LIMITATIONS ON THE USE OF BUSINESS LAW

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Introduction

In examining the limitations on the use of "business law," we must view the term "business law" in its broad sense. The student of the business school, in many courses other than those labeled "business law," receives detailed and technical information in a specialized area of the law. The courses labeled "business law" provide the background for study in these other courses as well as some specialized materials. Thus our inquiry into the limitations on the use of "business law" must concern itself with all courses in the curriculum which are involved with legal principles and rules of law.

Although the inclusion of specialized materials in the business curriculum is currently under attack, we must recognize that business specialists in fields such as taxation, insurance, estate planning, real estate and banking do require detailed and technical information in limited areas of the law. If this information is not obtained during their formal education, it will be obtained on the job from trade publications, tax services, etc. Therefore, the problem as to the limitations on the use of this knowledge is before us even if we substantially alter the business curriculum.

To illustrate the presence of the problem and the need for communicating possible solutions to the students, I submit the following questions to my students:

1. Is it proper for a C. P. A. to solve and give advice on a long and involved tax problem?
2. Is it proper for a real estate broker to prepare deeds and contracts of sale?
3. Is it proper for an insurance salesman to assist in the solution of estate planning problems or give advice concerning testate or intestate succession to property?
4. Is it proper for a labor union or its officials to assist its members in filing workmen's compensation claims?
5. Is it proper for a bank or trust company to advise its clients concerning their wills, trusts, etc.?
6. Is it proper for a collection agency to sue a debtor in its own name as assignee?

These are practical questions which will actually confront many of our graduates. It is unfortunate that most of the textbooks in our field ignore this problem as apparently belonging to the practicing lawyer. These are questions which should be asked and answered as part of the educational process in the schools of business.

In effect, they raise the fundamental question as to the role of the businessman in our legal system.

The Responsibility of the Teacher of Business Law

Once we have recognized the existence of this problem, the next question is this: Upon whom should the responsibility fall for raising the problem with the student and for pointing out possible solutions to it? The schools of business have generally ignored this problem in the past, but I predict they will not be able to do so much longer. These limitations are of growing concern to the bar. Only a glance at the periodicals of the American Bar Association[1] and the various state bar associations will demonstrate the concern of the bar over the invasion of the lawyers' domain by our graduates. (It should be pointed out also that perhaps we as teachers of business law ought to be concerned about the encroachment on our domain by our faculty colleagues. For example, isn't the accountant, who teaches a course in taxation, teaching law? Isn't the economist who teaches labor problems teaching law? Etc.? It is not my purpose to advocate that these courses be taken over by teachers of business law, but it is my purpose to point out, to those who would eliminate or drastically change the traditional courses in business law, the fact that many courses in the business curriculum are concerned with legal principles. This fact underscores the need for a solid foundation in legal fundamentals such as contracts, etc.)

The concern of the bar is not limited to monetary considerations and questions of competition. The survival of the legal profession may well be at stake, for if we are to allow persons trained in a specialized area to give legal advice and to solve legal problems, only the field of litigation will be left for the attorney. It is the position of the bar that only a person who is trained in all areas of the law, who is ethically and morally fit, and who is totally disinterested and subject to the discipline of the courts, should be allowed to give legal advice.[2] It is not one of the goals of a business education to train substitutes for lawyers in specialized situations.

We teachers of business law, as attorneys, may find an inner conflict of attitude and allegiance as we study this problem. On one hand, we desire that our graduates prosper and perform vital functions. On the other hand, we do not desire to undermine the bar and assist those who would destroy it. We may be persuaded by the argument that if the person is adequately trained (we'll see to that), then in the interest of cheapness, speed, and efficiency, he should be allowed a wide range of latitude in the services he performs. But whatever our personal opinion, we have a duty and responsibility to our students, to the bar, and to the public, to create an awareness of this problem in our courses and to offer possible solutions to it. As teachers of business law, we are the only members of the business faculty who can appreciate the position of the bar and successfully communicate it to the students.

We owe the responsibility to our students for the simple reason that if they are guilty of improper conduct by going beyond the prescribed limitations, they

[1]*Unauthorized Practice Source Book* (American Bar Foundation, 1958), a compilation of cases and commentary on Unauthorized Practice of the Law. Cf. Melvin F. Adler, "Unauthorized Practice: A Continuing Campaign in the Public Interest," 44 A.B.A.J. 649 (1958).

