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In 1979, the Washington legislature enacted RCW chapter 19.62, which authorized certain laypersons to prepare documents and instruments relating to real estate transactions. The statute was passed in response to the Washington Supreme Court's decision in Washington State Bar Association v. Great Western Union Federal Savings and Loan Association. In Great Western, the court held that laypersons who received

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   The following individuals, firms, associations, partnerships, or corporations:
   (1) Any person or entity doing business under the laws of this state or the United States relating to banks, trust companies, bank holding companies and their affiliates, mutual savings banks, savings and loan associations, credit unions, insurance companies, title insurance companies and their duly authorized agents exclusively engaged in the title insurance business, federally approved agencies or lending institutions under the National Housing Act; or
   (2) Any escrow agent or escrow officer subject to the jurisdiction of the department of licensing:

   when acting in such capacity in connection with a loan, forbearance, or other extension of credit, or closing, or insuring title with respect to any loan, forbearance, or extension of credit or sale or other transfer of real or personal property, may select, prepare, and complete documents and instruments relating to such loan, forbearance, or extension of credit, sale, or other transfer of real or personal property, limited to deeds, promissory notes, deeds of trusts, mortgages, security agreements, assignments, releases, satisfactions, reconveyances, contracts for sale or purchase of real or personal property, and bills of sale, provided:
   (a) No such person or entity makes an additional charge for the selection, preparation, or completion of any such document or instrument;
   (b) All parties to the transaction are given written notice substantially as follows: IN CONNECTION WITH THE . . . (describe the transaction) . . . (name of person or entity) . . . SELECTS, Prepares, AND Completes CERTAIN INSTRUMENTS OR DOCUMENTS WHICH MAY SUBSTANTIALLY AFFECT YOUR LEGAL RIGHTS, BUT IS DOING SO FOR ITS OWN BENEFIT AND TO PROTECT ITS OWN INTEREST IN THIS TRANSACTION. IF YOU HAVE ANY QUESTION REGARDING SUCH DOCUMENTS OR INSTRUMENTS OR YOUR RIGHTS, YOU SHOULD CONSULT AN ATTORNEY OF YOUR CHOICE; and
   (c) No attorney or other agent had previously been designated in writing by a party to such documents or instruments to select and prepare the same.

   RCW § 19.62.020 (1981) provides:

   Notwithstanding any provision of RCW 19.62.010, in the event any individual, firm, association, partnership, or corporation described in RCW 19.62.010 selects, prepares, or completes any document or instrument in connection with a transaction described in RCW 19.62.010, such individual, firm, association, partnership, or corporation shall be held to a standard of care equivalent to that of an attorney had such attorney selected, prepared, or completed any such instrument or document.

compensation for the preparation of legal documents were engaged in the unauthorized practice of law. The legislature’s response, authorizing the activities prohibited in Great Western, raised questions regarding the scope of legislative and judicial power to define and regulate the practice of law.

The Washington Supreme Court resolved these questions in Hagan & Van Kamp, P.S. v. Kassler Escrow, Inc., holding that, in enacting RCW chapter 19.62, the legislature unconstitutionally encroached upon the judiciary’s power to regulate the practice of law. Relying upon the doctrines of separation of powers and inherent judicial power, the court unanimously reasserted its exclusive power to define and regulate the practice of law.

This Note examines the doctrine of inherent judicial power to regulate the practice of law, as developed by the Washington court, and discusses the relation of this doctrine to the preparation of real estate documents. It recommends that the Washington Supreme Court adopt a limited practice rule or some other guideline to regulate competent lay preparation of real estate documents. Adoption of such a rule would allow the court to maintain its integrity, while best serving and protecting the public.

I. LEGAL BACKGROUND

A. The Doctrine of Inherent Judicial Power

The doctrine of inherent powers is based on the doctrine of separation

3. Specifically, the “legal documents” included deeds, mortgages, deeds of trust, promissory notes, and agreements modifying these legal documents. 91 Wn. 2d at 54, 586 P.2d at 874.
4. Id. at 61, 586 P.2d at 878.
6. Id. at 453, 635 P.2d at 736. See also 1982 Op. Wash. Att’y Gen. No. 1 (the rulings in Hagan and Great Western do not preclude licensed real estate agents from doing any of the things permitted by their licenses in closing real estate transactions under the provisions of RCW chapter 18.85. Those authorized practices, however, may not constitutionally be construed to include the selection, completion, or drafting of form legal documents, including deeds, mortgages, deeds of trust, promissory notes, and agreements modifying those documents).
7. The power to regulate the “practice of law” is generally thought to include not only the power to regulate qualified legal practitioners, but also the power to define law practice and to regulate lay practitioners. See generally Comment, Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power, 28 U. Chi. L. Rev. 162 (1960) (hereinafter cited as Control of Unauthorized Practice). The Washington court has asserted its right to control unauthorized lay practice as an incident of its inherent power over bar admission and discipline of attorneys. See Washington State Bar Ass’n v. Washington Ass’n of Realtors, 41 Wn. 2d 697, 251 P.2d 619 (1952); In re McCallum, 186 Wn. 312, 57 P.2d 1259 (1936).
8. Inherent power is that “authority not expressly provided for in the constitution but which is derived from the creation of a separate branch of government and which may be exercised by the branch to protect itself in the performance of its constitutional duties.” In re Juvenile Director, 87 Wn. 2d 232, 245, 552 P.2d 163, 171 (1976). See also note 14 and accompanying text infra.
of powers, which some consider the "dominant principle of the American political system." Under the separation of powers doctrine, governmental powers are divided among three co-equal branches: the executive, the legislative, and the judicial. This separation of powers, however, is not absolute, and has been modified by the constitutional provisions for checks and balances. Each branch thus has limited control over the other two branches to avoid an improper concentration of power in any one branch.

