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Unauthorized practice of law is practice by one who has not been admitted to practice by the supreme court and who is not a member in good standing of the state bar association.[1] It is now undisputed that the supreme court has sole jurisdiction over admission to practice[2] and apparently may deal with unauthorized practice as an incident of its power over admission.[3] However, unauthorized practice has also been the subject of legislative enactment.[4] It follows, therefore, that the sanctions which are imposed to prevent the unauthorized practice of law in this state are of both judicial and legislative creation. At the outset it may be conceded that these acts are not inherently evil. Why then have the court and legislature undertaken to discourage practice by persons who are not technically qualified?

The most obvious reason for the policy of imposing civil and criminal sanctions is to prevent the avoidance of the requirements for admission to practice. The court and legislature have established these requirements and have provided that no person may practice until the requirements have been satisfied and the person admitted by the court.[5] The ultimate question then becomes one of the reasons for the requirements for admission. The reason should be apparent. Artless practice by persons who are technically unqualified is the cause of much litigation.[6] In our complex society, practice of law ought not to be undertaken by the inept, for the sake of their clients. Practice is an occupation requiring professional skill, a trained judgment, and an awareness of the overlapping qualities of rules of law. A requirement that practitioners meet the standards of examination, character, residence, and the like, as a condition of practicing, tends to minimize artless practice and the harmful effects that follow it. The underlying judicial and legisla-

[1] With this exception: non-resident attorneys may practice in Washington courts with the court's permission, in conjunction with a resident attorney. This article deals only with unauthorized practice by laymen, hence practice by attorneys which is unauthorized because they are the holders of certain public offices will not be considered; Revised Rules for Admission to Practice 18, 34-A Wn.2d 25.

[2] *In re* Bruen, 102 Wash. 472, 172 Pac. 1152 (1918).

[3] *In re* McCallum, 186 Wash. 312, 57 P.2d 1259 (1936), Washington State Bar Association v. Washington Association of Realtors, 41 Wn.2d 697, 251 P.2d 619 (1952).

[4] RCW 2.48.170, .180, .190.

[5] Revised Rules for Admission to Practice, 34-A Wn.2d 15; RCW 2.48.170, .180, .190.

[6] Washington State Bar Association v. Washington Association of Realtors, *supra* note 3.

tive attitude, expressed necessarily in general terms, may be stated as follows: Persons who are not licensed to practice law are usually incompetent to practice. Incompetent practice often causes harm to the public. Therefore, practice by unlicensed persons may often cause harm to the public, and should be prevented. Our court has recently announced that harm to the public, or the probability of it, is a sufficient reason for the policy of limiting practice to persons who are technically qualified.[7] This should be the *sole* reason for regulating admission and punishing or enjoining the unauthorized practitioner.

Although it is undisputed, as a general proposition, that the court is empowered to grant some form of relief against unauthorized practice, a difficult problem often arises regarding the classification of specific activities. In other jurisdictions the issue is typically this: Do the acts complained of constitute practice of law? Where an affirmative answer is necessary the practice is enjoined or the practitioner is punished. The term "practice of law" has often been given a wide connotation by these courts, embracing most acts that attorneys customarily perform. One popular definition of the term is that it ". . . embraces the preparation of pleadings and other papers incident to actions and special proceedings on behalf of clients before judges and courts, and, in addition, conveyancing, the preparation of legal instruments of all kinds, and, in general, all advice to clients, and all action taken for them in matters connected with the law."[8] This label approach to the problem may lead to consistent conclusions, but the Washington court has not used the technique, and has, more often than not, declined to define "practice of law". The Washington court, rather, attempted to narrow the field of acts prohibited. The facts of a few of our cases may clearly have called for a prohibition of the activities, for example, where the practice was before a court;[9] but in the majority of the cases the court was concerned with the policy question of whether the acts complained of should be classified as *sanctionable varieties* of unauthorized practice. The Washington court has in some cases declined to enjoin or punish acts which probably would be dealt with in other states as unauthorized practices, preferring not to lay down broad prohibitions but to deal with each case as it arises. The problem has been treated as one peculiar to the state, and the formulae of other states have been disregarded to a large extent.[10]

[7] *Ibid.*
[8] 2 R.C.L. 938, § 4.
[9] *See* Ferris v. Snively, 172 Wash. 167, 19 P.2d 942 (1933).
[10] *See* Washington State Bar Association v. Washington Association of Realtors, *supra* note 3.

