LEGISLATION NOTES

CONVEYANCING—THE ROLES OF THE REAL ESTATE BROKER AND THE LAWYER IN ORDINARY REAL ESTATE TRANSACTIONS—WHEREIN LIES THE PUBLIC INTEREST?

To what extent may a real estate broker be involved in the conveyancing process once he has performed his traditional function—the bringing together of a ready, willing and able buyer and seller? This problem, defining the role a broker should play in an ordinary real estate transaction, has been often litigated, especially in recent years, but no clear-cut solution has emerged. Solutions necessarily involve the courts in public policy determinations of what documents involved in the conveyancing process, if any, may be prepared by the broker. Such determinations inevitably turn upon the result of a delicate balancing process whereby the courts weigh the relative importance of two broad concepts—“public protection” and “public convenience,” the element of protection being stressed by the lawyer, and that of convenience being stressed by the broker.

The public interest necessitates that a workable solution to the problem be formulated:

*No real estate transaction can be said to be unimportant.* Whether it involves an inexpensive lot upon which the purchaser expects to build a home or a business property of greater worth, the undertaking . . . is likely to be one of the most

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1. The “conveyancing process” is the process whereby absolute title or a lesser interest in real property is transferred from one party to another; it includes preparation of all documents from the preliminary contract to the deed.


3. The lawyer (protection) versus broker (convenience) approach reeks of the “good guy”:“bad guy” approach which does justice to neither viewpoint. To say that the broker is against public protection, or that the lawyer is against public convenience, is overly simplistic and undoubtedly untrue. It is, however, a fair and useful classification for the purpose of demonstrating the distinctive viewpoint of each as to which concept deserves more weight in the balancing process.
important in the lifetime of the buyer. Hence . . . important and essential inquiries are, or should be, made.4

By whom these "essential inquiries" should be made is disputed: the broker contends that he is qualified to make them,5 and the lawyer insists that only he is so qualified.6 "Absolute public protection" demands that essential inquiries and preparation of all documents involved in the conveyancing process be handled by those most qualified to do so, namely, lawyers.7 According to this view, the preparation of these documents by brokers would constitute the unauthorized practice of law.8 "Absolute public convenience," on the other hand, dictates that the title transferring process be both expeditious and inexpensive.9 Unnecessary delays resulting from the interjection of lawyers into the transaction, and added expenses such as legal fees should be eliminated from the ordinary real estate transaction. Preparation of all necessary documents by the broker, according to this line of thought, would not constitute the prac-

4. Houck, Drafting of Real Estate Instruments: The Problem from the Standpoint of the Bar, 5 LAW & CONTEM. PROB. 66, 67 (1938) (emphasis added). See also infra note 100 and accompanying text.

5. Herbert Nelson, Executive Vice-President of the National Association of Real Estate Boards, expressed the broker's position: "[A] licensed real estate broker, not authorized to practice law, is competent, and should be permitted by law, to select, draft and complete preliminary contracts, simple deeds, simple leases, land contracts and mortgages, if he does so in the course of his business to consummate transactions in which he is interested as agent or broker, and if he neither holds himself out to the public as one specially authorized to do these acts nor receives compensation for the preparation of these instruments." Nelson, Drafting of Real Estate Instruments: The Problem from the Standpoint of the Realtors, 5 LAW & CONTEM. PROB. 57, 59 (1938). Although this view was expressed more than thirty years ago, the broker's view has not changed since.

6. "[I]t is clearly in the public interest that every inquiry necessary to safeguard a party's interests . . . be made . . . by one qualified, competent, and authorized, or licensed, by law to make it [i.e., a lawyer]; and that none be intrusted to one whose interests conflict with, or are adverse to, those of the person he serves [i.e., a broker]." Houck, supra note 4, at 67. "As a minimum [the public] should have the formal protection and the advice and assistance of disinterested and technically qualified counsel." Payne, supra note 2, at 470.

7. Although the public has not always accepted the truth of this proposition, an argüendo assumption of the validity of this statement must be made for purposes of this comment. Brokers would contend that they are competent, but probably would concede that lawyers are most qualified.


9. This view depends upon the validity of the assertion that closing real estate deals can be competently accomplished by a broker. Even assuming the truth of that assertion as to actual matters of title, it fails to encompass important collateral matters, such as advice as to tax implications. Improper information, or silence as to these collateral matters can be extremely "costly."
The various results of the balancing process have fortunately been rooted in the fertile middle ground between these absolutes. The clash between two such powerful interest groups—brokers and lawyers—has all too often obscured the interest of the ultimate beneficiary of the conveyancing controversy—the public. The public is incapable of protecting its own interest for a variety of reasons; in short, the public wants protection, but only if it is convenient. The onus is, therefore, on the lawyers, the real estate brokers and the courts to formulate and implement solutions to the conveyancing problem which maximize both public protection and public convenience. Such solutions are possible, if a broker-lawyer compromise is accepted as a necessity. The broker must at least be allowed to prepare a document which will evidence that he has brought together a ready, willing and able buyer and seller, thereby earning his commission: working within such a compromise, the lawyers, brokers and courts must then focus their attention on safeguards to protect the public interest.

The Illinois solution to the broker-lawyer controversy can be a model for other states to follow. The 1966 Illinois Supreme Court, recognizing the need for a broker-lawyer compromise, held, in The Chicago

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12. For example, the laws of real property are extremely complex; the average buyer is involved in the conveyancing process only an extremely limited number of times; the resulting injuries are often not immediately suffered, but may be manifested years later when the property is resold, or the owner dies; the damages are often of a nebulous nature—the market price might be affected by an indeterminable amount, or more favorable tax consequences could have been obtained; and title companies and licensed brokers are clothed with indicia of authority. John Payne noted that "the home buyer is engaged in a highly technical transaction about which he is inexperienced; . . . he dislikes lawyers; . . . he is therefore receptive to the suggestion that laymen carry out the entire transaction for him, particularly if some of the services are 'free.' He wants complete security with a minimum of expense and bother." Payne, supra note 2, at 470.
Bar Association v. Quinlan and Tyson, Inc.,18 that brokers may prepare only certain preliminary documents. Of more import, however, was the fact that the decision was a catalyst in the formulation of The Illinois Real Estate Broker-Lawyer Accord,14 which, in addition to delineating the respective roles of the broker and the lawyer in real estate transactions, provides a framework for settling future disputes. Implementation of the Accord is, however, in its embryonic stage, and certain safeguards can be built into it which would be beneficial to all concerned—brokers, lawyers, courts, and the public. To that end, this comment is offered.

UNAUTHORIZED PRACTICE OF LAW
HISTORICAL ORIGINS AND GROWTH OF THE LEGAL PROFESSION TO PROTECT THE PUBLIC INTEREST

In order to appreciate the distinctions between the concepts of "public protection" and "public convenience," it is useful and necessary to briefly trace the historical origins of "authorized" and "unauthorized" practice of law. At first blush, it would seem that the very concept of unauthorized practice of law a fortiori implies the existence of some concept of authorized practice of law. Historically, however, the inverse of this simple proposition proved true—practice of law became "authorized" because of widespread evils which resulted from the unqualified, and therefore "unauthorized," practice of law. As early as 468 A.D., unqualified practice necessitated a Roman statute prohibiting the practice of law by those not authorized to so practice.15 Over seven centuries later, the practice of law began to develop in England when Henry II created a "Central Court" which consisted of a selected, "small number of men who [were] to do justice habitually."16 Only one century later, in 1292, because of "a condition, intolerable to the king's people [that grew] up by the promiscuous practice around the king's courts of persons unskilled in the law . . . ."17 Edward I was forced to limit the number of practitioners, and in so doing, vested in the Court of Common Pleas the power to appoint "attorneys and lawyers of the best and most apt for their learning and skill, who might do service to his court and people; . . . those so chosen only, and no other [should practice]."18 Thus, as a result of

13. Supra note 11.
14. See Appendix A, infra.
17. Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R.I. 122, 133, 179 A. 139, 143 (1935).
authorized practice of law, rather than as a cause, the 1292 ordinance established the principle that law could be practiced only by those "authorized" to do so by the court.

