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# COMMENTS

## THE COMPLETION OF DEED FORMS BY REAL ESTATE BROKERS

The phrase, practice of law, does not have a precise definition which serves as a panacea for the solution of all problems arising out of the unauthorized practice of law. It is generally conceded that the practice of law is not confined to the area of litigation, but extends to much of the office work of an attorney, including conveyancing.<sup>1</sup> Under Anglo-American jurisprudence, all men possess legal rights and are bound by legal duties. Since it is a practical impossibility for all men to be conversant with all of their legal rights and duties, certain qualified men, learned in the law and subject to a rigorous code of ethics, are permitted to give advice and take action affecting the legal rights of others. This method is necessary to secure for all men a realization of theoretical legal rights contained in the law. The practice of dealing in a representative capacity with the legal rights of others is termed the practice of law. This area must perforce be limited to lawyers; not to assure a monopoly to those practicing law, but to protect the public from relying upon incompetents in regard to their legal rights. The practicing of law by a layman is called the unauthorized practice of law. It has been suggested that a broker may be practicing law, and yet not be guilty of the unauthorized practice of law.<sup>2</sup> This distinction is semantical. The considerations are the same regardless of which way the problem is phrased.<sup>3</sup>

The overwhelming weight of authority asserts that the primary power to control the unauthorized practice of law rests in the judicial branch of the government.<sup>4</sup> The function of an attorney, whether it be before the courts or in his office, is an integral part of the administration of justice<sup>5</sup> which is vested in the judiciary under the separation of powers doctrine. While the legislative branches of the states have passed statutes regulating the unauthorized practice of law, it is generally held that these statutes are an aid to the judicial branch of the state govern-

<sup>1</sup> Opinion of the Justices, 289 Mass. 606, 194 N.E. 313, 317 (1935).

<sup>2</sup> Conway-Bogue Realty Investment Co. v. Denver Bar Ass'n, 135 Colo. 398, 312 P. 2d 998 (1957).

<sup>3</sup> Petitions of Ingham County Bar Ass'n, 342 Mich. 214, 69 N.W. 2d 713 (1955).

<sup>4</sup> People v. People's Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940); Washington State Bar Ass'n v. Washington Ass'n of Realtors, 41 Wash. 2d 697, 251 P. 2d 619 (1952); State (*ex. rel.* Junior Ass'n of the Milwaukee Bar) v. Rice, 236 Wis. 38, 294 N.W. 550 (1940); New Jersey State Bar Ass'n v. Northern New Jersey Mortgage Associates, 32 N.J. 430, 161 A. 2d 257 (1960).

<sup>5</sup> Opinion of the Justices, *supra* note 1, at 317 where the court states: "The work of the office lawyer is the groundwork for future possible contests in courts. It has a profound affect on the whole scheme of the administration of justice."

ment in its regulation of the unauthorized practice of law.<sup>6</sup> It may be argued that the legislature is in a better position to ascertain the needs of the public because of its widespread representation, and hence should control the unauthorized practice of law through its police power. However, in the area of the unauthorized practice of law there is more at stake than public welfare. There is at stake the due administration of justice which is vested in the courts. A small percentage of legal controversy is actually settled in the courtroom, when compared to out-of-court settlements. The courts view the office work of an attorney as an integral part of the administration of justice, because in reality that is where much of it takes place. The courts would be fulfilling only part of their constitutional responsibility if they did not take jurisdiction over the administration of justice outside of the courtroom. The unauthorized practice of law is not only a danger to the public, but also to the courts insofar as it affects the function of the judiciary. Attorneys practice under a rigorous code of ethics because they act as officers of the court who aid the judiciary in its task. For the legislature to set the standards of legal practice would be to deprive the courts of control of the tools necessary to perform its duty.<sup>7</sup> Since the judicial branch of the government has the power to control the practice of law in its jurisdiction, it is also charged with the duty to do so, a duty which cannot be taken lightly.<sup>8</sup>

A current problem in the field of unauthorized practice of law is whether a real estate broker who fills in blank spaces on a form deed, without extra compensation, in a transaction in which he is acting as a broker, is guilty of the unauthorized practice of law. It is the purpose

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<sup>6</sup> Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, *supra* note 2.

