Marquette Law Review

Volume 41
Issue 4 *Spring 1958*

Article 9

Conveyancing as Practice of Law Under Sec. 59.513, Wis. Stats.

James G. Doyle

flected by the present method of accounting, and as to when the present method did or did not clearly reflect income. While this issue has not been taken up squarely by any court as yet, there are cases such as the instant case and *Beacon Publishing Co. v. Commissioner*[28] where the court has taken it upon itself to decide when there is or is not distortion of income. As the law stands today, there is a clear split in the Circuits, the instant case being handed down by the U.S. Court of Appeals of the Eighth Circuit and the *Boylston* decision by the U.S. Court of Appeals of the First Circuit. Hence, it is difficult to forecast which rule will ultimately prevail if the Supreme Court undertakes to resolve the conflict. While there are strong policy reasons for the result of the instant case, there would seem to be abundant authority for a contrary ruling.

ALFRED A. HEON

Unauthorized Practice: Conveyancing as Practice of Law Under Sec. 59.513, Wis. Stats.—On May 8, 1957 the Wisconsin Legislature published a statute which requires, as a condition of recordation, that every domestic instrument other than a will or a court decree, which in any way affects the title to or an interest in real property, must incorporate the name of the draftsman.[1]

The legislative purpose in enacting such a statute is subtly towfold. Mr. Phillip Haberman,[2] one of the draftsmen of the bill, has pointed out in a discussion of the bill with the present author, that the bill was intended to facilitate the detection of those who are drafting such instruments in violation of sec. 256.30(2),[3] as well as to enable any examiner of such instruments to contact its draftsman to resolve certain ambiguities. Wisconsin, like all other states, has adopted a system of well-defined licensing requirements for the practice of law.[4] The

---

[28] 218 F.2d 697 (10th Cir. 1955).

[1] WIS. STATS. §59.513 "Including name of person drafting instrument:
(1) No instrument by which the title to real estate of any interest therein or lien thereon, is conveyed, created, encumbered, assigned, or otherwise disposed of, shall be recorded by the register of deeds unless the name of the person who, or governmental agency which, drafted such instrument is printed, typewritten, stamped or written thereon in a legible manner. An instrument complies with this section if it contains a statement in the following form: 'This instrument was drafted by ———— [name] ————.'
(2) This section does not apply to an instrument executed before the effective date of this section, nor to
(a) A decree, order, judgment, or writ of any court
(b) A will or death certificate
(c) An instrument executed or acknowledged outside of this state."

[2] Secretary of Wisconsin Bar Association.

[3] "It is presumed that the bill is aimed at persons drawing documents who have not been admitted to the practice of law in Wisconsin." From a letter signed by the "Sec'ry——Wis. Recorders Ass'n" found in the Official Drafting Record of §59.513.

[4] WIS. STATS. §256.28 (1955).

legislature has also provided a penalty for those who attempt to practice law without being so licensed, and defines the practice of law in the following terms in sec. 256.30(2) of the Wisconsin Statutes:

> "Every person who shall appear as agent, representative or attorney, for or on behalf of any other person, or any firm, copartnership, association or corporation in any action or proceeding in or before any court of record, court commissioner, or judicial tribunal of the United States, or any state, or who shall otherwise, in or out of court for compensation or pecuniary reward give professional legal advice not incidental to his usual or ordinary business, or render any legal service for any other person, or any firm, copartnership, association or corporation, shall be deemed to be practicing law within the meaning of this section."

The phrase, "not incidental to his ordinary business," appearing in sec. 256.30(2), might be thought to qualify the broad inclusions of the other clauses. However, in *State ex rel Junior Association of the Milwaukee Bar. v. Rice*[5] the Court refused to adopt a contention to that effect. The Court gave independent force to the prohibition against rendering "any legal service" stating:

> "In our opinion, the contention is unsound for the reason that a lay person may not engage in a business which involves the rendering of 'legal service' and then claim immunity because the giving of the professional legal advice was incidental to his usual or ordinary business."[6]

The Court went on to say:

> "A number of courts have from time to time, in deciding a given case, attempted to define practice of law, but the general trend of judicial decision is to determine each case of unauthorized practice of law largely upon its own particular facts."[7]

Insofar as the drafting of a conveyance is a process of merely filling in a printed form, the last-cited decision contains additional indications of the law. Citing a Missouri decision,[8] the Court held:

> ". . . that if in effecting a settlement of a claim arising under a policy of casualty insurance an adjuster fills in blank spaces of a printed form *prepared by counsel for the company,* such act does not constitute the practice of law."[9] [Emphasis supplied]

The impact of the emphasized language will be more readily appreciated on a subsequent analysis of sister-state decisions.