It is important to determine that authorized practice came into being to safeguard the public interest because the basic criticism through the centuries of the very notion of "authorized" practice has been that those who determine what is authorized, and thereby what is unauthorized, have too great a personal stake in such determination. Although there undoubtedly exists more than a scintilla of truth in that assertion, the idea that the legal profession is a mercenary, monopolistic, self-serving entity, unresponsive to the public interest and dispensing privileges only to a favored few, has been consistently rejected by commentators and courts. Benjamin Cardozo observed:

[One is] received into that ancient fellowship [i.e., the Bar] for something more than a private gain. [The lawyer] becomes an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.19

Wigmore stated: "The most important thing about the practice of law is that it is, and in the inherent nature of things demands always that it shall be, a profession."20 A "profession," said Roscoe Pound, is "a group of men pursuing a learned art as a common calling in the spirit of a public service —no less a public service because it may incidentally be a means of livelihood."21 That "spirit of public service" is a "prerequisite of sound administration of justice according to law."22 Courts have also accepted this reasoning.23

RESPONSIBILITY OF THE PUBLIC FOR THE GROWTH OF UNAUTHORIZED PRACTICE

Once authorized practice came into being to protect the public, and unauthorized practice became punishable, one might believe that authorized practice, which is deserving of independent existence, would pre-empt the growth of unauthorized practice. Human experience, however, dictates that what ought to be is not necessarily what is. Unauthorized prac-

19. Karlin v. Culkin, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928). See also Rhode Island Bar Ass’n v. Automobile Service Ass’n, supra note 17, at 133-34, 179 A. at 146; In re Day, 181 Ill. 73, 54 N.E. 646 (1899).
20. POUND, supra note 15, at 353.
23. See People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919). “The reason why preparatory study, educational qualifications, experience, examination and license by the courts are required, is not to protect the bar . . . but to protect the public.” Id. at 339, 125 N.E. at 673. See also Chicago Bar Ass’n v. Quinlan & Tyson, Inc., supra note 8.
tice, like a parasite, attached and fed upon authorized practice and has to a greater or lesser degree experienced a parallel growth. The need for public protection has been continually tempered by the attitude of the public that “anything you (lawyers) can do, I (the public) can do better.” That the 1292 ordinance of Edward I did not check the growth of unauthorized practice is evidenced by the extensive body of legislation and case law which has developed since, and continues today.\(^{24}\)

It is ironic that primary responsibility for allowing the growth of unauthorized practice must fall upon the public—the same public whose interest was to be safeguarded by the legal profession and its authorized practitioners. Growth of unauthorized practice has resulted both from direct support by the public (use of lay practitioners) and from indirect support (general public dissatisfaction with the legal system). This general dissatisfaction, according to Pound, emanated from four general sources:

1. Inevitable mechanistic operation of rules of law;
2. Inevitable difference in the rate of progress between law and public opinion;
3. Premise that the administration of justice is so simple that anyone is sufficiently competent to engage in it;
4. Inherent human impatience of restraint.\(^{25}\)

Pound's latter two causes of dissatisfaction with the legal process have played a substantial role in the broker-lawyer controversy. Brokers have consistently claimed that conveyancing is such a simple matter that brokers, with their specialized training, are clearly competent to prepare all necessary documents.\(^{26}\) They further assert that involving an additional party in the title-transferring process (adding a lawyer where only the buyer, seller and broker are necessary) is not only inconvenient and causes delay, but also has a chilling effect on many transactions.

**UNAUTHORIZED PRACTICE OF LAW—GENERAL PROPOSITIONS**

This brief historical discussion of the practice of law is offered to establish the proposition that the interplay of two divergent concepts governs that which constitutes “authorized” or “unauthorized” practice at any

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\(^{24}\) Later English statutes excluded certain individuals from practice in the public interest—e.g., bailiffs, court clerks, sheriffs, etc. See 1 Henry V (1413); 33 Henry VI, c.7 (1455); 3 James I, c.7 (1606). For legislation concerning the unauthorized practice of law in the United States see the Unauthorized Practice Statute Book (1st ed. 1961). For cases and secondary material concerning the unauthorized practice of law see the Unauthorized Practice Source Book (Bass rev. ed. 1965).

\(^{25}\) Pound, supra note 15, at xxiv (Preface). A fifth factor which may be of greater importance, practically speaking, than the other four is the cost factor.

\(^{26}\) See Nelson, supra note 5.
given time in history: (1) public protection, on the one hand, necessitates
the continued growth of a learned, legal profession; (2) public con-
venience, on the other hand, dictates that it is often inconvenient and costly
to consult authorized practitioners on all matters concerning legal re-
lations. In order to make a determination that certain activities constitute
unauthorized practice of law, the courts must necessarily weigh the re-
spective merits of these concepts.

Several subsidiary propositions concerning the unauthorized practice of
law also emerge: (1) The public did not as much demand protection as
protection was imposed upon them from a superior authority—historically,
the sovereign; (2) the courts were invested with the power to authorize
practitioners; and (3) the public has never been wholly satisfied with the
legal system, thereby supporting unauthorized practice of law. Each of
these premises plays a significant role in the broker-lawyer conveyancing
controversy, and any solution to the problem must recognize and take
advantage of these historical implications.

**ABSOLUTE JUDICIAL CONTROL OVER PRACTICE OF LAW**

**JUDICIAL CONTROL OVER ADMISSION TO THE PRACTICE OF LAW**

With few exceptions, American courts have held that the judiciary has
absolute power to determine who shall be authorized to practice law.27
Such plenary power over admissions to the practice of law derives from
either, or both, of two sources: the doctrine of inherent power of the
common law judiciary, and the doctrine of separation of powers. Al-
though related, the two concepts are distinguishable; yet courts consistently
confuse or fail to differentiate between them.

The inherent power concept has obscure origins. One line of thought
theorizes that the common law courts were necessarily forced to undertake
numerous powers ancillary to their adjudicative functions28 so as "to fill

27. See, e.g., State Bar of Arizona v. Arizona Land Title & Trust Co., supra
note 8; In re Day, supra note 19; In re Opinion of the Justices, 289 Mass. 607, 194
N.E. 313 (1935); Hulse v. Criger, supra note 10. See also Cheadle, Inherent
Power of the Judiciary Over Admission to the Bar, 7 WASH. L. REV. 318 (1932);
Lee, The Constitutional Power of the Courts Over Admission to the Bar, 13 HARV.
L. REV. 233 (1924). The states which recognize legislative supremacy over ad-
missions are Maryland, New York, North Carolina and Vermont. See Bastian v.
Watkins, 230 Md. 325, 187 A.2d 304 (1963); In re Cooper, 22 N.Y. 67 (1860);
In re Applicants for License, 143 N.C. 31, 55 S.E. 635 (1906); Button v. Day, 204
Va. 547, 132 S.E.2d 292 (1963). For majority and minority holdings, see Payne,

28. Such as "regulating procedure, providing for judicial personnel and quarters,
maintaining order during court proceedings, and enforcing decrees." Payne, supra
note 27, at 37.
a legal vacuum" created by the non-assertion of regulatory power vested in but unexercised by the crown or Parliament. Thus, as a "result of improvisation [rather] than design," the judiciary filled the need for regulation. Once the power was exercised over a period of time, as in the case of admissions to practice, the courts then relied upon "immemorial custom" to sustain such exercise.