Before considering the specific rules that have been developed in Washington, a brief examination of the nature of practice of law should be made. The practice of law is a service, that is, it is employment for the principal benefit of others. For this reason a layman does not *practice* law when he he transacts the business affairs in which he is a principal, even though this may involve what is conceded to be legal work. If this proposition is doubted, then such activity is still not *unauthorized* practice, for it is a common law right too well established to be disputed. Furthermore, appearance in court in one's own behalf is permitted by statute in this state.[11] Our investigation of unauthorized practice is then concerned only with practices performed for the primary benefit of other persons, the practitioner not being a party in interest. The area may be further cut down by eliminating all merely ministerial acts as not being within the scope of our investigation. The practice must be professional, at least in the sense that it is the product of an exercise of judgment. To summarize, there must be a rendition of service, based on judgment and discretion. Without this there can be no unauthorized practice.

Because the Washington court has not given us a modern definition of the term "practice of law," we are without a broad statement indicating the specific acts which will be prevented. Furthermore, the court has recently asserted that the definitional or label approach will not be used.[12] In this attempt to ascertain the court's present position on unauthorized practice it becomes necessary to examine the court's attitude toward specific practices as it is revealed by case law. The phases of practice fall conveniently into four categories.

The most obvious category consists of the management of a cause before a court. This is clearly an instance of contempt, and the clarity of this situation accounts for a lack of decisions squarely on the subject.[13]

Another form of practice is the preparation of pleadings and similar documents. The court has apparently indicated that this activity falls within the area of prohibition, for the preparation of the legal documents required in probate proceedings,[14] and the preparation of complaints and writs of garnishment[15] have been held to be unauthorized practice.

[11] RCW 2.48.190.
[12] *See* Washington State Bar Association v. Washington Association of Realtors, *supra* note 3.
[13] *But see* Ferris v. Snively, *supra* note 9.
[14] Ferris v. Snvely, *supra* note 9.
[15] Yount v. Zarbell, 17 Wn.2d 278, 135 P.2d 309 (1943).

Giving legal advice is also prohibited.[16]

Thus far the course has been rather plain. Not much objection can be raised against a policy which prohibits advocacy, counselling, and the preparation of pleadings by laymen. The fourth category, the preparation of ordinary business instruments, has been more troublesome. In this situation the reasons for regulating practice may be less clear to laymen. The problem looms larger because the profitable use of such tactics is much greater.

Unauthorized drafting typically occurs in this way: many business transactions are brought about by specialists, such as real estate brokers, bankers, accountants, and property management agents, who are not parties to the transaction itself and, therefore, not authorized, as the parties are, to draft the documents necessary to the transaction. The reasons why the specialist takes it upon himself to draw the instruments are numerous. Along with the factor of convenience may be the specialist's intimate contact with the transaction, his desire to give his customer a complete service, his often extensive experience in the particular business involved, and, occasionally, the belief (sometimes well founded) that to secure the services of an attorney means delay and possible loss of the transaction.

Under these circumstances there are bound to be conflicting ideas as to how the problem should be met. It is plain that drafting by laymen should not be completely unchecked. The problem is the extent to which drafting by a specialist of the documents necessary to his legitimate business activities is consonant with the needs of the parties to be protected from unskilled drafting. The position taken by the writer of this article is expressed in the following paragraph.