Legislative and judicial regulation of the practice of law have co-existed in many states, although judicial regulation has predominated. Few state constitutions specifically empower the judiciary to regulate attorney conduct and the practice of law, but a number of state supreme courts have asserted an "inherent" judicial power to regulate the legal profession. This inherent power derives from the judiciary's status as a


11. See Control of Unauthorized Practice, supra note 8, at 164–65. Nevertheless, as one commentator has noted, it is difficult to state whether exclusive judicial power to regulate the practice of law is a minority or majority position because of the elusiveness of judicial opinions on this subject. Note, The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation, 60 Minn. L. Rev. 783, 787 (1976).

Courts have recognized several factors indicating that an act having legal consequences for another person does not constitute law practice:

1. The act is performed as an incidental part of another transaction that is clearly not law practice or ancillary to a primary employment. See, e.g., Creekmore v. Izard, 236 Ark. 558, 367 S.W.2d 419, 423 (1963); Ingham County Bar Ass'n v. Walter Neller Co., 342 Mich. 214, 69 N.W.2d 713, 721 (1955); Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 855, 863 (1952). But see Arizona State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), supplemented, 91 Ariz. 293, 371 P.2d 1020 (1962); Keyes Co. v. Dade County Bar Ass'n, 46 So. 2d 605 (Fla. 1959); Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 34 Ill. 2d 116, 214 N.E.2d 771 (1966).

2. The act is not performed for separate pay. See, e.g., Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998 (1957); State ex rel. Indiana State Bar Ass'n v. Indiana Real Estate Ass'n, 244 Ind. 214, 191 N.E.2d 711 (1963). But see R.J. Edward, Inc. v. Hert, 504 P.2d 407, 416 (Okla. 1972) ("a service which otherwise would be a form of the practice of law does not lose that character merely because it is rendered gratuitously"); Washington State Bar Ass'n v. Washington Ass'n of Realtors, 41 Wn. 2d 697, 699, 251 P.2d 619, 621 (1952).

3. The person performing the act is a specialist or licensed. See Hulse v. Criger, 363 Mo. 26, 247 S.W.2d 885 (1952).


12. See, e.g., Ark. Const. amend. XXVIII; Fla. Const. art. 5, § 15; N.J. Const. art. 6, § 2, para. 3.

separate branch of government. The advocates of inherent powers claim that this status implies the incidental powers necessary to ensure the courts’ dignity, functioning, and survival. Some courts claim that the practice of law is closely tied to the judicial function and that members of the bar are “officers of the court.” They conclude that it is the duty of the court to regulate their conduct.

Other courts, however, have recognized that the close relation between lawyers and courts does not exempt the practice of law from legislative scrutiny. These courts have deferred to the legislative assessment of public interest on grounds of comity. They view legislative regulation of the legal profession either as an aid to the judiciary’s attempt to define the boundaries of legal practice, or as a valid exercise of police power.

B. Inherent Judicial Power in Washington

The doctrine of inherent judicial power in Washington has developed from concurrent legislative and judicial regulation of the practice of law to exclusive judicial regulation. As early as 1898, the Washington court asserted an inherent power to discipline attorneys in In re Lambuth. The court stated that this power was necessary to protect the court and the profession, to ensure the proper administration of justice, and to further the public interest. The case presented no legislative-judicial conflict

15. See, e.g., In re Greer, 52 Ariz. 385, 81 P.2d 96 (1938); Heiberger v. Clark, 148 Conn. 177, 169 A.2d 652 (1961); In re Opinion of the Justices, 279 Mass. 607, 180 N.E. 725 (1932); In re Baker, 8 N.J. 321, 85 A.2d 505 (1951).
18. See, e.g., In re Day, 181 Ill. 73, 54 N.E. 646, 652 (1899); In re Bonam, 225 Mich. 59, 237 N.W. 45, 46 (1931); Clark v. Austin, 340 Mo. 467, 101 S.W.2d 977, 985 (1937); Creditors’ Service Corp. v. Cummings, 57 R.I. 291, 190 A. 2 (1937); In re Cannon, 206 Wis. 374, 240 N.W. 441, 450 (1932). See also notes 64–66 and accompanying text infra.
20. The court stated: [P]ower to strike from the rolls is inherent in the court itself. No statute or rule is necessary to authorize the punishment in proper cases. Statutes and rules may regulate the power, but they do not create it. It is necessary for the protection of the court, the proper administration of justice, the dignity and purity of the profession, and for the public good and the protection of clients.
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because the court did not assert that its power to discipline attorneys was exclusive.

