

Unauthorized Practice of Law - Planning Estates Incidental to Selling Life Insurance Construed as the Practice of Law - Oregon State Bar v. John H. Miller & Co., 385 P. 2d 181 (Ore. 1963)

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tiffs' case. Rather the reversal was based on the disclosure that the plaintiff had appeared as a witness in the *trial* and that the magazine articles were presented at *that* time. The court reasoned that the plaintiffs' appearance at a public trial revived the defense of newsworthiness.

In conclusion, it would seem that although the original opinion in *Wagner v. Fawcett Publications*²⁹ was reversed and is no longer the law, it has fostered confusion in a somewhat settled area of a tort action which is less than three quarters of a century old. By holding that a lapse of time between the occurrence of a newsworthy event and its publication in a magazine sold for profit would invade a plaintiff's right of privacy, the Seventh Circuit Court of Appeals has rendered a decision which is against the prevailing weight of authority. Examination of prior authority has shown that even a lapse of time of over forty years between the happening of the event and its subsequent publication forms no basis upon which to destroy the newsworthiness privilege and to permit a plaintiff to recover for invasion of the right of privacy.

UNAUTHORIZED PRACTICE OF LAW—PLANNING ESTATES INCIDENTAL TO SELLING LIFE INSURANCE CONSTRUED AS THE PRACTICE OF LAW

John H. Miller, a layman, was the principal stockholder and president of a corporation which offered a service of aiding individuals in financial and estate planning. The services rendered were either for a fee, or as a gratuitous service incidental to another business which Mr. Miller was engaged in, that of selling life insurance. Each customer received a report from the corporation which usually contained suggestions relating to the transfer of assets, the making of gifts, the use of marital deductions, the use of inter vivos and testamentary trusts and other devices designed to minimize taxes. Upon discovering such practices, the Oregon State Bar brought an action to have Mr. Miller and his company enjoined from preparing any estate plans involving legal analysis. The lower court ruled in favor of the plaintiffs, but specifically held that such legal practices were permissible when directly related to the selling of life insurance. This decree was subsequently modified by the Oregon Supreme Court when it disallowed the lower court's exemption. *Oregon State Bar v. John H. Miller & Co.*,—Ore.—,385 P. 2d 181 (1963).

In analyzing the various issues of the case, the lower court found: that the practices of the defendant could be construed as giving legal advice; and that the defendant had gone to the extent that such advice constituted

²⁹ 307 F. 2d 409 (7th Cir. 1962).

the practice of law. The lower court, however, concluded that even though defendant's acts could be construed as giving legal advice, they did not constitute the practice of law when they were incidental to his selling life insurance. Therefore, although advice may substantially involve the application of legal principles and would thus ordinarily constitute the practice of law, such practices will not be considered as the practice of law if they are incidental to another business. The court enjoined the defendant accordingly.¹

The Supreme Court of Oregon did not agree with the lower court's ruling that advice which would ordinarily be construed as constituting the practice of law is not so if incidental to another business, and presented the following argument. The legal element involved in advice must not only be *incidental* but also *insubstantial* to the defendant's business in order to be outside the practice of law. Planning insurance needs for another cannot properly be done without an appraisal of the entire estate of a particular customer. This appraisal would necessarily involve the determination of whether life insurance is preferable to some other method of distributing assets, and would thus amount to estate planning. Because much of the advice regarding estate planning must be fortified with an understanding of various aspects of the law of taxation, the court states that, "It cannot be said that one who plans another person's estate employs the law only in an insubstantial way."² In concluding, the Supreme Court held that the defendant should not be allowed to do any estate planning even if it merely involved the selling of life insurance, and that life insurance salesmen should only be allowed to explain how life insurance would affect estates in general. Pursuant to this opinion, the defendant was enjoined from engaging in any estate planning involving legal analysis.³

In considering this precedent-setting decision, it will be necessary to examine the rulings of other jurisdictions to ascertain the probability of a new concept in the area of unauthorized practice of law. Since this particular problem has not arisen prior to this time, the ruling must be examined by analogy through cases involving other types of activities wherein laymen gave legal advice. The analysis consists of the following: First, a definition of what constitutes legal advice; Second, an analysis of the degree to which such advice may be extended before it will be construed as the practice of law; Third, an analysis of the legal effect of this advice when it is incidental to another business.

Legal advice constitutes all advice in matters connected with the law.⁴ It has been held that where one advises another as to his legal rights for

¹ Oregon State Bar v. John H. Miller & Co., — Ore. —, 385 P. 2d 181 (1963).

² *Id.* at 182.

³ *Supra* note 1.