Every sale of real property negotiated by a broker or other specialist involves two sets of legal relations. One exists between the buyer and seller, the other, between the broker and the party who retains him, usually the seller. The broker is a party to this latter or secondary transaction. The interest of the broker in this transaction is the fee or commission which is to be earned by finding a buyer. Is the broker placed in a position in which he cannot earn his fee because he is not authorized to draft the instruments required in the principal transaction? Apparently he is not, for the fee is earned typically by finding a buyer who is ready, willing, and able to buy. The commission is not earned by drafting the deed or contract which defines the legal relations of the parties to the principal transaction. Since the deed or contract

[16] State *ex rel.* Ayamo v. Washington State Bar Association, 24 Wn.2d 706, 167 P.2d 674 (1946); Paul v. Stanley, 168 Wash. 371, 12 P.2d 401 (1932).

defines the legal relations of the principal parties only it cannot be doubted that the broker who drafts such instruments engages in unauthorized practices, and since the broker's interest is not prejudiced if he does not draft these documents there is no justification for such practices. The rule which can be formulated from this example has support in Washington case law.[17] This rule is that the preparation of any document having any effect upon the legal relations of the parties, concerning a transaction to which the draftsman is not a party, amounts to practice of law.

In some quarters the idea is advanced that this rule is undesirable because its strictness may foreclose to laymen many useful activities. According to this view it should be permissible for laymen to draft simple instruments, while documents involving complex rules or relations would be outside the layman's authority. Instruments prepared from printed forms would apparently be considered as simple instruments, on the theory that the draftsman in fact does little or no writing other than to fill in the blanks with known information. The fallacy of the "simple instrument" theory lies in its assumption that untrained persons can skillfully prepare these instruments. Judge Pound remarked on this subject:[18] "I am unable to rest any satisfactory test on the distinction between simple and complex instruments. The most complex are simple to the skilled, and the simple often trouble the inexperienced." Furthermore, this theory necessarily assumes that all instruments fit into one of two well defined categories. There would be difficulty in applying such a rule. In addition, with respect to the use of printed forms, it is well known that such forms are used primarily for the purpose of time saving and uniformity, and not because they are less complex than documents in other forms.

An approach differing from either of the above ideas was apparently taken by the Washington court in the case of *Washington State Bar Ass'n. v. Washington Ass'n. of Realtors.*[19] The court there examined the alleged unauthorized practices with an eye to deciding whether the practice showed such a lack of skill that the client was placed in an unsatisfactory position, rather than flatly stating either that the practice was practice of law and illegal or that the practice was simple drafting and permissible. A resort to prior case law will serve as introduction to the *Realtors* case.

[17] Paul v. Stanley, *supra* note 16.
[18] People v. Title Guarantee & Trust Co., 227 N.Y. 336, at page ...., 125 N.E. 666, at page 670 (1919).
[19] *Supra* note 3.

The first Washington case on the subject of drafting was *Paul v. Stanley*.[20] There the defendant, a notary public, had drafted wills, community property agreements, warranty and quit claim deeds, conditional sale contracts, creditor's claims in probate, and various other documents, for compensation, and had also given legal advice with the instruments. Two attorneys sought an injunction. RRS 139-4 provided that "No person shall be permitted to practice as an attorney at law or to do work of a legal nature for compensation . . . unless . . . (he) has been admitted to practice law in this state . . ." At the trial the defendant asserted that he had the right to draft these instruments and would continue to do so if not enjoined. The trial court granted an injunction ordering the activities ceased, whether performed for compensation or not, but permitting the defendant to continue to draft "simple" instruments so long as he remained a notary public. Both sides appealed, the plaintiffs because the injunction allowed the defendant to draft simple instruments, and the defendant because the injunction prohibited gratuitous drafting. The supreme court stated that an attorney possessed a privilege to practice law, that this privilege was of the nature of a property right, and that a court of equity would protect it from infringement. The decree was then modified in two respects. First, the court rejected the idea that a notary public ought to be permitted to draft simple instruments, citing Judge Pound's statement in support,[21] and further stating: "The evil from which RCS 139-4 is designed to protect the public is not done away with by permitting the respondent to draw simple instruments which either define, set forth, limit, terminate, specify, claim or grant legal rights."[22] This holding was weakened by prefacing it with language indicating that relief would not have been granted but for the fact that the defendant had also given legal advice to the persons for whom the drafting was accomplished.[23] In other words, the fact of oral advice was apparently made an element of unauthorized drafting. The second modification was the result of holding that the defendant should not be enjoined from drafting instruments gratuitously, the ground for this being that it was not the intention of the legislature, as expressed in RCS 139-4, to protect persons from incompetency when they had paid nothing for the work done. It is apparent throughout the opinion that the court

[20] *Supra* note 16. For a complete discussion see: Shattuck, *Injunctive Relief against the Unlicensed Practice of Law as Represented by Drafting of Legal Instruments*, 8 WASH. L. REV. 33.