The court recognized some degree of legislative regulation in In re Bruen, while making clear that it retained its inherent powers. The court invalidated that portion of a statute that authorized the board of law examiners to disbar attorneys, but upheld the establishment of the board and its authority to examine bar applicants and attorneys. Acknowledging the overlap between the legislative and judicial powers to regulate the practice of law, the court distinguished as judicial the power to admit, suspend, or disbar attorneys from practice, and as legislative the power to regulate and restrict that judicial power.

Although the court allowed the legislature to establish minimal requirements for admission to the bar in Bruen, it later held that judicial authority to regulate the practice of law was not dependent on legislative authorization. In In re Schatz, for example, the court stated that the board of governors of the state bar association was an arm of the court independent of legislative direction. Although the State Bar Act gave the board of governors the discretionary power to adopt rules for admission to the practice of law, the Act conditioned exercise of that power upon approval by the supreme court. The dissent viewed the bar association as a state agency, but the majority reasoned that the legislature expressly recognized the court's primacy in this area when it made the board's power subject to the court's approval.

The court's inherent power to regulate admission, discipline, and dis-

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18 Wash. at 480, 51 P. at 1072. In Lambuth, the attorney faced disciplinary charges for using discourteous language in a petition for rehearing. Id. at 478, 51 P. at 1071.
21. 102 Wash. 472, 172 P. 1152 (1918).
22. These inherent powers included the power to protect itself, to administer justice, to promulgate rules for legal practice, and to provide process where none existed. Id. at 476, 172 P. at 1153.
23. The court stated:
   It is true that the judicial power of this court was created by the constitution, but upon coming into being under the constitution, this court came into being with inherent powers. Among the inherent powers is the power to admit to practice, and necessarily therefrom, the power to disbar from practice, attorneys at law. . . .
   . . . The cases are fairly uniform upon the proposition that admitting to practice, suspending, and disbarring are judicial functions. The legislative power, in the interest of uniformity of standard and to remedy and prevent mischiefs in the profession, may regulate and restrain the power, but cannot take it away.
25. Id. at 607, 497 P.2d at 155.
27. 80 Wn. 2d at 612, 497 P.2d at 158.
28. Id. at 607, 497 P.2d at 155.
barment has developed into an exclusive power to regulate the practice of law. In *Graham v. Washington State Bar Association*, the state auditor sought to audit the bar association pursuant to a statute authorizing post audits of state agencies and departments. The court held that under the separation of powers doctrine the legislature had no power to audit the bar association’s funds. The court further held that the State Bar Act of 1933 was unnecessary as a source of power because the inherent power to regulate the practice of law was found first in the court and not in the legislature. It stated that the power to regulate the practice of law was exclusive and could not be encroached upon by the legislative or executive branches. Thus, the court asserted the total independence of the bar and the judiciary from legislative regulation.

C. Real Estate Document Preparation in Washington

The court’s expansion of its power to regulate the practice of law necessarily broadened its authority to regulate laypersons’ preparation of real estate documents. In *Washington State Bar Association v. Washington Association of Realtors*, the court stated that a legislative act permitting gratuitous legal work by the unskilled or unqualified could not prevent the court from granting an injunction if necessary to protect the public interest. In granting an injunction restraining certain practices of a licensed real estate broker, the court relied on its equitable power to enjoin activities harmful to the public interest rather than on any broad power to define and regulate the unauthorized practice of law. The court stated that the nature and character of the services rendered, rather than the presence or absence of compensation, governed their classification and relation

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30. *Id.* at 633, 548 P.2d at 316. Further, the court found that the legislature’s characterization of the bar as an agency of the state did not deprive the court of its right to control the bar. *Id.* at 632, 497 P.2d at 316.
31. The court stated that ‘‘the regulation of the practice of law and ‘the power to make necessary rules and regulations governing the bar was intended to be vested exclusively in the supreme court, free from dangers of encroachment either by the legislative or executive branches.’’ *Id.* at 633, 548 P.2d at 316, (quoting Sharood v. Hatfield, 296 Minn. 416, 210 N.W.2d 275 (1973)).
33. 41 Wn. 2d 697, 251 P.2d 619 (1952).
34. *Id.* at 699, 251 P.2d at 621. The court’s narrow holding enjoined the specific kind of defects in a particular deed drafted by the defendant. *Id.* at 701, 251 P.2d at 622.
35. *Id.*
36. The court overruled an earlier statement in *Paul v. Stanley*, 168 Wash. 371, 12 P.2d 401 (1932), that a layperson could be restrained from doing work of a legal nature only if that work was
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to the public interest. Nevertheless, the court expressly declined to define what constituted the practice of law.\(^{37}\)