<sup>7</sup> "Having power to determine who shall and who shall not practice law in this state, and to license those who may act as attorneys and forbid others who do not measure up to the standards or come within the provisions of its rules, it necessarily follows that this court has the power to enforce its rules and decisions against offenders, even though they have never been licensed by this court. Of what avail is the power to license in the absence of power to prevent one not licensed from practicing as an attorney? In the absence of power to control or punish unauthorized persons who presume to practice as attorneys and officers of this court the power to control admissions to the bar would be nugatory. . . .

"It is also argued that for acts outside of court which amount to unauthorized practice of law the offender cannot be punished for contempt of this or any other court. What we have said above should be sufficient to dispose of this contention. To deny the power of the court to deal with such offenders would be tantamount to a destruction of the power itself. Perhaps the major portion of the actual practice of law under modern conditions consists of the work of attorneys outside of any court and has nothing to do with court proceedings." *People v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N.E. 901, 906 (1931).

<sup>8</sup> "The bench and bar may not lightly disregard these public obligations. Nor, in default of duty, may they casually permit the public to be led to rely upon the counselling, in matters of law, of persons not subject to the standards and discipline of an attorney as imposed by law for the public protection." *Beach Abstract & Guarantee Co. v. Bar Ass'n of Arkansas*, 326 S.W. 2d 900, 904 (Ark. 1959).

of this article to examine this problem from the viewpoint of the public interest which by necessity must be the controlling consideration.

#### PRIOR DECISIONS

In *Cowern v. Nelson*,<sup>9</sup> the defendant appealed from a judgment restraining him from performing certain acts held by the trial court to constitute the unauthorized practice of law. The defendant was a real estate broker who prepared purchase money contracts, contracts for deeds, leases, notes, mortgages, chattel mortgages, bills of sale, deeds, assignments and satisfactions. In some cases he performed this service while not engaged as a broker in the transaction. Occasionally he received compensation for the preparation of the papers. The instruments were those commonly used in the legal profession. He personally selected the form, determined its suitability, and advised the interested parties as to the legality and legal effect of the instrument. On appeal, the defendant conceded that a fee could not be charged, and accepted the trial court's judgment insofar as it applied to transactions in which he was not acting as a broker. He defended on the ground that his activity was authorized by statute.<sup>10</sup> Although the defendant recognized that the legislature could not authorize the practice of law by a layman, he contended that as a matter of comity the judicial branch should defer to the legislative declaration of policy. The plaintiff contended that the acts of the defendant constituted the unlawful practice of law, and insofar as the statute permitted them, it was unconstitutional.

The Minnesota court accepted the statute on the grounds of comity, but rejected that portion of the statute which provided that a fee could be charged. The court went on to say that a decision of this type could not be based solely upon the character of the instrument involved and whether or not a broker is either technically or practically a party to the transaction. The court held ordinary conveyancing to be within an area between what was clearly the unauthorized practice of law and what was clearly permissible. Placing great emphasis on the burden which would fall upon the public if brokers were enjoined from performing this service, the court reasoned that the legal profession could not claim a necessity for judicial restraint. Reversing the trial court, the Supreme Court of Minnesota declared that the possible harm which might come to the public by defective conveyances prepared by brokers was not sufficient to outweigh the public inconvenience which would follow if it were necessary to call in a lawyer to draft simple instru-

<sup>9</sup> 207 Minn. 642, 290 N.W. 795 (1940).

<sup>10</sup> MINN. SESS. LAWS 1931, ch. 114 §1 (c) which reads in part: ". . . and shall not prohibit anyone, acting as a broker for the parties or agent of one of the parties to a sale or trade or lease of property or to a loan, from drawing or assisting in drawing, with or without charge therefor, such papers as may be incident to such sale, trade, lease, or loan."

ments. The court concluded by holding that a broker, in a transaction in which he was acting as a broker, could fill in simple instruments as long as he charged no extra fee.

The Supreme Court of Missouri reached the same result in the case of *Hulse v. Criger*.<sup>11</sup> This case arose from an information by the Advisory Committee of the Missouri Bar Administration alleging that the defendant, a licensed real estate broker, engaged in the unlawful practice of law as a practice and as a business. The defendant admitted that he selected and filled in blanks on form instruments, and admitted that he charged a nominal fee. The defendant denied that he gave legal advice as to the effect of the instrument. The defendant contended that his conduct did not constitute the unlawful practice of law.

