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THE IMPACT OF THE CODE OF PROFESSIONAL RESPONSIBILITY UPON THE UNAUTHORIZED PRACTICE OF LAW

JOHN F. SUTTON*

Unauthorized practice of law problems can be divided into three general categories: the practice of law by laymen; the practice of law by corporations and other groups; and the practice of law by lawyers in states in which they are not licensed to practice. Although a discussion directly concerning the three problem areas is outside the scope of the proposed Code of Professional Responsibility,¹ the provisions of the Code do have some impact upon the problems encountered in each category.

The scope of the proposed Code parallels that of the present American Bar Association Canons of Professional Ethics, which the Code will succeed if it is adopted by the ABA House of Delegates.² The Code is

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¹ In 1964, the American Bar Association created the Special Committee on Evaluation of Ethical Standards, giving it the responsibilities of evaluating the ABA Canons of Ethics and of proposing any changes or additions found desirable. On January 15, 1969, the committee released its preliminary draft of a proposed new Code of Professional Responsibility, designed to replace entirely the present Canons of Professional Ethics.

The proposed new Code contains only nine canons, each being a short statement in one sentence of a general proposition regarding the professional responsibility of lawyers. Following each canon is a textual development, termed "Ethical Considerations," of the various professional obligations flowing from that general proposition. Following each of the nine statements of Ethical Considerations are one or more related "Disciplinary Rules."

The Disciplinary Rules are designed to constitute a body of specific, penal, substantive law enforceable in disciplinary proceedings. By contrast, the Ethical Considerations are not ethical rules to be enforced by sanctions; rather they are a text for the information of the lawyers who seek to understand what lawyers should be doing if they are to render to society the services they should render. See generally ABA SPECIAL COMMITTEE ON EVALUATION OF ETHICAL STANDARDS, CODE OF PROFESSIONAL RESPONSIBILITY, Preamble 1-2 (Prelim. Draft, 1969) [hereinafter cited as CODE OF PROFESSIONAL RESPONSIBILITY].

² While the scope of the Code parallels the present Canons, the Code contains many innovations; some examples are: (1) the Ethical Considerations of Canon 6 beseech the lawyer to use a contingent fee "only in those instances where the arrangement will be beneficial to the client." *Id.*, Canon 6—Ethical Considerations ¶ 6, at 61. (2) A lawyer who limits his practice to a single field of law may so state on his letterhead, shingle, and professional card. *Id.*, Discip. R. 2-105(A)(4), at 25. (3) A lawyer is urged not to accept employment which he cannot handle competently, *id.*, Canon 4—Ethical Considerations, at 50, and he is subject to disciplinary action for neglecting a client's work. *Id.*, Discip. R. 4-101

concerned exclusively with the conduct of lawyers. It does not include prohibitions against the practice of law by laymen,³ it does not establish requirements for being admitted to practice, and it does not contain reciprocity provisions for allowing lawyers to practice where not licensed; these are functions of the individual states. However, the Code does deal with the aspects of conduct by lawyers that concern unauthorized practice. Thus it specifically touches upon aiding laymen to practice law, accepting employment to provide legal services to members and beneficiaries of corporations and other groups, and practicing law in states where one is not licensed.

The principal canon of the proposed Code pertaining to unauthorized practice is Canon 3. Canons 2 and 6 are also relevant. Proposed Canon 3, which is followed by related ethical considerations and disciplinary rules, states: "A Lawyer Should Assist in Preventing the Unauthorized Practice of Law."⁴ The ethical considerations include discussions of the rationale for restricting the practice of law to lawyers, of factors involved in determining what constitutes the practice of law, of instances when a layman may properly perform law-related tasks, and of the need for less restrictive state regulations pertaining to out-of-state lawyers. Generally, the disciplinary rules prohibit aiding a layman to practice law.⁵ The provisions of Canons 2 and 6 are relevant to unauthorized practice insofar as they deal with the provision of legal services by lawyers in the form of a professional legal corporation or in cooperation with a corporation or other group.

The continuing vitality of unauthorized practice problems may be due in part to the difficulty in viewing unauthorized practice in a proper perspective. It has become such an emotionally-charged subject that some lawyers seem unable to overcome an instinctive negative reaction and to advance to a detached analysis of a particular situation and its harmful consequences, if any, to the public.⁶ The emotional reaction may stem

(A)(4), at 50-51. (4) Each lawyer is enjoined to participate in efforts to improve laws and the legal system in order to make the legal system more responsive to the needs of society. *Id.*, Canon 8—Ethical Considerations, at 107-109.

³ "The Canons of Ethics do not apply to corporations or non-attorneys." *Touchy v. Houston Legal Found.*, 432 S.W.2d 690, 694 (Tex. Sup. Ct. 1968).