A second theory traces the origins of inherent power to express grants of authority from the crown or Parliament, rather than to necessity. A strong argument can be offered that "inherent" judicial control over admission to the practice of law stemmed from such grants. The 1292 ordinance of Edward I provided that the Court of Common Pleas was to appoint qualified "attornies and lawyers . . . who might do service to his court and people . . . ." Subsequent legislation on the matter of admissions had a dual effect. While it ostensibly set minimum standards or excluded persons unfit to practice, it also directly or indirectly reaffirmed the premise that ultimate control over admissions rested in the judiciary. The courts continued to exercise such power. Therefore, because of the express grant, reaffirmations and "immemorial custom," the judiciary, ipso facto, had inherent power to control admissions to practice.

From the standpoint of the history of the American judiciary, the doctrine of separation of powers has played an important role in the determination that the courts have plenary power to control admittance to the practice of law. Simply stated, the separation theory provides that:

Although the constitutions of only a few states expressly grant the judiciary

29. Payne, supra note 27, at 36.
30. Payne, supra note 27, at 36.
31. Payne, supra note 27, at 36.
32. Pollack & Maitland, supra note 16, at 194. "[T]he object of this first attempt at regulating the bar was the well-being of government and people [and] the duty of bringing that about was expressly charged upon the justices." Rhode Island Bar Ass'n v. Automobile Service Ass'n, supra note 17, at 133, 179 A. at 143.
33. See, e.g., I Henry V (1413); 33 Henry VI, c.7 (1455); 3 James I, c.7 (1606). See generally In re Day, supra note 19, at 85, 54 N.E. at 649. "[T]he legislation was of a character to exclude persons unfit to practice, who threatened the public welfare through ignorance or untrustworthiness." See also Rhode Island Bar Ass'n v. Automobile Service Ass'n, supra note 17.
34. Kilbourne v. Thompson, 103 U.S. 168, 190 (1880) (emphasis added).
the power to control admissions, the majority of state courts imply such plenary control from the grant of the whole judicial power to the judicial department. A leading decision on unauthorized practice expressed this view:

The grant of the judicial power to the department created for the purpose of exercising it must be regarded as an exclusive grant covering the whole power, subject only to the limitations which the constitutions impose. In commenting upon the rationale for such an implication, the Illinois Supreme Court demonstrated that it relied both upon the concept of "inherent power" of the judiciary as well as upon the doctrine of "separation of powers:"

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

IMPLIED JUDICIAL POWER TO PREVENT UNAUTHORIZED PRACTICE

Once the courts asserted their inherent power over admissions, whether justifiably or otherwise, the inference process had to be carried one step further. Inferred from the power to admit to or exclude from practice was implied power to prevent unauthorized practice, usually by injunction and contempt proceedings. The rationale underlying the power

35. See, e.g., Ark. Const. amend. 28; Fla. Const. art. 5, § 23; N.J. Const. art. 6, § 2 (3).
38. See Illinois State Bar Ass'n v. Peoples Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); In re Opinion of the Justices, supra note 27; In re Opinion of the Justices, 279 Mass. 607, 180 N.E. 725 (1932); Rhode Island Bar Ass'n v. Automobile Service Ass'n, supra note 17; Washington State Bar Ass'n v. Washington Ass'n of Realtors, supra note 11; In re Morse, 98 Vt. 85, 126 A. 550 (1924).
39. See Conway-Bogue Realty Investment Co. v. Denver Bar Ass'n, supra note 10; Smith v. Illinois Adjustment Finance Co., 326 Ill. App. 654, 63 N.E.2d 264 (1945): "Surely the courts are not impotent to protect those to whom the right to practice law has been granted from the natural and necessary results of the unauthorized exercise of those rights by others, whether they be corporations or individuals." Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 34, 193 N.E. 650, 655 (1934); see Washington State Bar Ass'n v. Washington Ass'n of Realtors, supra note 11.
40. See Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 8 N.E.2d 941, cert. denied, 302 U.S. 728 (1937); Illinois State Bar Ass'n v. Peoples Stock Yards State Bank, supra note 38; Rhode Island Bar Ass'n v. Automobile Service Ass'n, supra note 17; In re Welch, 128 Vt. 180, 185 A.2d 458 (1962); In re Morse, supra note 38; But cf. Indianapolis Bar Ass'n v. Fletcher Trust Co., 211 Ind. 27, 5 N.E.2d 538 (1937); Murphy v. Townley, 67 N.D. 560, 274 N.W. 857 (1937).
to prevent unauthorized practice was expressed by the Illinois Supreme Court:

[Having inherent power to control admissions] it necessarily follows that this court has the power to enforce its rules and decisions against offenders, even though they have never been licensed by this court. Of what avail is the power to license in the absence of power to prevent one not licensed from practicing as an attorney? In the absence [of such power] the power to control admissions would be nugatory.41

The weight of authority supports the premise that the judiciary may punish unauthorized practice42 irrespective of statutory penalties which are generally construed as non-exclusive.43

IMPLICATIONS OF ABSOLUTE JUDICIAL CONTROL OVER PRACTICE OF LAW

Whether absolute judicial control over the practice of law derives from common law “necessity” or “express grant” origins, or from the doctrine of separation of powers, has become unimportant today. It is now axiomatic that the judiciary has such plenary power. This view of judicial supremacy represents the great weight of authority.44 An important corollary to this proposition has also emerged: legislation concerning the practice of law can set minimum standards for authorization, but such legislation can be, at most, of an advisory nature; it cannot usurp or infringe upon the absolute control vested in the judiciary.45 The inter-relationship of these two propositions offers a flexibility which can be effectively utilized in the formulation of an ideal solution to the broker-lawyer conveyancing problem.46

CONVEYANCING—THE ROLE OF THE REAL ESTATE BROKER

CONVEYANCING—PRACTICE OF LAW?

Judicial attempts to define the nebulous concept of “practice of law” have been uniformly unsuccessful in their failure to delineate any practicable boundaries to the term. Most definitions are all-encompassing in their implications:

“Practice of law” [is not limited to the conduct of cases in court, but also] in-

41. Illinois State Bar Ass’n v. Peoples Stock Yards State Bank, supra note 38, at 471-72, 176 N.E. at 906 (emphasis added).
42. See In re Day, supra note 19; In re Opinion of the Justices, supra note 27; In re Morse, supra note 38.
43. See supra note 33, and accompanying text.
44. See Chicago Bar Ass’n v. Quinlan & Tyson, Inc. supra note 8; In re Day, supra note 19; In re Opinion of the Justices, supra note 27; Washington State Bar Ass’n v. Washington Ass’n of Realtors, supra note 11.
45. See supra note 33, and accompanying text.
46. See text infra pages 335-43.
cludes legal advice and counsel, as to the preparation of legal instruments and contracts by which legal rights are secured . . . .

A literal interpretation of such a broad definition would leave virtually no commercial area of human endeavor untouched. The necessity of including certain out-of-court activities within the concept of practice of law has a sound underlying rationale: whereas in-court mistakes are capable, in many instances, of being corrected by the court, "[i]gnorance and stupidity [in out-of-court matters] may . . . create damage which the courts of the land cannot thereafter undo." It is in making determinations of which out-of-court activities constitute practice of law that courts must weight the respective merits of the "public protection" and "public convenience" concepts.