In upholding the contention of the broker, except as to the charging of a fee, the Missouri Supreme Court placed emphasis on the position of the broker in a real estate transaction. The court did not hold that the broker was a party to the transaction, but the decision implied as much. Technically, the broker merely by his status as a broker for the seller could not be a party to the transaction. However, the court seemed to be impressed with the broker's pecuniary interest in the closing. It observed that as a practical matter a broker does not get paid until the deal is closed. Moreover, the court believed that general warranty deed and trust deed forms were so standardized that to complete them for usual transactions required ordinary intelligence rather than legal training. The criteria applied by the court was whether or not the service was incidental to the broker's business.

An aspect of the problem considered extensively by the court was the effect of advice given by a broker to the parties concerning the legal results of an instrument and the legal rights and obligations of the parties. The court unequivocally condemned such conduct as the unlawful practice of law. It based its conclusion on two grounds, the lack of legal training which renders brokers incompetent for such work and the conflict of interest to which brokers are subject by virtue of their own pecuniary interest.<sup>12</sup> Although the court held that the filling in of standardized forms by a broker in a transaction in which he is acting as a broker, without charging a fee, did not constitute the unlawful practice of law, the court stated that only such information as was necessary for the filling in of the blanks could be elicited by the broker. The consistency of this portion of the decision was subsequently criticized in a case arising in the state of Washington.<sup>13</sup>

Relying to a great extent on *Cowern v. Nelson*,<sup>14</sup> and *Hulse v.*

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<sup>11</sup> 363 Mo. 26, 247 S.W. 2d 855 (1952).

<sup>12</sup> *Id.* at 861.

<sup>13</sup> See note 32 *infra*.

<sup>14</sup> *Supra* note 9.

*Criger*,<sup>15</sup> the Michigan Supreme Court distinguished a prior case<sup>16</sup> and concluded in *Petitions of Ingham County Bar Association*<sup>17</sup> that the filling in of form instruments by a broker did not constitute the unauthorized practice of law as long as the broker was handling the transaction as broker. The Michigan court examined its statutes dealing with the unauthorized practice of law<sup>18</sup> and the regulation of real estate brokers.<sup>19</sup> The court was of the opinion that while the statutes did not define the practice of law, they revealed, at least, the right of realtors to engage in conveyancing. It then assumed the burden of deciding whether the filling in of the forms constituted the unlawful practice of law. Viewing the problem in light of public convenience, the court held that the service did not constitute the unlawful practice of law. Justice Sharpe dissented vigorously, pointing out that "in practically every real estate transaction the attorney is required to give advice concerning some phase of the transaction."<sup>20</sup> He also observed that a substantial number of cases in the courts of the state were brought about by incompetent preparation of a legal instrument. This observation should be contrasted with that of the Minnesota court in *Cowern v. Nelson*<sup>21</sup> where the court held the relative danger to the public to be slight.

The Colorado court in *Conway-Bogue Realty Investment Co. v. Denver Bar Association*<sup>22</sup> faced problems peculiar to its jurisdiction when it considered the question of conveyancing by brokers. The complaint alleged that the defendants, licensed real estate brokers, had been engaged in the unlawful practice of law by preparing for others instruments relating to and affecting title to real estate. The defendants charged no separate fee, but acted as brokers in the transactions. The complaint also alleged that the brokers advised the parties as to the legal effect of the instruments. The defendants admitted the allegations of the complaint, but contended that their actions were a reasonable and necessary incident to their business. The defendants argued that public convenience required that they be allowed to fill in approved legal forms. They also testified that, upon inquiry, they would explain the difference between joint tenancy and tenancy in common, and the difference between assuming and taking subject to an incumbrance.

The Colorado court thus phrased the first question raised by the parties:

Does the preparation of receipts and options, deeds, promissory

<sup>15</sup> *Supra* note 11.

<sup>16</sup> *Grand Rapids Bar Ass'n v. Denkema*, 290 Mich. 56, 287 N.W. 377 (1939) which was distinguished on the basis of the incidental-to-the-business test.

<sup>17</sup> *Supra* note 3.

<sup>18</sup> MICH. COMP. LAWS ch. 601, §601.61 (1948).

