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COMMENTS

UNAUTHORIZED PRACTICE OF LAW: REMEDIAL PROCEDURES

The problem of unauthorized practice of law has confronted the legal profession since time immemorial. The solution of this problem is a duty the legal profession owes to the public. The greatest proportion of legal work and the aim of the legal profession is the practice of preventive law. Apart from the injustices that result to the public at large from such practice by unqualified laymen, their incompetence in professional matters results ultimately in a tremendous amount of needless litigation.¹

The American Bar Association has long recognized the problem and has a standing committee on unauthorized practice, which committee is instrumental in assisting local bar associations in seeking out and eliminating unauthorized practice.²

Many excellent, but by no means exhaustive, articles and opinions are to be found on what acts are included in the term "practice of law."³ Decisions indicate that the practice of law generally includes not only the conduct of litigation and appearances in court, but also the preparation of pleadings and other papers incident to any action or special proceeding in any court or other judicial body; conveyancing, the preparation of all legal instruments of all kinds whereby a legal right is secured, the rendering of opinions as to the validity or invalidity of the title to real or personal property, the giving of any legal advice, and any action for others in any matter connected with the law.⁴ Variations of this wide definition are found in decisions, both civil and criminal, in almost every jurisdiction.

Proceedings against persons or corporations practicing law without authority can be instigated by any party having an interest in such an action.⁵

¹ In re Opinion of the Justices, 289 Mass. 606, 194 N.E. 313 (1935).

² XVII Unauthorized Practice News, No. 1 (Jan., 1951). The central office of this publication is located at 1140 N. Dearborn Street, Chicago, Illinois.

³ Unger v. Landlords' Management Corp., 114 N.J. Eq. 68, 168 Atl. 229 (Ch., 1933); Hobson v. Kentucky Trust Co., 303 Ky. 493, 197 S.W. 2d 454 (1946); Commonwealth v. Jones and Robins, Inc., 186 Va. 30, 41 S.E. 2d 720 (1947); LaBrum v. Commonwealth Title Co. of Phil., 368 Pa. 239, 56 A. 2d 246 (1948). See, for excellent discussion of acts constituting unauthorized practice, Unauthorized Practice: A Decade of Conflict, 25 Notre Dame Lawyer 346 (1949-50); and Practice of Law: Unauthorized Practice by Real Estate Brokers and Agents, 25 Notre Dame Lawyer 387 (1949-50). An excellent discussion of the problems appears in 33 Va. L. Rev. 379 (May, 1947).

⁴ Commonwealth v. Jones and Robins, Inc., 186 Va. 30, 41 S.E. 2d 720 (1947).

⁵ People ex. rel. Wayman, State's Att'y v. Chamberlin, 242 Ill. 260, 89 N.E. 994 (1909).

This includes the state bar associations (local or otherwise), individual members of the bar, and non-members who have suffered as a result of unauthorized practice. The proceedings are usually undertaken by the local bar associations.⁶

The campaigns against unauthorized practice have taken several approaches:

1. An indictment is brought under a statute which makes it a crime to practice law without a license. Typical of such statutes is that of Illinois, which provides for a maximum fine of \$100 or thirty days in jail, or both, for unauthorized practice.⁷

2. An injunction against the unauthorized practice is sought in a regular court of equity.

3. A petition in the nature of quo warranto is directed against the unlawful practitioner.

4. An information of contempt of court is filed with the state supreme court.

The shortcomings and defects of proceedings under the criminal statute are obvious. If the unauthorized practice is at all extensive, this procedure may result in a multiplicity of law suits. Moreover, the rule of proof beyond a reasonable doubt places an almost impossible burden of technical investigation on the state whose law enforcement agencies are normally over-burdened. This procedure is resorted to primarily in prosecutions of disbarred attorneys who continue their legal work without sanction.

Until 1931, the use of the injunction by members of a profession to prevent encroachments on their field by the lay-public was not recognized. In 1931, an injunction was allowed in a case involving the legal profession,⁸ and to a considerable extent it has been so confined.⁹ Gradually, the practice has been extended until today almost every jurisdiction will grant injunctions in cases of unauthorized practice of law.¹⁰

Equity has given several reasons for justifying these injunctions, such as that the franchise to practice law is a property right and unauthorized practice is an infringement on that right,¹¹ that unauthorized practice of

⁶ *In re Malmin*, 364 Ill. 164, 4 N.E. 2d 111 (1936).

⁷ Ill. Rev. Stat. (1949) c. 13, § 1.

⁸ *Dworken v. Apartment House Owners' Ass'n of Cleveland*, 38 Ohio App. 265, 176 N.E. 577 (1931).

⁹ *Licensed Practitioner's Right to Enjoin "Illegal Practice,"* 11 So. Calif. L. Rev. 476 n. 2 (1937-38).

¹⁰ *Dworken v. Apartment House Owners' Ass'n of Cleveland*, 38 Ohio App. 265, 176 N.E. 577 (1931); *People ex. rel. Illinois State Bar Ass'n v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N.E. 901 (1931); *Johnson v. Purcell*, 225 Iowa 1265, 282 N.W. 741 (1938); *Stewart Abstract Co. v. Judicial Commission of Jefferson County*, 133 Tex. 645, 131 S.W. 2d 686 (1939); See *Sharp-Boylston Co. v. Haldone*, 53 Ga. App. 753, 187 S.E. 68 (1936).