"Obviously the Canons, Ethical Considerations and Disciplinary Rules cannot apply to non-lawyers. . . ." CODE OF PROFESSIONAL RESPONSIBILITY, Preamble 2.

⁴ CODE OF PROFESSIONAL RESPONSIBILITY, Canon 3, at 44.

⁵ "A lawyer shall not aid a non-lawyer in the unauthorized practice of law." *Id.*, Discip. R. 3-101(A), at 46.

⁶ As long ago as 1938, K. N. Llewellyn, referring to the problem of unauthorized

from a fear of competition from persons outside the legal profession and from a realization that inroads are being made on what previously has been the exclusive work of lawyers.⁷ The present traditional methods of lawyers in providing legal services have been challenged. Other organizations compete with lawyers for specialized, volume business of a routine nature.⁸ Some members of the public, perhaps uncertain as to how to locate a competent lawyer who is interested in rendering the particular services desired,⁹ obtain legal services through organizations such as practice as a problem of using the processes of law to define and protect a monopoly, wrote:

This paper looks to one thing only: to set out a little horse-sense about a situation which when viewed little piece by little piece has not thus far made too much sense for horse or man. Horse-sense about matters where emotions stir, where both vanity and interest and worry and a profession are involved—horse-sense about such matters commonly makes unpleasant reading. The reason is simple: when we human beings are worried we do and say silly things; when we are both worried about being crowded out and vain of our own work, we are in a jam, and act accordingly. When we look back on it, we mostly wish we hadn't. That is why it may be worth using hindsight ahead of time, this time.

Llewellyn, *The Bar's Troubles and Poultices—and Cures?*, 5 LAW & CONTEMP. PROB. 104, 108 (1938).

⁷ It was not until about twenty-five years ago apparently that lawyers first began to feel apprehensive over the "unauthorized practice" situation. Then it was corporate practice of law that was considered to be particularly menacing. A lawyer writing in the *Yale Law Journal* in 1913 . . . sets forth the manner in which corporations were taking away the lawyer's business and concludes woefully: "The lawyer as such as is being devoured by his own Frankenstein."

Foreword, *The "Unauthorized Practice of Law" Controversy*, 5 LAW & CONTEMP. PROB. 1-2 (1938).

⁸ It was also predictable that these organizations would attempt to preempt routine transactions which occurred in large numbers with little deviation. Thus arose collection agencies, title insurance companies, real estate agencies and other institutions which specialized in one form of activity and adopted new techniques to handle the volume.

Schwartz, *Changing Patterns of Legal Services*, in LAW IN A CHANGING AMERICA 109, 113 (G. Hazard ed. 1968).

⁹ Few lawyers are willing and competent to deal with every kind of legal matter, and laymen have difficulty in judging the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers.

CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2—Ethical Considerations ¶ 7, at 12-13.

The canons of ethics on business-getting are still built in terms of a town of twenty-five thousand (or, much more dubiously, even fifty thousand)—a town where reputation speaks for itself from mouth to mouth, even on the other side of the railroad track. . . . Turn those same canons loose on a great city, and the results are devastating in proportion to its size. If

associations to which they belong. Yet despite the emotional reverberations, activities of non-lawyers should be banned as constituting the unauthorized practice of law only if the activities are inimical to the public interest—not merely because the activities are competitive with lawyers.¹⁰ One of the important contributions of the proposed Code of Professional Responsibility may prove to be its recurring insistence that the problems of professional conduct be judged according to the interests of the public.

PRACTICE OF LAW BY LAYMEN¹¹

The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary character of the attorney-client relationship and the inherently complex nature of our legal system, the public can be assured of the requisite responsibility and competence only if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession.¹²

Since the practice of law is, in the public interest, forbidden to anyone who has not demonstrated the requisite competence and integrity, by meeting the requirements for a law license,¹³ lawyers have a monopoly in the rendition of legal services. The existence of this monopoly in the important area of legal services, together with the fact that the practice

a small client does not know to whom to go, he does his pondering with all the folk-lore about lawyers stalking blackly through his brain—they overreach, they overcharge, they are not to be trusted. This means, in result, undone legal business. Or, it means turning to some non-lawyer who undertakes to help out. Or, it means chancing it.

Llewellyn, *supra* note 6, at 115-16.

¹⁰ "The Bar's response to the rise of these other agencies was not so much to change its own ways of handling its business as to rely upon unauthorized practice doctrines to eliminate the competition." Schwartz, *supra* note 8, at 113.

The great majority of lawyers seem to be opposed to group legal services. See, e.g., 13 AM. B. NEWS No. 11, Nov. 1968, at 6. At least some of the opposition may be based upon the competitive aspects of that method of furnishing legal services. For example, a position paper of the Illinois State Bar Association has been quoted as saying that "if groups were permitted to organize and employ lawyers 'the days of the private practitioner . . . will be numbered.'" *Id.*

¹¹ See generally, Vorn Baur, *What You Should Know About the Unauthorized Practice of Law*, 4 STUDENT LAW., Oct. 1958, at 20.