[21] 168 Wash. at p. 378, 12 P.2d at p. 404.

[22] At page 378 of the opinion.

[23] At page 376 of the opinion.

felt that it should operate entirely within the framework of the statute, for no mention was made of any inherent power over unauthorized practice. To summarize, the *Paul* decision was that a court of equity could enjoin a layman, at the instance of an attorney, from drafting legal instruments whether simple or complex, when compensation was received and when legal advice was given. The compensation requirement has probably been a considerable road block to the initiation of unauthorized practice actions, for most brokers make no separate charge for the preparation of deeds.

In re *McCallum*[24] and In re *Estes*[25] were original contempt proceedings. McCallum, a notary public and real estate broker, had prepared deeds, real estate contracts and mortgages, for compensation. After admonition by the bar association he had ceased accepting compensation for the work, and after further admonition had ceased the practice altogether. The supreme court, after assuming that McCallum had practiced law in the respect alleged, decided that it possessed the inherent power to punish as for contempt a layman who had practiced law. The court declined to punish him in this case, however, on the ground that his conduct did not warrant punishment by such a drastic, summary proceeding. The *Paul* case was distinguished on the ground that there the defendant had given legal advice to the persons for whom the work was done, and had been guilty of more flagrant conduct. Dismissal was without prejudice to another form of action. The *Estes* case was similar in facts and was disposed of by a reference to the *McCallum* opinion. The opinions are *obiter dictum* as to the court's contempt jurisdiction over unauthorized drafting where there has been no allegation of violation of injunction, but the cases may have forecast the court's later willingness to break away from the self imposed limitations of statutory law and exercise inherent powers in dealing with unauthorized practice.

Returning now to the *Realtors* case, this case was originally an action against all licensed real estate brokers in the state, in which an injunction was sought against the preparation of deeds and other documents. It was eventually reduced to an action against one C. K. Worrell, the complaint alleging that he had unlawfully practiced law and had unlawfully done work of a legal nature. He was specifically accused of preparing five statutory form deeds and two real estate contracts. Worrell admitted that he had prepared four deeds from printed forms.

[24] 186 Wash. 312, 57 P.2d 1259 (1936).
[25] 186 Wash. 690, 57 P.2d 1262 (1936).

The defense was that no compensation had been received for the preparation of the deeds, other than the usual broker's fees earned for finding the buyers. The trial court ruled that the *Paul* case was controlling, and denied relief because of the lack of compensation. On appeal the case was reversed. As hinted in the *Estes* and *McCallum* opinions the court was willing to exercise an inherent power of regulation over unauthorized practice, and was unwilling to be limited by statute. The following propositions were laid down:

(1) one who prepares an instrument by filling in blanks in a printed form does work of a legal nature, for every form must be skillfully adapted to conform to the agreement intended by the parties;

(2) the court has the inherent power to protect the public interest by injunction when an unskilled person does work of a legal nature;

(3) statutes are no bar to the power of the court to interfere by injunction when the statutes do not adequately protect the public interest. A statute which apparently permits practice by unqualified persons when performed gratuitously is inadequate protection, and does not, therefore, stand in the way of court interference. The *Paul* case was expressly overruled as to the compensation requirement.

The court also considered these factors, and indicated that they had an effect on the decision: (1) One who prepares legal documents implicitly represents that he is qualified to do the work; (2) A lay draftsman is unfettered by canon and so may always represent both the parties to a transaction; (3) There is no simple legal instrument which can necessarily be distinguished from a complex one so as to justify its preparation by an unqualified person.