That step was taken in *In re Droker & Mulholland.*\(^ {38}\) The Droker court equated the practice of law with the preparation of legal instruments and contracts securing legal rights.\(^ {39}\) The court gave this question more detailed treatment in *Washington State Bar Association v. Great Western Union Federal Savings & Loan Association.*\(^ {40}\) It held that the selection and completion of form legal documents—including deeds, mortgages, deeds of trust, and promissory notes—and the preparation of agreements modifying these documents constituted the practice of law.\(^ {41}\)

In *Great Western,* the bar association sought declaratory and injunctive relief against the activities of a savings and loan association that provided closing services for the real estate transactions it financed. Relying on *Washington Association of Realtors,* the court stated that the nature and character of the services performed, not the person performing the services, determined whether given activities constituted the practice of law.\(^ {42}\) Further, the court stated that relief was not precluded merely because there was no evidence of public harm.\(^ {43}\)

In response to the holding in *Great Western,* the Washington legislature enacted RCW chapter 19.62.\(^ {44}\) The statute authorized escrow agents and others to select, prepare, and complete certain real estate documents, subject to two significant limitations. First, the agent could not charge an additional fee for the document preparation.\(^ {45}\) Second, the agent was required to inform the parties in writing that their legal rights might be affected and that any questions should be referred to an attorney.\(^ {46}\)

\(^{37}\) 41 Wn. 2d at 701, 251 P.2d at 621–22.

\(^{38}\) 59 Wn. 2d 707, 370 P.2d 242 (1962).

\(^{39}\) *Id.* at 719, 379 P.2d at 248.

\(^{40}\) 91 Wn. 2d 48, 586 P.2d 870 (1978).

\(^{41}\) *Id.* at 54–55, 586 P.2d at 875.

\(^{42}\) *Id.* at 54, 586 P.2d at 874. The *Great Western* court did recognize a limited "pro se" exception to the general prohibition against laypersons practicing law. *Id.* at 56–58, 586 P.2d at 876. Under this exception, nonlawyers can act on their own behalf with respect to their legal rights and obligations. Although Great Western was a party to the transaction, the receipt of compensation was held to be conclusive evidence that Great Western was not acting "pro se" but had assumed the additional burden of acting for another. The court stated that the issue of whether the conduct was unauthorized even if no fee was charged was not before the court; the only evidence indicated that a fee was charged. *Id.* at 59, 586 P.2d at 876–77.

\(^{43}\) *Id.* at 60–61, 586 P.2d at 878.


\(^{46}\) WASH. REV. CODE § 19.62.010(2)(b) (1981), *reprinted in note 1 supra.* The statute also held lay practitioners to a standard of care equivalent to that of an attorney. *Id.* § 19.62.020.
II. STATEMENT OF THE CASE

Defendant Kassler Escrow was a registered escrow company that employed licensed escrow officers to close real estate transactions. In two of these transactions, the escrow company prepared documents and performed other services, including the preparation of earnest money agreements that specified Hagan & Van Kamp’s law office as the place of closing. Hagan & Van Kamp brought suit to enjoin the performance of certain services by the escrow company which allegedly constituted the unauthorized practice of law in violation of RCW §§ 2.48.170–.190.47

After the suit was filed, the Washington legislature enacted RCW chapter 19.62, authorizing the preparation of real estate documents by non-lawyers. Relying on this statute, the defendant moved to dismiss the action. The trial court denied the motion and declared RCW chapter 19.62 unconstitutional.

The Washington Supreme Court unanimously affirmed. It concluded that because RCW chapter 19.62 allowed laypersons to practice law, the statute was an unconstitutional exercise of legislative power which violated the separation of powers doctrine.48 The court reasoned that the Washington constitution’s express grant of power to the judiciary necessarily implied an inherent power to regulate the practice of law.50 Therefore, the court stated that the practice of law by laypersons was a judicial matter addressed solely to the courts.51

The court reaffirmed its broad definition of the practice of law as stated in Great Western and rejected the argument that escrow agents are exempt from this definition. The nature and character of the services, the court emphasized, rather than the person performing the services, defines the boundaries of legal practice.52

Stressing its duty to protect the public from injury by unauthorized practitioners, the court found that the statute was dangerously flawed. First, it placed virtually no restrictions on a large group of laypersons performing tasks relating to property transactions. Second, the court

47. (1981).
49. WASH. CONST. art. 4, § 1.
50. 96 Wn. 2d at 452, 635 P.2d at 735.
51. Id. at 453, 635 P.2d at 736 (quoting Washington State Bar Ass’n v. Washington Ass’n of Realtors, 41 Wn. 2d 697, 707, 251 P.2d 619, 625 (1952)).
52. Hagan, 96 Wn. 2d at 448, 635 P.2d at 733. See note 41 and accompanying text supra. The court also rejected the argument that the services rendered fell within the pro se exception. The escrow agents’ interest in the real estate transaction was held not substantial enough to fall within the pro se exception. The agents could not be said to be acting “solely” on their own behalf. Id. at 451, 635 P.2d at 735.
stated that laypersons were not held to the high standard required of attorneys, even though the statute stated that lay practitioners would be held to such a standard. No jurisdiction, the court observed, had upheld a statute as broad as RCW chapter 19.62.