[2]For a statement of the current position of the organized bar see Edwin M. Otterbourg, "A 1960 Resume: Unauthorized Practice of the Law," 46 A.B.A.J. 46 (1960).

may be guilty of a crime or may be held in contempt of court and punished accordingly.[3] We owe them this responsibility whether we give them specialized training or just a foundation from which specialized training will follow, for we must recognize that many of our students upon graduation are engaged in activities where their conduct may be questioned. We are arming them with knowledge that may cause them to get into serious trouble. Common courtesy, if nothing else, dictates that we warn them of this danger.

We are also duty bound to the bar to add this area to our courses. As members of the bar, we ought not to be a contributing factor in undermining its role in society. If the position of the bar is sound, then it is in the public interest that we caution our students as to the proper scope of their activities. The best way to protect the public from the evils of unauthorized practice is to discourage it before it starts. We as business law teachers have a unique opportunity to be of service to the bar and the public, because we are in a position to make a greater impression on more persons who may be guilty of unauthorized practice than any other group concerned with the problem.

Finally, it is in our own self-interest that we add materials on unauthorized practice to our courses. By failing to do so, we may be blamed by the bar for aiding and abetting those who are guilty of improper conduct. Such an accusation would only add ammunition to those who would reduce our course to a study of the court systems. Those who believe in business law as a course of substance have the obligation of informing their students of the proper use of the substantive materials given.

The Manner of Fulfilling the Responsibility

It has been said that the law is a seamless web. It could also be said that business problems and the law form a seamless web. The interrelationship of business and the law brought about by government regulation has turned every business problem into a legal problem at least in part. Businessmen are going to use their knowledge of the law. There is no simple answer as to how far they can go. There are, however, certain guideposts and principles which are generally accepted and which it is suggested ought to form the nucleus of the study in this area.

Foremost among the recognized guideposts are the "Statements of Principles" with respect to the practice of law which have been adopted by the American Bar Association and the various business and professional groups to which many of our graduates belong.[4] These statements of principles supply the foundation for understanding the proper functions of the various business specialists and provide the "rules of thumb" for governing their conduct. These principles must be viewed in light of court decisions in each state. It is suggested that copies of these Statements of Principles be furnished the student and that appropriate cases be used as supplementary material. It should be noted that these cases will also furnish the student with an insight into the judicial process and legal reasoning.

To illustrate the matters to be presented and some of the points to be made, I have selected materials concerning the accountant, the real estate dealer, and the

[3]For a compilation of state laws prohibiting the practice of law by laymen see Edwin M. Otterbourg, *A Study of Unauthorized Practice of Law* (Chicago: American Bar Association Committee on Unauthorized Practice of the Law, September 1951), 61-72.

[4]*Statements of Principles with Respect to the Practice of Law Formulated by Representatives of the American Bar Association and Various Business and Professional Groups* (Chicago: Martindale-Hubbell Inc., November 1958).

estate planner. Materials are also readily available in other areas such as collection agents, union officials, book publishers, insurance adjusters, etc.

Accountants

In 1951, the American Bar Association and the American Institute of Accountants, in adopting the following principles among others, recognized that their two professions perform functions so interrelated, interdependent and overlapping, particularly in the tax field, that there was some doubt as to where the accounting function ended and the legal function began, and vice versa:

"1. It is a proper function of a lawyer or a certified public accountant to prepare federal income tax returns.

2. When a certified public accountant prepares a return in which questions of law arise, he should advise the taxpayer to enlist the assistance of a lawyer.

3. In the course of the practice of law and in the course of the practice of accounting, lawyers and certified public accountants are often asked about the probable tax effects of transactions.

The ascertainment of probable tax effects of transactions frequently is within the function of either a certified public accountant or a lawyer. However, in many instances, problems arise which require the attention of a member of one or the other professions, or members of both. When such ascertainment raises uncertainties as to the interpretation of law (both tax law and general law), or uncertainties as to the application of law to the transaction involved, the certified public accountant should advise the taxpayer to enlist the services of a lawyer. When such ascertainment involves difficult questions of classifying and summarizing the transaction in a significant manner and in terms of money, or interpreting the financial results thereof, the lawyer should advise the taxpayer to enlist the services of a certified public accountant. . . .

