further restrict corporations from practice.⁷¹

The House remained undeterred and considered similar legislation in subsequent legislative sessions. House Bill No. 1433, entitled

title of lawyer or attorney and counselor-at-law or attorney-at-law, or counselor-at-law, or attorney, or counselor or attorney and counselor or equivalent terms in any language, in such manner as to convey the impression that he is a legal practitioner of law, or in any manner to advertise that he either alone or together with any other persons or person has, owns, conducts or maintains a law office or law and collection office, or office of any kind for the practice of law, without having first been duly and regularly licensed and admitted to practice law in the courts of record of this commonwealth. Any person violating the provisions of this section is guilty of a misdemeanor, and it shall be the duty of the district attorneys to enforce the provisions of this section and to prosecute all violations thereof.

Section 2: If any attorney knowingly permits any person not being his general law partner or a clerk in his office, to sue out any process or to prosecute or defend any action in his name, except as authorized by this section such attorney, and every person who shall so use his name is guilty of a misdemeanor. Whenever an action or proceeding is authorized by law to be prosecuted or defended in the name of the people, or of any public officer, board of officers or municipal corporation, on behalf of another party, the attorney-general or district attorney, or attorney of such public officer or board or corporation may permit any proceeding therein to be taken in his name by any attorney to be chosen by the party in interest.

66. See, e.g., House Bill No. 1624, entitled "Bill Relating to the Unauthorized Practice of Law and Prohibiting Certain Acts and Practices" which passed the House (May 19, 1931), but was rejected by the Senate (May 21, 1931).

67. See Hicks and Katz, at *supra* note 54, citing two reports of economic distress of the Massachusetts Bar: 1. Over 200 replies were purportedly received to an advertisement from a small Boston corporation for a collection attorney to be paid a minimal fee, including letters from graduates of top law schools with significant experience, reported in John Peterson, *A Picture of Current Supply and Demand for Employment*, 16 MASS. L. Q. 37 (1931); and 2. An informal assessment of the annual income of Boston lawyers indicated that some 50% did not net \$3,000 a year after expenses, reported in John Bantry, *A Newspaperman's View of the Profession*, 16 MASS. L. Q. 43, 44 (1931). But see HURST, *supra* note 3, at 321-22 (noting the lack of empirical evidence that lay practice was decreasing lawyers' business, citing studies in New Haven (1934), Wisconsin (1934), and Columbus, Ohio (1940) which failed to document widespread economic loss due to lay competition), and at 323 (noting coincidence between Depression and increased vigor of efforts to restrict UPL). In accord, Conference on *Law and Lawyers in the Modern World*, Address presented by Prof. Silas Harris, Ohio State University Law School, Afternoon Session, 15 U. CIN. L. REV. 176, 180 (1941) (concluding, based on Columbus study, that there is no evidence of any "general unauthorized practice of law").

"An Act Relative to the Unauthorized Practice of Law and Prohibiting Certain Acts and Practices," would also have provided stringent restrictions on lay practice. However, amendments to the original bill attempted to grant certain banks and trust companies permission to engage in the practice of law.⁷² While it passed the House, the Senate tabled the legislation and sought guidance from the SJC. On June 29, 1934, the Senate adopted an order requesting the SJC to answer certain questions regarding the constitutionality of the proposed legislation. The Senate's questions went to the heart of the separation of powers debate: was it constitutional under Article XXX of the Massachusetts Constitution for the legislature to enact provisions which either enabled or forbade lay individuals, associations, and corporations from practicing law?⁷³

On January 30, 1935, the SJC delivered its response in an opinion which attempted to define the inter-branch balance of power. The SJC made clear that it retained plenary superintendence powers over bar admission and lawyer performance: "It is inherent in the judicial department of government under the Constitution to control the practice of the law..."⁷⁴ The SJC cited rationales including

68. House and Senate Journal, 1931, pp. 61 and 205 (Marshall petition), 104 and 204 (Avery, et al. petition, accompanying House Bill No. 1579, prohibiting the unauthorized practice of law and certain other legal activities. See also House Bills Nos. 1579, and 1624 (1931).

69. State Representative Paul Dever, a Democratic powerbroker who would later be elected as Attorney General and then Governor, sought targeted limitations related to restricting advertising by lay fiduciaries for trusts and estate work. While his Bill did not pass, it was a creative effort to limit lay competition without explicitly forbidding lay practice. An Act Relative to Advertising that One is Competent or Authorized to Act as Administrator, Executor, or Trustee, House Bill No. 175 (1931), House and Senate Journal, 1931, 53.

70. In May 21, 1931, the Senate rejected House Bill No. 1624 (which had been substituted for House Bill No. 1579), An Act Relating to the Unauthorized Practice of Law and Prohibiting Certain Acts and Practices. Both Houses of the General Assembly had tried passing numerous amendments to save the legislation, but to no avail.

71. House and Senate Journal, 1931, at 990 (House passage of amended House Bill No. 1624), 1025 (Senate rejection). Then, in 1933, both Houses passed a bill bearing the same title, which carried the nickname, "the Bar Bill." However, that proposal reflected a legislative compromise, as it would have exempted many business entities from the scope of UPL, including allowing accountants to provide tax advice and to appear before the state Board of Tax Appeals, and permitting title examiners and insurers to practice. Governor Joseph Ely vetoed the bill, finding it "somewhat wide of the mark" of protecting the Bar and eliminating corporations from practice. See generally, "The Bar Bill" Relative to "The Unauthorized Practice of Law" as Vetoed by the Governor, As Amended in Accordance with his Suggestions and then Rejected by the House of Representatives, 18 MASS. L. Q. 22-27 (1932-33).

72. In the summer of 1934, the Senate tabled House Bill No. 1433 (1934), which had passed the House. The Senate then sought guidance from the SJC. See generally, *Massachusetts Rules Legislature Cannot Permit Practice of Law by Lay Agencies*, 1 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 3, Feb. 1935, at 1. That article described the legislature's failed attempts at passing UPL restrictions, noting that the 1934 effort to restrict lay practice had produced so many amendments to the original bill that the result actually would have increased practice by non-lawyers, particularly by banks and insurance companies. *Id.*

73. Opinion of the Justices, 289 Mass. 607, 608 (1935). The ABA's Committee on Unauthorized Practice dubbed the SJC's decision "an able opinion, of vital significance in defining the powers of court and legislature over the practice of law..." *Massachusetts Rules Legislature Cannot Permit Practice of Law by Lay Agencies*, 1 UNAUTHORIZED PRAC. NEWS, no. 3, Feb. 1935, at 1.

74. *Opinion of the Justices*, 289 Mass. at 612. See also Opinion of the Justices, 279 Mass. 607, 608 (1932) (instructing the legislature on the unconstitutionality

attorney expertise, fiduciary duties, professional responsibility, and the public welfare to support its view that the practice of law should reside exclusively in lawyers' hands. Since the courts were ultimately responsible for admitting and regulating lawyers, the SJC concluded that only the judiciary could define practice.

However, the SJC carved out a narrow role for the legislature: "While the judicial department cannot be circumscribed or restricted in the performance of these duties [i.e., defining practice, admitting lawyers to practice, and disciplining them], appropriate and essential assistance in discharging them may be afforded by the enactment of statutes."⁷⁵ The SJC conferred on the legislature limited power to forbid non-lawyers from conducting both litigation and transactional work. However, the legislature was barred from conferring the right to practice law. The SJC proposed that it would retain the final say on all practice matters and determine who could practice, while the legislature would be the courts' helpmate:

Legislation forbidding such practice of the law by corporations of associations, or by individuals other than members of the bar, would be within the competency of the General Court. It would tend to enhance the effectiveness of the judicial department. Crimes might be established for the infraction of prohibitions of such practice of the law. Civil remedies in equity or otherwise for the prevention of such infractions might be provided and made plain.

It would not be within the competency of the General Court to enact legislation designed to permit such practice of the law "by corporations or associations or by individuals other than members of the bar of the Commonwealth."⁷⁶

This bold assertion of power by the SJC stood in sharp contrast to the legislature's prior efforts to pass laws that permitted lay practice.⁷⁷

The SJC then applied its new allocation of duties to the specific legislation at issue. Given that the legislature could act only by prescription, the SJC deemed the proposed 1935 bill, which would have allowed lay advocacy by bank and trust companies, to be invalid as a legislative usurpation of power:

[E]nabling "any bank or trust company" ...to furnish

"legal information or legal advice with respect to investments, taxation, stocks, bonds, notes or other securities or property" transcends in some particulars the limits permissible to those not members of the bar and would comprehend, if stretched to its limits, a considerable practice of law.⁷⁸

Thus, as to the legislature's proposal to permit fiduciary institutions to practice law, the SJC would have none of it. In contrast, the court expressed approval of those portions of the bill which forbade corporate practice.

The court relied on its inherent judicial powers and its central role in the administration of justice to decree itself the final arbiter of what constitutes unauthorized practice.⁷⁹ To the extent that the legislature in posing certified questions, invited the court to establish clear ground rules, the SJC offered instead laundry lists of potentially contradictory items which it deemed the practice of law (e.g., conveyancing, provision of legal advice, preparation and execution of legal instruments) and which it did not (e.g., occasional drafting of simple deeds not as a business and for limited remuneration,⁸⁰ rendering civil assistance to the poor, title searches without more, accounting).⁸¹ Not only did the SJC's *Opinion* create an era of judicial dominance, but it declared invalid the legislative compromise between lawyers and banks and other fiduciaries which was at the heart of the 1934 bill. Moreover, that decision cast into doubt the legislature's 1790 law and the Commonwealth's long history of permitting lay practice.⁸²

2. *The Executive Branch Becomes a Player*

Contemporaneous pressures from quarters other than the legislature continued to mount. By 1930, the American Bar Association had organized a Committee on Unauthorized Practice, which began collecting from and disseminating to state and local bar associations relevant UPL information.⁸³ The Committee's mission could not have been clearer—"the elimination of the unauthorized practice of law"—and it enlisted the active support of local bar associations.⁸⁴ Massachusetts soon thereafter answered the call, as the local bar associations of Middlesex and Worcester Counties, Fall River, and the City of Boston formed Unauthorized Practice of Law Committees by 1935.⁸⁵ State-wide efforts followed suit when the Massachusetts Bar Association ("MBA")⁸⁶ and the state's newly elected Attorney

of proposed Senate Bill No. 322, entitled "An Act to Regulate the Correction of Answers to Bar Examination Questions," which would have allowed laymen to assist with grading bar examination answers). The SJC sent a clear message to the legislature as to the court's unfettered right to define practice, noting that no statute "can control the judicial department in the performance of its duty to decide who shall enjoy the privilege of practicing law." *Id.*, at 611; *see also* BRINK, *supra* note 3, Chapter II, at 5.