It is an elementary principle of law that if an indviidual draft an instrument for his own benefit, his conduct does not constitute the

---

[5] 236 Wis. 38, 294 N.W. 550 (1940).
[6] 236 Wis. 38, at 43, 294 N.W. 550, at 556 (1940).
[7] *Ibid.*
[8] Liberty Mutual Insurance Co. v. Jones, 334 Mo. 932, 130 S.W.2d 945 ( ).
[9] 236 Wis. at 45, 294 N.W. at 558.

unauthorized practice of law,[10] just as one appearing in his own behalf in an actual court proceeding is not unlawfully practicing law.[11]

The basic question to be resolved in determining the efficacy of the new statute is whether the drafting of the instruments specified therein is, de facto, practicing law within the meaning of sec. 256.30(2). This question takes us into what might be termed a "twilight zone" between what constitutes the practice of law and what does not.[12] The decisions of sister states are of limited persuasiveness, because such decisions are substantially tempered, if not totally controlled, by the pertinent—and different—statutes of those states.

Although the decisions of other states are conflicting, an analysis of such decisions would afford an opportunity to determine at least the crucial fact criteria on which these decisions turn—in other words to pick out the posts on which the fence of conflict is constructed. There is an occasional decision which seems to hold unequivocally either that the drafting, or filling-in of blanks in printed forms, of instruments relating to realty by a layman constitutes the unauthorized practice of law;[13] or, that it does not constitute such practice.[14] However the majority of the decisions lie in the area between these polarities.

In a very recent Colorado case,[15] the Denver Bar Association and the Colorado Bar Association brought three separate actions to enjoin a corporation, a realty investment company, and an individual, all licensed real estate brokers, from preparing certain legal documents, and from giving advice to the parties to such documents as to the legal effect thereof, all of which, the plaintiffs alleged, constituted the unlawful practice of law. The issues in each case were substantially the same. The same alleged objectionable acts were performed by each of the defendants. The court affirmatively answers the question:

> "Does the preparation of receipts and options, deeds, promissory notes, deeds of trust, mortgages, releases of encumbrances, leases, notice terminating tenancies, demands to pay rent or vacate by completing standard and approved forms, coupled

---

[10] People v. Alfani, 227 N.Y.334, at 337, 125 N.E. 671, at 674 (1919): "Thus a man may plead his own case in court, or draft his own will or legal papers."

[11] Osborne v. Bank of United States, 9 Wheat. 738, 6 L.Ed. 204 ( ); Funded Debt Commrs. v. Younger, 29 Cal. 1447, 87 Am. Dec. 164 ( ); Hench v. Todhunter, 7 Harr. & J. (Md.) 275, 16 Am. Dec. 300 ( ); Abernathy v. Burns, 206 N.C. 370, 173 S.E. 899 ( ).

[12] People ex rel Atty. Gen. v. Jersin, 101 Colo. 406, 74 P.2d 688 (1937).

[13] Keyes Co. v. Dade County Bar Assoc., 46 So.2d 605 (1950).

[14] La Brum v. Commonwealth Title Co., 358 Pa. 239, 56 A.2d 246 (1948). In this case conveyancing looked on as a field unto itself, free and distinct from law. "He [the conveyancer] does not hold himself out as a lawyer engaged in practicing law."

[15] The Conway-Bogue Realty Investment Co. v. The Denver Bar Association; Van Schaak & Company v. The Denver Bar Association; and John F. Bruno v. The Denver Bar Association, ——— Colo. ———, 312 P.2d 998 (1957).

with the giving of explanation or advice as to the legal effect thereof, constitute the practice of law?"[16]

Although finding this conduct to constitute the practice of law, the court held that this was not an unauthorized practice for, as the court said:

"We feel that the weight of authority and especially the more recent decisions, sanctions our holding that the acts of which complaint is made, done without separate charge therefor by licensed real estate brokers only in connection with their established business, and in behalf of their customers and in connection with a bona fide real estate transaction which they are handling as brokers, should not be enjoined."[17]

On the same day, the Colorado Supreme Court, in actions brought by the same plaintiffs, sustained the position of the lower court in granting injunctions against the defendants, an abstract company and a title insurance company, restraining them from selling a real estate "closing service"; but, in light of their earlier holding of that day, struck a provisionary ruling of the trial court which prohibited the Title Guarantee Company from preparing documents pertaining to real estate loans, which it was certain it was going to grant.[18] With respect to the "closing service," which consisted of affording space and accommodations for closing conferences, including preparation of deeds, promissory notes, deeds and mortgages, releases of trust deeds and mortgages, preparation of settlement sheets, and distribution of the money and the documents, the court held:

"It is apparent that preparation of the documents in question where title insurance is not applied for or written has nothing whatsoever to do with defendant's business of abstracting and insuring titles to real estate. Preparation of these documents constitutes the practice of law and a power not granted to the defendants expressly or by implication under the corporation laws of this state. Preparation of these documents is not necessary to defendants' abstract or title insurance business, it is a separate, distinct and other business, much of which constitutes the practice of law."[19]

In *Cain v. Merchants National Bank & Trust Co. of Fargo*,[20] the plaintiffs attempted to enjoin defendant from preparing for others chattel mortgages, bills of sale, crop contracts, deeds, real estate mortgages, extensions, and assignments of rents. In denying the injunction the court said:

"A careful study of the many decisions of the courts relative to

---

[16] 312 P.2d at 1004.
[17] *Id.* at 1007.
[18] Title Guaranty Company v. Denver Bar Association, ——— Colo. ———, 312 P.2d 1011 (1957).
[19] *Id.* at 1015.
[20] 66 N.D. 746, 268 N.W. 719 (1936).