The injunction was then ordered granted, but on a very limited scale. The defendant was to be enjoined only from doing the kind of legal work that was evidenced by one of the deeds which ambiguously referred to a mortgage; this limitation because of the narrowed issues of the case, the court's reluctance to exercise its inherent powers, and the fact that the result was reached via the partial overruling of previous case law. It is not clear whether the injunction was intended to prevent merely the defective drafting of deeds referring to mortgages, or the drafting of deeds referring to mortgages, or the defective drafting of deeds, or all defective drafting. Concurring in the result in a separate opinion Judge Donworth stated that an injunction should be granted to prevent the drafting of any deeds.

The opinion definitely rejects the concept that a layman should be permitted to draft "simple" instruments. At the same time it fails to

embrace the theory that laymen should be prevented from preparing any instrument affecting legal relations where he is not a party, this being evidenced by the fact that the defendant was not enjoined in toto from drafting deeds. The outstanding features of the opinion are the court's refusal to be limited by statutory law, and the emphasis that is placed upon the public interest factor. The court declined to define practice, and stated that each case was to be disposed of on its own facts, with relief to be granted wherever a continuation of the practice was detrimental to the public interest.

What practices are likely to be found detrimental to the public interest? Does the public interest suffer when one who is technically unqualified does work of a legal nature, or does it suffer only when such person does legal work imperfectly? Does "harm to the public interest" mean realized harm to the client, or the litigation that is created, or merely disadvantage to the client from being placed in a weak or ambiguous position? It is fairly clear that there is harm to the public, within the meaning of the language of the opinion, when the client has been placed in a weak or ambiguous position as the result of unauthorized practice, and that there is harm to the public where there is a probability of unnecessary litigation because of the client's position. In addition, there is language in the opinion which will support either of two other propositions which are contrary to one another: (1) When an unqualified person practices law there is a probability of harm to the public which will not be condoned; and (2) To be enjoinable there must be practices which are demonstrably imperfect. This language makes it difficult, if not undesirable, to attempt to forecast future results, but it should be kept in mind that one of the strong limiting factors of this case, the partial overruling of the *Paul* case, would not be present in future litigation. It is not unlikely that in the future the scope of relief granted will be broader, for example, enjoining all drafting by one who has demonstrated that he is unqualified, even though a part of his work was properly done. The *Realtors* case may at least be taken as a present warning that laymen who draft legal documents for others do so at the peril of being involved in unauthorized practice litigation if they err.

Does the result of the *Realtors* case accord with the underlying policy of protecting persons from the harmful effects of incompetency? Probably not. The defendant amply demonstrated that he was not qualified to draft deeds, the evidence of this being the realization of harm to the grantee. A continuation of the practice will create the probability of harm to other grantees, and to the public through the probability of

unnecessary litigation, even though the deeds drafted by the defendant do not refer to mortgages. It is, therefore, submitted that laymen in the following cases should be denied the authority to draft documents affecting legal relations when they are not parties: (1) When the layman has demonstrated a lack of ability. This is evidenced by the realization of harm to a client. A present lack of ability indicates a probability that the harm will occur again if the practice is continued. (2) Where the practice is continuous or periodical. Here it is likely that the draftsman, not being technically qualified, will eventually cause harm to someone. In either of these two cases a failure to halt the practice will result in an avoidance of the reason for the requirements for admission to the bar.

What was the effect of the *Realtors* case upon statutory enactments? The court stated that RCW 2.48.190 ". . . might well be viewed as a statement of the minimum requirement for an action at law for relief against the proscribed activities. It is not a maximum requirement that divests a court of jurisdiction or precludes its action in an equitable proceeding."[26] The kind of "action at law" referred to by the court does not come readily to mind, suggesting that this statute may well be a dead letter, although an argument by the bar association that the statute was repealed by implication by RCW 2.48.180 was noticed by the court but left unanswered.[27]

Passing once more into the general problem of unauthorized practice, and leaving the specific problem of drafting, it will be of interest to examine the circumstances under which the issue of unauthorized practice has arisen. Unauthorized practice may be the cause of the litigation, or it may arise incidentally as a defense. The nature of the proceeding may be equitable, criminal, civil, or special.