75. *Opinion of the Justices*, 289 Mass. at 612-13.

76. *Id.* at 612 (internal citations omitted).

77. An Act Authorizing Particular Persons in Certain Cases, To Prosecute And Defend Suits At Law, ch. 58, 1788-1789 Mass. Acts 511 (1894 rep.) (January Session, 1790), and accompanying text.

78. *Opinion of the Justices*, 289 Mass. 607, 615 (1935).

79. *Opinion of the Justices*, 289 Mass. at 613. *See generally* Allan Greenberg, *The Case Against Unauthorized Practice of Law*, 18 B.U. L. REV. 298, 300-301 (1938) (confirming national trend for state courts to invoke inherent powers of judiciary to define and regulate the practice of law).

80. *But see* REBA—SJC, 459 Mass. 512, 524 n.24, (2011), which rejected this aspect of the *Opinion of the Justices*, 289 Mass. at 615.

81. *Id.* at 614. *See generally* HURST, *supra* note 3, at 320 (noting that legal

history was "mostly ambiguous or silent" as to a clear definition of what constitutes the practice of law).

82. In 1941, the SJC relied upon its 1932 *Opinion of the Justices* in calling into question the propriety of practice by a layman who had only a power of attorney. *Gill v. Richmond Co-Op. Ass'n*, 309 Mass. 73, 75-76 (1941). There, the court suggested in dicta that the recently repealed MASS. GEN. LAWS ch. 221, §49 (1935) which had permitted lay practice since 1790, had not been good law since its 1932 *Opinion of the Justices*. *Id.* at 76. For more analysis of the efforts of layman William Graustein to practice law, *see* Part IV A. *Infra*.

83. Denckla, *supra* note 51, at 2584; Christensen, at 189-191.

84. *Foreword*, UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 1, Dec. 1934, at 1. One source has characterized the Unauthorized Practice News as "vigorously pro-lawyer and in its comments and in its selection of materials for reprinting reflects a strong advocate bias." QUINTIN JOHNSTONE AND DAN HOPSON, JR., *LAWYERS AND THEIR WORK*, *supra* note 40 at 190 (1967).

85. *Directory of Unauthorized Practice Committees*, 1 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 10, Sept. 1935, at 3, 8.

86. BRINK, *supra* note 3, at Chap. II, last 2 pages.

General, Paul Dever, joined the fray.⁸⁷

Massachusetts voters made Dever, a Boston Democrat, the youngest Attorney General in the history of the Commonwealth.⁸⁸ Shortly after being sworn into office in 1935, the Attorney General launched a special investigation to ascertain the effects of lay practice.⁸⁹ The study claimed that lay companies had milked Massachusetts residents of over \$1 million by improper debt collection.⁹⁰ Citing consumer protection, his staff made clear that “the unauthorized practice of law by laymen and corporations is going to be stopped.”⁹¹ The Boston Herald reported the dramatic results of the Attorney General’s active investigation and subsequent litigation:

Alarmed by the investigation, half the collection agencies of the state have gone out of business in Massachusetts since the attorney-general’s investigation began. In the same time, 13 of 25 automobile road service companies operating in the state have withdrawn from business and others have been sharply warned to cease giving legal advice or attempting to act in a legal capacity for clients.⁹²

The Office of the Attorney General filed petitions in equity against those who chose to stay in business, which invoked the inherent power of the judiciary to regulate law practice.⁹³

87. *Massachusetts Attorney General Institutes Wholesale Prosecution of Illegal Practitioners in that State: Investigation Reveals that Collection Agencies, Automobile Service Companies, and Others Take Large Toll Illegally*, 1 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 10, Sept. 1935, at 1. For subsequent reports on the Attorney General’s concerted effort to terminate lay practice, see *Inherent Power of Court to Curb Unlawful Practice Is Basis of Massachusetts Proceedings*, 2 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 2, Feb. 1936, at 17, 18 (commenting that the proceedings are analogous to disbarment actions); 2 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 9, Sept. 1936, at 97, 102-03 (reporting on speech made by Assistant Attorney General Goldman at a meeting of the 1936 ABA Unauthorized Practice Committee held in Boston which cited results of Attorney General Dever’s investigation: 456 illegal lay practitioners investigated; 191 cases filed, of which 132 were successful prosecutions; over 200 other targets evaded prosecution).

88. Early in his career, Dever had made rooting out UPL a personal campaign. After passage of the 1935 UPL statutes, he took credit, noting that he had been the Act’s initial architect some seven years before. He blamed lawyers in the Senate for difficulties in passage of the Act. He promised that, as Attorney General, he would continue to support the “so-called ‘practice of law’ act,” stating: “We will give way to no one in our drive. At no time will we pull our punches.” Remarks of Attorney General Paul Dever at the Law Society of Massachusetts Banquet on October 15, 1935 reported as *Drive on Banks’ Legal Practice*, BOSTON GLOBE, Oct. 17, 1935, at 21.

Dever later ran successfully for Governor of the Commonwealth and was elected by the greatest plurality at that time of any gubernatorial candidate at that time. He served as Governor from 1949-1953, making health care and services for children with special needs high priorities of his administration. Later he lost his bid for the Democratic Presidential nomination in 1952. However, he had sufficient national presence that he was chosen to give the keynote address at that year’s Democratic National Convention. Foreword, ADDRESSES AND MESSAGES TO THE GENERAL COURT, PROCLAMATIONS, PUBLIC ADDRESSES, OFFICIAL STATEMENTS AND CORRESPONDENCE OF GENERAL INTEREST OF HIS EXCELLENCY GOVERNOR PAUL A. DEVER, compiled by JOHN HENRY MORRIS AND J. LOUIS HERN (1952).

89. Paul A. Dever, *The Stand of the Attorney General of Massachusetts on Unauthorized Practice of Law*, 7 LAW AND SOC. J. 43, 44 (1936) (explaining that his office’s campaign against UPL drew its impetus from passage of the 1935 legislation and the SJC’s 1935 *Opinion of the Justices*).

90. *Id.*

Those lawsuits aligned the Attorney General’s crackdown with the courts’ role in the administration of justice. But it had a secondary advantage as well, as it shielded these actions from legislative meddling. The targets of his probe could not gain any meaningful relief by lobbying the legislature to save their businesses, where the litigation was not based on a statutory violation. As the ABA’s Committee on Unauthorized Practice noted in reviewing the SJC’s 1935 decision defining its role in the UPL debate:

Legislation attempting to define the practice of law or to prohibit the doing of certain acts which may constitute the practice of law is dangerous, undesirable and ineffective.

If history repeats itself, such legislation will always be burdened with exceptions in favor of lay practitioners. When these exceptions are enacted, the only way to eliminate them will be to assert later that they are, as the Massachusetts court says, an unconstitutional encroachment by the legislature upon the judicial department of the government. The Committee feels, therefore, that there is no good reason why the entire subject should not be dealt with exclusively by the judiciary.⁹⁴

91. *Dever Charges Public Robbed in Collections*, BOSTON HERALD, Aug. 30, 1935, at 1, 9 (late city edition), quoting Massachusetts Assistant Attorney General Maurice Goldman. The commentary laid bare the dual reasons for the Attorney General’s probe: 1. Protection of consumer debtors from being bilked by unscrupulous debt collection agencies; and 2. Protection of attorneys’ economic interests. On the latter point, Goldman was quoted as saying: “The situation was getting so bad that young lawyers getting out of law school found practically all the legal work which should normally go to them was being gobbled up by collection agencies, automobile road service companies and corporations.” See also *61 Collection Agencies Hit*, BOSTON GLOBE, Sept. 21, 1935, at 22 (discussing Dever’s drive to end the “collection racket”); *Injunctions in Massachusetts Are Putting Collections Agencies Out of Business*, 1 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 12, Nov. 1935, at 6 (reporting on successful litigation to enjoin collection agencies from practice and including a sample Order of Judgment, allegedly entered in a number of actions, which not only prevented such companies from practicing law, but also constituted a cease and desist order from conducting collection business); *Massachusetts Association Checks Notaries Who Were Misleading Foreigners*, 2 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 6, June 1936, at 62 (reporting on local bar associations’ actions to enjoin notaries from practicing law to prevent exploitation of local immigrants who might misperceive the role of lay notaries in the United States); *State Activities in Massachusetts to Combat Unauthorized Practice: Lecture Given By Ass’t. Att’y. Gen’l. Goldman for Att’y. Gen’l. Dever of Boston*, 2 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 9, Sept. 1936, at 102 (citing confluence of the SJC’s decision in *Opinion of the Justices*, 289 Mass. 607, and the legislature’s passage of Mass. Gen. Laws Ann. ch. 221, §46 (West 2012), as providing the “welcome mandate” for the Attorney General who undertook “the wholesale elimination of these [unauthorized law] practices”).

92. BOSTON HERALD, Aug. 30, 1935, at 9.

93. 2 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 9, Sept. 1936, at 103. The petitions filed in 1935, which reached the SJC in 1936 and which are discussed, *infra*, were each titled: “Information Invoking a Remedy to Protect the Courts and the Public.” See, e.g., actions brought in the SJC in equity to restrain lay practice: *In re Maclub*, 295 Mass. 45 (1936); *In re Walter F. Lord, Inc.*, No. 60149 (1936), discussed in *Decree Against Collections Agencies in Massachusetts*, 3 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 1, Jan. 1937, at 6, 7, and *In re Astin d.b.a. Fall River Bonded Collection Agency*, No. 60145 (1936) (enjoining lay practice); and discussion *infra*.