Conveyancing—"[a] term including both the science and art of transferring titles to real estate from one man to another"—is an out-of-court activity which has caused courts great difficulty. The most often cited definitions of practice of law specifically include conveyancing:

*Practice of law* under modern conditions consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces conveyancing, the giving of legal advice in a large variety of subjects, and the preparation and execution of legal instruments . . . . These "customary functions of an attorney or counsellor at law" . . . bear an intimate relation to the administration of justice by the courts. *No valid distinction . . . can be drawn between that part of the work of the lawyer which involves appearance in court and that part which involves advice and drafting of instruments . . . .*

Such definitions seemingly exclude the real estate broker from any participation in the conveyancing process since preparation of any necessary documents would constitute practice of law. Many courts, however, qualify such definitions and allow drafting of "simple" instruments under certain conditions: "*The occasional drafting of simple deeds, and other*

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48. People v. Alfani, *supra* note 23, at 340, 125 N.E. at 673 (emphasis added). *See also* Illinois State Bar Ass'n v. Peoples Stock Yards State Bank, *supra* note 38, at 473, 176 N.E. at 906: "It is just as essential to the administration of justice and the proper protection of society that unlicensed individuals should not be permitted to prey upon the public in that sphere [out-of-court] as it is with respect to proceedings in the court."

49. BLACK'S LAW DICTIONARY 403 (4th ed. 1951).

legal instruments when not conducted as an occupation or yielding substantial income may fall outside the practice of law."\textsuperscript{51} Confusion obviously results from such conflicting statements. It is understandable that courts have taken different views as to whether or not preparation of necessary conveyancing documents constitutes practice of law.

WHAT CONVEYANCING DOCUMENTS MAY BE PREPARED BY REAL ESTATE BROKERS?

The result of the delicate balancing process ultimately involves the policy determination of what documents the broker may or may not prepare. Three general solutions to the document problem have emerged: (1) the broker may prepare virtually all documents\textsuperscript{52} (emphasis on public convenience); (2) the broker may prepare no documents\textsuperscript{53} (emphasis on public protection); (3) the broker may prepare some documents\textsuperscript{54} (compromise between protection and convenience).

\textit{All Documents}

The courts which have held that real estate brokers may prepare virtually all documents involved in the conveyancing process have asserted, either impliedly or expressly, that the underlying rationale of such a determination is that public convenience outweighs the need for public protection:

The line between what is and what is not the practice of law cannot be drawn with precision. Lawyers should be the first to recognize that between the two there is a region wherein much of what lawyers do every day in their practice may also be done by others without wrongful invasion of the lawyers' field. [O]rdinary conveyancing, part of the everyday business of the realtor, is within that region and consequently something of which the legal profession cannot under present circumstances claim that the public welfare requires restraint by judicial decree. . . . \textit{We do not think the possible harm which might come to the public from the rare instances of defective conveyances in such transactions is sufficient to outweigh the great public}

\textsuperscript{51} In re Opinion of the Justices, \textit{supra} note 27, at 615, 194 N.E. at 317 (emphasis added).
\textsuperscript{53} See State Bar of Arizona v. Arizona Land Title & Trust Co., \textit{supra} note 8; Chicago Bar Ass'n v. Quinlan & Tyson, Inc., \textit{supra} note 8. \textit{See also Annot.}, 53 A.L.R.2d 788 (1957).
inconvenience which would follow if it were necessary to call in a lawyer to draft these simple instruments.65

In arriving at such a finding, the courts first affirm their inherent power over practice of law,66 state that practice of law includes both in-court and some out-of-court activities,67 and hold that legislative enactments are, at most, advisory and do not bind the judiciary.68 Several factors influence the court decision: that preparation of the documents was incidental to the brokerage business;69 that legal advice was not given;70 that the document was "simple" rather than "complex;"71 that no compensation was received other than receipt of the regular brokerage fee;72 that the broker was licensed;73 and that it was customary in the community that the broker prepare such documents.74

After weighing all factors, these courts agree only that all necessary


57. See Creekmore v. Izard, supra note 10; In re Matthews, supra note 10; Hulse v. Criger, supra note 10.


59. This generally means that since a broker is licensed to negotiate sales, he therefore may prepare the documents necessary to consummate such sales. See generally Creekmore v. Izard, supra note 10; Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, supra note 10; State Bar of Michigan v. Kupris, supra note 10; Ingham County Bar Ass'n v. Walter Neller Co., supra note 10; Cowern v. Nelson, supra note 10; Hulse v. Criger, supra note 10.


64. See Creekmore v. Izard, supra note 10; Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, supra note 10; Hulse v. Criger, supra note 10.
documents may be prepared by the broker. They do not agree whether or not such preparation constitutes the practice of law. Some expressly state that such preparation is not the practice of law,\(^6\) other jurisdictions hold that such preparation is the practice of law, but it is not unauthorized,\(^6\) and others hold that preparation is not the unauthorized practice of law,\(^6\) which means that preparation may or may not be practice of law.

No Documents

The courts which have held that the real estate broker may prepare none of the documents involved in the conveyancing process stress the element of public protection.\(^6\) The main factors which other courts rely on in finding that the preparation of certain documents does not constitute the unauthorized practice of law are systematically criticized as follows: (1) *incident of lawful, licensed business*—"Centering the decision . . . on a definition of what is incident to the defendant's business is merely the reverse of centering it on a definition of what is the practice of law,"\(^6\) and ignores the public interest.

Any rule which holds that a layman who prepares legal papers . . . is not practicing law when such services are incidental to another business . . . completely ignores the public welfare.\(^7\)

The mere fact that the broker is licensed to carry on certain activities (i.e., sales of realty, etc.) does not allow him to carry on an activity for which he is not licensed (i.e., practice of law); (2) *simple instrument*—There exists no valid distinction between "simple" and "complex" documents where real estate is involved. "A document is simple or complex relative to who prepares it . . . . "The most complex [is] simple to the skilled and the simplest often trouble[s] the inexperienced;"\(^7\) (3) *no

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\(^6\) "The public interest must be the guiding principle for the court in deciding this case . . . . " Chicago Bar Ass'n v. Quinlan & Tyson, Inc., *supra* note 8, at 394, 203 N.E.2d at 135. See also State Bar of Arizona v. Arizona Land Title & Trust Co., *supra* note 8.

\(^6\) Chicago Bar Ass'n v. Quinlan & Tyson, Inc., *supra* note 8, at 395, 203 N.E.2d at 135-36.


\(^7\) Chicago Bar Ass'n v. Quinlan & Tyson, Inc., *supra* note 8, at 406, 203
compensation—"This contention [that failure to charge for the preparation of various legal documents removes such preparation from the field of the practice of law] is specious, since receipt of compensation is not the feature which determines whether a given act is the practice of law."72 "The need for protection of the public interest is the same whether the broker's services are paid for or gratuitous;"78 (4) custom—

The fact that these practices have continued for many years and have been acquiesced in by the bar does not make such activities any less the practice of law. . . . [N]either the public's blissful acquiescence nor the bar's confessed lethargy can clothe the activities with validity. There is no prescriptive right to practice law . . . .74

From the standpoint of absolute public protection, the arguments of the courts which allow preparation of no documents by brokers are very logical. However, they ignore one basic historical principle—that the public wants absolute protection, but does not want to pay for it. This basic proposition has influenced most courts to accept some broker-lawyer compromise.

Some Documents

The courts which permit the real estate broker to prepare some of the documents involved in the conveyancing process have accepted the proposition that some broker-lawyer compromise is necessary:

As a practical solution . . . it [is] advisable to permit a real estate broker to prepare simple contracts of sale, options, leases, etc., and to prohibit him from preparing legal instruments whereby the legal title to property passes from the seller to the purchaser.75

The documents which may be prepared by the broker, however, are generally of a preliminary nature—"offers to purchase," "options," "earnest money receipts," or "binders." The rationale underlying the decision prohibiting the broker from preparing certain subsequent documents and instruments is similar to the rationale expressed by the courts which prohibit the broker from preparing any documents:78 (1) preparation of


73. Chicago Bar Ass'n v. Quinlan & Tyson, Inc., supra note 8, at 410, 203 N.E.2d at 142 (emphasis added).

74. State Bar of Arizona v. Arizona Land Title & Trust Co., supra note 8, at 93, 366 P.2d at 13 (emphasis added).

75. Commonwealth v. Jones & Robbins, Inc., supra note 11, at 727. See also Keyes Co. v. Dade County Bar Ass'n, supra note 11; Chicago Bar Ass'n v. Quinlan & Tyson, Inc., supra note 11; Gustafson v. V.C. Taylor & Sons, Inc., supra note 11; Washington State Bar Ass'n v. Washington Ass'n of Realtors, supra note 11.