In *State v. Chamberlain*,[28] the only appellate criminal decision on the subject, the defendant was charged with a violation of RCS 139-4.[29] The language of the information charged that the defendant ". . . did then and there willfully and unlawfully represent himself as, and practice as an attorney and counsellor at law, and did then and there do work of a legal nature for compensation." The issue on appeal was the sufficiency of the information. The defendant argued that the information was vague, there being no statutory definition of the crime charged.

[26] At page 699 of the opinion.
[27] *Cf.*: OPINION OF THE ATTORNEY GENERAL, 55-57 #1.
[28] 132 Wash. 520, 232 Pac. 337 (1925).
[29] R.C.S. 139-22 made violation of R.C.S. 139-4 a gross misdemeanor. The provisions of R.C.S. 139-22 have been omitted from the revised code.

The court defined "practice of law" as doing that which an attorney or counselor at law was authorized to do, and held that the information was sufficient under the rules of criminal pleading since it substantially followed the language of the statute.

In *Washington State Bar Association v. Merchants Rating and Adjusting Company*[30] the court held that a corporation which instituted litigation in its own name on accounts assigned to it for that purpose was not practicing law. The collection agency was held to be a party in interest, under RRS 191,[31] and not therefore practicing without authority. In *State* ex rel. *Lundin v. Merchants Protective Corporation,*[32] a quo warranto proceeding, it was shown that the defendant had sold membership cards to merchants entitling them to extensive legal services from named attorneys for the period of one year. The court held that the defendant corporation was either acting as a solicitor for attorneys or was actually practicing law through its attorney agents, and in either event a judgment of ouster was necessary. Practice of law by a corporation is of course always illegal.[33]

In *Ferris v. Snively,*[34] the plaintiff, a law clerk, sued the heirs of his deceased employer. One cause of action was for services rendered as an employee of the deceased employer, and the other was for services rendered to the heirs relating to the probate of the attorney's estate. The defendants showed that the plaintiff had committed numerous acts of unauthorized practice in performing the services alleged in both causes of action. Unauthorized practice was held not to be a defense to the first cause of action, on the principle that the defendants were representatives of the deceased employer and should not be permitted to invoke the defense of illegality. As to the second cause of action, the court said that in an action against a client the defense of unauthorized practice was available, and that if the plaintiff wished to recover for that portion of the services which were lawful he must segregate them from those that were unlawful. In *Yount v. Zarbell*[35] the plaintiff, an attorney, sued for services rendered as employee of a collection agency. A part of the agency's business was to institute suit on accounts assigned to it for that purpose. It was shown that the plaintiff had rubber stamped complaints and writs of garnishment prepared by the defendant employer. The acts of the employer were said

[30] 183 Wash. 611, 49 P.2d 26 (1935); discussed in 11 WASH. L. REV. 39.
[31] RCW 4.08.060.
[32] 105 Wash. 12, 177 Pac. 694 (1919).
[33] *Ibid.*
[34] *Supra* note 9.
[35] *Supra* note 15.

to be unauthorized practices so that there was a violation by the plaintiff of Rule 10, Section 5, Rules for Discipline of Attorneys, in lending her name to be used by one not authorized to practice law. This was a defense. There is an apparent conflict between this case and the *Merchants Rating and Adjusting* case on the issue of unauthorized practice, for in both cases the collection agency was an assignee for collection and hence a party in interest.

In *State* ex rel. *Ayamo v. Washington State Bar Association*[36] the relator sought a review of the denial by the Board of Governors of his application for admission to practice. The relator had held himself out to others as an attorney, and had given legal advice to persons in his office, upon the door of which was a sign "Legal Adviser". In fact the relator was licensed to practice law in Indiana. The court held that the relator's conduct amounted to unauthorized practice and a representation that he was a Washington attorney. This was a sufficient reason for denying the application for admission on the ground of unethical conduct.

[36] *Supra* note 16.