94. 1 UNAUTHORIZED PRAC. NEWS (A. B. A. Comm. On Unauthorized Practice

Indeed, Massachusetts's experience with UPL legislation proves the Committee's point. Previous legislative efforts in 1916 and in 1934 had carved out exceptions for certain banks and trust companies to continue to engage in lay practice. However, the SJC rejected those legislative attempts which encroached on its judicial power to define practice.⁹⁵

3. The Enactment of the 1935 UPL Laws

With the SJC's directions in hand and a financial crisis to overcome,⁹⁶ the Legislature finally passed a comprehensive UPL statute in 1935.⁹⁷ For the first time, the new law criminalized laypersons' attempts to engage in practice, except when proceeding pro se.⁹⁸ The provision prohibited a broad range of conduct as the practice of law: "[N]o individual, other than a member, in good standing, of the bar of this commonwealth shall practice law, or, by word, sign, letter, advertisement or otherwise, hold himself out as authorized, entitled, competent, qualified or able to practice law..."⁹⁹ That Act overturned a nearly 150-year tradition of lay practice in Massachusetts by repealing chapter 58 of the law enacted in 1790.¹⁰⁰ Good moral character and a general power of attorney no longer sufficed as a ticket to practice.¹⁰¹

Furthermore, the Legislature revamped the 1916 provision barring business entities from practicing law to broaden its coverage and to delete the numerous exemptions which the SJC had called into question in 1935.¹⁰² In addition, the new provisions allowed

for private enforcement by either bar associations or three or more attorneys, as well as by the Attorney General.¹⁰³

The new UPL statutes and the subsequent lawsuits received generally favorable press. Attorney General Dever took credit for initiating the UPL-related bills while still in the legislature, and promised his agency would actively pursue prosecutions.¹⁰⁴ The Boston newspapers gave ample coverage to the prosecutions under the "practice of law" Act.¹⁰⁵ However, there were some naysayers. Some Boston lawyers attempted to discredit the Attorney General's UPL campaign as a "political gesture,"¹⁰⁶ a charge Dever vigorously opposed.

IV. THE COURTS' ROLE IN IMPLEMENTING THE UPL STATUTES

How the new UPL restrictions would affect the delivery of legal services in Massachusetts remained to be seen. While pressures to determine the scope of lawyers' monopoly existed beyond the judicial forum,¹⁰⁷ this section will address how the Massachusetts courts interpreted the newly minted UPL statutes.

A. The SJC's Response to the 1935 UPL Statutes

Only a year after passage of the 1935 statutes, three cases brought by the Attorney General presented the SJC in rapid succession with opportunities to delineate the scope of the practice of law in light of the new statutes. Each, however, raised the UPL issues obliquely, since these three cases concerned whether lay intermediaries should

of the Law, Chicago, Ill.), no. 4 (Mar. 1935), at 8, referencing the Opinion of the Justices, 289 Mass. 697 (1935); see also 3 UNAUTHORIZED PRAC. NEWS (A. B. A. Comm. On Unauthorized Practice of the Law, Chicago, Ill.), no. 3 (Jan. 1937) (expressing similar views regarding proposed ABA support for new law restricting lay practice before administrative agencies and advertising by banks and fiduciaries for trust and estate work); Greenberg, *supra* note 73, at 300, 314 (extolling the courts' assumption of power in UPL matters); Hicks and Katz, *supra* note 54, at 97 (predicting that proposed bill which would restrain advertising by lay entities for fiduciary services would fail due to anticipated extensive lobbying from corporate fiduciaries). But see HURST, *supra* note 3, at 319-321 (noting that states continued to try to enact UPL legislation during the 1930's).

95. *Opinion of the Justices*, 289 Mass. 607, 616 (1935).

96. See generally, Frank Grinnell, *Why Do So Many People Want To Be Lawyers: Some Evidence as to the Economic Conditions of the Profession*, 16 MASS. L. Q. 36 (1930-31) (noting a lack of legal business in Massachusetts "to support the flood of lawyers"); 9th Report of the Judicial Council of Massachusetts, 19 Mass. L. Q. 10-11 (1933-34) (decrying the overcrowded bar).

97. Act Relative to the Unauthorized Practice of Law, ch. 346, 1916 Mass. Acts 389 (codified as amended at MASS. GEN. LAWS ch. 221, §§46-46B (1935)). The provisions barring corporate and associations from lay practice are found in MASS. GEN. LAWS ch. 221, §46; those barring individuals from lay practice are found in MASS. GEN. LAWS ch. 221, §46A.

98. *Id.* at §2.

99. MASS. GEN. LAWS ch. 221, §46A.

100. Act Authorizing Particular Persons in Certain Cases, To Prosecute And Defend Suits At Law.

101. For a discussion of the efforts of one lay advocate to continue to practice without a license, see discussion of William Graustein litigation, part IV. A, *infra*.

102. *Opinion of the Justices*, 289 Mass. 607 (1935).

103. MASS. GEN. LAWS ch. 221, §46B.

104. Remarks of Attorney General Paul Dever at the Law Society of Massachusetts Banquet on October 15, 1935, at 21.

105. See generally, *Court Order Hits Collection Firms*, BOSTON GLOBE, Oct. 2, 1935, at 9; *Drive on Banks' Legal Practice*, at 21; *High Court Decides Against 20 Agencies*, BOSTON GLOBE, Oct. 9, 1935, at 7; *61 Collection Agencies Hit*, at

22; *Move Today On Bill Collectors*, BOSTON GLOBE, Nov. 8, 1935, at 17; *Says Undertakers Are Practicing Law*, BOSTON GLOBE, Dec. 17, 1935, at 11; *Warning to Notaries and Justices Not Lawyers*, BOSTON GLOBE, Nov. 30, 1935, at 2; *37 Collection Agencies Named*, BOSTON GLOBE, Dec. 21, 1935, at 15; *59 Collection Agencies Hit*, BOSTON GLOBE, Oct. 16, 1935, at 36.

106. Remarks of Attorney General Paul Dever and Assistant Maurice Goldman at the Law Society of Massachusetts Banquet on October 15, 1935, at 21 (suggesting that a law firm had sent letters to collection agencies doing business in the state, advocating that they ignore the Attorney General's prosecution efforts and noting that other lawyers had written letters to the editors of local papers objecting to the 1935 Act as adversely affecting access to justice for the poor).

107. Forging a working compromise between lay practitioners and the Bar proceeded on many distinct tracks. For example, administrative agency practice became an area ripe for lay challenge to the bar's purported monopoly. See BRINK, *supra* note 3, Chap. II; see also Brief in Favor of the Proposal, Submitted at the Request of the Massachusetts Bar Association by Edward O. Proctor and Mayo A. Shattuck, *In the Matter of the Proposal for the Complete Organization of the Bar in Massachusetts as a Self-Governing Body by Rule of Court*, No. 10-400 (April 14, 1947) ("The growing importance of numerous administrative agencies, where lawyers are not welcomed and laymen regularly appear, accentuates the need for solution of this problem [i.e. UPL]").

On the ability generally of lay advocates to appear before a variety of state and federal agencies, see, e.g., MASS. GEN. LAWS ANN. ch. 151A, §37 (West 2012) (unemployment compensation hearings); MASS. GEN. LAWS ANN. ch. 58A, §8 (West 2012) and Rules of the Massachusetts Appellate Tax Board which permitted lay practice before the agency until January 31, 1951 (state tax administrative proceedings) (on file with author); 42 U.S.C.A. §406(a)(1) (Social Security disability hearings). For a recent critique of unregulated lay practice in Social Security disability hearings, see Drew Swank, *Non-Attorney Social Security Disability Representatives and the Unauthorized Practice of Law*, 36 S. Ill. Univ. L. J. 223 (2012). See also Unauthorized Practice Handbook (eds. Justine Fischer and Dorothy Lachmann) (1990) at 89-94, 163-73; 3 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 1, Jan. 1937, at 4 (urging ABA to encourage administrative agencies to adopt internal procedures regulating lay practice in lieu of statutory change).

In addition, various bar groups, led by the American Bar Association ("ABA") in 1937, entered into private Statements of Principles with other professional and

be enjoined from interfering with the sacrosanct attorney-client relationship to protect clients' rights to independent, professional legal judgment.¹⁰⁸

First, in *In re Maclub of America*, Attorney General Dever asked the Court to determine whether Maclub, a Massachusetts automobile association which offered to provide attorneys to members involved in vehiclerelated legal actions, could be enjoined.¹⁰⁹ Maclub maintained a list of lawyers willing to handle such actions on behalf of Maclub's members and paid the attorneys. Individuals, who paid an annual membership fee ranging from \$10-\$12, remained free to hire their own counsel; however, they owed no additional fees if they chose to have a Maclub-retained attorney represent them. While Maclub had a legal department, outside counsel handled the members' litigation. On the record before him, the single Justice of the SJC who initially heard the matter found that there was no violation of the state's new UPL statute, chapter 221, section 46, unless those facts required a finding of violation as a matter of law, and reported the case to the full court for resolution.¹¹⁰

The SJC interpreted the facts quite differently and granted the Attorney General his requested relief. After announcing that the new statute governed,¹¹¹ the full court reviewed the services being performed by Maclub and concluded that Maclub was engaged in the business of law:

It could not furnish those services in conformity to its contracts with its members unless it was dealing in the

purchase and sale of legal services to be rendered by lawyers in its behalf and upon its credit. This method of conducting its business conclusively stamps the activities of the respondent as the unauthorized practice of the law. It buys and sells practice of the law on a commercial basis as essentially as a merchant buys and sells his wares.¹¹²

The court interpreted the member-association contracts as requiring Maclub to provide legal defense, not just payment for those services. Although it acknowledged that the single Justice had found that Maclub had honored its contracts, the SJC found Maclub functioned as an improper lay intermediary, fatally disrupting the attorney-client relationship (with all its attendant attributes, including confidentiality, loyalty, and fiduciary duty) to which the member should be entitled.¹¹³