Because RCW chapter 19.62 authorized nonlawyers to perform services defined by the court as the practice of law, the court struck down the statute as an unconstitutional extension of legislative power. The court affirmed the lower court's refusal to dismiss the request for injunctive relief and remanded the case for trial.

III. ANALYSIS

The Washington Supreme Court has steadily expanded the scope of its inherent judicial power to regulate the practice of law. The court's early recognition of the overlap in legislative and judicial powers to regulate this area disappeared as the court decided that legislative action was inappropriate because the power to regulate the practice of law inhere exclusively in the court. Finally, in *Hagan & Van Kamp, P.S. v. Kassler Escrow, Inc.*, the court culminated this trend toward an assertion of exclusive power by ruling that the legislature had no power to legitimate the practice of law by nonlawyers.

A. Separation of Powers

The Washington court has recognized that the separation of powers doctrine does not establish distinct categories of functions. Indeed, "complete separation was never intended and overlapping functions were created deliberately." Although judicial power extends to functions necessary or incidental to the adjudicative role, the power is not necessarily exclusive. Because the court's inherent powers are essentially protective and defensive, the complete denial of legislative power to regulate the practice of law can be justified only if RCW chapter 19.62

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54. 96 Wn. 2d at 448, 635 P.2d at 733.
55. See notes 24-31 and accompanying text supra.
57. *In re Juvenile Director*, 87 Wn. 2d 232, 242, 552 P.2d 163, 169, (1976). Washington is one of a large minority of states that lack an express separation of powers provision in their constitutions. See Note, supra note 2, at 919.
58. 87 Wn. 2d at 242, 552 P.2d at 169.
59. *See, e.g.*, id. at 245, 552 P.2d at 171 (courts have inherent power to protect themselves in the performance of their constitutional duties); *In re Clerk of Court's Compensation v. Lyon County Comm'r's*, 308 Minn. 172, 241 N.W.2d 781, 784 (1976) ("At bottom, inherent judicial power is grounded in judicial self preservation.").
interfered with or threatened the adjudicatory function. RCW chapter 19.62 arguably interfered with the judicial function because it was passed in response to the court's decision in *Great Western.* The complete denial of legislative power over this area, however, is an overreaction and is unduly restrictive.

Courts in other jurisdictions have recognized that the judicial hegemony over the practice of law need not be absolute. For example, in *Cowern v. Nelson,* the Minnesota court found no unconstitutional infringement in an unauthorized practice statute exempting real estate document preparation from the general ban. The court accepted the appellant's contention that:

> [A]s a matter of comity rather than as acknowledgement of power the judicial branch should defer to the legislative regulation as a declaration of public policy in harmony with the expression of courts in general, and as a legislative effort to cooperate with and implement the efforts of the courts in the enforcement of that policy.

Thus, the Minnesota court considered and deferred to the legislative declaration of public policy while maintaining regulatory power over real estate brokers.

The *Hagan* court similarly should have recognized that RCW chapter 19.62 includes procedures that protect the public. Because the purpose of unauthorized practice regulation is to protect the public, RCW chapter 19.62 could have been seen as legislation promoting the public interest. The practice of law by anyone affects the general public at least as much

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60. See notes 2-4 and accompanying text *supra.*
61. 207 Minn. 642, 290 N.W. 795 (1940).
62. *Id.* at ——, 290 N.W. at 797. The Minnesota court refused to accept the portion of the statute allowing brokers to charge fees for document preparation. It is interesting to note, however, that under *Minn Stat. Ann.* § 481.02 subdiv. 3(3) (West 1981), brokers and agents who prepare documents are now exempt from the unauthorized practice ban, even if a fee is charged.
63. The *Hagan* court relied on another Minnesota case, *Sharood v. Hatfield,* 296 Minn. 416, 210 N.W.2d 275 (1973), in which the Minnesota court struck down a statute which diverted attorneys' registration fees to the general revenue fund without appropriating an equal amount to the supreme court. The Minnesota court held that the statute interfered with its regulation of the practice of law because it deprived the court of operating funds for the Board of Law Examiners and the Board of Professional Responsibility. *Id.* at ——, 210 N.W.2d at 281-82. The court's exercise of its power in that case, though, was necessary to maintain even a minimal regulation of the practice of law. But see Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation,* 60 *Minn L. Rev.* 783, 795 (1976), which argues that the Minnesota court appeared to negate the possibility of legislative influence when it decided *Sharood.* Subsequent decisions have cited *Cowern* as support for the proposition that statutes authorizing admission to the bar by legislation are unconstitutional. See, e.g., *In re Petition for Integration of the Bar,* 216 Minn. 195, 12 N.W.2d 515, 518 (1943).
64. *Hagan,* 96 Wn. 2d at 447, 635 P.2d at 733.
65. See note 66 and accompanying text *infra.*
as it affects the operation of the judicial branch and, therefore, the public’s representatives should have a voice in its regulation. This analysis distinguishes between the judicial functions of resolving particular disputes, construing the laws in these disputes, and creating laws in the common law tradition, and the legislative function of promoting the public welfare. Thus, courts should recognize that ultimate authority to regulate legal practice can rest with the legislature because legal practitioners play active and important roles in community life.

