Indiana Law Journal

Volume 14 | Issue 3 Article 11

2-1939

Unauthorized Practice of Law-Right to Recover Compensation

UNAUTHORIZED PRACTICE OF LAW—RIGHT TO RECOVER COMPENSATION.—An employee of the Pennsylvania Railroad Company was killed under circumstances that gave rise to a claim against the railroad company. Plaintiff, a retired railroad claim agent, undertook to negotiate a settlement with the railroad company upon the behalf of the widow and minor children pursuant to an understanding that he was to be paid a reasonable sum for services rendered. Through his negotiations a settlement was finally effected. On distribution of the amount received the widow as administratrix refused to pay the plaintiff. In the lower court the plaintiff recovered for services rendered. On appeal, reversed: the court holding that the settling of a claim constituted the practice of law and that any unlicensed person engaged in the practice of law cannot recover for services rendered. *Fink v. Peden* (Ind. 1938), 17 N. E. (2d) 95.

---

[8] Peru Heating Co. v. Lenhart (1911), 48 Ind. App. 319, 95 N. E. 680; Colbert v. Holland Furnace Co. (1928), 331 Ill. 78, 164 N. E. 162.

[9] Daugherty v. Herzog (1896), 145 Ind. 255, 44 N. E. 457; Travix v. Rochester Bridge Co. (1919), 188 Ind. 79, 122 N. E. 1.

[10] Peru Heating Co. v. Lenhart (1911), 48 Ind. App. 319, 95 N. E. 680; Casey v. Hoover et al. (1905), 114 Mo. App. 47, 89 S. W. 330.

The practice of the law is an exclusive privilege which is limited to those who have qualified and complied with the necessary requirements as set forth by the constitution, the statutes, and the rules of the court.[1] It is not a right guaranteed by the constitution,[2] but it is in the nature of a franchise from the state conferred only for merit to a limited few who have fulfilled certain requirements.[3]

An all-embracing definition of the term practice of law would involve great difficulty. Of course, it is well-established that the practice of law is not confined to practice in the court, and that the vast bulk of legal work is done outside the courts.[4] But what its outermost limits and ramifications are, no one knows.[5] The tendency is to broaden its meaning to include all work involving legal knowledge and advice whether inside or outside the court and to determine each case largely on its own particular facts.[6]

On the facts of the present case the court had great difficulty in determining the definition of the practice of law. And while deciding that an agreement by a claim adjuster to investigate the case does not in itself amount to such practice, a contract whereby he undertakes to "enforce, secure, settle, adjust, and compromise" whatever claim the plaintiff had does constitute the practice of law, since it necessitates the use of legal knowledge and counsel.[7] And this would be true even though the layman agreed to do so gratuitously,[8] and though he did not hold himself out as an attorny.[9]

The chief reason for the added interest in this field is the advent of the unauthorized layman into the practice of law. His entrance has been marked by a steady and gradual encroachment until today it assumes almost overwhelming proportions, being carried on through the following lay agencies: banks and trust companies, collective agencies, trade associations and clubs, credit associations, title companies, mortgage loan companies, real-estate brokers, and many others.[10]

The reasons for the entrance of the layman and the lay agencies into the field of the practice of law are principally economic ones, some of them

---

[1] 2 R. C. L. 940; People ex rel. Courtney v. Association of Real-Estate Taxpayers of Ill. (1933), 354 Ill. 102, 187 N. E. 823.

[2] State v. Rosborough (1922), 152 La. 945, 94 So. 858; In re Maddox (1901), 93 Md. 727, 50 A. 487.

[3] State v. Rosborough (1922), 152 La. 945, 94 So. 858.

[4] Eley v. Miller (1893), 7 Ind. App. 529, 535, 34 N. E. 836, 111 A. L. R. 21.

[5] Depew et al. v. Wichita Assn. of Credit Men, Inc. et al. (1935), 142 Kan. 403, 49 P. (2d) 1041, 1046.

[6] Re Shoe Mfgrs. Protective Assn. (Mass., 1936), 3 N. E. (2d) 746, 748; Jessup, in his work on Legal Ethics defines the practice of law as: "The practice of the law is any service, involving legal knowledge, whether of representation, counsel, or advocacy, in or out of court, rendered in respect of the rights, duties, obligations, liabilities, or business relations of the one requesting the services."

[7] Meunier v. Bernick (La. App., 1936), 170 So. 567.

[8] Creditors Natl. Clearing House v. Bannwort (1917), 227 Mass. 579, 116 N. E. 886.

[9] State ex rel. Wright, Atty. Gen. v. Barlow (1936), 131 Neb. 700, 268 N. W. 95.

[10] American Bar Assn., "Report of the Special Committee on Unauthorized Practice of the Law," 56 Rep. Amer. Bar. Assn. 470, 471-474 (1931); see also 111 A. L. R. 19; Hicks and Katz, "The Practice of Law by Laymen and Lay Agencies," 41 Yale L. J. 69.

being: more technical skill along certain lines, more efficiency, speed, less expense and high financial responsibility.[11]

The arguments for the continuance of such practices are varied. Some say the purpose of the statutes requiring all persons to be licensed[12] is to preserve the public welfare by excluding from practice persons with inadequate ability, morality, and learning;[13] that as long as the attorneys of a corporation are properly licensed and their professional activities are not interferred with by unlicensed persons, the purpose of the statute is fully effected;[14] and that the courts have misconstrued the purpose of such statutes in holding that corporations cannot practice law because of their inability to meet the educational and character requirements.[15] Other arguments are that although such practices do impair the relations between client and attorney, they usually exist in the field where intimate personal relation is comparatively unnecessary. Another argument is that such corporations are amenable to government regulations, so they should be regulated instead of destroyed.[17]

In rebuttal, the claim of the Bar to continue its monopoly in this field to the exclusion of all others rests upon two principal grounds; first, established expertness in the legal field, and secondly, a higher sense of responsibility resulting from the character of the work done and the insistence of the profession upon unusual standards.[18] These two requisites are deemed essential if the interests of society, of the client, and of the attorney are to be protected from the irresponsible laymen who are not bound by the canons of ethics and are interested only in private gain.[19] Therefore, in order to insure adequate protection to society and to promote orderly administration of justice, the law should be practiced by those who are legally qualified and bound by the canons of professional ethics.