Next came *Matter of Shoe Manufacturers' Protective Association*, another injunctive proceeding brought by the Attorney General.¹¹⁴ The business, a collection agency focused on the shoe industry, defended by denying the charges and by expressly asserting that its business plan conformed with the requirements of the new 1935 Act.¹¹⁵ This action had first been heard at the trial court level where a master had prepared findings as to the nature of the association's business. When the SJC reviewed that record, it concluded that the outside attorneys retained by the company were acting as agents, not of the individual creditors, but of the association that retained and

business groups which attempted to delineate unauthorized practice in specific fields (e.g., accounting, banking, life insurance companies, real estate). *See generally*, Johnstone and Hopson, Jr, *supra* note 40, at 184-87, 193-94; , *see* note 83. The Massachusetts Bar appears to have followed this movement toward Statements of Principles with interest. Attorney General Dever announced the formation of a subcommittee to study revisions to the state banking laws consistent with an agreement reached between the Boston Bar and the "trust men," i.e., trust officers and other fiduciaries. *See BOSTON GLOBE*, at 11, reporting on remarks of Attorney General Dever. For subsequent developments, *see generally*, *Statement of Principles between Massachusetts Bar Association and Boston Banks*, 31 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 1, Spring, 1965 at 1-6. *See also Wagner Bill and Proposed Legislation Re Executors Disapproved by House of Delegates*, 3 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 1, Jan. 1937, at 2, 4 (urging ABA to encourage administrative agencies to adopt internal procedures regulating lay practice in lieu of statutory change); *Administrative Practitioners Act Sponsored by Gwynne and Wiley*, 13 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.) no. 1, 1st Quarter 1947, at 1, 2-4. However, anti-trust challenges to those "treaties" have prompted their abandonment. *See* note 83. James Podgers, *Statements of Principles: Are They on Their Way Out?*, 66 ABA J. 129 (1980). Regarding guidance from federal agencies on the anti-trust issues inherent in requiring attorneys to perform all aspects of real estate conveyancing, *see* letter authored by R. Hewitt Pate, et al., Assistant Attorney General, Federal Trade Comm'n., Department of Justice to the Standing Committee on the Unlicensed Practice of Law (Mar. 20, 2003), available at: <http://ftc.gov/bel/v030007.shtm> (last visited August 24, 2012) (a FTC opinion related to that referenced in the brief filed by the Massachusetts' Attorney General in *REBA-SJC*, 459 Mass. 512 (2011), at 22, n. 14).

Lastly, the UPL debate also shaped lawyers' ethical rules. The first national attempt at a model provision barring lay practice came in 1937, when the ABA adopted Canon 47. *See DRINKER, supra* note 43, at 66; *HURST, supra* note 3, at 330-331 (noting economic motive in Canon's approach to restricting lay competition and solicitation). While the SJC did not adopt formal professional ethical rules until 1972, the Massachusetts Bar Association and the Bar Association of the City of Boston had adopted Canons of Professional Ethics modeled after the ABA's Model Code which Massachusetts invoked in an effort to restrain lay practice. *See* Brief of Attorney General in *In the Matter of William A. Thibodeau*,

SJC Equity No. 3555 (1936) at 8; *see also* Model Code of Professional Conduct, DR 2-102. The SJC adopted SJC Rule 3:22 in 1972, 359 Mass. 796-832 (1972) (adopting professional rules largely based on the ABA's Model Code). The current Massachusetts Rule of Professional Conduct forbidding an attorney from engaging or assisting others in engaging in unauthorized practice is codified in Rule 5.5. *See also*, MASS. R. PROF. C. 5.7(b) (defining "law-related" services as those activities not prohibited to a layperson) and MASS. R. PROF. C. 5.7, cmt. 9 (acknowledging economic efficiencies of bundling legal and law-related services).

108. Under current ethics law, these three 1935 SJC cases would likely be analyzed under Rule 5.4 of the Massachusetts Rules of Professional Conduct, rather than under Rule 5.5. *See* MASS. R. PROF. C., Rules 5.4 and 5.5.

109. *In re Maclub of America, Inc.*, 295 Mass. 45 (1936). Note that the 1935 UPL statutes became effective on June 13, 1935 as emergency legislation. Even though Dever filed this equity action on September 27, 1935, some three months later, his Information did not cite the new statutes.

110. *Id.* at 47.

111. The SJC declared that the new UPL statute, codified as MASS. GEN. LAWS ANN. ch. 221, §46 (West 2012), enacted on June 13, 1935, was the governing law, given that the action was being decided subsequent to the statute's operative date. *Maclub*, at 47-8 (1936). In addition, the SJC proclaimed that ch. 346 allegedly did not "enlarge" the common law provisions related to the practice of law. *Id.* at 48. That dicta is surprising, given that the cases cited for that proposition did not involve injunctions designed to prevent lay practice. Instead, the cases support, at best, the principle that the judiciary has retained the power to define practice. For other discussions of the *Maclub* case, *see* Greenberg, *supra* note 79 at 308-09; *Massachusetts Prohibits Automobile Club From Furnishing Legal Services*, 2 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 7, July 1936, at 79-81.

112. *Maclub*, 295 Mass. at 50.

113. *Id.* at 50-51.

114. *Matter of Shoe Manufacturers Protective Association, Inc.*, 295 Mass. 369 (1936). As in *Maclub*, the AG did not cite the UPL statutes in its Information but rather listed a host of practices which the AG asked the SJC to enjoin.

115. Answer of Respondent Shoe Manufacturers Protective Association, Inc., filed by Harry J. Sheehan (Nov. 8. 1035), at 2.

paid them. That conclusion prompted the SJC to affirm the injunction. However, the record demonstrated that a sizeable number of client-creditors had authorized the association to act on their behalf in choosing outside counsel.¹¹⁶ Rather than affirm those creditors' choices, the court concluded that the independent professional judgment of the Protective Association's attorneys was likely tainted. Thus, the SJC remained vigilant in forbidding lay intermediaries from interfering with the attorney-client bond.

Given its first two decisions on the new UPL statutes, the SJC's opinion in the third case, *In re Matter of William A. Thibodeau*, decided the same day as *Shoe*, is particularly noteworthy.¹¹⁷ There were marked similarities between *Thibodeau* and the two prior cases (*Maclub* and *Shoe*): another petition brought by the Attorney General, another association whose business plan involved helping members with litigation. Furthermore, as in *Maclub*, the single Justice who originally handled *Thibodeau* found no facts to support a finding of unauthorized practice.

However, here the principal was an attorney, who did business as the "Automobile Legal Association" ("ALA"), and thus the action was styled as a disciplinary proceeding rather than a violation of the UPL statute.¹¹⁸ The court distinguished *Maclub* and *Shoe* on the basis that Thibodeau and ALA did not contract with members to provide legal services. Instead, the court concluded that the ALA provided members with a list of attorneys and paid for their work, but that litigation decisions remained entirely with the members. In dismissing the Attorney General's petition, the court noted that Thibodeau had recently revamped his business plan for ALA on the eve of this litigation.¹¹⁹

One could argue that Thibodeau's business plan was the one most likely to be rejected since he had developed a very extensive solicitation and marketing network throughout New England and adjacent states. In addition, one of his firm's partners (and that attorney's son) was on ALA's approved counsel list and his firm on occasion had received business from ALA members on non-automobile matters.

Despite the significant evidence of commercial methods being employed by ALA through its principal, Thibodeau, the court did not find sufficient evidence to prove that the attorneys were agents of ALA instead of its subscribers.¹²⁰ Thus, the different result for Thibodeau may be largely attributable to his superior ability to marshal evidence in support of the legitimacy of ALA's business plan and his proactive discussions with the local bar association's Committee on Corporate Fiduciaries and Unlawful Practice of Law.¹²¹

In just three years, all three branches had played active roles in the unauthorized practice debate. The SJC's contributions served as bookends to the period. First, in 1934, the court advised the legislature on the permissible scope of its involvement; then in 1936, the SJC weighed in again by ruling on the specific cases in controversy. In between, Attorney General Dever's exercise of his prosecutorial powers to target lay associations and corporations, particularly debt collectors and automobile associations, complemented the legislature's actions in passing the 1935 UPL laws. That type of concerted governmental focus on unauthorized practice in Massachusetts would not be repeated.¹²²

One might assume that external events, particularly World War II, were responsible for redirecting the state's attention from the UPL debate. Indeed, during the 1940s, Attorney General Dever had enlisted in the War effort and his successor, Republican Robert Bushnell, launched investigations into other matters.¹²³ However, that explanation is not totally satisfying given that UPL prosecutions waned even before Dever left office.

Nor is there evidence that the Commonwealth had been effectively rid of lay practitioners. "The professional layman" continued to trouble the bar.¹²⁴ While still a legislator, Dever had alerted his colleagues that the various early versions of the 1935 UPL statute still failed to prohibit practice by individuals operating under powers of attorney. Therefore he pressed for an amendment designed to repeal the 1790 grant of practice rights to lay advocates.¹²⁵

One layman had become the symbol of the bar's inability to

116. *Id.* at 373. See also *Sweeping Collection Agency Decision in Massachusetts*, 2 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 10, Oct. 1936, at 113-15.

117. *In re Matter of William A. Thibodeau*, 295 Mass. 374 (1936).

118. Respondent Thibodeau specifically defended against the injunction by arguing that the 1935 UPL statute was inapplicable to him given his license to practice. Answer of Respondent Thibodeau to the Information filed by the Attorney General (Oct. 8, 1935), by his attorneys in the action, Withington, Cross, Proctor & Park.

119. *Thibodeau*, 295 Mass. at 376.

120. *Id.* at 378-80. See also *What An Automobile Association Can Do*, 2 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 10, Oct. 1936, at 115-16; Greenberg, *supra* note 79 at 309. The following year, the SJC agreed to modify the scope of restrictions on lay debt collection in *In re Lyon Furniture Mercantile Agency*, No. 3690, discussed in *Massachusetts Court Clarifies Former Opinion*, 4 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 8, Aug. 1938, at 89-90 (discussing *In re Lyon*, 301 Mass. 30 (1938) and *Final Order Entered In Collection Agency Case*, 4 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 11, Nov. 1938, at 127-28 (permitting, for example, a lay debt collector to threaten legal action in its attempt to seek payment from the debtor).

121. Answer of Respondent Thibodeau, at §3.

122. The 1930's proved a key decade nationally, not just in Massachusetts, in the legal history of unauthorized practice law. As one commentator noted:

It is a rare phenomenon in the history of jurisprudence for a body of law on a particular subject of consequence to crystallize within the short space of ten years. And yet, in even less time that that a virtually complete case has been made out against unauthorized practice of law.

Greenberg, *supra* note 79 at 314.