¹² CODE OF PROFESSIONAL RESPONSIBILITY, Canon 3—Ethical Considerations ¶ 1, at 44.

¹³ See, e.g., TEX. REV. CIV. STAT., art. 320a-1, § 3 (1948) ("[A]ll persons not members of the State Bar are hereby prohibited from practicing law in this State").

of law is a profession,¹⁴ dictate that the directives in the proposed Code be based upon serving the public interest.¹⁵ Since the public interest is served by forbidding laymen to practice law, it is against the public interest for lawyers to aid or encourage laymen to practice law.

The apparent simplicity of the propositions that a layman should not be permitted to practice law and that a lawyer should not aid a layman in the practice of law turns into a quagmire of confusion when one attempts to state specifically what it is that the unlicensed layman is not supposed to do.¹⁶ Although "practice of law," like "obscenity," defies accurate definition,¹⁷ the problems of unauthorized practice of law are often approached on the basis of definitions which are focused too exclusively upon the mechanics of a lawyer's work. Definitions such as "the use of legal knowledge to help another person,"¹⁸ "those acts . . . which lawyers customarily have carried on from day to day through the centuries . . .,"¹⁹ and "to do the work, as a business, which is commonly and usually done by lawyers here in this country"²⁰ have generally proven to be either too broad or too narrow.²¹ They are not helpful primarily because they direct attention to the competitive nature of the activities of the layman rather than to the probability of harm to the public.

In contrast, the proposed Code of Professional Responsibility takes

¹⁴ "Historically there are three ideas involved in a profession: organization, learning, *i.e.*, pursuit of a learned art, and a spirit of public service. These are essential. A further idea, that of gaining a livelihood is involved in all callings." R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 6 (1953).

¹⁵ See *West Virginia State Bar v. Earley*, 144 W. Va. 504, 109 S.E.2d 420 (1959), *But cf. Q. JOHNSTONE & D. HOPSON, LAWYERS AND THEIR WORK* 187-97 (1967).

¹⁶ See generally Q. JOHNSTONE & D. HOPSON, *supra* note 15, at 164-97.

¹⁷ Cf. CODE OF PROFESSIONAL RESPONSIBILITY, Canon 3—Ethical Considerations ¶ 5, at 45: "It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law."

¹⁸ Grammer, *The Lawyer—Professional or Tradesman?*, 31 TEX. B.J. 1039, 1040 (1968). Query: under this definition, is a policeman practicing law when he relies on his legal knowledge concerning crimes and arrests to detain a person who is in the process of robbing an old lady at gunpoint?

¹⁹ *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 87, 366 P.2d 1, 9 (1961). Does this definition mean that representing a litigant in a lawsuit involving recent federal civil rights legislation is not the practice of law?

²⁰ *Merrick v. American Sec. & Trust Co.*, 107 F.2d 271, 273 (D.C. Cir. 1939), *cert. denied*, 308 U.S. 625 (1940), *quoting* *People v. Alfani*, 227 N.Y. 334, 338-39, 125 N.E. 671, 673 (1919). Does this view mean that operation of a business to collect past due accounts (*i.e.*, a collection agency) necessarily is the practice of law? See *Bump v. District Court*, 232 Iowa 623, 5 N.W.2d 914 (1942).

²¹ See Q. JOHNSTONE & D. HOPSON, *supra* note 15, at 165.

a somewhat different approach to the determination of what constitutes the practice of law. Stressing the client's need for the professional judgment of a lawyer, it states:

Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of a lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem. . . . Where this professional judgment is not involved, non-lawyers . . . may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.²²

The Code also gives another description of the nature of the lawyer's professional judgment:

Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment.²³

Several issues of fact may be involved in deciding whether any given conduct constitutes the practice of law. Almost everyone is concerned as to whether the conduct involves the use of legal knowledge or skill. Reliance—that is, whether the potential client is placing personal reliance upon the other person to protect his interests or welfare in matters having legal consequences—is also important.²⁴ The philosophy of the Code

²² CODE OF PROFESSIONAL RESPONSIBILITY, Canon 3—Ethical Considerations ¶ 5, at 45.

²³ *Id.*, Canon 3—Ethical Considerations ¶ 2, at 44. *Cf. id.*, Canon 6, at 60.

²⁴ While obviously involved in the concept of the unauthorized practice of law, the reliance factor is not easy to pinpoint. *Cf. Hull v. United States*, 390 F.2d 462 (D.C. Cir. 1968). The underlying concern is that a client (*i.e.*, the one receiving the services in question) may not be competent to judge the quality of the services rendered and has little choice but to place his confidence and trust in the person rendering the services. Compare the following views.