⁴ People v. Alfani, 227 N.Y. 334, 125 N.E. 671 (1919).

selecting legal instruments,⁵ for claiming personal injuries,⁶ for liquidating a business,⁷ for collecting on workmen's compensation,⁸ or for rearranging and reinvesting assets,⁹ he is giving legal advice. In that the *Miller* case involves the rearranging and reinvesting of assets, and can be construed as involving legal advice as defined by prior judicial decision, it falls into this latter category. Regarding the problem of whether the rearranging and reinvesting of assets involves legal advice and answering such query affirmatively, the American Bar Association issued an opinion in 1959 and stated that when "pursued to its proper conclusion, estate planning necessarily involves the application of legal principles of the law of wills and decedents' estates, the law of trusts and future interests, the law of real and personal property, the law of taxation . . . or other fields of law."¹⁰ In *Chicago Bar Association v. Financial Planning, Inc.*, the Superior Court of Cook County held that certain estate planning services involve the giving of "legal advice on some of the most important problems which can arise during a man's lifetime and after his death."¹¹ Thus, it appears that most states would be in accord with the *Miller* case on the ruling that suggestions to rearrange and reinvest assets which involve the giving of legal opinion in pursuance of life insurance sales constitute the giving of legal advice.

The practice of law includes legal advice and counsel where it is necessary "to form and to act on opinions as to what such (legal) rights are and as to the legal methods which must be adopted to enforce them."¹² It follows then when any layman or lay organization proposes to give "advice as to how [others] may arrange [their] affairs so as to comply with the law and thereby reap legal benefits,"¹³ it is the practicing of law. Although it would appear then from this encompassing definition that any

⁵ *Ibid.*

⁶ *Fitchette v. Taylor*, 191 Minn. 582, 254 N.W. 910 (1934), 94 A.L.R. 356; *Quarles v. State Bar of Texas*, 316 S.W.2d 797 (1958), cert. denied: 368 U.S. 986 (1962).

⁷ *Depew v. Wichita Association of Credit Men*, 142 Kan. 403, 49 P. 2d 1041 (1935).

⁸ *People ex rel Chicago Bar Association v. Goodman*, 366 Ill. 346, 8 N.E.2d 941 (1937), 111 A.L.R. 1.

⁹ *Chicago Bar Association v. Financial Planning, Inc.*, 26 Law Week 2662, 24 Unauth. Prac. #2, p. 29 (1958).

¹⁰ Opinion 1959-A—Estate Planning, American Bar Association Standing Committee on Unauthorized Practice of Law, 45 American Bar Association Journal 1296 (1959).

¹¹ *Supra* note 9, at 32.

¹² 19 C.J.S. Corporations, § 956, 57.

¹³ Eplen, *Unauthorized Practice and Estate Planning*, 26 Unauth. Prac. #2, p. 104-106 (1960).

legal advice would constitute the practice of law, this is not entirely true as the following cases indicate. For example, in *Agran v. Shapiro*,¹⁴ a Certified Public Accountant prepared a tax return involving a tax loss carryback and filed the necessary forms, and in certain instances defended the client before the Internal Revenue Service. The accountant's advice in this case involved legal analysis, but the court did not hold that such acts constituted the practice of law. The Superior Court, Appellate Division, stated that legal advice constitutes the practice of law only where *difficult or doubtful* legal questions to a "reasonably intelligent layman who is reasonably familiar with similar transactions"¹⁵ are involved.

Similar standards of measurement have been followed by many states, as the New York case of *In Bercu*¹⁶ indicates. Here, a Certified Public Accountant gave advice regarding past-due sales and use taxes, and was enjoined from continuing such practices in the future. The Supreme Court's decision was based on the premise that where tax questions are so involved and difficult that an ordinary accountant cannot handle them they should be handled by a qualified attorney in the interest of public protection. In the Illinois case of *Illinois State Bar Association v. Schaefer*,¹⁷ a real estate broker who advised a party with regard to the disposition of her estate was subsequently enjoined from doing such acts in the future. The Illinois Supreme Court stated that the giving of legal advice as to the disposition of one's estate involves careful determination of facts and conditions, and that such circumstances require the measure of legal skill more than ordinary business intelligence, and thus constitutes the practice of law. Considering the Minnesota case of *Gardner v. Conway*,¹⁸

¹⁴ 127 Cal. App. 2d 807, 273 P.2d 619 (1954).

¹⁵ *Agran v. Shapiro*, 127 Cal. App. 2d 807, 818, 273 P. 2d 619, 626 (1954); This measurement was used so as to safeguard the public against laymen giving advice which reasonably demands a legally trained mind.

¹⁶ 299 N.Y. 728, 87 N.E.2d 451 (1949); *In Re Roel*, 3 N.Y.2d 224, 144 N.E.2d 24 (1957); *Conway-Bogue Realty Investment Co. v. Denver Bar Association*, 135 Colo. 398, 312 P.2d 998 (1957).