4. Only a lawyer may prepare legal documents such as agreements, conveyances, trust instruments, wills, or corporate minutes, or give advice as to the legal sufficiency or effect thereof, or take the necessary steps to create, amend or dissolve a partnership, corporation, trust, or other legal entity."[5]

Thus it was recognized that it is the lawyer's and not the accountant's function to give legal advice. The accountant should limit his activities to the accounting aspects of tax problems.

Many of the decisions involving accountants and tax law have been a real source of agitation to the accounting profession. In *Agran v. Shapiro,*[6] the court held that the preparation of a tax return by an accountant does not allow him to seek a refund or advise his client as to difficult or doubtful legal questions that may arise. The case involved a net loss carryover, which decision was dependent on the interpretation of a statutory definition. This was held to be solely a matter of law, and advice by an accountant concerning it was improper. The court of New York, in *In Re Bercu,*[7] held that advice as to tax liability is improper when an accountant's primary employment is not the preparation of tax returns. The court stated that when a taxpayer is faced with a tax question so involved and difficult

[5]*Ibid.,* pp. 116A-117A.
[6]127 Cal. App. 2d 807, 273 P 2d 619 (1954).
[7]273 App. Div. 524, 78 NYS 2d 209 (1948).

that he has to seek outside advice, the advice should be sought from a qualified lawyer and not an accountant.

The Supreme Court of Massachusetts, in *Lowell Bar Association v. Loeb,*[8] held that the filling out of short form tax returns was not the practice of law, but noted that an examination of statutes, judicial decisions, and departmental rulings and advising a client thereon would be the practice of law. The Supreme Court of Minnesota, in *Gardner v. Conway,*[9] held that a layman who, in preparing a tax return, resolved the legal effect of a taxpayer's marital and business status was practicing law. The court here applied the difficult question of law criteria announced in the Statement of Principles. It recognized the interrelation of all branches of law and the limitation on certain activities by lay persons.

Thus it is apparent that the accountant has a limited field of activity in tax matters. The accounting profession as a whole is concerned about its proper relationship with the legal profession and with its proper function in the tax field. The close contact of the members of this Association with the accounting profession affords us a unique opportunity to serve both professions by assisting in the formulation of a workable solution to this problem. We can make a substantial contribution by a frank discussion of the problem in our courses with the accountants of tomorrow.

Realtors

The National Conference of Realtors and Lawyers, in adopting their 1942 statement of principles, provided:

"1. The Realtor shall not practice law or give legal advice directly or indirectly; he shall not act as a public conveyancer, nor give advice or opinions as to the legal effect of legal instruments, nor give opinions concerning the validity of title to real estate, and he shall not prevent or discourage any party to a real estate transaction from employing the services of a lawyer.

2. The Realtor shall not undertake to draw or prepare documents fixing and defining the legal rights of parties to a transaction. However, when acting as broker, a Realtor may use an earnest-money contract form for the protection of either party against unreasonable withdrawal from the transaction, provided that such earnest-money contract form, as well as any other standard legal forms used by the broker in transacting such business, shall first have been approved and promulgated for such use by the Bar Association and the Real Estate Board in the locality where the forms are to be used."[10]

The above statement would seem to clarify the situation as to the proper conduct of our graduates who enter the real estate field, but the courts have added much confusion in a variety of decisions concerning real estate brokers.

A leading case limiting the activities of real estate brokers is *Arkansas Bar Association v. Block.*[11] The case was presented on facts stipulated by and between the Bar Association of Arkansas and the Arkansas Real Estate Association. Arkansas had a statute prohibiting the practice of law without a license, but the term "practice of law" was not defined. Real estate brokers were in the habit of using prepared

[8]315 Mass. 176, 52 N.E. 2d 27 (1943).
[9]234 Minn. 268, 48 N.W. 2d 788 (1951).
[10]*Statements of Principles with Respect to the Practice of Law, op. cit.,* p. 116A.
[11]323 S.W. 2d 912 (Ark. 1959).

forms and filling in the blanks to complete the transaction. No charge was made for this service other than the usual real estate commission. The forms used had been previously approved by attorneys as suggested in paragraph 2 of the Statement above. The information to complete the blanks was obtained by the broker. The court held that the completion of these forms constituted an unauthorized practice of law. The court admitted that it was difficult to define the practice of law, but stated unequivocally that it consists in no small part of work performed outside of any court and having no immediate relation to proceedings in court. It embraces the giving of legal advice on a large variety of subjects and the preparation of legal instruments covering an extensive field. The opinion pointed out that the work of the office lawyer has a profound effect on the whole scheme of the administration of justice, and that it is of importance to the welfare of the public that these functions be performed by persons possessing adequate training, sound moral character, etc. The court recognized that in completing the blanks on these forms many legal points had to be considered, and that if the information elicited is considered and acted upon, it is the practice of law. In other words, if such service of the real estate dealer does not amount to the practice of law, it is without material value, but if it is of material value, it is the practice of law.