Dacey's book [*How to Avoid Probate*] is sold to the public at large. There is no personal contact or relationship with a particular individual. Nor does there exist that relationship of confidence or trust so necessary to the status of attorney and client. This is the essential of legal practice—the representation and advising of a particular person in a particular situation. . . .

There is no personal reliance upon the selection and judgment of Dacey in the discretionary choice of a form adapted to the customer's needs. *New York County Lawyer's Ass'n v. Dacey*, 28 A.D.2d 161, —, 283 N.Y.S.2d 984, 998 (dissenting opinion), *rev'd* 21 N.Y.2d 694, 234 N.E.2d 459, 287 N.Y.S.2d 422 (1967) (on basis of the dissenting opinion).

A layman who seeks legal services often is not in a position to judge

indicates that an even more important factor is whether the situation is one in which the professional judgment of a lawyer would be important for the protection of the potential client.

If the conduct in question is determined to be the practice of law, does it necessarily follow that the conduct should be prohibited?²⁵ Bench and bar may be appalled that this question could even be asked, but one senses that this question today is being considered and answered, covertly if not overtly, on an ad hoc basis. Perhaps the present wide range of views and the existing vague standards as to what constitutes "practice of law" are due in part to decisions, made on the basis of unarticulated factors, that certain lay conduct is acceptable even though the conduct falls within frequently used definitions of "practice of law." Stressing as a key factor the need of the client for the professional judgment of a lawyer, as indicated by the Code, may alleviate the decisional stresses; for a court, by determining in an appropriate situation that there is little need for the professional judgment of a lawyer, may hold—without obscuring the basis for the decision—that the conduct, which might involve some sort of advice as to a legal matter, is not the practice of law.

In the absence of an approach to unauthorized practice that involves weighing the need for the professional judgment of a lawyer, courts may increasingly be urged in the name of the public interest to approve conduct of laymen that appears to involve the unauthorized practice of law.

whether he will receive proper professional attention. The entrustment of a legal matter may well involve the confidences, the property, the freedom, or even the life of the client. Proper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he is subject to the regulations of the legal profession.

CODE OF PROFESSIONAL RESPONSIBILITY, Canon 3—Ethical Considerations ¶ 4, at 44-45.

"That relationship of trust and confidence essential to the relationship of attorney and client did not exist between the members of the respondent association and its attorneys. . . ." *People v. Association of Real Estate Taxpayers*, 354 Ill. 102, 109, 187 N.E. 823, 826 (1933).

"A characteristic of professional service is that it is extremely difficult for the client to evaluate its quality, at least until long after the event." Schwartz, *supra* note 8, at 121.

²⁵ It is our opinion that on an occupation-by-occupation basis, some of the legal restraints on lay competition should be lifted. Reputable and established professions and businesses should be expressly authorized to perform certain lawyer-like tasks now prohibited to them; but this should be allowed only if the chances of clients being adversely affected are slight or if the clients involved are fully informed on the risks entailed and quite able to absorb any losses incurred from lay incompetence or dishonesty.

Q. JOHNSTONE & D. HOPSON, *supra* note 15, at 549.

This prognostication is supported by several indications and considerations. For example, various observers have suggested that the poor, the disadvantaged, and the troubled can be advised on legal matters by social workers, health department investigators, public health services' psychologists and psychiatrists, local pastors, and the like.²⁶ Legal aid societies may and do furnish legal services to the poor.²⁷ Is it a factor favoring propriety that the lay person in question does not solicit or obtain a fee for his services but performs the work gratuitously rather than as an aid to, or as part of, his business?²⁸ Is it in the public interest to permit an individual to receive services of a legal nature from a layman if the recipient of those services has been unable to secure the services of a lawyer, particularly if the nonlawyer who renders the services is possessed of more legal competence than the usual layman?²⁹ If the expertise of lawyers and particular lay experts overlap, so that both the

²⁶ See Sparer, Thorkelson & Weiss, *The Lay Advocate*, 43 U. DET. L.J. 493 (1966). See also Smith & Curran, *A Study of the Lawyer-Social Worker Professional Relationship*, in AMERICAN BAR FOUNDATION RESEARCH CONTRIBUTIONS No. 6 (1968).

Broadly phrased unauthorized-practice-of-law statutes . . . could make criminal many of the activities regularly done by social workers who assist the poor in obtaining welfare and attempt to help them solve domestic problems. Such statutes would also tend to deter programs in which experienced welfare recipients represent other, less articulate, recipients before local welfare departments.

Hackin v. Arizona, 389 U.S. 143, 150 (1967) (dissenting opinion).