B. Defining the Practice of Law

In Hagan, the court stated again that the practice of law encompassed the preparation of legal instruments creating legal rights. This vague and overbroad definition disregards the extent to which nonlawyers are involved with legal issues. As the Michigan court recently acknowledged, “[a] broad definition of the ‘practice of law’ embraces virtually all commercial areas of human endeavor. This, of course, will not do.” Requiring a lawyer to preside over every transaction involving written legal forms would restrict business activities and prevent expeditious consummation of business deals. For many persons in commercial professions, it would be difficult to give intelligent advice without touching upon legal concerns.

Quoting the Great Western decision, the Hagan court reaffirmed its view that “[t]he services at issue here are ordinarily performed by licensed attorneys, involve legal rights and obligations, and by their very nature involve the practice of law.” Yet these services are not ordinarily performed by practicing lawyers in Western Washington and in many other jurisdictions. The Washington public has long employed nonlaw-

66. Kalish, The Nebraska Supreme Court, the Practice of Law and the Regulation of Attorneys, 59 Neb. L. Rev. 555, 557 (1980) (courts’ recognition of the legislature’s police power would comport with the legislature’s role as the representative voice of the people). See, for example, a Missouri justice’s perceptive observation:
But it does not follow that the courts have the exclusive power to regulate the practice of law, or that they recognize legislation on that subject only out of comity. So far as is necessary to their self-protection the right of the courts is paramount or exclusive; but beyond that point the legislative department also has constitutional rights in the exercise of the police power. If the courts were lax and slothful in regulating the practice of law, it would hardly be contended lawyers would be left free to prey upon the public, because, forsooth, they are officers of the court, and that the legislative department would be helpless.
67. Hagan, 96 Wn. 2d at 446, 635 P.2d at 732.
69. 96 Wn. 2d at 446–47, 635 P.2d at 732 (quoting Washington State Bar Ass’n v. Great Western Union Federal Savings & Loan Ass’n, 91 Wn. 2d 48, 54–55, 586 P.2d 870, 875 (1978)).
70. In California, for example, real estate brokers and other lending and title institutions handle
yers almost exclusively to prepare documents for routine home sales. The "affecting legal rights" test is also unpersuasive. Sales clerks, police officers, and many governmental employees, among others, affect legal rights daily by making contracts, filling out forms, and performing other routine duties. Further, the circular "ordinary practice" standard ignores the concern for specialized competence. Under the Hagan approach, the practice of law in Washington consists of work that lawyers have traditionally done, without regard to whether laypersons can competently perform the same job.

C. Public Policy

The prohibition against the unauthorized practice of law theoretically protects the public from unnecessary litigation, excessive fees, incompetent work, lack of professional ethics and disciplinary procedures, and conflicts of interest. The Hagan court's policy discussion centered around two of these problems: competence and discipline.

First, the court stated that RCW chapter 19.62 was dangerously flawed because it authorized "almost anyone of any degree of intelligence to perform . . . property transactions." Many lawyers, however, have only limited training in the procedures for transferring title and preparing closing documents. Escrow agents at least have the benefit of performing these procedures every day and are also probably policed by lending institutions and title companies.

Requiring lawyers to perform incidental closing services will add to the already high cost of land transfers. Even if lawyers take over the escrow function, they may assess additional charges for more extensive client counseling. Most people are not willing to pay for extensive legal ad-
vice. As one commentator notes, "[r]ightly or wrongly, ill advised or well, the public has in fact been choosing Brand X over the real thing to do its legal work in these closings." 76

Ironically, the forced introduction of lawyers after the closing raises costs without helping the consumer to plan the transaction. What clients really need is legal advice before they sign the earnest money contract that determines the rights of the parties. Even the Washington court has not required lawyer participation at this stage, probably because of the inconvenience and the certainty of resistance from consumers and real estate brokers. Yet the forced introduction of lawyers as mere scriveners after the closing misplaces the emphasis. Lawyers should be involved in the planning as well as routine drafting if the public policy concerns of the court and the legislature are to be adequately met.

Secondly, the Hagan court was concerned that escrow agents were not subject to attorneys' rules of ethics and discipline. The court found that the statute's licensing and warning provisions were inadequate to ensure that escrow agents possessed the requisite discipline and ethical standards to draw up real estate documents. Yet, it is questionable whether the absence of bar or court supervision significantly increases the risk to the public in routine land transfers. 77 The court's assertion that escrow agents are not held to the standards of attorneys is unsupported either by case law or by RCW chapter 19.62, which had established a standard of care equivalent to that of attorneys. 78 Further, escrow agents must be licensed 79 and must prove the financial ability 80 to provide a security fund 81 for their clients.