123. See generally, biographical information on Paul Dever; John Esposito, *FIRE IN THE GROVE: THE COCOANUT GROVE TRAGEDY AND ITS AFTERMATH*, ch. 7 (2005) (noting that Robert Bushnell, a former prosecutor, had actively pursued investigations into the causes of the 1942 Cocoanut Grove fire, in which over 400 people perished and into the propriety of contemporary local fire codes). The ABA reflected on the problems facing its UPL campaign during wartime when law school attendance had been drastically reduced and many lawyers had been called to duty. In 1943, Chairman Ottenbourg warned that: "under these circumstances, laymen would again get into the field of unlawful practice because of the public need for advice, and that this presented a very serious problem for the bar." *Chairman Warns Of Threat To Bar*, 9 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 2, Mar.-Apr. 1943, at 1 (reporting on his speech to the House of Delegates in Chicago).

124. See *Curbing Unlawful Practice of the Law - A Judicial or a Legislative Function?*, 74 BAR BULLETIN II (August 1933); see also RESOLUTION OF THE EXECUTIVE COMMITTEE OF THE MASSACHUSETTS BAR ASSOCIATION, March 1933, reported in "*The Bar Bill*," at 29.

125. See "*The Bar Bill*," *supra* note 124, at 25.

restrain unauthorized practice. William A. Graustein resisted multiple attempts to prevent him from litigating without a license. After being driven out of the milk industry following litigation, business man Graustein began studying law informally to ascertain his rights. He first appeared in milk-industry antitrust cases on his own behalf, but soon thereafter began representing other parties pursuant to general powers of attorney.¹²⁶ Graustein developed a long and rewarding career as a lay practitioner; by one account he had represented parties in litigation in some 277 cases over a 30 year span with their powers of attorney as his only authority.¹²⁷ In 1935, the Lowell Bar Association and members of the 1st District Eastern Middlesex Bar filed suit, seeking to enjoin Graustein from practice as “an invasion of the franchise exclusively enjoyed by those who have been regularly admitted to the practice of law.”¹²⁸ Graustein, then aged 70, proved a formidable foe, invoking federal and state constitutional rights in his defense and alleging that any person of good moral character with a power of attorney could obtain a court’s permission to represent another.¹²⁹ When the Bar obtained an injunction against his continued lay representation under powers of attorney, he slightly modified his business plan. Rather than direct lay representation, he successfully pursued cases pro se as the holder of an assignment of the causes of action.¹³⁰

Graustein was not the only thorn in the Attorney General’s side. Despite reports from Dever and his staff of some lay businesses fleeing the state,¹³¹ others noted that certain areas of litigation had seen a blossoming of lay practice, particularly administrative agency

advocacy. As one of Dever’s Assistant Attorneys General noted:

The remarkable growth of administrative law in recent years has given rise to new problems relating to practice by lay persons or corporations.... There seems to be no valid reason why the conduct of such practice as a business should not be limited to members of the bar.¹³²

However, the Massachusetts Legislature never passed a statute expressly banning lay practice before all administrative agencies.¹³³ Instead the General Assembly’s more limited approach of regulating lay practice was agency specific.

On the national stage, the United States Congress had considered national legislation barring laymen from practicing before agencies in 1936, known as the Wagner bill: “A Bill to Prevent and Make Unlawful the Practice of Law Before Government Departments, Bureaus, Commissions, and their agencies by those other than duly licensed attorneys at law.”¹³⁴

Indeed the ABA, acting on the recommendations of its Unauthorized Practice Committee, resolved not to endorse the Wagner bill. The ABA concluded that resort to legislative action was wrong-headed:

Since its inception the Committee has steadfastly expressed the view that the suppression of unauthorized and unlicensed practice of the law should be sought exclusively through and from the courts, the Judicial Department of our state and federal governments; and

126. See *Defends Right to Practice Law: Graustein Fights Move to Disbar Him*, BOSTON GLOBE, Apr. 16, 1935, at 2; *Indict Boston Milk Men*, NEW YORK TIMES, May 27, 1911.

127. *Graustein v. Barry*, 315 Mass. 518, 521 (1944) (affirming a lower court judgment against Graustein, who had sued his client for the value of his services, holding that Graustein had a contractual right only to recover his costs, not his fees, since his lay services as an attorney in fact were not permissible, citing both *Opinion of the Justices*, 279 Mass. 607 (1932), and the repeal of MASS. GEN. L. ch. 221, §49); *Gill v. Richmond Co-Op. Ass’n, Inc.*, 309 Mass. 73, 76-77 (1941) (affirming decision below in an action involving Graustein who appeared pro se as an assignee seeking to recover for a \$1200 debt for his legal services); *Graustein v. Boston & Maine Railroad*, 304 Mass. 23 (1939) (reversing trial court’s grant of defendant railroad’s motion to dismiss given Graustein retained the right to proceed pro se as assignee of action). See generally discussion of bar leaders’ actions to restrain Graustein’s unauthorized practice reported in *Massachusetts Proceeds Against Layman*, 1 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 7, June 1935, at 9; *Professional Attorney-In-Fact Perpetually Enjoined From Practicing by Massachusetts Court*, 1 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 11, Oct. 1935, at 11.

128. See *Defends Right to Practice Law: Graustein Fights Move to Disbar Him*, *supra* note 126.

129. It is noteworthy that bar leaders had recommended that lay practitioners who make a livelihood at the expense of the profession, like Graustein, could be restrained by adoption of court rules to “eliminate the layman who makes a living by successfully soliciting powers of attorney to try cases.” See 74 BAR BULLETIN, *supra* note 124.

130. *Richmond* 309 Mass. at 73; *Graustein*, 315 Mass. at 518.

131. See Dever, 7 LAW AND SOC. J. 43, 44; 1936 ABA UPL Convention speech by Assistant Attorney General. In addition, litigation begun by the Attorney General’s Office in 1935 concluded in subsequent years. See, e.g., Orders entered barring collection agency activities. See also petition filed by Massachusetts Bar Association seeking restraining order barring local radio station from airing judicial commentary on individual’s legal issues, *Rosenthal, et al. v. Shepard Broadcasting Service, Inc.* (1938)(SJC held talk show to be sponsored by a corporation practicing law illegally). See *Massachusetts Court Gives Opinion On Radio*

Broadcasts, 4 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 5, May 1938, at 55, for a description of the company’s decision to suspend the show.

132. Greenberg, *supra* note 79 at 316-17, indicating that Greenberg was the Chief Investigator for Unauthorized Practice, Department of the Attorney General of Massachusetts in 1935 and Chairman of the Unauthorized Practice Committee, National Lawyers’ Guild, Eastern Massachusetts Chapter, in 1938. In accord Roy Hammer and Richard Vita, *The Committee on the Unauthorized Practice of Law*, 59 MASS. L. Q. 14 (1974-75) (describing the issue of administrative law practice by laymen as a “subject of much importance”); *Opinion of the Attorney General*, March 13, 1947 (advising that representation in contested hearings before the state’s Department of Public Utilities constitutes the practice of law). See also, *supra*, discussing the challenges inherent in restricting lay practice before administrative agencies.

133. To the contrary, in 1941, the Legislature passed MASS. GEN. LAWS ANN. ch. 151A, §37 (West 2012) which specifically granted laypersons the right to represent claimants at unemployment compensation hearings. See also, note 10-1, regarding the earlier Rules governing the state’s Appellate Tax Board which allowed lay representation; *Lowell Bar Assoc. v. Loeb*, 315 Mass. 176, 184 (1943). See also Roy Hammer and Richard Vita, *Res Gestae: The Committee on the Unauthorized Practice of Law*, 59 Mass. L. Q. 7,14 (Spring, 1974) (reviewing attempts to curtail lay representation in unemployment compensation hearings, but referencing *Opinion of the Attorney General*, dated March 13, 1947, which condemned lay practice in contested hearings before the state’s Department of Public Utilities); *Activities of Massachusetts Bar Association Unauthorized Practice of Law Committee*, 39 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 1, Fall-Winter, 1974 (discussing lay representation in unemployment compensation hearings at issue in *Massachusetts Bar Association v. Weaver Associates, Inc., et al.* and social workers appearing for the Department of Welfare at issue in *Massachusetts Bar Association v. Department of Welfare*) at 36-40.

134. Wagner Bill S. 2944, 74th Congress. See *Wagner Bill and Proposed Legislation Re Executors Disapproved By House of Delegates*, 3 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no.1, Jan. 1937, at 2 (discussing resolutions considered by the ABA at its 1936 annual convention, which had been held in Boston).

that resort to legislation, to the legislative department of our state or federal governments, is both undesirable and ineffectual.¹³⁵

The House of Delegates recommended that restrictions on administrative practice by non-lawyers be left to the inherent rule-making powers of the individual agencies.¹³⁶

So it would be that the SJC remained the principal arbiter of lay practice. While Dever, through his prosecutorial campaign, and the legislature, through its requests for advice, had thrust the SJC into the limelight of this debate, the court did not flinch from assuming center stage. In keeping with its self-proclaimed constitutional role, the SJC has continued in the post-War years to ensure that the definition of practice continues to be a judicial creation.

B. Tax Practitioners Test the SJC's UPL Standard

As will be seen from a review of the major SJC decisions from the 1940s through the *REBA* opinion on the First Circuit's certified questions, the court's definition of practice is still in flux. A case brought by the Lowell Bar Association, to prevent a local lay tax preparation company from continuing to operate, is the prime example during this period.¹³⁷ During WWII, a Boston attorney, Louis Loeb, had devised a new business plan to offer tax preparation assistance to individual wage earners at a very modest, fixed price (\$2 for a state or federal return or a discounted price of \$3.75 for both returns).¹³⁸ He formed an unincorporated company staffed by his wife and others, none of whom was an attorney. While Loeb did not actively engage in the tax work, the court found him to be the "real owner" of the enterprise, American Tax Service ("ATS"), even though he was not a party to the action. Instead, the Lowell Bar Association sought injunctive relief against Loeb's wife and other staffers from conducting the business of ATS as a violation of the 1935 UPL statute.¹³⁹ The trial court granted relief, in essence shutting ATS's doors.