<sup>19</sup> MICH. COMP. LAWS ch. 451, §451.208 (1948).

<sup>20</sup> *Supra* note 3, at 722.

<sup>21</sup> *Supra* note 9.

<sup>22</sup> *Supra* note 2.

notes, deeds of trust, mortgages, releases of encumbrances, leases, notice terminating tenancies, demands to pay rent or vacate by completing standard and approved printed forms, coupled with the giving of explanation or advice as to the legal effect thereof, constitute the practice of law?

This question we answer in the affirmative.<sup>23</sup>

The court held that the drafting of any one of the enumerated instruments and advising as to the legal effect thereof might present a simple legal problem or a complex one. In either case, it would constitute the practice of law. Notwithstanding this interpretation, the court refused to enjoin the brokers from this practice. The court used three reasons to justify their position. First, it accepted the incidental test, pointing out that according to a Colorado statute<sup>24</sup> a broker generally was not entitled to his commission until the sale was consummated. Hence, the completion of the forms was definitely incidental to the brokers' profession. Second, it was not in the public interest to grant an injunction because in three counties there were no attorneys, in ten counties there was only one attorney, and in seven counties there were only two attorneys. The court granted that the plaintiffs had much logic in support of their contention, but concluded that reason, public convenience and public welfare were on the other side.

The third reason presented by the court was phrased as follows:

We feel that to grant the injunctive relief requested, thereby denying to the public the *right* to conduct real estate transactions in the manner in which they have been transacted for over half a century, with apparent satisfaction, and requiring all such transactions to be conducted through lawyers, would not be in the public interest . . . [emphasis added].<sup>25</sup>

This statement seems to be based on a freedom of contract theory, a freedom with which courts will not interfere without grave cause. It is difficult to ascertain the weight to be accorded this statement in light of the peculiar context in which the court was deciding the case.

Although the *Conway-Bogue*<sup>26</sup> case ruled in favor of the brokers, it is somewhat inconsistent with *Hulse v. Criger*.<sup>27</sup> It should be noted that the Missouri court was strongly against *any* advice given by brokers to the parties concerning their legal rights. This did not seem to disturb the Colorado court.

Limited relief was granted in *Washington State Bar Association v. Washington Association of Realtors*.<sup>28</sup> Originally the action was brought against all the brokers in the state, but at the trial level it was reduced

<sup>23</sup> *Id.* at 1004-05.

<sup>24</sup> COLO. REV. STAT. ch. 117, §117-2-1 (1953).

<sup>25</sup> *Supra* note 2, at 1007.

<sup>26</sup> *Supra* note 2.

<sup>27</sup> *Supra* note 11.

<sup>28</sup> 41 Wash. 2d 697, 251 P. 2d 619 (1952).

to an action against one defendant. The plaintiff alleged that the defendant prepared two real estate purchase contracts and five warranty deeds. The defendant did not question on appeal the trial court finding that he prepared the four deeds in evidence, but he contended that since he received no compensation he was not guilty of the unlawful practice of law. The decision of the court centered around one of the deeds in evidence. This deed, the Voeller-Newman deed, was a statutory warranty deed which contained the following language after the property description:

Subject: To a \$4,000 mortgage held by Public Service Life,  
Health and Accident Company.  
A mortgage of \$850.<sup>29</sup>

The earnest money receipt indicated that the mortgages were to be assumed.

The court began by asserting that no statutory violation need be shown because of the court's inherent power to punish or restrain the unauthorized practice of law. The mere fact that no compensation was received did not absolve the defendant.<sup>30</sup> The court noted the division of authority on the question of preparation of deeds by brokers and declined to refer to other cases, stating that each court must resolve the problem as it deems proper. In addition to asserting its inherent power to restrain those who might harm the public because of their lack of professional skill, whether they be members of the bar or not, the court recognized that it had a duty to do so. Before disposing of the case, the court listed the considerations which inhered in the case:

1. The representation of qualification and competence to do work of a legal nature and to advise upon that subject, which is implicit in the preparation of any legal document by the selection and completion of a blank form.
2. The presence of ethical problems of conflict of interest which must be considered.
3. The fact that no sound distinction can be drawn between a simple and complex instrument.<sup>31</sup>

Since the court was reluctant to use its inherent power unless absolutely necessary, it issued an injunction prohibiting the broker from preparing such instruments as represented by the Voeller-Newman deed. Justice Donworth, in a concurring opinion,<sup>32</sup> took the position that the court should have issued a broader injunction so as to preclude brokers from filling in legal documents.