¹¹ *Unger v. Landlords' Management Corp.*, 114 N.J. Eq. 68, 168 Atl. 229 (Ch., 1933).

law constitutes a public nuisance,¹² and that many cases of unauthorized practice combine the worst elements of unfair competition and fraud both on the public at large and the judicial system.¹³

The advantages of seeking injunctive relief are numerous. It is by all odds the swiftest of the four remedies; it is tremendously effective against individuals, as opposed to corporations, whose regular business activities enable them to cross into the field of law without wide-spread attention (into this group would fall real estate agents, insurance companies, insurance brokers, small title companies, accountants and tax consultants); it avoids a multiplicity of suits; the power to punish for contempt is sufficiently flexible for the courts effectively to discourage any further unauthorized practice; and finally, there is no question that an interested party can bring the case to equity.¹⁴

The third remedy, that of quo warranto, is most often used to question a corporation's right to practice law.¹⁵ As the corporation exists by virtue of a franchise from the state, quo warranto lies to secure a judgment of ouster and seizure of the corporation's franchise after the franchise has been abused by using it as a shield to practice law.¹⁶ The action is brought by the state's attorney and is criminal in nature although more often civil in effect.¹⁷

Quo warranto is frequently used and is often effective, but it is sometimes slow and difficult to commence, especially for infractions that may seem minor in considering the entire scope of the corporation's activities. Fortunately, however, the courts have shown a tendency to issue injunctions in quo warranto actions to restrain the corporation's unauthorized practice without dissolving the corporation (i.e., forfeiting its franchise).¹⁸

Probably the most common procedure used in Illinois to combat unauthorized practice is the filing of an information of contempt with the Supreme Court of Illinois.¹⁹ The contempt power as here used is based on the fact that the court has inherent powers to determine standards for attorneys since they are officers of the court, hence those who practice law without meeting the requirements of the court are automatically in contempt.²⁰ The action is wide-spread and in use in many jurisdictions.²¹

¹² *Fichette v. Taylor*, 191 Minn. 582, 254 N.W. 910 (1934).

¹³ *Unger v. Landlords' Management Corp.*, 114 N.J. Eq. 68, 168 Atl. 229 (Ch., 1933).

¹⁴ *Chicago Bar Ass'n v. Kellogg*, 338 Ill. App. 618, 88 N.E. 2d 519 (1949); *Chicago Bar Ass'n v. United Taxpayers of America*, 312 Ill. App. 243, 38 N.E. 2d 349 (1942).

¹⁵ *State v. Retail Credit Men's Ass'n*, 163 Tenn. 450, 43 S.W. 2d 918 (1931).

¹⁶ *People v. Merchants' Protective Corp.*, 189 Cal. 531, 200 Pac. 363 (1922).

¹⁷ *People's Transit Co. v. Louisville Ry.*, 220 Ky. 728, 295 S.W. 1055 (1927).

¹⁸ *State v. Retail Credit Men's Ass'n*, 163 Tenn. 450, 43 S.W. 2d 918 (1931).

¹⁹ *People ex. rel. Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N.E. 2d 941 (1937), cert. denied, 302 U.S. 728 (1937).

²⁰ *People ex. rel. Illinois State Bar Ass'n v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N.E. 901 (1931).

²¹ *Auerbacher v. Wood*, 139 N.J. Eq. 599, 53 A. 2d 800 (Ch., 1947).

The advantages to such a proceeding are many and the shortcomings are few.

The information of contempt may be filed by any officer of the court in the name of the people; hence, there is no delay in commencing the action.²² The litigation is of necessity confined to a short span, since it is an original proceeding in the supreme court. This avoids any possibility of a long and costly struggle through the appellate court stages.

The great advantage in this action is that the court does not have to issue an injunction and then wait for future violation. The contempt is, so to speak, retroactive and the mere practicing of law without authority is punishable as contempt without an individual specific order directed against particular defendants.²³

Probably the only drawback to the use of this procedure is the time and expense immediately involved. In most cases, the local bar associations will find that in the long run such action against unauthorized practice is far less expensive and detrimental to the profession and the public than allowing the illegal practice to continue.

In addition to the above remedies, some jurisdictions have statutes creating injunctions against unauthorized practice of law.²⁴ Such statutes seem unnecessary, since the majority of courts have upheld the right of the court to punish such practice as contempt without an injunction, either judicial or statutory.²⁵

In the final analysis, there is no single "best" weapon for attacking unauthorized practice. The duty to make the attack is clear and it is the responsibility of the lawyers, acting individually and within state and local associations. The law makers have provided the various instruments to remedy the situation, but in each case the particular remedy must be selected with care. In making the choice, consideration must be given to the prevailing procedures in the jurisdiction where the unauthorized practice exists, the nature and scope of the wrong, the characteristics of the wrongdoer if such would affect the remedy, and the result sought by the procedure. A thorough knowledge of the remedial possibilities and the general scope of activities that constitute unauthorized practice should be at the command of every member of the bar.

²² *People ex. rel. Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N.E. 2d 941 (1937), cert. denied 302 U.S. 728 (1937).

²³ *People ex. rel. Courtney v. Ass'n of Real Estate Taxpayers of Illinois*, 354 Ill. 102, 187 N.E. 823 (1933).

²⁴ For example of such a statute, *Lamb v. Whitaker*, 171 Tenn. 475, 105 S.W. 2d 105 (1937).

²⁵ *People ex. rel. Chicago Bar Ass'n v. Motorists' Ass'n of Illinois*, 354 Ill. 595, 188 N.E. 827 (1933).