The Hagan court was also concerned with ethical problems such as

76. Stoebuck, supra note 71, at 25.
80. Id. § 18.44.050 (1981).
81. The client's security fund is similar to the security fund maintained by the Washington State Bar Association.
conflicts of interest. The interests of brokers or sales officers in making a deal and earning a commission may not always coincide with the interests of their customers. Yet, similar risks of conflicts of interest may arise when lawyers provide real estate services. Lawyers might have to negotiate with lenders and real estate companies. These companies may be actual or potential clients, capable of giving lawyers much more profitable business than real estate consumers. An equally unhealthy relationship may arise when real estate companies and lawyers provide free services or reduced fees in exchange for directing business to each other.82

The twin rationales advanced by the Hagan court—ensuring professional competence and discipline—seem unpersuasive in the context of real estate transactions.83 The court’s underlying goal of protecting the public interest, of course, remains commendable. The court should retain this goal as its paramount concern while redefining the limits that it places on the practice of law.

The public already views unauthorized practice prohibitions as “self-protective, monopolistic, or greedy.”84 Exclusive judicial regulation of the practice of law and concurrent absolute denial of legislative power may result not only in strained relations between the government branches, but also in reduced public confidence in the judiciary.85

82. While Canon 5 of the A.B.A. Code of Professional Responsibility advocates disclosure of compromising influences, article 7 of the Code of Ethics of the National Association of Realtors also advocates “absolute fidelity to the client’s interest.” See Rhode, supra note 77, at 92 nn. 380–81.

83. The Hagan court could have viewed the statute as a legislative expression of minimal standards, analogous to legislatively set minimal standards for admission to the bar. It then could have set higher standards without striking down the legislation. In In re Levy, 23 Wn. 2d 607, 614, 161 P.2d 651, 654 (1945), for example, the court allowed the legislature to set minimum standards but made clear that legislative power could not derogate from the judicial power to require additional qualifications.

84. Rhode, supra note 77, at 40.

85. These adverse effects were dramatically illustrated when the Arizona Supreme Court held that a real estate broker filling in the blanks on a standardized form purchase contract was engaged in the unauthorized practice of law. See State Bar of Ariz. v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961), aff’d on rehearing, 91 Ariz. 293, 371 P.2d 1020 (1962). Within months, the public overwhelmingly approved a referendum passing a constitutional amendment allowing real estate brokers to draft instruments pertaining to real estate transactions, so long as no fee was charged. Ariz. Const. art. 26, § 1. See generally Adler, Are Real Estate Agents Entitled to Practice a Little Law?, 4 Ariz. L. Rev. 188 (1963); Marks, The Lawyers and the Realtors: Arizona’s Experience, 49 A.B.A.J. 139 (1963) (documenting the Arizona public’s disenchantment with and loss of confidence in the judiciary).

See also Beardsley, The Judicial Claim to Inherent Power over the Bar, 19 A.B.A.J. 509 (1933):

The inherent power doctrine is detrimental to the courts, as well as to the bar, because it places a severe strain upon the standing of the courts with the public. Generally, the courts are not subjected to the public criticism which is incidental to controversial governmental matters, because the public understands that the function of the courts is simply to administer the law as it is, and that the courts have no direct responsibility for what the law is. This understanding of the nature of the judicial function is the foundation of the public’s respect for the courts.

Id. at 511.
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 Specifically, the judiciary’s refusal to allow lay participation in the preparation of real estate documents may lead to the public perception that the judiciary and lawyers are acting in concert to increase lawyers’ workloads and fees.

 By asserting an inherent power to protect against the danger of legislative encroachment on an exclusive judicial function, the Washington Supreme Court instead may have cast a shadow upon the integrity of the judiciary and the legal system without advancing the public welfare.

IV. RECOMMENDED ALTERNATIVES

A. Public Policy Test

 Courts in other jurisdictions have adopted a public policy test that balances the costs and benefits of lay assistance. Because the small risk of injury from lay consultation is outweighed by the inconvenience, delay, and expense of forced legal consultation, some courts have authorized real estate brokers to complete forms or to perform services incidental to their primary employment. These courts have found a noticeable absence of injury to the public from the change. The New Mexico Supreme Court, for example, found that the changeover from attorneys to title services completing real estate forms did not result in any detriment or inconvenience to the public. Instead, uncontroverted evidence demonstrated that using lawyers considerably slowed loan closings and increased costs. Similarly, in Colorado, where realtors have completed

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86. In In re Juvenile Director, 87 Wn. 2d 232, 552 P.2d 163 (1976), the Washington court restricted its inherent judicial power to compel funding of its operations because of its concerns with the “judiciary’s image of impartiality and the concomitant willingness of the public to accept its decisions as those of a fair and disinterested tribunal.” Id. at 249, 552 P. 2d at 173. These concerns also should have been considered by the court in its use of its inherent power to regulate the practice of law.

87. See Rhode, supra note 77, at 81–85.

88. A recent study of unauthorized practice found no indication of widespread public injury in real estate transactions performed by laypersons. Id. at 33–35.