In further support of the above arguments it is pointed out that the following evils have arisen from the unauthorized practice of law: a decided increase of professional misconduct; a reintroduction of unethical practices by the licensed attorney so as to compete with the layman who indulges in such practices; a grave injury to the public since justice is being administered by untrained and incompetent people who have no obligations to the public and whose sole object is private gain; a destruction of the confidential relation

---

11 Kales. A. M., "The Economic Basis for a Society of Advocates in the City of Chicago," 9 Ill. L. Rev. 478 (1915).

12 1933 Burns Ind. Stat. Ann. 4-3611.

13 Note, 48 Yale L. J. 346.

14 S. Fla. R. R. v. Price (1893), 32 Fla. 46, 13 So. 638.

15 In re Cooperatives Law Co. (1910), 198 N. Y. 479, 92 N. E. 16.

16 Notes, 48 Yale L. J. 346; 44 Harv. L. Rev. 1114.

17 Notes, 44 Harv. L. Rev. 1114, 1118; In re Otterness (1933), 185 Minn. 254, 232 N. W. 319. The Harvard note gives the impression that the corporations can be made to comply with the code of professional ethics. This argument is further substantiated by the fact that many such businesses have adopted codes of ethics. See Hicks and Katz, "The Practice of Law by Laymen and Lay Agencies," 41 Yale L. J. 69.

18 Cheatham, "Cases and Other Materials on the Legal Profession," pp. 55-56 (1938).

19 Noone, "Does Business Inefficiency of Attorneys Cause Business to Practice Law?" 22 Am. Bar Assn. Journal 609 (1936).

between the attorney and client; and finally driving out of existence the legally qualified attorney.[20]

These abuses suggest the very serious and difficult question of what can and what should the legal profession do about it? Up to date, the courts have indulged in the following direct and indirect sanctions to prevent the unauthorized practice of law: the injunction;[21] the imposition of criminal liability;[22] the use of the writs of quo warranto,[23] mandamus and prohibition;[24] the use of declaratory judgments[25] and the punishment for contempt of court.[26] The indirect sanctions in use are: the denial of recovery for services rendered;[27] the nullification of proceedings conducted by an unlicensed layman[28] and the dismissal of suits and the setting aside of judgments rendered.[29]

In the present case the court used the indirect sanction as its preventive and the court in a well-reasoned opinion followed the clear weight of authority in holding that an unlicensed person engaging in the practice of law could not recover for services rendered.[30]

In addition to the above mentioned methods of meeting the problem it has been suggested that the legal profession as a whole take a more determined and aggressive stand to rid its ranks of all inefficient and unethical practices by its delinquent members.[31] If such action were taken, it would help curb the existing evils in the bar and greatly facilitate the solution of the problem.

F. L. M.

WORKMEN'S COMPENSATION—REMAND FOR REHEARING.—Plaintiff McCoy brought an appeal from the award of the Industrial Board denying her compensation for the death of her husband, alleged to have been caused by an accident arising out of and in the course of his employment by the defendant corporation. A physician testified for the plaintiff that it was his opinion that death resulted from heat exhaustion occasioned by the work done by plaintiff's deceased. Two physicians were called for the defendant; one, testifying in answer to a hypothetical question which included facts not proved by the evidence, gave it as his opinion that the most logical explanation was a

---

20 Clark, "The Effect of Unauthorized Practice of Law Upon the Ethics of the Legal Profession." 5 Law & Contemporary Problems 97.

21 Land Title Abstract and Trust Co. v. Duorken (1934), 290 Ohio St. 23, 193 N. E. 650.

22 1933 Burns Ind. Stat. Ann. 4-3611.

23 Berk v. State ex rel. Thompson (1932), 225 Ala. 324, 142 So. 832; People ex rel. Los Angeles Bar Assn. v. Cal. Protective Corp. (1926), 76 Cal. App. 354, 244 Pac. 1089.

24 Goodman v. Beall (1936), 130 Ohio St. 427, 200 N. E. 470.

25 Richmond Assn. of Credit Men, Inc. v. Bar Assn. of City of Richmond et al. (1937), 167 Va. 327, 189 S. E. 153.

26 In re Morse (1924), 89 Vt. 85, 126 A. 552.

27 5 Am. Jur. 353; Creditors Nat. Clearing House v. Bannwort (1917), 227 Mass. 579, 116 N. E. 886.

28 Bennie et al. v. Triangle Ranch Co. (1923), 73 Colo. 584, 216 P. 718.

29 Crawford Co. Treas. et al. v. McConnell et al. (1935), 173 Okla. 520, 49 P. (2d) 718.

30 5 Am. Jur. 353; Creditors Nat. Clearing House v. Bannwort (1917), 227 Mass. 579, 116 N. E. 886.

31 Stinchfield, F. H., Our Position for the New Year, 23 Am. Bar. Assn. Journal 110 (1937); Hill, W. H., Address to the Indiana Bar Assn. on the Integrated Bar, 14 Ind. Law Journal 81 (1938).