76. See supra notes 39-64 and 69-74 and accompanying text.
subsequent documents is not incidental to the business of selling or buying real estate; (2) these documents are not simple; (3) the character of the act and not whether compensation is received governs; and (4) the fact that brokers may have customarily prepared such documents is irrelevant if the public welfare demands otherwise.

Rather than accepting the fact of compromise necessitated by public convenience considerations, the courts attempt to rationalize the distinction they make between permitting the broker to prepare preliminary binding contracts and prohibiting him from preparing subsequent conveyancing documents. In permitting preparation of preliminary documents, most courts rely upon similar factors which dictate an opposite result when applied to the subsequent documents: (1) The broker is licensed to negotiate sales and purchases of real estate, and as an incident of his business, he may therefore prepare these preliminary documents; (2) the preliminary documents are generally standardized, "simple" forms originally prepared by a lawyer; (3) the broker receives no compensation other than his brokerage fee; (4) brokers have customarily prepared such documents; (5) selection of such standard forms does not constitute the giving of legal advice; and (6) the broker is merely supplying factual data, filling in the blanks, and making additions and deletions to the contract as called for by the buyer or seller.

The attempt by the courts to rationalize the distinction between "preliminary" and "subsequent" documents is somewhat illogical in that it ignores the basic fact that the content of the latter is controlled by the former:

[The contract between the parties is the fundamental instrument in a real estate transaction and determines their future rights and obligations. It seems . . . somewhat anomalous to permit the broker to prepare the controlling agreement but not those [subsequent documents] which it controls.77

In reply to this argument, the courts further distinguish the subsequent documents as being more than mere contracts—they are "extraordinary contracts" which are "muniments of title."78 Therefore, since many subsequent documents are recorded, it is more important that they be prepared by those most able to do so. Although this "recording argument" does benefit the public to the extent that it maximizes the probability that they will receive title to the property, it ignores the fact that perhaps more actual damage results to the buyer at the bargaining stage when the pre-

77. Chicago Bar Ass'n v. Quinlan & Tyson, Inc., supra note 11, at 124, 214 N.E.2d at 776 (dissenting opinion).
liminary, binding contract is drawn by the broker, who is theoretically acting as agent for the seller.

Another sound argument offered by the courts as justification for making the distinction between preliminary and subsequent documents concerns the broker's commission. He is generally entitled to a commission when he brings together a ready, willing and able buyer and seller:

It seems logical and fair that the realtor be restricted in the drafting of papers to those, such as a memorandum, deposit receipt, or the contract . . . recording his handiwork—that is, the bringing together of buyer and seller . . . . Once this point is reached [and he is entitled to compensation] the field is the lawyers . . . .

THE ILLINOIS SOLUTION

HISTORICAL BACKGROUND

Illinois courts have been among the majority in asserting their plenary control over admissions to the practice of law, relying both upon the doctrine of separation of powers and the doctrine of inherent judicial power. Implicit in such power over admissions is the power and "duty to punish those who seek to practice law without the authorization of the judicial department," notwithstanding any statutory penalties for unauthorized practice. Power to punish unauthorized practice extends to out-of-court practice as well as in-court activities; the public interest governs what activities constitute unauthorized practice, not where the act took place. Indeed, the purpose underlying prohibition of unauthorized practice is to protect the public, not to perpetuate a self-serving legal profession:

In modern times the affairs of the people requiring the services of a lawyer have become more intricate and complex, demanding a corresponding increase in the standards of the profession through preliminary education and a lengthened and more diversified course of study by those who would engage in the practice . . . .

79. Keyes Co. v. Dade County Bar Ass'n, supra note 11, at 606.
80. Chicago Bar Ass'n v. Quinlan & Tyson, Inc., supra note 8; See In re Day, supra note 19.
81. See supra note 37 and accompanying text.
82. Chicago Bar Ass'n v. Quinlan & Tyson, Inc., supra note 8, at 394, 203 N.E.2d at 135. See also Illinois State Bar Ass'n v. Peoples Stock Yards State Bank, supra note 38.
83. ill. Rev. Stat. ch. 13, § 1, as amended March 5, 1965 (Supp. 1969): "No person shall be permitted to practice as an attorney or counselor at law within this State without having previously obtained a license for that purpose from the Supreme Court of this State. . . . Any person practicing, charging or receiving fees for legal services within this State . . . without being licensed to practice as herein required, is guilty of contempt of court . . . ."
84. Chicago Bar Ass'n v. Quinlan & Tyson, Inc., supra note 8, at 394, 203 N.E.2d at 135. See also Chicago Bar Ass'n v. Tinkoff, 399 Ill. 282, 77 N.E.2d 693 (1948).
These prerequisites are not for the purpose of creating a monopoly in the legal profession nor for its protection, but for the better security of the people against incompetency and dishonesty.86

Whether or not broker participation in the conveyancing process was one of those out-of-court activities by a layman which constituted the unauthorized practice of law did not confront the Illinois Supreme Court until 1949. In that year, in *People v. Schafer*,86 the Illinois Bar Association brought an action against a licensed real estate broker seeking to enjoin him from engaging in the unauthorized practice of law, and to have him found in contempt of court for carrying on certain activities. The activities complained of included preparation of contracts, mortgages and deeds; no fee was charged when Schafer was the broker in the transaction, but an additional fee was charged when he was not the broker in the transaction, but merely one who filled in necessary documents. In finding the defendant guilty of contempt for engaging in the unauthorized practice of law, the court rejected the argument that preparation of such documents was a necessary incident of the real estate business, and the mere filling in of blanks in “simple” instruments did not constitute practice of law:

One who merely fills in certain blanks [in deeds, notes, mortgages and contracts] when other pertinent information should be elicited and considered is rendering little service but is acting in a manner calculated to produce trouble. When filling in blanks as directed he may not by that simple act be practicing law but if he elicits the proper information and considers it and advises and acts thereon he would in all probability be practicing law. In other words, if *his service does not amount to the practice of law it is without material value; but if it is of material value it would likely amount to the practice of law*.87

THE QUINLAN & TYSON CASE

Although the *Schafer* case seemed to prohibit real estate brokers from preparing any of the necessary documents involved in the conveyancing process, the brokers continued to prepare such documents. Finally, in 1957, the Chicago Bar Association filed suit against Quinlan & Tyson, Inc., a reputable real estate brokerage firm which prepared all documents involved in the title-transferring process—from the preliminary contract to deeds of conveyance. The trial court referred the matter to a Master in Chancery who heard extensive testimony, and who concluded that preparation of all conveyancing instruments constituted the unauthorized practice of law. The Chancellor modified the Master's findings to the

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85. *Chicago Bar Ass’n v. Quinlan & Tyson, Inc.*, *supra* note 8, at 394, 203 N.E.2d at 135 (emphasis added). *See also supra* note 40.
86. 404 Ill. 45, 87 N.E.2d 773 (1949).
87. *Id.* at 53-54, 87 N.E.2d 777-78 (emphasis added).
extent that the broker should be allowed to prepare preliminary contracts of sale:

"As a necessary incident to the transaction of its real estate brokerage business the [broker] when [he] is engaged as a broker by either the seller or the buyer of real estate may prepare offers and contracts to purchase or sell under the following conditions" (a) The contracts to be filled in are contracts customarily used in the broker's community; (b) No additions are made in the form except those commonly made in supplying factual and business details pertinent to the transaction; no deletions are made in the form except those involving the elimination of factual and business details not pertinent to the transaction.88

The trial court thus determined that the convenience afforded to the public outweighed the need for public protection, at least insofar as the preparation of preliminary contracts by brokers was concerned.