90. State Bar v. Guardian Abstract & Title Co., 91 N.M. 434, 575 P.2d 943, 949 (1978), aff’d in part, rev’d and remanded in part, 92 N.M. 327, 587 P.2d 1338 (1978) (title company only authorized to fill in blanks on statutory forms and forms prepared by lawyers, or forms used for closing government-insured loans; title company was enjoined from choosing between competing forms and from giving advice about the legal effect of the form’s language).
forms and given advice for the majority of real estate transactions, the court found no instance of injury to the public, laypersons, or lawyers.\textsuperscript{91} Many commentators agree that the use of lawyers to perform routine tasks such as real estate closings and title searches constitutes an enormous waste of skill and causes increased costs to parties.\textsuperscript{92}

In RCW chapter 19.62, the Washington legislature imposed reasonable conditions on lay preparation of documents. The disclosure statement required by the statute informs the consumer of the limited nature of the services provided and recommends legal counseling if necessary. While disclosure has never been suggested as a defense to unauthorized practice, the disclosure statement does emphasize that the agents are not holding themselves out as lawyers and gives the public notice of the limited nature of the services provided. Because the statute does not appear to impair the court unreasonably in its adjudicatory process and functions, it was improper for the court to assert its inherent judicial power in this case. A more thorough consideration of public policy issues would have required the court to defer to the legislature.

\subsection*{B. Limited Practice Rule}

The Washington Supreme Court has recently published a draft of a proposed "Limited Practice Rule for Closing Officers."\textsuperscript{93} The proposed rule provides for a new group of practitioners known as closing officers, who will have their own licensure, admission, examination, control, and discipline. These officers would be subject to the ultimate control of the state supreme court. The rule classifies closing officers conceptually as members of a profession practicing law in a limited area.

A "Limited Practice Board," composed of no less than four bar representatives and four business representatives nominated by the bar association and appointed by the supreme court, would supervise the examination, investigation, and recommendation of each applicant.\textsuperscript{94} The board would also handle complaints and could impose or recommend discipli-

\textsuperscript{91} Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P.2d 998, 1007 (1957).
\textsuperscript{92} E.g., Rhode, supra note 77, at 88; Whitman, \textit{Home Transfer Costs: An Economic and Legal Analysis}, 62 GEO. L.J. 1311, 1334 (1974).
\textsuperscript{93} By an order dated June 2, 1982, the Washington Supreme Court directed the publication of the proposed Admission to Practice Rule 12 for purposes of soliciting the comments of the bench and bar and other interested parties. The proposed rule was published at 97 Wn. 2d i (1982).
\textsuperscript{94} \textit{PROPOSED WASH. CT. APR 12 § (b)}.
The supreme court, however, would retain the ultimate power to admit or suspend laypersons from limited practice. Under this proposed rule, laypersons would be allowed to prepare documents if they pass an examination, pay an annual fee, take an oath, and enroll as certified closing officers. The rule would also require proof of financial responsibility to respond in damages for malpractice. The officer would have to advise the parties that the documents affect the parties' legal rights, that their interests may differ, and that they may wish to consult a lawyer. Both parties to the transaction would have to agree in writing to the terms of the transaction and to the officer's legal limitations.

Adoption of a limited practice rule would best serve both the judiciary and the public. Because the court would retain the power to admit, discipline, and suspend closing officers, it could wield this power to protect the public and to ensure its own dignity and proper functioning. While recognizing the court's primacy in regulating legal practice, the Limited Practice Rule harmonizes the legislative declaration of public policy implicit in RCW chapter 19.62 with the judicial concern for competence and ethical standards.

The public will also best be served by adoption of this rule. Enforcement of the competence and ethical standards will reduce the possibility of injury to the public arising from real estate transactions. Further, members of the public will avoid the added costs of forced legal counselling. Finally, the public's view of the judiciary may improve with the realization that the judiciary has acted, not to increase business for attorneys, but to better serve and protect the public interest.

95. Id. § (b)(2)(v).
96. Id. §§ (b)(2)(iii), (v).
97. Id. 12 §§ (c)(3)–(5).
98. Id. § (1)(2).
99. Id. §§ (e)(2)(i)–(iv).
100. Id. § (e)(1).
101. Id. § (d).
102. Alternative limited practice rules should similarly focus on three requirements for lay practice: (1) standards of competency similar to those of a lawyer; (2) informed consent by the client before services are provided; and (3) licensing or certification. See Rhode, supra note 71, at 94–96.
V. CONCLUSION

In *Hagan & Van Kamp, P.S. v. Kassler Escrow, Inc.*,\(^{103}\) the Washington Supreme Court invalidated RCW chapter 19.62 as an unconstitutional encroachment upon the judiciary’s inherent power to regulate the practice of law. The judiciary’s assertion of its exclusive power and, conversely, legislative disability in this area, may result in adverse practical effects for the public and for the judicial system. Because the statute arguably did not threaten or interfere with the adjudicatory function, and therefore did not violate the separation of powers doctrine, the court should have deferred to the legislative expression of public policy.

The court, however, may still remedy the situation. By adopting a limited practice rule, the court could maintain its integrity as an independent branch, ensure high standards of competence and care in the preparation of real estate documents, and avoid imposing costly and wasteful services on consumers. By adopting a limited practice rule the court could, in short, best protect and serve the public interest.

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