²⁷ *Touchy v. Houston Legal Found.*, 432 S.W.2d 690 (Tex. Sup. Ct. 1968), is illustrative. In this case the court was confronted by a long line of decisions holding that a for-profit corporation was practicing law when it furnished legal services of its employee-attorneys to its customers. The court in *Touchy* held that a charitable corporation "which acts merely as a conduit or intermediary to bring the attorney and client together and does not purport to control or exploit the manner in which the attorney represents his indigent client" is not practicing law. *Id.* at 695. In *Touchy* as well as in the prior cases the services of the employee-lawyers clearly fell within the category of the "practice of law." Yet in the prior cases the conduct of furnishing the legal services was condemned (because of certain evils regarding exploitation of the lawyers for corporate profit, divided loyalty of the lawyers, etc.) while in *Touchy* it was recognized that the "procuring of counsel in a proper case is the performance of a needed public service." *Id.*

See also *In re the Opinion of the Justices*, 289 Mass. 607, 194 N.E. 313 (1934); *Azzarello v. Legal Aid Society*, 117 Ohio App. 471, 185 N.E.2d 566 (1962).

²⁸ See Hackin v. Arizona, 389 U.S. 143 (1967) (dissenting opinion). Cf. *Grievance Comm. v. Dean*, 190 S.W.2d 126 (Tex. Civ. App. 1945).

²⁹ See Hackin v. Arizona, 389 U.S. 143 (1967) (dissenting opinion); *White v. Blackwell*, 277 F. Supp. 211 (N.D. Ga. 1967) (a prison inmate unable to obtain the services of a lawyer desired to obtain the services of a more learned, experienced inmate). Cf. *Creekmore v. Izard*, 236 Ark. 558, 367 S.W.2d 419 (1963). It is difficult to see how this particular problem could arise, however, if the services of lawyers were fully available.

legal competence of the lawyer and the technical competence of the lay expert are of substantial importance to the one receiving the services, should the layman be permitted to render his services?³⁰ Where does the public interest lie in the case of a nonlawyer who is in fact a law clerk whose work is supervised, either specifically or generally, by a lawyer or law firm?³¹ What should be done about one who is not licensed to render the legal services in question only because he has failed to pay his bar association dues?³²

PRACTICE OF LAW BY CORPORATIONS AND GROUPS³³

It is said to be well settled that a corporation may not practice law.³⁴ A corporation can act, of course, only through human instrumentalities—its officers, agents and employees. If the person acting for the corporation is not a lawyer and is engaged in the practice of law, the problems generally are the same as those encountered when any layman undertakes to practice law. The added problem is that of applying sanctions directly against the corporate entity. The statutes and decisions prohibiting the practice of law by corporations facilitate the task of applying sanctions: the corporation can be threatened, enjoined, prosecuted, etc., on the theory that it is unlawfully practicing law.³⁵

The picture changes hue, however, if the corporate employee who performs the legal services is a lawyer. It is somewhat anomalous to say that it is in the public interest to prevent the unauthorized practice of law by nonlawyers because legal services should be rendered only by those who by virtue of training and education possess the professional judgment of a lawyer, and at the same time to say that it is the unauthorized practice of law for a corporation or group to furnish the services of a lawyer to another. The reason behind the rule is missing in those situations where the legal services are rendered in fact by a lawyer. There may

³⁰ See *Bancroft v. Indemnity Ins. Co. of N. America*, 203 F. Supp. 49 (W.D. La. 1962). Cf. *Blumenberg v. Neubekcer*, 12 N.Y.2d 456, 191 N.E.2d 269, 240 N.Y.S.2d 730 (1963).

³¹ See *People v. Alexander*, 53 Ill. App. 2d 299, 202 N.E.2d 841 (1964).

³² See *Hill v. State*, 393 S.W.2d 901 (Tex. Crim. App. 1965).

³³ No attempt is made to define or discuss group legal services as such, for "[e]very definition of group legal services is so broad as to include almost every conceivable change in the existing patterns of providing legal services." Schwartz, *supra* note 8, at 123.

³⁴ See generally Annot., 157 A.L.R. 282 (1945).

³⁵ See Q. Johnstone & D. Hopson, *supra* note 15, at 177-79; Sanders, *Procedures for the Punishment or Suppression of Unauthorized Practice of Law*, 5 LAW & CONTEMP. PROB. 135 (1938).

be other reasons in a given situation for prohibiting corporations or groups from supplying the services of lawyers to others,³⁶ but the prohibition is not supported by the public policy underlying unauthorized practice doctrine, which tries to assure that each member of the public will have the professional judgment of a lawyer when that judgment is needed.