<sup>29</sup> *Id.* at 626.

<sup>30</sup> *Paul v. Stanley*, 168 Wash. 371, 12 P. 2d 401 (1932) was overruled insofar as it held compensation to be an element of the unauthorized practice of law.

<sup>31</sup> *Supra* note 28, at 621, 622.

<sup>32</sup> Justice Donworth attacked the reasoning in *Hulse v. Criger*, *supra* note 11, on the ground that the selection of the form by the broker constituted giving legal advice which the Missouri court was strongly against.

The strongest ruling against brokers<sup>33</sup> was handed down in *Arkansas Bar Association v. Block*.<sup>34</sup> In that case, the court listed twenty-four types of legal instruments,<sup>35</sup> and held that brokers would be engaging in the unlawful practice of law if they filled out any one of these instruments, notwithstanding the fact that they were acting as brokers and receiving no extra compensation. The court asserted that the practice of law included in its scope the office work of an attorney. The court dismissed the concept of simple instrument saying that any legal form must be adapted skillfully to a transaction. Underlying the court's decision was a theory expressed in an earlier New York case:

... a very little can go wrong in a court where the proceedings are public, and the presiding officer is generally a man of judgement and experience. . . . Not so in the office. . . . Ignorance and stupidity may here create damage which the courts of the land cannot thereafter undo.<sup>36</sup>

The emphasis of the court was on public protection rather than public convenience.

#### THE SITUATION IN WISCONSIN

The only case in Wisconsin dealing with the filling in of form deeds by real estate brokers is the *Cunningham-Nield Realty Co.*<sup>37</sup> case. In that case, the Circuit Court of Kenosha County held that Cunningham-Nield had violated the Wisconsin statute<sup>38</sup> prohibiting the advertising of one's self as capable of performing legal work. The company in their advertising had stated that they performed all the work necessary to close the deal. Justice Baker, in writing his opinion, declared that he believed that the Wisconsin Supreme Court would follow *Arkansas Bar*

<sup>33</sup> A position contrary to brokers was also taken in: *In re Gore*, 58 Ohio App. 79, 15 N.E. 2d 968 (1937); *Keyes Co. v. Dade County Bar Ass'n*, 46 So. 2d 605 (Fla. 1950); *Commonwealth v. Jones & Robins, Inc.*, 186 Va. 30, 41 S.E. 2d 720 (1947).

<sup>34</sup> 323 S.W. 2d 912 (Ark. 1959).

<sup>35</sup> *Id.* at 913-14. Warranty deeds, disclaimer deeds, quitclaim deeds, joint tenancy deeds, leases, options, easements, loan applications, promissory notes, real estate mortgages, deeds of trust, assignments of leases or rentals, contracts of sale of real estate, release and satisfactions of real estate mortgages, agreements for the sale of real estate, bills of sale, contracts of sale, mortgages, pledges of personal property, notices and declarations of forfeiture, notices requiring strict compliance, releases and discharges of mechanic's and materialmen's liens, printed forms approved by attorneys, including the various forms furnished by title insurance companies to defendants for use by defendants as agents of title insurance companies, and acting as closing agents for mortgage loans and completing by filling in the blanks therein with factual data such instruments as are furnished to them and are necessary and incidental and ancillary to the closing of the transaction between the mortgagee for whom they act as agent and the mortgagor.

<sup>36</sup> *People v. Alfani*, 227 N.Y. 334, 339-40, 125 N.E. 671, 673 (1919).

<sup>37</sup> *State of Wisconsin ex rel. State Bar of Wisconsin and Kenosha County Bar Ass'n v. Cunningham-Nield Realty, Inc.*, Kenosha County Circuit Court, Feb. 10, 1960.

<sup>38</sup> Wis. STAT., §256.30 (1959).