On appeal,89 the trial court decision was affirmed in part and reversed in part. The Chancellor's finding that preparation of documents subsequent to the offer to purchase constituted the unauthorized practice of law was affirmed, but the finding that preparation of the offer to purchase was not unauthorized was reversed. In a decision which emphasizes the need for public protection in conveyancing matters,90 the Illinois appellate court rejected all traditional arguments made on behalf of the broker: (1) incident to licensed business;91 (2) no additional compensation;92 (3) simple document;93 (4) custom;94 (5) necessity of a writing to evidence the

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88. Chicago Bar Ass'n v. Quinlan & Tyson, Inc., supra note 8, at 391-92, 203 N.E.2d at 133 (emphasis added).
89. Chicago Bar Ass'n v. Quinlan & Tyson, Inc., supra note 8.
90. See also State Bar of Arizona v. Arizona Land Title & Trust Co., supra note 8.
91. "We cannot adopt this 'incident to business' rule . . . . [I]t is an evasion of the hard core principle of the public interest which must be the basis for deciding whether or not the defendant's actions constitute the practice of law. . . . Centering the decision of this case on a definition of what is incident to the [broker's] business is merely the reverse of centering it on a definition of what is the practice of law. To take an approach to this case on either basis without considering where the public interest lies is . . . objectionable." Chicago Bar Ass'n v. Quinlan & Tyson, Inc., supra note 8, at 395, 203 N.E.2d at 140.
92. "The character of the act and not whether compensation is or is not received is determinative. The need for protection of the public interest is the same whether the broker's services are paid for or gratuitous." Chicago Bar Ass'n v. Quinlan & Tyson, Inc., supra note 8, at 409-10, 203 N.E.2d at 142.
93. "[A] document is simple or complex relative to who prepares it . . . . Moreover, it is apparent that the simplicity or complexity of a document also depends on the social and legal context into which it is placed. Hence the preparation of a real estate sales contract is simple enough when the instrument is viewed merely as a memorandum of the agreement as to the terms of a transfer of ownership of real estate. But the contract cannot realistically be viewed in such isolation. The one who prepares the contract must keep in mind the law of marriage or divorce, probate, heirship, landlord and tenant, vendor and purchaser and many other
bringing together of a ready, willing and able buyer and seller.\textsuperscript{95}

The Illinois Supreme Court reinstated the finding of the trial court—the brokers were permitted "to fill in the blanks of whatever form of such contract is customarily used in the community and to make appropriate deletions from such contract to conform to the facts,"\textsuperscript{96} but were prohibited from preparing subsequent documents. The articulated rationale was that since a broker is licensed to find a ready, willing and able buyer, and he earns his commission at that point, he should therefore be allowed to evidence his performance by such a writing. However, there is an inarticulated rationale for the decision—a broker-lawyer compromise is acceptable because the need for public protection is considerably tempered by the public demand for convenience.

THE ILLINOIS REAL ESTATE BROKER-LAWYER ACCORD

Perhaps more important than the *Quinlan & Tyson* decision itself was the subsequent formulation of the *Illinois Real Estate Broker-Lawyer Accord*.\textsuperscript{97} The Accord was necessary because after the appellate court decision which held that brokers could prepare no documents, "a real Donnybrook was developing."\textsuperscript{98} Two bills were introduced into the 1965 General Assembly which would have nullified the appellate holding, and "there was even talk of sponsoring a constitutional amendment [allowing brokers to prepare certain documents] if the Illinois Supreme Court affirmed . . . ."\textsuperscript{99} Such public controversy between brokers and lawyers could not benefit either profession, or the public, as evidenced by a similar
problem in Arizona. A special committee of brokers and lawyers was therefore appointed in 1965 to implement the appellate decision. The Supreme Court ruling allowing brokers to fill in preliminary contracts was of great assistance. In so finding, the court recognized that a broker-lawyer compromise was necessary. Based upon that premise, the logical place to restrict broker activity was after a preliminary contract was signed. This was beneficial to the broker in that he could then evidence the bringing together of a ready, willing and able buyer and seller, and it was also beneficial to the lawyer in that he was also assured a role in the conveyancing process. The Accord was formulated in 1966, shortly after the Supreme Court ruling.

The importance of the "truce" between the brokers and the lawyers in the form of the Accord cannot be underestimated—it represents not only an effort to protect their own professional reputations, but also represents an effort by both to recognize wherein the public interest lies. In defining the respective roles that brokers and lawyers are to play in the conveyancing process, and in providing a framework within which disputes can be settled by a decision-making body consisting of representatives of each interest group, the brokers, the lawyers, the courts and the public all stand to be benefitted.

SUGGESTIONS FOR IMPLEMENTING THE BROKER-LAWYER ACCORD

Although the Illinois Real Estate Broker-Lawyer Accord and the con-

100. After the Arizona Supreme Court ruled that real estate brokers could not prepare any documents involved in the conveyancing process, State Bar of Arizona v. Arizona Land Title & Trust Co., supra note 8, an open "war" between brokers and lawyers resulted. A constitutional amendment was offered to circumvent the supreme court ruling, and after a campaign in which "both professions suffered permanent injury in the eyes of the public," the amendment passed. "Some idea of the heat of that campaign was a slogan used, 'Protect your pocketbook . . . beat the lawyers.'" Id., at n.1.

101. See ILLINOIS REAL ESTATE BROKER-LAWYER ACCORD Preamble (1966), Appendix A, infra.

102. In defining the respective roles, the traditional grievances of brokers and lawyers vis-à-vis each other emerge. For example, the broker is not to give any legal advice, or to "minimize the value of the lawyer's services" or refer customers to one specific lawyer. And the lawyer is not to delay the transaction, or "minimize the value of the broker's services" or "participate or attempt to participate in the broker's commissions." Id. art. II, III. A previous attempt at defining the respective roles of brokers and lawyers ended in a 1943 agreement between the American Bar Association and the National Association of Real Estate Boards which contained some provisions similar to those in the Accord. See 3 MARTINDALE-HUBBELL LAW DIRECTORY 224A (1970).

103. The "Illinois Joint Real Estate Broker-Lawyer Committee" consists of four realtors and four lawyers. Id. art. III.
tinuing organization created therein—the "Illinois Joint Real Estate Broker-Lawyer Committee"—present a viable framework for settling future disputes, there are areas in which improvement can be made. First, the principles of the Accord should be made applicable to all real estate brokers, rather than only to members of the real estate organizations which were parties to the Accord. Secondly, attention should be focused on the preliminary contract which the broker is allowed to prepare, and proper safeguards should be inserted in the public interest. Finally, education concerning the Accord and the nature of the preliminary contracts should be improved.

Making the Principles of the Accord Applicable to all Brokers

Since the Illinois Supreme Court has followed the majority of jurisdictions in asserting its inherent control over the authorized and unauthorized practice of law, it has several practical alternatives. Under its own rule-making power, the court could adopt the principles of the Accord and, in the interest of the public, could make those principles applicable to all brokers and lawyers. A second alternative would provide that the Department of Registration and Education adopt the principles of the Accord.104 Since all brokers are licensed by the Department, they would thereby be bound by the principles of the Accord. Although the Department is a creature of the legislature, the court could, consistent with its interpretation of inherent powers, recognize this alternative as an aid to the judiciary in carrying out its function.