That there is nothing inherently evil about the furnishing of legal services through a corporation is demonstrated by the ease with which the legal professional adjusted to the use of professional legal corporations. A professional legal corporation is not regarded as being engaged in the unauthorized practice of law, but it is closely regulated to guard against other specific evils.³⁷

The fact that corporations are branded as being engaged in the unauthorized practice of law when the corporation supplies the legal services of lawyers to others might be of less importance were it not for the regulatory problems evidenced by three recent, well-known decisions: *NAACP v. Button*,³⁸ *Brotherhood of Railroad Trainmen v. Virginia*,³⁹ and *United Mineworkers v. Illinois State Bar Association*.⁴⁰ In each of these disputes, it was contended that the activities of the organization constituted the unauthorized practice of law; and in each instance it was held that the activities were constitutionally privileged under the first amendment.

³⁶ See, e.g., CODE OF PROFESSIONAL RESPONSIBILITY, Discip. R. 2-101, 2-102, & 6-108, at 19-21 & 69. Some of the potential evils are well catalogued in a recent opinion of the Texas Professional Ethics Committee; in that opinion the committee considered the possibility that a corporation is practicing law by furnishing the services of its lawyer to subsidiary or closely related corporations and after mentioning the safeguards that should be taken, concluded that "the possibility of the lawyer aiding his general corporate employer in the unauthorized practice of law . . . is more imagined than real." STATE BAR OF TEXAS PROFESSIONAL ETHICS COMM., OPINIONS, No. 343, in RULES AND CANONS OF ETHICS 257, 259 (Supp. No. 7, 1968) (publication of State Bar of Texas).

³⁷ See ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 303 (1967). The opinion approved practice in corporate form, but was concerned with such ethical problems as misleading firm names, interference by laymen with the lawyer's professional judgment, and protection of the confidences of clients; cf. *Empey v. United States*, 272 F. Supp. 851 (D. Colo. 1967). Consider also the right, even duty, of a liability insurance company to furnish counsel to defend litigation brought against its insured. See Knepper, *Insurer's Duty to Defend: Recent Developments*, 17 DEFENSE L.J. 391, — (1968) ("The duty to defend is separate and distinct from the obligation to pay a judgment rendered against the insured . . . [it] exists regardless of the insurer's ultimate liability to the insured."). Cf. *Pendleton v. Pan American Fire & Cas. Co.*, 317 F.2d 96 (10th Cir. 1963).

³⁸ 371 U.S. 415 (1963).

³⁹ 377 U.S. 1 (1964).

⁴⁰ 389 U.S. 217 (1967).

The ground rules for regulation of the practice of law in the area of first amendment freedoms were stated in the three decisions. In *Mineworkers*, it was said that "laws which actually affect the exercise of these vital rights [to first amendment freedoms] cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil."⁴¹ In *Mineworkers*, it was deemed significant that a decree against the conduct in question was "not needed to protect the State's interest in high standards of legal ethics."⁴² In *Trainmen*, it was pointed out that the conduct inveighed against was "not a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice . . .,"⁴³ and that "the State again has failed to show any appreciable public interest in preventing the Brotherhood from carrying out its plan. . . ."⁴⁴ In *Button*, it was stressed that regulations in the area of first amendment freedoms must be drawn "with narrow specificity . . .,"⁴⁵ for "[t]he objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application."⁴⁶

Button, *Trainmen*, and *Mineworkers* indicate that regulations designed to affect the conduct of corporations and other groups in paying for, recommending, or supplying lawyers to others must be specifically and clearly aimed at a real and demonstrable evil.⁴⁷ To label the conduct the unauthorized practice of law accomplishes little, for "a State cannot foreclose the exercise of constitutional rights by mere labels,"⁴⁸ and the evil at which regulation of the unauthorized practice of law is directed is the evil of allowing one other than a lawyer to make decisions that should be made by a lawyer—which is not one of the evils involved when

⁴¹ *Id.* at 222.

⁴² *Id.* at 225.

⁴³ 377 U.S. at 6.

⁴⁴ *Id.* at 8.

⁴⁵ 371 U.S. at 433.

⁴⁶ *Id.*

⁴⁷ The difficulty of regulating so-called group legal services was pithily stated by Murray L. Schwartz who, in commenting on the *Mineworkers* decision, said, "it is difficult to conceive of practical and attractive group legal arrangements that would not be protected by the rule it announces." Schwartz, *supra* note 8, at 117.

⁴⁸ 371 U.S. at 429.

a corporation or other group supplies the services of a lawyer to another.

Threats to high standards of legal ethics obviously may be involved in some situations in which the services of lawyers are supplied to others by corporations or other groups. These threats involve dangers that may also be found in other factual settings. For example, the loyalty of the lawyer to the one receiving the services may be diluted by the wishes and desires of the corporation to the extent that the lawyer's professional judgment will be affected; or the corporation may exploit the lawyer's professionalism and engage in a commercialization of the legal profession for its own financial benefit. Regulation should be closely related to these and other real dangers.