¹⁷ 404 Ill. 45, 87 N.E.2d 773 (1949); *People v. Peters*, 10 Ill.2d 577, 141 N.E.2d 9 (1957); *Chicago Bar Association v. Barasch*, 21 Ill.2d 407, 173 N.E.2d 417 (1961); *Arkansas Bar Association v. Block*, 230 Ark. 430, 323 S.W.2d 912 (1959); *Idaho State Bar v. Meservy*, 80 Idaho 504, 335 P.2d 62 (1959); *Ingham County Bar Association v. Walter Neller Co.* 342 Mich. 214, 69 N.W.2d 713 (1955); *Hulse v. Criger*, 363 Mo. 26, 247 S.W.2d 855 (1952); *New Jersey State Bar Association v. Northern New Jersey Mortgage Associates*, 32 N.J. 430, 161 A.2d 257 (1960); *Washington State Bar Association v. Washington Association of Realtors*, 41 Wash.2d 697, 251 P.2d 619 (1953).

¹⁸ 234 Minn. 468, 48 N.W.2d 788 (1951); *Nebraska State Bar Association v. Butterfield*, 172 Nebr. 645, 111 N.W.2d 543 (1961); *Petition of Kearney*, 63 So. 2d 630 (Fla. 1953); *New Jersey State Bar Association v. Northern New Jersey Mortgage Associates*, 55 N.J. Super. 230, 150 A.2d 496 (1959).

where a defendant resolved difficult legal questions incidental to the preparation of an income tax return, the Supreme Court enjoined the defendant from so practicing on the basis that such questions would be difficult for a "reasonably intelligent layman who is reasonably familiar with similar transactions."¹⁹

A recent application of this test of considering only difficult types of legal advice as being the practice of law appears in the case of *Indiana State Bar Association v. Indiana Real Estate Association, Inc.*²⁰ In this action, the Supreme Court enjoined real estate brokers and salesmen from giving legal advice in creating estates and conveying property. The opinion stated:

Generally, . . . filling in of blanks in legal instruments, prepared by attorneys, which require[s] only the use of common knowledge regarding the information to be inserted in said blanks, and general knowledge regarding the legal consequences involved, does not constitute the practice of law . . . [but this is not true when it] involves considerations of significant legal refinement[s], or the legal consequences of the act[s] [that] are of great significance to the parties. . . .²¹

Therefore, in the majority of states not all legal advice given in regard to estate planning constitutes the practice of law, but rather only the handling by laymen of those difficult legal questions which involve significant consequences to the customer can be construed as engaging in activities limited to attorneys. Thus, it follows that most states would allow insurance salesmen to give legal advice in planning customers' estates, so long as such advice does not involve difficult legal questions.

The final problem to consider is whether the fact that legal advice is given incidentally in the pursuance of another business would affect the conclusion that only advice involving difficult legal questions would amount to the practice of law. In other words, if advice would ordinarily be construed as the practice of law because of its difficulty, does the fact that such advice is given as an incident to another business prevent it from being termed legal practice and make it permissible conduct? It has been held that where a bank,²² a Certified Public Accountant,²³ a real estate

¹⁹ *Gardner v. Conway*, 234 Minn. 468, 481, 48 N.W.2d 788, 796 (1951).

²⁰ *Indiana State Bar Association v. Indiana Real Estate Association, Inc.*, 191 N.E.2d 711 (1963).

²¹ *Id.* at 715.

²² *Illinois State Bar Association v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N.E. 901 (1931).

²³ *Chicago Bar Association v. United Taxpayers of America, Inc.*, 312 Ill. App. 243, 38 N.E.2d 349 (1942).

broker,²⁴ a title insurance company,²⁵ a surveyor,²⁶ and an escrow agent²⁷ had been giving legal advice, the fact that such advice was incident to another business was not a factor to be considered by the court in rendering its decision. It therefore follows that, regardless of the reason for giving legal advice (such as being incidental to another business), the important factor considered by the courts in determining whether such advice constitutes the practice of law is the difficulty to the advisor of the legal questions considered within their own set of facts.

In conclusion, it appears that the decision of the Oregon Supreme Court to enjoin life insurance salesmen from performing any estate planning which involves legal analysis would be contrary to the majority view, in that, it is the prevailing view to examine each case separately to determine the difficulty of the legal questions involved. Consequently, the probability is slight that the *Miller* decision will become a new concept in the area of unauthorized practice of law.

²⁴ Chicago Bar Association v. Tinkoff, 399 Ill. 282, 77 N.E.2d 693 (1948); People v. Sipper, 61 Cal. App. 2d 844, 142 P.2d 960 (1943).

²⁵ Hexter Title & Abstract Co., Inc. v. State Bar of Texas, 142 Tex. 506, 179 S.W.2d 946 (1944); State v. Schmitt, 174 Kan. 581, 258 P.2d 228 (1953).

²⁶ In Re Welch, 123 Vt. 180, 185 A.2d 458 (1962).

²⁷ Oregon State Bar v. Security Escrows, Inc., 233 Ore. 80, 377 P.2d 334 (1962).