*Ass'n v. Block*.<sup>39</sup> On April 11, 1960, the Attorney General of Wisconsin rendered an opinion<sup>40</sup> to the effect that the *Cunningham-Nield* case was the law of Wisconsin. He considered it essential to the decision that filling in of form deeds constitutes the practice of law, otherwise there would be no harm in advertising the practice. The Real Estate Brokers Board responded by amending Rule 5.04 of the Wisconsin Administrative Code<sup>41</sup> in such a manner as to make it clear that in the opinion of the Board the brokers could fill in form instruments as long as they were legally approved forms. The ultimate resolution of the issue has devolved upon the Supreme Court of Wisconsin.<sup>42</sup>

#### ANALYSIS OF THE PROBLEM

Several theories have appeared in the foregoing cases which bear analysis. The standard by which these theories must be judged is the public interest. Above all, it must be realized that the problem cannot be solved by the use of cliches.

It has been held that the filling in of a form deed in order to transfer title in the closing of a real estate transaction is incidental to the main business of a real estate broker and therefore does not constitute the unauthorized practice of law.<sup>43</sup> In *Gardner v. Conway*,<sup>44</sup> a case involving a tax consultant, the Supreme Court of Minnesota concluded that the incidental-to-the-business test had no value except in a negative sense, namely that legal services of a layman if not performed as an incident to his business were definitely the practice of law, but the mere fact that they were incidental to his business did not mean that the acts did not constitute the unauthorized practice of law. The court disposed of the rule saying, "Any rule which holds that a layman who prepares legal papers or furnishes other services of a legal nature is not practicing law when such services are incidental to another business or pro-

<sup>39</sup> *Supra* note 34.

<sup>40</sup> 49 Wis. Op. Atty. Gen. 79.

<sup>41</sup> WIS. ADM. CODE §R.E.B. 5.04 (2) :

"Real estate or business opportunity brokers, in transactions in which they are acting as a broker may use standardized forms, as set forth in subsection (1), of deeds, land contracts, leases, options, mortgages, assignments of mortgages and land contracts, releases of mortgages, chattel mortgages, bills of sale, conditional sales contracts and other instruments of a similar nature, provided, however, that such are appropriate and incidental to transactions in which they act as licensed brokers, and that said brokers receive no compensation for filling in or completing such forms. The broker may not do so in any other transactions. Said forms shall not, however, be prepared by salesmen."

<sup>42</sup> A case involving the validity of R.E.B. 5.04 is now before the Wisconsin Supreme Court.

<sup>43</sup> Petitions of Ingham Cty. Bar Ass'n, *supra* note 3.

<sup>44</sup> 234 Minn. 468, 48 N.W. 2d 788 (1951). In this case the court adopted the complex legal question test. It noted its earlier acceptance of the incidental to the business test in *Cowern v. Nelson*, *supra* note 9, but held that the new test would produce the same result in the case of a broker. The weakness of the complex legal question test is that a broker may not have the legal background necessary to perceive the presence of a complex legal question.

fession completely ignores the public welfare."<sup>45</sup> Similarly, the Wisconsin Supreme Court has held that one engaged in rendering legal services cannot claim immunity on the ground that such service was incidental to his main business.<sup>46</sup> The danger to the public arising from the unauthorized practice of law is not lessened by the mere fact that it is carried on as an incident to another business. Moreover, it is not necessary for a real estate broker to fill in the forms which convey title to property in order to receive his commission. His work is complete when he has found a buyer ready, willing and able to purchase.<sup>47</sup> The business of a broker is not affected if he is barred from filling in the deeds in a real estate transaction. The substantial effect which does result is the protection of the public.

One of the elements which always receives attention in unauthorized practice of law cases involving the filling in of form instruments is whether or not a separate charge is made for the service.<sup>48</sup> Cases which hold that a broker can fill in forms to effectuate a conveyance of title invariably hold that he may not charge for this service. This position is difficult to sustain unless this service constitutes the practice of law, otherwise there could be no prohibition against charging a fee. Whether or not a fee is charged may, however, have a bearing on the question of whether the service is rendered incidental to the broker's business. If substantial income is derived from fees, the service could not be explained away as an incident of other business. Under this rationale, it would seem that a nominal charge would not destroy the incidental criterion and hence would be permissible. But the courts will not tolerate even a nominal charge for this service.<sup>49</sup> In any event the public is in no way safeguarded by the compensation test. As the Supreme Court of Washington pointed out: "The probability of injurious consequences from the acts of the unskilled is shown by the constant stream of litigation arising from this source. These consequences are not made less probable, nor are their results less severe, because the unskilled are not paid for their services."<sup>50</sup> There is also a serious contention that the brokers do receive compensation in an indirect form. The rendering of legal services in the form of conveyancing is used as a leader to bring lucrative business to the broker. Hence, the fact that no monetary charge is made does not of itself indicate a gratuitous service.<sup>51</sup>

Some courts attempt to draw a distinction between a complex legal

<sup>45</sup> *Id.* at 795.