The Code of Professional Responsibility cannot and does not attempt to regulate the conduct of corporations and other nonlawyers; yet it does attempt to regulate the conduct of lawyers supplied by corporations and other groups, but only in regard to specific evils.⁴⁹

THE UNAUTHORIZED LAWYER⁵⁰

Regulation of the practice of law is accomplished primarily through licensing procedures and by imposition of penalties in disciplinary actions. This regulation has long been the function principally of the individual states.⁵¹ Yet today our society is more mobile than ever before, and a client's business interests may cross many state lines.⁵² As a result,

⁴⁹ See CODE OF PROFESSIONAL RESPONSIBILITY, Discip. R. 2-101 (Recommendation of Professional Employment), 2-102 (Suggestion of Need of Legal Services), 3-102 (Dividing Legal Fees With a Non-Lawyer), 5-101 (Preservation of Confidences and Secrets of Clients), & 6-108 (Avoiding Influence by Others Than the Client), at 19, 20, 46, 55, & 69. The broad prohibition of Disciplinary Rule 3-101(A) that "[a] lawyer shall not aid a non-lawyer in the unauthorized practice of law," is limited by the provision of 3-101(C) that "[c]onduct permitted by the Disciplinary Rules of Canons 2 and 6 does not violate Disciplinary Rule 3-101." *Id.*, Discip. R. 3-101, at 46.

⁵⁰ See generally Note, *Attorneys—Interstate and Federal Practice*, 80 HARV. L. REV. 1711 (1967) [hereinafter cited as Note, 80 HARV. L. REV. 1711 (1967)].

⁵¹ Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so.

CODE OF PROFESSIONAL RESPONSIBILITY, Canon 3—Ethical Considerations ¶ 9, at 46.

⁵² See ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 316 (1967).

It is also apparent that in some situations the local unpopularity of a person's cause may be so strong that full protection of his legal interests may be best served by employment of a lawyer from out of state. See *Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968).

lawyers increasingly are called upon to give legal advice and assistance (as well as to serve as advocates in litigation) in states in which they are not licensed.

The Code of Professional Responsibility, perhaps because of its premise that "[t]o lawyers, respect for the law should be more than a platitude,"⁵³ provides for the discipline of a lawyer who practices law "in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."⁵⁴ Yet at the same time the Code deplores unreasonable territorial regulations, and so it also states that "[i]n furtherance of the public interest, the legal profession should discourage regulation which unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice."⁵⁵

Since it "is a matter of law, not of ethics, as to where an individual may practice law,"⁵⁶ most of the problems concerning the practice of law by a lawyer outside the state where he offices and is licensed are not solved by the proposed Code. The power to correct the situation lies with the individual states in the exercise of their right to determine the qualifications for the practice of law.

Many remedies have been suggested. One proposal is to have a nationally administered bar examination or a uniform bar examination,⁵⁷ coupled with greater reciprocity in admitting to practice those licensed in other states. But this remedy primarily aids the migrating lawyer rather than the lawyer of one state whose client's affairs are involved in another state or in several states.

A liberal policy of admission *pro hac vice* seems to be in existence now,⁵⁸ but again the lawyer whose legal practice consists of out-of-court

⁵³ CODE OF PROFESSIONAL RESPONSIBILITY, Canon 1—Ethical Considerations ¶ 5, at 5-6.

⁵⁴ *Id.*, Discip. R. 3-101(B), at 46.

⁵⁵ *Id.*, Canon 3—Ethical Considerations ¶ 9, at 46.

⁵⁶ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 316 (1967).

⁵⁷ See Coffman, *A Uniform National Bar Examination: An Economical Improvement*, 36 A.B.A.J. 623 (1950); *Nationally Administered Bar Examinations*, 7 J. LEGAL ED. 28 (1954) (panel discussion).

⁵⁸ See Comment, *Interstate and International Practice of Law*, 31 S. CAL. L. REV. 416 (1958); Note, 80 HARV. L. REV. 1711 (1967). Cf. *Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968). See generally Katz, *Admission of Nonresident Attorneys Pro Hac Vice*, in AMERICAN BAR FOUNDATION RESEARCH CONTRIBUTIONS No. 5 (1968).

work receives little succor. A requirement that a local lawyer be associated is not always practical, and the requirement may be a needless expense and burden on the client,⁵⁹ particularly if local law is not involved.

The state's interest in protecting the public against an out-of-state lawyer lies primarily in the possibility that the lawyer is not competent with regard to local law. A secondary consideration is that the state in which the lawyer is licensed may not have sufficiently high standards concerning character or integrity, and thus the out-of-state lawyer may not meet local standards of integrity. When these two objections to practice by an out-of-state lawyer are met, public interest may be served by recognizing his right to practice law in the state even though he does not hold a license from that state.⁶⁰

A state's interest in controlling those who provide legal services within its boundaries may indicate that one who maintains an office within the state or who regularly practices law within the state should be required to comply with its licensing requirements. But the out-of-state lawyer who only incidentally or occasionally engages in the practice of law within the state generally should be permitted to do so, in the interest of making legal services fully available, provided there is adequate assurance of his integrity and competence. Adequate assurance of requisite character and integrity is based upon the existence of high moral standards in the state in which the lawyer primarily practices; there is reason to believe that sufficiently high standards of character will soon be commonplace.