From the standpoint of all concerned, perhaps the best solution to the problem would involve the "Joint Real Estate Broker-Lawyer Committee." By court rule, the Committee could continue to function as an advisory body for the court. In order to enforce provisions of the Accord, the Department of Registration and Education could make violation of the Accord punishable by fine, and in the case of repeated offenders, violation could constitute a ground for license revocation. In extreme cases, the Committee could also seek to enjoin offenders and have them cited for contempt. Such a solution benefits the brokers and lawyers in that the initial decision maker—the Committee—consists of members of each group. From there, for disciplinary matters, the offenders could be referred to their respective organizations—the Department of Registration and Education or the bar associations. The courts would benefit by having the Committee as an advisory body. Ultimately, of course, the

104. Orville Foreman, former member of the Broker-Lawyer Committee and one of the participants in the original drafting of the Accord suggested this alternative to this writer in a letter dated October 14, 1969.
public would benefit from such a system because the controversy would not be carried on in the press, and public confidence in attorneys would not be shattered as was the case in Arizona.

The Preliminary Contract

Since brokers are allowed to fill out preliminary contracts of sale, safeguards to protect the public interest should be inserted in such contracts. One avowed function of the Committee is to formulate standardized form contracts.\textsuperscript{105} The mere fact of using standardized contracts is beneficial to all parties concerned because constant use by lawyers and brokers, and court constructions of the same documents will result in the reduction of errors caused by the use of many documents having varied terms and conditions. Whether one form or several are created, each should contain certain warnings for the public. Initially, the title—"OFFER TO PURCHASE"—is misleading to many laymen; some buyers do not realize that upon acceptance of this offer, a binding contract is formed. In order to avoid such a problem, the title should be—"CONTRACT OF SALE." The National Conference of Lawyers and Realtors recently suggested a "Model Form" which contains a boldface heading to avoid this problem—"THIS IS A LEGALLY BINDING CONTRACT: IF NOT FULLY UNDERSTOOD, SEEK COMPETENT ADVICE! CONTRACT OF SALE."\textsuperscript{106}

A secondary proposition which many laymen fail to appreciate is that the broker in almost every transaction is acting as agent for one principal, usually the seller, and not as agent for both parties. Theoretically, when the broker is making additions to and deletions from the preliminary contract, he is acting on behalf of his principal. In order to warn the other party of that relationship, the contract should note in boldface or contrasting color that "BROKER REPRESENTS (BUYER) (SELLER) (strike one)." This gives the other party another notice that if he needs advice concerning the contract, he should consult a lawyer, rather than rely upon the advice of the broker.

Another desirable feature which should be included on a contract of sale is a brief marginal checklist of items customarily covered in a sale contract.\textsuperscript{107} For example, the list could include items the contract is usually conditioned upon, such as sale of other property, rezoning, fi-

\textsuperscript{105.} ILLINOIS REAL ESTATE BROKER-LAWYER ACCORD art. III § 3(e), see Appendix A, infra.

\textsuperscript{106.} The "Model Form" is reprinted in UNAUTHORIZED PRACTICE NEWS (Fall/Winter 1968-69) at 57.

\textsuperscript{107.} Such a checklist is provided on the standard "Offer to Purchase" forms used in Wisconsin, and approved by the Wisconsin Real Estate Brokers' Board.
nancing, etc. By listing these items in the margin, the possibility that the buyer will inadvertently overlook an essential term is minimized.

**Education**

Education of the brokers, the lawyers and the public is essential to any successful program aimed at bettering the existing conveyancing process. The public should certainly be informed as to the content of the Accord, and efforts should even be made to reach those brokers and lawyers unfamiliar with the Accord and its implications. Once standardized forms are adopted, there should be education as to the import of the terms on the contract. For example, most form contracts of sale list as a general lien and encumbrance, any “restrictions, conditions or covenants of record.” Brokers often leave such a phrase in the contract unless the buyer specifically requests its deletion. Often, neither the broker nor the buyer comprehend the extremely serious implications of such a phrase, but leave it in the contract merely because it is printed there. Educating the broker as to the implications of such a phrase is desirable. The obvious intent of both buyer and seller in most instances is to convey title subject only to those liens and encumbrances specifically listed and understood by both parties. The broker should recognize this fact and make appropriate deletions and factual insertions according to the circumstances. Education as to these matters could be given through the respective bar associations, real estate associations, the Broker-Lawyer Committee, or the Department of Registration and Education.

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108. Frank A. Reichelderfer, Chairman of the “Joint Real Estate Broker-Lawyer Committee,” in a letter to this writer dated November 4, 1969 expressed this problem: “The committee feels that the improvement in the relationships between the realtors and lawyers can best be accomplished by continued education of the principles of the Accord. Most of the matters which come before the committee involve acts by parties who are not familiar with the Accord and some are not even familiar with the Quinlan & Tyson case.” This is a problem which must be remedied.

109. See examples of form contracts used in the Chicago area: e.g., George E. Cole Legal Form No. 672, February, 1967; Anderson & Anderson Form No. 572-R, revised 1966; Chicago Title and Trust Company Revised 1968 Form.

110. Although the bar associations and real estate associations, through continuing education seminars and trade publications, do reach certain members of the professions, the people who most need the education are the least likely to participate in such programs or read such materials.

111. “[J]oint dissemination to brokers, lawyers and the public of information on the conduct of real estate transactions” is another function of the Broker-Lawyer Committee. ILLINOIS REAL ESTATE BROKER-LAWYER ACCORD art. III 3(f), see Appendix A, infra.

112. The Department of Registration has the power to regulate the curriculum of accredited real estate schools. Since many brokers attend these schools, it would be advisable to supply materials to them relating to the ACCORD and to
CONCLUSION

A brief historical look at the background of practice of law demonstrated that practice became “authorized” to protect the public from unskilled, “unauthorized” practitioners. Notwithstanding this laudable foundation of the legal profession, the public has always been dissatisfied with the legal profession and the legal process. The basic reason underlying this dissatisfaction has been inconvenience; the public is willing to receive necessary protection, but is unwilling to pay for it—both in terms of money and delay. Nowhere have these basic propositions been more demonstrable than in the conveyancing process. For this reason, if protection is to be afforded to the public, that protection must be imposed on the public from those interest groups most involved in the conveyancing process. For this reason, if protection is to be afforded to the public, that protection must be imposed on the public from those interest groups most involved in the conveyancing process on a continuing basis—real estate brokers and lawyers.

Recognizing the basic historical problems, the courts must necessarily accept some broker-lawyer compromise which allows the broker to prepare a document which will evidence the bringing together of a ready, willing and able buyer and seller. Working within such a compromise, the brokers, the lawyers and the courts will be better able to focus attention on the public interest. The courts can exercise their plenary power over the practice of law as necessary, or can accept legislative assistance in carrying out their inherent judicial function. Such a system can benefit all parties concerned—the brokers, the lawyers, the courts, and most importantly, the public.

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standardized contract forms. See REAL ESTATE BROKERS AND SALESMEN LAW 3.01 (Supp. 1969).