<sup>46</sup> *State ex rel. Junior Ass'n of the Milwaukee Bar v. Rice*, 236 Wis. 38, 294 N.W. 550 (1940).

<sup>47</sup> *Niske v. Nackman*, 273 Wis. 69, 76 N.W. 2d 591 (1956).

<sup>48</sup> *Hulse v. Criger*, *supra* note 11.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Washington State Bar Ass'n v. Washington Ass'n of Realtors*, *supra* note 28, at 621.

<sup>51</sup> *Hexter Title & Abstract Co. v. Grievance Committee*, 142 Tex. 506, 179 S.W. 2d 946 (1944).

instrument and a simple legal instrument, holding that the execution of the latter does not constitute the practice of law.<sup>52</sup> It is urged that since it requires no special legal aptitude to fill in blank spaces on approved legal forms, this work is merely clerical. The crucial question at this point is whether the public generally views this service as being merely clerical, or whether the public relies on the broker for more than the use of his spelling ability. For the most part, people have few encounters with conveyancing in their lifetime, and they respect the broker as a man who is constantly engaged in real estate transactions. It is easy for the uninitiated to confuse skill in selling real estate with skill in conveying it. Even though the broker says nothing, the parties to the transaction will believe that by filling in the form instrument which *he* has chosen the broker is effectuating their intent and doing what is best for them.<sup>53</sup> This is the epitome of unauthorized law practice, for they are relying on a third party who is unskilled in the law in matters affecting substantial legal rights. By filling in the conveyance, the broker not only lulls the parties into a false sense of security, but affirmatively affects their legal rights. Good faith on the part of the broker is no substitute for legal knowledge. Justice Pound, in repudiating the distinction between simple and complex legal instruments, observed: "The most complex are simple to the skilled, and the simplest often trouble the inexperienced."<sup>54</sup> The distinction is of no avail because simplicity and complexity do not lie in the instrument per se, but in the situation of the parties. A broker does not have the legal education necessary to evaluate properly the legal position of the parties, and the use of a simple instrument does not overcome this deficiency.

It might be well at this point to raise some of the legal considerations of conveyancing which must be kept in mind by a conveyancer in order to protect adequately the overall legal position of the parties. These considerations apply also to the "simple" instruments which brokers maintain they have a right to execute. One of the basic questions which must be answered if an existing mortgage is involved is whether the buyer is assuming the mortgage or taking subject to it. What are the legal obligations of the buyer in each case? Is one method more advantageous to the seller? The case of *Washington State Bar Ass'n v. Washington Ass'n of Realtors*<sup>55</sup> presents a good example of the turmoil which can result if these questions cannot be answered by the conveyancer.

Another aspect of conveyancing is whether title to the property should be held by one person in severalty, or in a joint tenancy, or in a tenancy in common. Many laymen know that the principal difference between a joint tenancy and tenancy in common is that the former has

<sup>52</sup> *People v. Title Guarantee & Trust Co.*, 227 N.Y. 366, 125 N.E. 666 (1919).

<sup>53</sup> 30 U. DET. L.J. 94 (1953).

<sup>54</sup> *Supra* note 52, at 670.

<sup>55</sup> *Supra* note 28.

as an incident the right of survivorship. Can the right of survivorship be defeated by the conveyance of one joint tenant? Will it make any difference if the property is also a homestead? Can the right of survivorship be defeated by will? Is it possible for a gift tax liability to arise immediately by the placing of property in joint tenancy? If the husband pays all of the consideration for the property will he still have to pay state inheritance tax if his wife predeceases him? Under Federal tax law is it possible that the entire joint tenancy will be included in the wife's estate even though the husband paid the entire consideration? What deductions can be taken from joint tenancy property for the purpose of computing state inheritance tax? Is the effective use of the Federal estate tax marital deduction hampered by joint tenancy? These numerous tax considerations must be made known to the parties before they can make a sound decision as to the manner in which the property should be held. In addition to the foregoing, there are also many basic questions concerning dower rights, property description, the proper naming of the parties, and the selection of the correct instrument which require the learning of one skilled in the law for proper solution. These problems cannot be handled as merely "clerical" problems which are solved by a "simple" instrument.