On appeal to the SJC, the case presented a prime opportunity

for the court to revisit the 1935 UPL laws and its decisions in the trio of 1936 cases. The SJC reaffirmed some well-established principles (i.e., judicial control of definition of practice; giving a legal opinion and appearing in court¹⁴⁰ constitute practicing law).¹⁴¹ However, the court acknowledged that the modern world had made citizens increasingly reliant on experts at the very time that the law was becoming an integral part of virtually all human endeavors.¹⁴² Furthermore, the day to day functioning of many modern business ventures required lay preparation of documents with legal ramifications. Hence the court recognized that there are many legal instruments, which are "common in the commercial world, and fraught with substantial legal consequences, that lawyers seldom are employed to draw, and that in the course of recognized occupations other than the practice of law are often drawn by laymen for other laymen."¹⁴³

The court's response to this new reality was to acknowledge explicitly how challenging it was to identify the proper scope of law practice. The court reviewed a host of professional practice areas, including accounting, architecture, appraising, auctioneering, and insurance, noting that in each the professional had regular occasion to deal with legal concepts. The SJC then concluded that accounting lay within a "penumbra" where a "sharp line cannot be drawn between the field of the lawyer and that of the accountant."¹⁴⁴ Therefore, the court reasoned that it would be unworkable and unwise to conclude that providing advice involving "some element of law," performing service requiring "some knowledge of law," and drafting documents that may have some legal effect constituted practice *per se*.¹⁴⁵ Instead, the court proposed to forbid only lay conduct which "lies wholly within the practice of law."¹⁴⁶

Applied to the case at bar, the court took great pains to review the factual record anew and then to conclude that preparation of individual wage earner personal income tax returns did not constitute impermissible lay practice: "[w]e think that the preparation of the income tax returns in question, though it had to be done with some

135. *Wagner Bill and Proposed Legislation Re Executors Disapproved By House of Delegates*, 3 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 1, Jan. 1937, at 2-4. That report also describes the ABA's decision to reject further legislative restrictions on advertising by fiduciary institutions soliciting trust and estate work. *See also* Remarks of the President, *Discussion of the Activities of Banks and Trust Companies and Other Corporations*, 16 Mass. L. Q. 28 (1930-31) (acknowledging that "we cannot expect the legislature, the great majority of whose members are not lawyers, to shed any tears for the lawyer," but concluding that legislative action to quell unauthorized practice might still be feasible if the lawmakers could be convinced that public welfare required it); Paul A. Dever, *The Stand of the Attorney General of Massachusetts on Unauthorized Practice of Law*, at 43 (noting that during his tenure in the General Assembly, the House would pass UPL bills which would then be rejected in the Senate).

136. *But see* a report on the ABA's apparent "about face," when in 1947 it elected to support Congress's proposed Administrative Practitioners' Act, which would have permitted an agency to allow lay practice by "certified" agents, within certain guidelines. *Administrative Practitioners Act Sponsored By Gwynne and Wiley*, 13 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 1, 1st Quarter 1947, 1-2. Given that this Act would have authorized further rule making by individual federal agencies, perhaps the ABA felt the bill achieved an acceptable compromise between legislation and administrative action. Note that other professions, particularly accountants and lay advocates who regularly appeared before the Interstate Commerce Committee, opposed the bill. *Id.* at 15-16.

137. *Loeb*, 315 Mass. at 176.

138. *Lowell Bar Assoc. v. Loeb*, 315 Mass. 176, 179 (1943).

139. *Id.* at 177-79. It is noteworthy that the Attorney General petitioned, and was granted permission to, intervene in the proceedings.

140. The SJC did concede that the limitation on court appearances to members of the bar, usually viewed as the heart of law practice, might be inapplicable in Small Claims Court due to the special rules of that type proceeding. *Id.* 183 n.3. *See also* *Varney Enters., Inc. v. WMF, Inc.* 402 Mass. 79 (1988) (referencing corporation's conduct of proceedings in Small Claims Court as having been undertaken by lay corporate officer). In *Loeb*, the SJC also noted, but did not resolve, the issue of CPAs practicing before the Massachusetts Appellate Tax Board under the version of Rule 1 of that agency then in effect. 315 Mass. at 184.

141. *Id.* at 181-83.

142. *Id.* at 180.

143. *Lowell Bar Assoc. v. Loeb*, 315 Mass. 176, 186 (1943); *see also* the court's earlier summary of existing UPL doctrine: "[D]rafting of documents, when merely incidental to the work of a distinct occupation, is not the practice of law, although the documents have legal consequences." *Id.* at 181.

144. *Id.* at 183. *See also* *REBA-SJC* 459 Mass. 512, 519-20 (2011) (noting that "[m]any of the discrete services and activities that may fall within the penumbra of modern conveyancing do not qualify as the practice of law"); *see also* JOHNSTONE AND HOPSON, JR, *supra* note 40 at 168-69 (commenting on the *Loeb* decision and noting that courts often use dicta to provide some clues as to how future cases might be decided).

145. *Loeb*, 315 Mass. at 181.

146. *Id.* at 183.

consideration of the law, did not lie wholly within the field of the practice of law.”¹⁴⁷ Furthermore, the court admitted that drafting of many legal documents used regularly in commerce by laymen for laymen with significant legal consequences is nonetheless not UPL. Therefore, the court struck the key provisions of the lower court’s decree which had enjoined ATS’s tax preparation services.¹⁴⁸

The court rendered a very narrow, fact specific decision and deferred ruling on whether other related tax matters, if undertaken by lay professionals like certified public accountants, constituted lay practice. Instead, the court concluded that the degree of complexity of the legal drafting should control the decision, together with the “actual practices of the community.”¹⁴⁹ Where, as with ATS, the tax returns were allegedly quite straightforward, and the service apparently popular with taxpayers, the court concluded that the ATS tax return preparation work “did not lie wholly within the field of the practice of law.”¹⁵⁰ The court thus invited inquiry into which legal functions were incidental to another professional’s work and which were “wholly” legal practice; whether that new test would be effective and convenient would remain to be seen. However, the SJC in *Loeb* sent a strong message that the UPL doctrine should evolve over time, rather than being locked into a static test rooted in outdated customs and practices.

The SJC did endorse one aspect of the injunction issued against ATS. Distinct from the tax preparation field, there remained that portion of the *Loeb* decree which forbade ATS from selling the legal services of Loeb, if the taxpayers/customers encountered any legal action connected with the tax returns it prepared. The court deemed that portion of ATS’s services unauthorized practice, invoking both *Maclub* and *Shoe* in support of its determination.¹⁵¹ The ATS principals failed to convince the SJC that ATS had sufficiently revised its business plan to avoid being barred from providing legal services. Lay intermediaries and businesses that interfered with the

attorney-client relationship continued to provoke the court’s ire.

The economic reality of current business dealings has remained an undercurrent in subsequent SJC rulings on UPL. Nearly 30 years later, the SJC noted that: “Obviously, the public interest will not be served by requiring that routine duties be performed by attorneys when laymen could adequately and more economically perform the functions.”¹⁵² Most recently, the SJC in its *REBA* decision again agreed that “competent non-lawyer professionals” routinely play significant roles in modern conveyancing even though title examinations and preparation of title abstracts involve legal concepts.¹⁵³

C. The Debt-Pooling Debate

Consistent with the legislature’s judicially-mandated role in UPL developments, the General Assembly provided both of the other branches with cause to review the scope of lay practice in the debt collection field during the post-WWII period. In 1955, the legislature amended the UPL statutes to prevent lay persons from advising and assisting debtors with debt pooling plans.¹⁵⁴ The bill initially sent to the Governor for signing did not pass muster in the Executive branch. At Governor Herter’s request, his Attorney General reviewed the new provision and opined that it was fatally defective.¹⁵⁵

The legislature acted quickly to amend the act in conformity with the Attorney General’s directions. Again the Governor consulted with the Attorney General, who concluded that the revised bill lay within the legislature’s province and who found that the legislature’s declaration that furnishing debt pooling services and advice constituted lay practice was “a reasonable one.”¹⁵⁶ Given the breadth of the existing 1935 UPL statute, it is striking that the legislature felt that provision of debt pooling services could not be prosecuted under current law.¹⁵⁷

On the heels of the Governor’s signing the new statute into law, companies and an individual involved in debt pooling challenged

147. *Id.* at 186.

148. Commentators were quick to label the court’s pragmatism as expedient. Speech by Edwin M. Otterbourg, President of the New York County Bar Association and member of the ABA’s standing committee on the Unauthorized Practice of Law, *The Lawyers, the Public and Illegal Practice of Law*, 18 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 4, Dec. 1952, at 3, 11 (commenting on the SJC’s decision in *Loeb* as exemplifying the “doctrine of expediency” to which he objected); *Services in Connection with Tax Matters as Practice of Law*, 9 A.L.R. 2d 797 (1950) (discussing *Loeb* and the SJC’s challenging line drawing). See also *Hulse v. Criger Defines Rights of Real Estate Brokers In Drafting Documents*, 18 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 3, Sept. 1952, at 21 (analyzing the decision in *Hulse v. Criger*, 247 S. W. 2d 855, 860 (Mo. 1952) in which Missouri’s high court cited favorably the SJC’s acknowledgment in *Loeb* that other professionals regularly undertake legal matters incident to their primary responsibilities, before ruling that preparation of simple legal documents by real estate brokers did not constitute unauthorized practice).

149. *Lowell Bar Assoc. v. Loeb*, 315 Mass. 176, 186 (1943).

150. *Id.*

151. *Id.* at 187.

152. *Goldblatt v. Corporation Counsel of Boston*, 360 Mass. 660, 665 n.4 (1971) (referencing the court’s earlier analysis in *Loeb*). In *Goldblatt*, the SJC had cause to comment on the extent that laypersons can undertake real estate work, noting that court appearances and provision of legal opinions on tax titles would not be permitted, but identifying other tasks which could be undertaken by a layman. *Goldblatt*, 360 Mass. at 660. See also the SJC’s opinion on certified questions from the federal district court involving the scope of practice in the bankruptcy field where the court noted: “In its thoughtful discussion

concerning whether the preparation of documents having legal effect constitutes the practice of law [referring to the SJC decision in *Loeb*], the court noted that architects prepare building contracts, insurance agents prepare riders to policies, auctioneers prepare sale notes, and custom house brokers prepare important documents, all without practicing law.” In re *Chimko*, 444 Mass. 743, 750 n.7 (2005). Similarly, the court let stand the trial court’s decision which had upheld the validity of a quit claim deed drafted by a lay real estate broker, even though such practice ought “not to be condoned.” *Freitas v. Freitas*, 349 Mass. 276, 277 (1965).