Adequate assurance that the out-of-state lawyer is competent in regard to the legal matters he undertakes to handle locally is a more difficult problem. There should be sufficient assurance, however, if he will be

⁵⁹ See *In re Estate of Waring*, 47 N.J. 367, 221 A.2d 193 (1966). Cf. *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161 (2d Cir.), *cert. denied*, 385 U.S. 987 (1966).

⁶⁰ The states, of course, have legitimate interests in maintaining relatively strict control over who may provide legal services within their jurisdictions; they are properly concerned to insure both to their courts and to the litigants in them that legal representation is provided only by men of sound ethics who have an adequate mastery not merely of the general skills of a lawyer, but of the particular features of the law of the state. Many of the present methods of protecting these interests seem, however, at least equally suited to serve the economic interests of the local bar. . . . [T]he desire of a state to exclude outside economic competition of any form is hardly an interest highly regarded in our federal system. Note, 80 HARV. L. REV. 1711, 1711-12 (1967).

subjected to both financial⁶¹ and professional sanctions for incompetent conduct. The likelihood that financial sanctions will be imposed depends upon the status of the state's tort law concerning negligence and professional malpractice,⁶² and upon the tendency of clients to resort to the courts for redress. The imposition of professional sanctions for incompetent conduct may be facilitated by the Code of Professional Responsibility. Canon 4 of the Code, stating that "A Lawyer Should Act Competently and Use Proper Care in Representing Clients,"⁶³ contains a disciplinary rule proscribing certain incompetence and neglect. It provides, for example, that a lawyer shall not "[h]andle any legal matter alone when he knows or it is obvious that he lacks the competence to handle the matter,"⁶⁴ or "[n]eglect a legal matter entrusted to him."⁶⁵ The applicability of such provisions to out-of-state lawyers permitted to practice law within the state, as well as to those possessing a local state license, should be made clear by each state when it adopts the Code of Professional Responsibility. It seems obvious, however, that the threat of sanctions such as disbarment and reprimand by a state in which one practices occasionally or incidentally does not have the same deterring effect as a threat of professional sanctions by the state where one regularly practices.⁶⁶ Therefore, the assurance of sufficient competency in part depends upon the vigilance and ardor with which the home state of the lawyer enforces the standards of competency.⁶⁷ But it is likely that each state in adopting the Code will provide that any violation of a Disciplinary Rule, regardless of the locale of the violation, may subject a lawyer to appropriate sanctions.⁶⁸

⁶¹ *Id.* at 1719.

⁶² "Neither the Canons, the Ethical Considerations, nor Disciplinary Rules are intended to suggest or define standards of liability in civil actions against lawyers involving their professional conduct." CODE OF PROFESSIONAL RESPONSIBILITY, Preamble, at 2.

⁶³ *Id.*, Canon 4, at 50.

⁶⁴ *Id.*, Discip. R. 4-101(A)(3), at 51.

⁶⁵ *Id.*, Discip. R. 4-101(A)(4), at 51.

⁶⁶ See Note, 80 HARV. L. REV. 1711 (1967).

⁶⁷ Cf. *Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968).

⁶⁸ [T]here is apparently no explicit understanding among any states that questionable conduct in one jurisdiction will lead to an investigation in the attorney's home state. At least there should be a formalized procedure for the exchange of information between bar associations of the states; it may be that present restrictions on the nonresident attorney will remain until there is a sufficiently direct relationship between misconduct in one state and disciplinary measures in another to act as a meaningful deterrent. Note, 80 HARV. L. REV. 1711, 1728 (1967).

CONCLUSION

Unauthorized practice problems have long plagued the Bar, and no doubt will continue to do so for some time to come. The Bar may be better able today than in some former decades to view the problems with detachment, and thus to seek solutions that favor the public interest irrespective of its own economic interests. The proposed Code of Professional Responsibility is not directly concerned with the unauthorized practice of law, and it will be influential in this area only to the extent that its approach and discussions are found to be persuasive. Many of its provisions concerning the lawyer's relationship to the unauthorized practice of law perpetuate existing views and existing restraints. Nevertheless, its stress upon the interests of the public (a stress found, for example, in its attitude as to the type of conduct that should be considered to be the unauthorized practice of law and in its opposition to unreasonable local restraints on practice by an out-of-state lawyer) indicates that its impact will not be on the side of parochialism.