The Supreme Court of Colorado, in *Conway-Bogue Realty Investment Company v. The Denver Bar Association,*[12] held that even though an activity may be within the concept of "practice of law," the activity will not be enjoined if the layman or corporate practioner can show that the activity is one the public is willing to buy and is performed with some degree of competence. In that case, the real estate firm was allowed to do some of the things that the Supreme Court of Arkansas prohibited, because the public was willing to patronize it and had been doing so for a long period of time, and because in Colorado there are many counties with either no or only a few lawyers. This case has received rather wide criticism in both the *Federal Bar News*[13] and the *Journal of the American Judicature Society.*[14] The Supreme Court of Michigan took the position in 1955 that the broker could do any act necessary to consummate the sale.[15]

An example of the danger inherent in lay persons practicing law is provided by the case of *Morris v. Muller.*[16] The court held that a chattel mortgage prepared by a realtor was void, and the loan which it purported to secure was discharged. In *People ex rel. Illinois State Bar Association v. Schafer,*[17] the Supreme Court of Illinois held that the activities of a real estate dealer who prepared deeds, contracts, and mortgages in connection with real estate transactions amounted to the practice of law and held him in contempt of court.

To summarize the problem of the business school graduate who specializes in real estate work, many states take the position that the completion of forms and the preparation of instruments by such persons is improper. Other states hold that only ordinary intelligence is required to fill in blanks,[18] or that under the circum-

[12]135 Colo. 398, 312 P. 2d 998 (1957).
[13]5 *Federal Bar News* 144 (1958).
[14]42 *Journal of the American Judicature Society* 3 (1958).
[15]Ingham County Bar Association v. Neller, 342 Mich. 214, 69 N.W. 2d 713 (1955).
[16]113 N.J.L. 46, 172 Atl. 63 (1934).
[17]404 Ill. 45, 87 N.E. 2d 773 (1949).
[18]Hulse v. Criger, 363 Mo. 26, 247 S.W. 2d 855 (1952).

stances an injunction is an improper remedy as the Conway-Bogue case implied, or that the broker's proper interest extended to completion of the instruments necessary to the consummation of the sale as was held in the Michigan case. Again, a valuable public service will be rendered if persons likely to enter this field are informed about this problem and this variety of decisions during their formal education.

Estate Planners

Another area in which great concern about the unauthorized practice of law has been generated is in the area of estate planning. This area has come under close scrutiny recently as a result of the development of what is in effect an estate planning team consisting of the lawyer, the insurance broker, the accountant, the investment advisor, and the corporate fiduciary. Estate planning services have become an important part of the work of all of these persons and, therefore, it is not surprising that conflicts have arisen as to the proper scope for the activities of each. Probably no problem is more complex than defining the proper role of various experts in estate planning. Only a cursory glance at the problem of the insurance salesman will indicate that it is most difficult to sell insurance without giving advice on estate planning. The corporate fiduciary and its trust department in accepting a trust must of necessity often make suggestions as to the drafting of the trust indenture or will. The proper scope of activity in this area is not, as of this date, a subject of much certainty. The American Bar Association Committee on the Unauthorized Practice of Law issued an opinion on estate planning in 1959.[19] In the opinion it was noted that estate planning necessarily involved the application of legal principles in fields such as wills, estates, trusts, future interests, real property, personal property, etc., to an actual situation. Estate planning necessarily includes legal research, the giving of legal advice, and the drafting of instruments. Thus, there can be no question that it is the practice of law. The opinion did point out that where the task is merely an analysis of the facts and assets of the estate, it may be performed by a lay person. It was also recognized that activities geared to motivating the individual to do something about his own estate, to seek the advice of his own lawyer, are proper, but legal advice with respect to the particular situation involved must not be given.