113. One writer described this approach as “The court ... quietly sanction[ing] a tenancy at sufferance on a parcel of its judicial domain.” Note, Constitutional Law—Wisconsin Supreme Court’s Control of the Practice of Law and Conveyancing, 1962 Wis. L. REv. 366, 374.
Preamble

WHEREAS, the public interest requires that the respective roles of real estate brokers (hereinafter referred to as "brokers") and lawyers in a real estate transaction be defined clearly and that brokers and lawyers in carrying out their respective roles at all times proceed in accordance with their respective codes or canons of ethics; and

WHEREAS, it is further desirable in the public interest that any disputes between brokers and lawyers as to their respective roles be reduced to a minimum and that, should such disputes arise, some expeditious method of settlement thereof be developed; and

WHEREAS, in the case of The Chicago Bar Association, et al. vs. Quinlan and Tyson the Supreme Court of Illinois has determined what the broker may or may not do in the consummation of a real estate sale; and

WHEREAS, nothing herein contained is designed to or does affect the right of a party to a real estate transaction to act for himself in such transaction without the services of a broker or a lawyer and it is not intended by this accord to either modify or destroy such right; and

WHEREAS, nothing herein contained is designed to or does affect the right of local bar associations and local real estate boards to continue recognition of existing agreements between them, or to execute new agreements, when such agreements are consistent with the principles herein contained; and

WHEREAS, committees of Illinois Association of Real Estate Boards, Chicago Real Estate Board, The Chicago Bar Association, and Illinois State Bar Association have considered all of the foregoing and have recommended this accord to their respective organizations.

Now, therefore, it is agreed as follows:

ARTICLE I

The Broker

It is the function of the broker to bring the seller and buyer to agreement as to the sale and purchase of a given parcel of real estate.

In order to accomplish this the broker should be governed by the following:

1. As stated by the Court in The Chicago Bar Association, et al. vs. Quinlan and Tyson, he may complete the document referred to in that case as the preliminary or earnest money contract, (hereinafter called "contract") which is customarily in use in the community where the broker does business, by filling in only factual and business details in blanks provided therefor. He may add to or delete from such form only factual statements and business details, furnished by the principals therein, the addition or deletion of which is necessary to conform to the particular factual situation. He may not prepare or complete any document necessary to carry out or implement the contract.
2. Where it appears prior to the execution of the contract that there are unusual matters involved in the transaction which should be resolved before a contract is executed, the broker should advise the parties that each should consult a lawyer of his choice before such contract is executed.

3. The broker may not give advice on any matter of law, either directly or indirectly, but he should recommend that both the seller and the buyer consult their respective lawyers as to all legal questions and for the preparation of all those documents which may be necessary to implement and carry out the contract.

4. Where either the seller or the buyer desires to see a lawyer prior to the execution of a contract the broker should not attempt to dissuade such party from legal consultation.

5. The broker should not minimize the value of the lawyer's services, or participate or attempt to participate in the lawyer's fees.

6. The broker may not directly or indirectly employ a lawyer or pay for the services of a lawyer, to represent either the buyer or the seller.

7. A broker may refer a buyer or seller to a lawyer if asked to do so by such buyer or seller but in such case the broker should give the party the names of not less than three lawyers who are qualified to perform the legal services involved, without indicating any preference as to any one of the three.

8. A broker should advise the parties that the contract is binding on them.

9. Where a broker is also a lawyer, he may not advertise that he can handle the complete details of a real estate transaction including preparation of documents other than the completion of the contract customarily used in the community, or that he can handle the transaction cheaper or better because he is also a lawyer, nor should he act as a lawyer for either the buyer or the seller in the same transaction in which he is acting or has acted as the broker.

ARTICLE II

The Lawyer

It is the function of lawyers to give all legal advice required by the parties in a real estate transaction and to prepare all the documents necessary to carry out the contract. The lawyer may prepare the contract, if employed so to do by the buyer, the seller or the broker.

In order to accomplish this function the lawyer should be governed by the following:

1. The lawyer who is consulted by either the buyer or the seller shall use his best efforts to proceed diligently to the conclusion of the transaction, and if his work load does not permit a prompt conclusion of the same he should so state at the time of employment.

2. The lawyer should not minimize the value of the broker's services, nor participate or attempt to participate in the broker's commissions.

3. The lawyer in representing the buyer or the seller in a real estate transaction should not give his opinion on the physical condition or the market value of the real estate involved in the transaction.

4. A lawyer may not accept employment by or compensation from the broker to render services to either the buyer or the seller in the transaction, or to prepare any documents which the broker is not himself authorized to prepare.
5. It is the responsibility of the lawyer to prepare documents for a buyer or seller which documents the broker is not himself authorized to prepare.

6. A lawyer may not represent more than one of the broker, buyer and seller, in the same transaction except in those communities where the applicable canons of ethics clearly permit representation of conflicting interests by a lawyer after full and complete disclosure of the conflict of interest to the parties desiring such representation and upon the express consent of the parties.

7. Where a lawyer also holds a broker's license he may not advertise that he can handle a real estate transaction cheaper or better because he is a broker as well as a lawyer nor may he act as a lawyer for the buyer and seller or either of them in the same transaction where he is the broker, even though no charge be made for his services as a lawyer.

ARTICLE III

Permanent Organization

1. There is hereby created a continuing organization which shall be designated Illinois Joint Real Estate Broker-Lawyer Committee which shall be constituted, and have the functions, as hereinafter in this Article set forth.

2. There shall be eight members of this committee, two from Illinois Association of Real Estate Boards; two from the Chicago Real Estate Board, two from The Chicago Bar Association and two from Illinois State Bar Association, who shall be designated by each of said organizations in such manner as to the organization seems desirable. The initial members shall be appointed one from each organization for a term of one year and one for a term of two years. Annually thereafter one shall be appointed from each organization for a two year term. Vacancies on the Committee may be filled for the unexpired term by the organization which originally appointed the member for whom such vacancy exists.

3. The Committee shall:
   (a) At all times act in the interest of the public.
   (b) Consider and promote such changes in procedure and in laws relative to real estate transactions, while preserving the respective roles of the brokers and lawyers, as will benefit the public, subject to the approval of the respective organizations approving this instrument.
   (c) Promote and encourage cordial relations between brokers and lawyers.
   (d) Consider any controversies which may arise between brokers and lawyers as may be referred to it, involving any alleged violations of the principles set forth in Articles I and II, inclusive, and attempt to resolve the same.
   (e) Attempt to obtain and formulate uniform types of contracts for use in the respective areas of the State of Illinois which forms will provide blanks for filling in factual and business detail only and which will expedite real estate transactions and reduce controversies to a minimum, while containing adequate safeguards to protect both the buyer and the seller, and which are capable of becoming the customary form or forms of contracts in use in the community as contemplated in
the recent case of The Chicago Bar Association vs. Quinlan and Tyson. Such forms shall be subject to the approval of the four organizations.

(f) Cooperate with the four respective organizations, as may be requested by them, in the joint dissemination to brokers, lawyers and the public of information on the conduct of real estate transactions.

ARTICLE IV

Approval and Dissemination

This Accord shall be in full force and effect on the date it is approved by the four participating organizations in accordance with the respective procedures of such organizations.

Each of the four organizations will use its best efforts to advise its members of this Accord and jointly to advise non-member brokers and lawyers and the general public.

APPROVED AND RECOMMENDED by the Committees from the Illinois Association of Real Estate Boards, Chicago Real Estate Board, The Chicago Bar Association and Illinois State Bar Association.

/S/ Marshall S. LeSueur, Chairman, The Chicago Bar Association, Committee on Quinlan-Tyson

/S/ Orville N. Foreman, Chairman, Illinois State Bar Association, Committee on Quinlan-Tyson

/S/ George Kemp, Chairman, Illinois Association of Real Estate Boards, Committee on Quinlan-Tyson

/S/ William C. Groebe, Chairman, Chicago Real Estate Board, Committee on Quinlan-Tyson

APPROVED and ADOPTED by the following organizations pursuant to action of their respective governing boards, this 26th day of October 1966.

/S/ William A. McSwain, President, The Chicago Bar Association

/S/ M. Edward Smith, President, Illinois Association of Real Estate Boards

/S/ Russell N. Sullivan, President, Illinois State Bar Association

/S/ Ross J. Beatty, Jr, President, Chicago Real Estate Board