153. *REBA-SJC*, *supra*, 459 Mass. 512, 521, 534 (2011) (citing *Goldblatt* 360 Mass. at 660, with approval). By the 1930s, commentators noted transformations in the title examination and conveyancing business. While young lawyers allegedly used to be given these assignments to help them build their practice, observers described a new business plan where banks controlled much of the “title business” and provided the necessary services more cheaply due to economies of scale. Title searches had purportedly become “merely a mechanical operation” performed for a modest fee of \$10, rather than at the old lawyer rates which would have been two to three times the new figure. *Bantry*, *supra* note 67, at 44.

154. Act Relative to Debt Pooling Plans, ch. 697, §1, 1955 Mass. Acts 648. St. 1955 (codified as amended in MASS. GEN. LAWS ANN. ch. 221, §46C (West 2012)).

155. Op. Atty. Gen. (Aug. 18, 1955) (referencing prior unpublished Opinion dated June 1, 1955 regarding House Bill No.2717), p. 31.

156. Op. Atty. Gen. (Aug. 18, 1955), at 31.

157. The 1955 debt pooling bill began as an amendment to existing banking laws. Legislators initially petitioned for a law “regulating the business of debt pooling organizations, so called,” which would have amended MASS. GEN. LAWS ANN. ch. 140 (West 2012) to add a provision requiring debt poolers to

its constitutionality.¹⁵⁸ The SJC lost little time in concluding that the new restrictions passed constitutional muster. The court reiterated the distinct provinces of the two branches of government: the legislature retained the power to restrict lay practice, while only the Judiciary could determine who is authorized to practice.¹⁵⁹ Here the court concluded that the statute was valid legislation in aid of the judicial function of determining who can practice law.

Similarly, the court paid short shrift to the debt poolers' argument that they were not engaged in unauthorized practice. The uncontested evidence established that the debt poolers did not draft documents, did not go to court, and did not challenge the validity of the underlying debts; rather their function was to negotiate settlements and payment plans for the debtors. Concluding that the debt poolers' services had "features" of the practice of law, and "viewed as a whole amounts substantially to that," the court upheld the new provision barring debt poolers.¹⁶⁰ In doing so, the SJC allowed the legislature to make the judgment that the debtors should have access to skilled professional legal advice which the debt poolers could not provide.¹⁶¹

Similar to *Loeb*, the court's decision may best be viewed as a pragmatic response to current economic conditions. Restrictions on lay debt adjustment companies were under consideration in other states. The New York Legislature had passed similar legislation which Governor Averell Harriman signed into law, stating: "[t]he Attorney General reports that debt consultants lure the financially

distressed by false and deceptive advertising, that they charge excessive fees, and that they derive the bulk of their revenue from the poorly educated and the people in the lower income groups."¹⁶² Perhaps that concern for the consumers of debt pooling services affected Massachusetts's leaders. Certainly that rationale would go far to explain the SJC's expedient decision in upholding the legislation in *Home Budget*.¹⁶³

Following *Loeb* and *Home Budget Service*, the court had only limited occasions to review the scope of UPL in the real estate conveyancing context before revisiting that question directly in the REBA litigation.¹⁶⁴ The most significant decision came in 1971, when the court faced the issue in a civil service employment appeal where the attorney/plaintiff had been rejected for a position in the city's Law Department in favor of a layman.¹⁶⁵ Louis Goldblatt argued that the position, which included appearing in Land Court, advising on tax titles, and drafting deeds on foreclosed property, could only be undertaken by an attorney like himself, not by an unlicensed candidate. The court agreed that certain of the tasks listed in the position's job description must be performed by a lawyer, including Land Court representation and advice on the legal validity of tax titles. The SJC deemed other portions of the job, such as title research and provision of "practical advice" on tax collection, to be open to laymen, citing with favor the economic realities referenced in *Loeb*.¹⁶⁶

Two other SJC decisions offer some additional insight into the

be licensed by the Commonwealth's bank commissioner. House Bill No. 113 (Jan. 1955). When that effort came to naught, a second effort to bar debt poolers proceeded on a somewhat different track. Instead of a licensing scheme, the second approach attempted to place the debt pooling restrictions under MASS. GEN. LAWS ch. 93, relating to trade regulation. House Bill No. 2717, sent to the Governor in April, 1955. Governor Herter vetoed the bill. Upon the bill's return to the General Assembly, the legislature adopted a third approach: making the debt pooling restrictions part of the Commonwealth's UPL arsenal. The revised bill ultimately passed and became MASS. GEN. LAWS ch. 221 §46C. Governor's "return" of the bill to the Senate (June 23, 1955).

158. *Home Budget Service, Inc. v. Boston Bar Association*, 335 Mass. 228 (1955).

159. *Id.* at 233.

160. *Id.* at 232.

161. After having decided to ban debt poolers as UPL, the legislature had a change of heart less than a decade later. In 1962, it passed another amendment to MASS. GEN. LAWS ANN. ch. 221 (West 2012), St. 1969, c. 421, s. 1, codified as MASS. GEN. LAWS ANN. ch. 221, § 46D (West 2012), which exempts credit counselors from the UPL restrictions. To date, that law has not faced constitutional challenge. However, it is worth note that the law enables credit counselors to conduct their business. To the extent *Home Budget Service* found that aspects of debt counseling involve the practice of law, then the 1969 amendment could be challenged as an unconstitutional encroachment on the solely judicial province of declaring who can practice law.

162. *More About Debt Adjustment Companies*, 22 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 2, June 1956, at 17-18 (noting legislation in New York, Virginia, as well as Massachusetts, barring debt adjustment companies as authorized practice); *SJC of Massachusetts Holds Debt Pooling to be Practice of Law*, 23 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 1, 1957, at 53.

163. *Home Budget Service, Inc. v. Boston Bar Association*, 335 Mass. 228 (1955). See generally *American Bar Association Standing Committee On Unauthorized Practice Of Law Statement To Conference of Presidents and Secretaries Of All State And Local Bar Associations*, 16 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 2, Mar. 1950, at 33 (referencing the ABA's Standing Committee on Unauthorized Practice

Statement to the Conference of Presidents and Secretaries of All State and Local Bar Associations, which concluded: "The public, far more than lawyers, suffers injury from the unauthorized practice of law"). The Report also references Statements of Principles between the bar and the National Association of Real Estate Boards. *Id.* at 35 (citing *Report of the Standing Committee on Unauthorized Practice of Law*, 67 Ann. Rpt. ABA 218 (1942)); see also *Statement of Principles Formulated by the National Conference of Realtors and Lawyers, May 1942*, 10 Law Soc. J. 310, 310-11 (1942). By 1969, the Massachusetts Commissioner of Banks had promulgated regulations regarding debt collectors. 35 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 3, Dec. 1970, at 27.

164. Trial courts, however, did have cause to review the scope of the UPL laws in the real estate conveyancing realm. One notable example came in *Maurice M. Goldman et al. v. Louis Gregory* (Superior Court, Barnstable County April 26, 1961) where the trial court endorsed the Master's Report which held that a broker who drafted purchase and sale agreements, provided advice on legal rights, and otherwise attempted to close real estate transactions without a lawyer was impermissibly practicing law. Evidence that the broker chose the lawyer who prepared the deed and retained control over the lawyer's activities rendered the broker's business practices impermissible. Surprisingly, the plaintiff/attorney initially did not invoke MASS. GEN. LAWS ch. 221 §46B, but rather sued to enjoin the broker under the inherent power of the judiciary to control practice. When the broker contested that basis for the suit, two additional attorneys were added as plaintiffs; the action then proceeded under the authority of MASS. GEN. LAWS ch. 221 §46B. See 27 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 3, Fall, 1961, at 261, 273-74. See generally John Payne, *Title Insurance and the Unauthorized Practice of Law Controversy*, 35 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 1, Spring, 1969, at 37, 93 (noting that the wave of public opinion views conveyancing as outside the practice of law); *Statement of Principles Relating to Real Estate Transactions*, 35 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 2, Summer, 1969, at 62-63 (detailing the agreement reached by the National Conference of Lawyers and Title Insurance Companies and Abstracters and approved by the House of Delegates of the ABA).

165. *Goldblatt v. Corporation Counsel of Boston*, 360 Mass. 660 (1971).

166. *Id.* at 666 n.4.

court's increased willingness to reach expedient results in UPL matters. First, in 1965, the court let stand a real estate property transfer despite the fact that the deed had been prepared by a lay broker.¹⁶⁷ The challenge arose in a family law dispute; the court affirmed the trial court's findings that the property transfer should not be upset, even though preparation of deeds by real estate brokers was a "practice not to be condoned."¹⁶⁸ Then, in 2005, the local federal district court certified questions in a bar disciplinary matter to the SJC when a Michigan attorney, not licensed in Massachusetts, faced sanctions for unauthorized practice.¹⁶⁹ Darryl Chimko had acted as an agent for Household Finance Corporation in a bankruptcy proceeding, involving modifications to a mortgage loan.¹⁷⁰ Again, the SJC counseled a measured response, concluding that the unlicensed attorney's actions were not impermissible even though important legal rights of the debtor and other creditors were certainly at stake.¹⁷¹

The SJC was not called upon to offer further guidance on the scope of law practice for real estate closings until 2011.¹⁷² While that calm may be attributable to the court's constitutional role of resolving matters only once they are in controversy, it likely also reflects the change in tactics advocated by some bar associations. By the 1950s, the ABA's Standing Committee on Unauthorized Practice counseled state and local bar associations to undertake a broad public education campaign regarding people's need for legal services. As one report concluded: "It is better public relations for the bar to bring about understanding and voluntary acceptance than to make a record of successful prosecutions."¹⁷³ The Massachusetts Unauthorized Practice Committee ultimately agreed, counseling that litigation should be a last resort.¹⁷⁴ Indeed the Massachusetts Attorney General's prosecution heyday of the 1930s has never been repeated.

In contrast to the recommendation of those bar groups, REBA's members have continued to use litigation as a primary tactic. The effectiveness of that strategy will be tested in its pending litigation.

CONCLUSION

REBA's current lawsuits could produce yet another chapter in Massachusetts's experience with unauthorized practice. However, given the history to date, it seems most likely that the pending litigation will offer only limited precedential guidance and no definitive resolution of the scope of UPL. Why have Massachusetts's efforts to delimit UPL been fraught with such difficulty? To answer that

question, one needs to examine the efficacy of the state's history of judicial dominance in the UPL debate.