> what constitutes practicing law, when applied to the facts in this case, leads us to the conclusion that a person who is not a member of the bar may draw instruments such as simple deeds, mortgages, promissory notes, and bills of sale when these instruments are incident to transactions in which such person is interested, provided no charge is made therefore."[21]

In *Ingham County Bar Association v. Walter Neller Company et al.*,[22] a Michigan decision, the issue with which the court was confronted was:

> "Have the respondents (realtors) practiced law or engaged in the law business contrray to MSA 27.81 by reason of their having completed and filled out printed forms of offers to purchase real estate, warranty deeds, quit claim deeds, land contracts, land contract assignments, leases, and notices to terminate tenancy *incidental* to their handling and consumation of real estate transactions *in which respondents were acting as real estate brokers,* no separate charge having been made therefor?"[23]

The court concluded:

> "There cannot be any objection to a licensed broker doing such work without compensation when it is incidental to his business."[24]

An analysis of the foregoing decisions suggests three main fact criteria:

(1) Whether the work was a mere incident to the business of the one preparing the instrument?

(2) Whether compensation was paid for the work?

(3) Whether the work consisted of the mere filling-in of blanks of a printed form or the compiling of the whole instrument?

While these are the controlling questions, there is no unanimity of interpretation as to their weight and effect, notwithstanding the similarity of circumstances involved. The majority of decisions, however, seem to have adopted the view that if the drafting consists of merely filling-in blanks, and is done incidentally to the business of the drafter, and is not done for compensation, that such drafting does not constitute the unauthorized practice of law.[25] The acquittal on a charge of unau-

---

[21] *Id.* at 723.
[22] 343 Mich. 214, 69 N.W.2d 713 (1955).
[23] *Id.* at 715.
[24] *Id.* at 721.
[25] See cases cited notes 15, 18, 20, 22 *supra,* also People v. Title Guarantee & Trust Co., 227 N.Y. 366, 125 N.E. 666 (1919); Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940) (As ancillary to the closing of a real estate transaction a broker may draw the ordinary instruments of conveyance); Gustafson v. V. C. Taylor & Sons, Inc., 138 Ohio St. 392, 35 N.E.2d 435 (1941) (Filling-in blanks in "offer or purchase" forms by a real estate broker through its officers was not enjoined; the forms prepared by an attorney); *c.f.* Childs v. Smetzer, 312 Pa. 9, 171 Atl. 883 (1934) (Defendant, a notary public and stenographer, who advertised herself as conveyancer; her practice was enjoined).

thorized practice hence requires that the person charged satisfy all three of the basic tests above suggested. But when one of these basic facts is changed, the decisions vary accordingly until a point of irreconcilable conflict is reached.[26]

Since the Wisconsin Supreme Court has never been called upon to answer the basic question, and since the cases in point are in conflict, no definite conclusion can be reached as to the status in Wisconsin of real estate brokers or salesmen, officers of banks, lending institutions etc. who draft such instruments.

What then is the efficacy of the new sec. 59.513? Warren H. Resch, the other co-draftsman of the bill, writing in the "Unauthorized Practice News," has perhaps given as good an answer as can be found.

> "The editor of this publication [Mr. Resch] can state that in the very short time which has elapsed since the enactment of the above statute, he has, in his capacity as an Assistant Attorney General for Wisconsin, received many inquiries from banks, trust companies, savings and loan associations, other institutions, and individuals as to the scope of the statute, and it is quite apparent that many persons who have been drafting instruments for recording with little thought of their legal right to do so, are now becoming quite apprehensive about the effect of this statute although on its face it prohibits no one from drafting instruments."[27]

JAMES G. DOYLE

---

[26] Compare In re Matthews, 58 Idaho 772, at 780, 79 P.2d 535, at 539 (1938): "It would be an anomaly to hold that every individual, abstracter, realtor, banker, title insurance company, etc., who fills out a blank deed, mortgage, bill of sale, contract, or such instrument and receives compensation therefor is engaged in the practice of law..." and Hulse v. Criger, 363 Mo. 26. 247 S.W. 2d 855 (1952) in which the defendant realtor executed conveyancing forms in connection with transactions in which he was the broker, making a separate charge therefore. The court proscribed the charge therefor, but not the practice of executing the forms.

[27] XXIII UNAUTHORIZED PRACTICE NEWS 44 (June 1957).