Several courts have stated that public convenience requires that brokers be allowed to fill in form conveyances.<sup>56</sup> There are two elements to be considered in analyzing public convenience, time and attorney fees. In view of the lapse of time between the signing of the contract and closing, it would seem as if there is ample time to obtain the necessary services of an attorney to effectuate the conveyance. Therefore, the time element sinks into insignificance. The question is reduced to whether the public should be burdened with attorney fees when conveying real estate. The question is best answered by another question. Should the public be burdened with attorney fees when seeking representation in court? In both cases legal rights are being substantially affected. It has been pointed out previously that to work effectively our system of jurisprudence demands that people be assured proper legal representation. This basic proposition is not altered by the fact that the folly of the people may dictate otherwise. It must be assumed that when a person asks a broker to do this type of work he is seeking competence, otherwise he would fill in the form himself. The point which is not understood by the layman is that a knowledge of law in fields outside of the immediate area of conveyancing is essential to adequately protect the rights of the parties. To fully convince the public of this proposition it would be necessary to educate them as to the multitudinous legal ramifications which can be involved in a simple conveyance. This is

<sup>56</sup> See *Petitions of Ingham Cty. Bar Ass'n*, *supra* note 3 and *Hulse v. Criger*, *supra* note 11.

impractical. Without this background, the public does not have the guide necessary in determining if a broker can adequately protect their legal rights. The public's freedom of choice in this case is interrupted because the courts realize that the public is being led astray by innocent ignorance. The right of a party to a conveyance to assume the responsibility of drafting a deed is not questioned. It is the intervention of third parties which is the crux of the issue. If a third party is to intervene and affect the legal rights of other people, it is fundamental that this person be an attorney. The courts cannot jeopardize the due administration of justice by allowing the public to ignore this proposition.<sup>57</sup> Whatever inconvenience there may be is overshadowed by the consideration of public welfare.

The fact that it has been the custom of the brokers in an area to execute form conveyances seems to have influenced some courts.<sup>58</sup> Any argument based on custom is, at best, rhetorical, because an illegal act does not become legal by virtue of its continued perpetration. Judicial courage should not wane in the presence of custom.<sup>59</sup>

It appears that the theories advanced by the brokers are not sound when viewed from the standpoint of public interest, and no combination of these theories will produce a sound result. There is, however, another reason for preventing brokers from filling in conveyancing forms.

A broker is employed by the seller and is paid a commission by the seller. However, the instrument he drafts affects the legal rights of both parties. This patently is a conflict of interest situation. The danger to the public arising from the unauthorized practice of law becomes intolerable when the person engaged in such practice is also acting under a conflict of interest. Justice Donworth, in a concurring opinion, made this quite clear: "Obviously, this court cannot permit an unlicensed layman who is entirely unaware of the legal ethics involved to attempt to fix the obligations of both parties *inter se* while being employed and paid by only one of them."<sup>60</sup> The broker's prime interest is to consummate the sale and receive his commission.<sup>61</sup> No attempt is made to disparage the valuable service the real estate broker performs for society. However, the broker, above all, should be the first to realize that he is not in a position of impartiality. To permit him to convey real estate under these circumstances would be unwise.

FRANCIS J. SKIBA

<sup>57</sup> See note 8 *supra*.

<sup>58</sup> *Conway-Bogue v. Denver Bar Ass'n*, *supra* note 2 and *Petitions of Ingham Cty. Bar Ass'n*, *supra* note 3.

<sup>59</sup> Courts have recognized the presence of custom in cases ruling against brokers. See cases cited at note 33 *supra*.

<sup>60</sup> *Washington State Bar Ass'n v. Washington Ass'n of Realtors*, *supra* note 28, at 627.

<sup>61</sup> The court in *Hulse v. Criger*, *supra* note 11, viewed this same pecuniary interest in a different light holding that it was one of the reasons a broker should be able to fill in forms.