First, as in most states,¹⁷⁵ the SJC ultimately won control of the debate over the other branches. Early in Massachusetts's history, the legislature had been very active in its repeated defense of lay practice. Until 1935, the General Assembly rejected a monopoly for lawyers by staking out a co-equal role for appointed advocates and pro se parties in court litigation. However, the court, in a string of subsequent opinions, clarified that the definition of the scope of practice in the Commonwealth would be the judiciary's prerogative. Similarly, the SJC embraced the opportunities presented it by both Attorney General Dever's prosecutions of lay businesses and the debt pooling controversy to enhance and then cement its role in defining UPL. While judicial control of the practice of law is consistent with constitutional principles of an independent judiciary, this approach has left the courts open to criticism of self-interested decision-making by lawyers for lawyers.¹⁷⁶

Moreover, judicial definition of the practice of law means that the UPL doctrine has unfolded incrementally, limited by matters in controversy, rather than by prophylactic rule-making. The SJC chose to relegate the legislature to a limited role of furthering the courts' mission of defining the practice of law. The court has repeatedly decreed that the legislature can play a secondary position, but cannot define the practice of law or grant permission to practice.¹⁷⁷

But what if the court had taken a different tack and allowed the legislature to act? Through positive law, the General Assembly might have continued the approach it had embarked upon in the 1930s of legislating which businesses or professions should be exempt from the scope of UPL. In addition, the history shows that the courts have on occasion deferred to administrative agencies which have enacted regulations permitting lay practice.¹⁷⁸ Under either scenario, the results of legislation or agency rule-making would remain subject to the SJC's ultimate review.

Other consequences of judicial control of the UPL debate stem from the courts' structural limitations. The judicial branch may be ill-suited to the kind of fact-gathering that would best inform decision-making on UPL. The principal justification relied upon by the SJC has been concern over the public welfare.¹⁷⁹ However, there appears to be precious little empirical evidence informing the courts' efforts to control lay practice.¹⁸⁰ A systematic study could

167. *Freitas v. Freitas*, 349 Mass. 276, 277 (1965).

168. *Id.* The trial court's findings which led to the dismissal of the plaintiff's actions are consistent with a theory that he should be stopped from denying the validity of the deed, given it was prepared by the broker at his insistence and later signed by him.

169. *In re Chimko*, 444 Mass. 743 (2005).

170. As part of the bankruptcy, Chimko had prepared and filed a reaffirmation agreement which "modifie[d] and create[d] rights, but which [did] not change the terms of the original loan." *Id.* at 744.

171. The court reaffirmed its holding in *Loeb*, where it had refused to adopt the proposition that "whenever, for compensation, one person ... performs for another some service that requires some knowledge of law, or drafts for another some document that has legal effect, he is practising [sic] law." *Lowell Bar Assoc. v. Loeb*, 315 Mass. 176, 181 (1943).

172. There were other cases decided after 1971 regarding real estate conveyancing, but none reached the SJC. See generally *Massachusetts Conveyancers Ass'n, Inc. v. Colonial Title & Escrow*, 2001 WL 669280 (Mass. Super. Ct. 2001); *Massachusetts Ass'n of Bank Counsel, Inc. v. Closings, Ltd.*, 1993 WL 818916 (Mass. Super. Ct. 1993) (both finding unauthorized practice, the first following a bench trial, the second, as a result of the defendants' default).

173. *American Bar Association Standing Committee On Unauthorized Practice Of Law Statement To Conference of Presidents and Secretaries Of All State And Local Bar Associations*, 16 UNAUTHORIZED PRAC. NEWS (A.B.A. Comm. on Unauthorized Practice of the Law, Chicago, Ill.), no. 2, Mar. 1950, at 33, 35 (extolling the virtue of conferencing with lay groups and public education campaigns).

174. 39 UNAUTHORIZED PRAC. NEWS, no. 1, Fall-Winter, 1974, at 38. However, the Massachusetts Committee also supported lobbying the legislature to enact more detailed laws, especially in the real estate conveyancing field.

175. See generally *Opinion of the Justices*, 279 Mass. 607, 611, n.1 (1932).

176. See generally *JOHNSTONE AND HOPSON, JR.*, *supra* note 40 at 173-176 (outlining various rationales in support of and in opposition to UPL legislation, including protection of lawyers interest in a "large and strong bar").

177. See *Opinion of the Justices*, 279 Mass. 607, 611 (1932); *Opinion of the Justices*, 289 Mass. 607 (1935); and accompanying text.

178. See text accompanying note 67, *supra*.

179. See generally *REBA-SJC*; 459 Mass. 512 (2011); *Lowell Bar Assoc. v. Loeb* 315 Mass. 176 (1943); *Matter of Shoe Manufacturer's Protective Assoc.* 259 Mass. 389 (1936).

180. See *HURST*, *supra* note 3 at 321-23. See also *Amicus Brief* filed by the

offer evidence on at least two critical questions: a. whether the consumers of legal services are prejudiced; and b. whether lawyers do indeed lose business (or are otherwise economically disadvantaged) by lay practice. To the extent that the parties to the *REBA* litigation provided any information on economic consequences of real estate conveyancing by non-lawyers,¹⁸¹ the limited record before the SJC in *REBA* did not support a finding of consumer harm.¹⁸² Ultimately, the sparse record before the Court forced it to conclude that it could not answer either of the First Circuit's certified questions and more litigation has ensued.

If the judiciary's end goal is to maintain control of the UPL debate, the inherent limitations of case-by-case adjudication could be overcome by a different approach: judicial rule-making.¹⁸³ The SJC engages regularly in rule-making to establish protocols for court practice.¹⁸⁴ Similarly, the SJC has used its inherent powers to enact Massachusetts's ethics rules.¹⁸⁵ Typically, the SJC has announced a proposed new rule, has invited public comment, and then has promulgated the final version.¹⁸⁶ Indeed REBA's members have solicited other bar associations to request that the SJC define the practice of law through rule-making.¹⁸⁷ Such a process would help ensure that the judiciary could engage in fact-gathering and solicit broader input to inform its decision-making on what constitutes the practice of law.

In addition to the challenges inherent in judicial decision-making in the UPL field, this review has also highlighted the limitations of the SJC's UPL standard. In words that are as applicable today as

they were in 1930: "[w]e really do not know what is and what is not practicing law under the conditions, complex as they are, which exist in this Commonwealth today."¹⁸⁹ Years of litigation have left both lawyers and laymen without clear guidance, as the current REBA lawsuits so poignantly demonstrate.

If "custom and practice" remain the touchstone of what constitutes the practice of law, then that standard should reflect Massachusetts's rich experience with UPL.¹⁸⁹ The current test risks enshrining UPL doctrine in what the court perceives as past practice, rather than freeing the UPL principles to reflect emerging needs. There have been glimmers of the court's recognition that societal customs evolve over time. Within conveyancing, real estate title work is a prime example; what had been the bailiwick of lawyers has become the province of a specialized industry of title insurance companies. Indeed the SJC has increasingly allowed that not all matters with legal ramifications need to be undertaken by lawyers.¹⁹⁰

More experimentation with the process of defining the practice of law and with the standards for assessing UPL could offer courts a firmer foundation on which to anchor future UPL decisions. Accommodating both the public's need for affordable justice and lawyers' desire to limit lay practice is particularly challenging in an era of economic distress not seen since the Depression. Finding a balance between providing competent legal services and increasing access to justice has proved elusive for the courts to date; new approaches to match current economic realities and social needs may offer a more workable, long-term solution.

Attorney General in *REBA-SJC*, at 22 n.14 noting: "The Record [in the REBA litigation] appears to lack empirical evidence that consumers are better protected if certain services are restricted to only attorneys, and thus restricting competition from non-attorneys absent legal requirements may go too far. In the Attorney General's Office, the issues of non-lawyers performing (or poorly performing) certain conveyancing services has not been a meaningful source of consumer complaints." As to the investigation conducted by Attorney General Dever's office of debt collection companies, we have been unable to locate those records to assay the scope and quality of that study.

181. See Amici Brief filed by Legal Assistance Corporation of Central Massachusetts Neighborhood Legal Services, Inc., South Coastal Counties Legal Services, Inc., Metrowest Legal Services, Inc., and Community Legal Services and Counseling Center, *REBA-SJC* (filed October 20, 2010), (warning that a decision that permitted lay conveyancing would further reduce the state's IOLTA fund, thus jeopardizing legal services to their indigent clients).

182. See *supra* note 180 (referencing the Attorney General's Amicus Brief in *REBA-SJC* which indicated no evidence of material complaints from lay conveyancing).

183. But see *Loeb* 315 Mass. at 184, where the SJC rejects offering broad principles not required for resolution of the pending case as "unwise" and "perhaps unfair."

184. See generally Opinion of the Justices, 289 Mass. 607, 612 (1935), where the court confirmed that "[i]t is inherent in the judicial department of government under the Constitution to control the practice of the law..." (emphasis added);

see also *Collins v. Godfrey*, 324 Mass. 574, 578 (1949) (approving issuance of judicial rules as within inherent power of courts).

185. See generally MASS. R. PROF. C .

186. See, e.g., the SJC's recent approach to enacting a new bar admission requirement on professionalism: Proposed New Supreme Judicial Court Rule 3:16: Practicing with Professionalism Course for New Lawyers, <http://www.mass.gov/courts/sjc/comment-sjc-r316-062612.html> (last visited August 11, 2012).

187. *REBA-1st Cir.*, 608 F.3d 110, 116-17 (1st Cir. 2010).

188. Remarks of Mr. Shrigley, *Discussion of the Activities of Banks and Trust Companies and Other Corporations*, 16 MASS. L. Q. 28, at 28.

189. The court has frequently invoked "custom and practice" in determining whether laymen should be restricted from a particular task. However, when the Commonwealth's entire legal history is reviewed, the evidence does not support a history of lawyer monopoly, at least in litigation. As we have seen, the state's early history found lay practitioners advocating alongside lawyers for 157 years of Massachusetts's 234 year existence, or some 2/3 of the time. One could argue that the SJC in its first *Opinion of the Justices* on the UPL topic called into question the propriety of lay practice in the courts. See Opinion of the Justices, 279 Mass. 607 (1932), and accompanying text. However, it was not until 1935 that the 1790 statute permitting lay advocates with powers of attorney to appear in court was repealed.

190. Lowell Bar Assoc. v. *Loeb*, 315 Mass. 176 (1943), *supra* note 137, et seq. and accompanying text.