Here again joint "Statements of Principles" will furnish the basic materials for study. The Statement of Principles adopted with the National Association of Life Underwriters provides in part:

"1. A life underwriter has no right to practice law or to give legal advice or to hold himself out as having such rights. He should not attempt to do so directly or indirectly. Therefore, he must never prepare for execution by his client legal documents of any kind, such as wills or codicils thereto, trust agreements, corporation charters, minutes, by-laws or business insurance agreements. When submitting an involved mode of settlement, or one which may affect a client's prior disposition of property by his Last Will and Testament, the life underwriter should suggest that the same be submitted to the client's attorney for approval.

2. In estate planning, all transfers of property, except simple modes of settle-

[19] "Opinion 1959-A Estate Planning," 45 A.B.A.J. 1296 (1959).

ment under life insurance policies or changes of beneficiary thereof, should be recommended subject to the approval of the client's attorney.

3. It is improper for a life underwriter, in submitting to his client an estate planning report, to attach thereto or insert therein any forms of legal instruments or of specific legal clauses. . . .

4. The proper protection of the public in connection with the sale of life insurance requires that life insurance agents be as well informed as possible about legal matters that have a particular bearing on life insurance. The agent should be cautioned not to give legal advice to clients on the basis of bulletins furnished by home office counsel, but to use legal information furnished him for his own edification. Any discussion with clients of underlying legal principles should always be made subject to confirmation by the client's counsel."[20]

Thus there are definite limitations on the conduct of life insurance agents in regard to their use of "business law." The danger in not apprising the student of these limitations is magnified when it is recognized that the large volume of legal material furnished him by his company will easily lead him to believe that he is qualified to give advice in this field. Just as the tax service encourages the accountant to study and give advice on tax problems, the home office bulletins (which usually are prepared by lawyers) encourage the insurance agent to give advice on estate planning. The instructor who teaches insurance is not likely to point out these limitations, so the responsibility falls to the business law teacher to raise them.

Another group whose members are vitally connected with estate planning is the American Bankers Association. Even small-town banks today are offering trust department services. These departments are staffed with lay personnel most of whom have received their formal education in a school of business. In the public interest, the American Bankers Association and the Association Bar Association agreed to the following principles with respect to the functions of the trust institution:

"1. Trust institutions should neither perform services which constitute the practice of law nor otherwise engage in such practice; therefore, they should not draw wills or other legal documents or perform services in the administration of estates and trusts where such acts by law or local procedure are considered the practice of law. . . .

2. In all legal questions which may arise in the development of trust business, the trust institution should advise the customer to confer with his own lawyer or a lawyer of his own choosing. . . .

3. A trust institution, qualified and authorized by law as a legitimate business enterprise, has an inherent right to advertise its trust services in appropriate ways. It should not, directly or indirectly, offer to give legal advice or render legal services, and there should be no invitation to the public, either direct or by inference in such advertisement, to bring their legal problems to the trust institution. Its advertisement should be dignified and the qualifications of the institution should not be overstated or overemphasized, and it should not be implied in any advertisement that the services of a lawyer are only secondary or ministerial, or that

[20]*Statements of Principles with Respect to the Practice of Law, op. cit.*, p. 117A.

by the employment of the services of the trust institution, the employment of counsel to advise the customer is unnecessary."[21]

Conclusion

Collegiate schools of business are giving training in specialized areas of the law. Even though certain groups are objecting to this specialization, it is apparent that it will probably continue at least to some degree. If not continued, the training given will provide the foundation for acquiring this specialized knowledge from other sources.

There are certain limitations on what use may be made of this knowledge. It is not the function of the business school to train substitutes for lawyers, but to train good clients for lawyers. Almost every business specialist is in a position to invade wrongfully the province of the attorney. We as teachers of business law should, as best as we can, define the proper areas of conduct for our students. If these areas need to be enlarged, we may be in a position to assist in that endeavor. Those of us who participate in the legal training of these business specialists ought to endeavor to make sure that the knowledge we give is used only within its proper limits. As lawyers, we owe this obligation to our students, to the bar, and to the public. As we examine the role of business law in the business school curriculum in the future, it is my hope that we recognize the problem of unauthorized practice by business school graduates and take positive steps to insure that it is also recognized by the graduates of schools of business.

[21] *Ibid.*, p. 114A.