

## The Practice of Law by Non-lawyers

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## THE PRACTICE OF LAW BY NON-LAWYERS

By Ambulance Chasers and Claim Adjusters\*

By CHARLES L. AARONS\*\*

IT WILL, no doubt, be generally recognized that the evils arising from the soliciting and settlement of personal injury claims, are to be regarded primarily from other viewpoints rather than the one involved in the title, for such solicitation is not law practice but is abhorrent to every right thinking lawyer. Effective attacks upon these evils can and should be made by the application of remedies other than the one which would bring certain of the activities which are incidental to the solicitor's work within the scope of law practice. Nevertheless consideration of the processes used by ambulance chasers and claim adjusters, insofar as they encroach upon the province of the legal profession by engaging in the practice of law, is highly important to a profession which is constantly striving to uphold its standards.

Those who are not conversant with the details disclosed by the inquiry<sup>1</sup> conducted by the Circuit Court of Milwaukee County may not fully realize the dominant influence which ambulance chasing organizations wielded in connection with claims for personal injuries. They occupied a commanding place in a field in which lawyers were, with few exceptions, the subordinates. In former years, where the practice of accepting solicited business existed, the lawyer was considered essential and still occupied first place in the mind of the client. The solicitor merely brought the client to the lawyer's office and was satisfied to be the means of bringing a case to the lawyer whereby he, the solicitor, would receive some compensation for his efforts. But ambulance-chasing in its modern form has assumed larger proportions. It has become a distinct busi-

\* This article is a revision of an address delivered by the writer on June 21, 1928, at Madison, Wisconsin, before the Wisconsin State Bar Association.

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<sup>1</sup> *In re Petition of Churchill, et al.* (Inquiry begun April 11, 1927.)

ness. The modern solicitor conducts an organization with tipsters and assistants in various parts of the city and state. These assistants are selected because of their nationality, their ability to speak the native language of the people in their section, and their influence. The solicitor has a clientele which trusts him and spreads his reputation because of his past success. Since he is regarded as a man having special knowledge and experience in handling claims people come to him as they formerly came to a lawyer. It is a mistake to suppose that every claim is directly sought out by going to the home of the injured person. In many cases the injured person or his friends seek out the well-known solicitor. He or his assistant takes the statement with an eye to the legal effect of the facts disclosed. Advice as to whether the case is one of liability and various other forms of advice, are freely offered with the confident air of one who possesses seasoned experience. The solicitor frequently assures the client that he possesses every facility for handling and settling the claim without a lawsuit. Instead of being a mere conveyor of business to a lawyer he performs the work himself and employs the lawyer only as a last resort.

In the Milwaukee proceeding there was testimony to the effect that about 90 per cent of the claims secured by solicitation were settled without a trial; that 50 to 60 per cent of such claims were settled without the commencement of an action; that included in the 10 per cent of cases which went to trial were formal settlements, approved in court, of the claims of minors. It is natural to infer that when settlements were made by the "chasers" with the claim adjuster all questions concerning the fairness of the settlement, in view of the legal rights of the injured, were referred to, and determined by, the "chaser." In quite a number of instances it was disclosed that the injured person regarded the layman solicitor as "the lawyer in the case," and so referred to him, although it did not appear that the solicitor had in any affirmative way represented himself as a lawyer.

On the other hand situations were presented wherein it appeared that claim adjusters for prospective defendants informed injured parties concerning their rights in such a manner as to have them believe that their cases lacked legal merit and that they had no cause of action.

Wherever there is present a fiduciary relationship which, because of the existing circumstances, is naturally regarded by the injured person as that of attorney and client, there is a subtle encroachment upon the functions involved in the term "the practice of law."

There has been some disagreement (in the absence of a statutory definition) as to what specific acts come within the fair scope of the term "the practice of law" under modern conditions. But in addition to the prosecution and defense of causes in the courts, it is generally

agreed that rendering advice to a client as to his legal rights and duties is clearly within the peculiar province of the legal profession.<sup>2</sup>

At the time of the filing of the first report of the Circuit Court, in the inquiry above referred to,<sup>3</sup> on May 24, 1927, certain legislative recommendations were made. Among them was: "(5)—A law to broaden and strengthen the present statute prohibiting the practice of law without a license." The Wisconsin Statute at the time was Sec. 256.30, which makes it an offense for any person to *practice as an attorney in any court of record*.

The next section, 256.31, provides that "No person shall in any manner hold himself out as an attorney," etc., or represent himself as authorized to practice law, unless licensed. It provides that the use of the words "attorney at law, lawyer," etc. or equivalent words, by any person in connection with his own name, or any sign, advertisement, card, etc., the evident purpose of which is to induce others to believe such person to be regularly licensed to practice law in the courts, is a holding out within the meaning of the section.

The 1927 legislature made no change in Sec. 256.30, which refers to practice "in a court of record" but added a sentence to Sec. 256.31 as follows: "Every person whose business it is *for fee or reward* to prosecute or defend causes *in any court of record* . . . or give advice in relation to causes or matters *therein pending*, shall be deemed to be holding himself out as an attorney within the meaning of this section."

Section 346.49 was also amended to the effect that any one falsely assuming or pretending to be (among other officers named) an attorney at law, and "shall take upon himself to act as such, . . . whereby another is injured or defrauded, . . . shall be punished," etc.

Though not strictly pertinent to the subject, it may be observed in this connection that common barratry at common law is "the offense of frequently exciting and stirring up *quarrels* and suits, either at law or otherwise."<sup>4</sup> But by Ch. 400, Laws of 1927, common barratry was defined as "the practice of soliciting, maintaining, or exciting *judicial proceedings or other actions* at law or equity."<sup>5</sup>

Chapter 457 of the Laws of 1927 (256.29) declares it ground for disbarment *for an attorney* "to stir up strife and litigation; or to hunt up causes of action and inform thereof, in order to be employed to bring suit, or to breed litigation by seeking out those having claims for per-

<sup>2</sup> 31 Harvard Law Rev. p. 887. *Re Duncan* (So. Car.) 24 L.R.A. n.s. 750, 753. *In re Bailey*, 50 Mont. 365, 146 Pac. 1101, Ann. Cas. 1917B, 1198 and note; 2 R.C.L. p. 938.

<sup>3</sup> *In re Petition of Churchill*, *supra*.

<sup>4</sup> 7 C.J. "Barratry" Sec. 1 p. 925; 4 *Bla. Com.* 134.

<sup>5</sup> Sec. 348.325 Wis. Statutes.

sonal injuries, etc., or to employ agents and runners." A contract of employment made in violation of this section is void *as to the attorney*. This statute does not apply *to the agents or runners* themselves. The 1927 barratry statute does not apply to the stirring up of *claims* (not in suit) by a layman, the word "quarrels" in the common law definition having been eliminated. The statute relating to the unlicensed practice of law does not apply to one who practices law *other than in a court of record*. The statute defining what constitutes a "holding out" as an attorney at law fails to include many acts which clearly constitute the practice of law; and the newly inserted provision concerning the *giving of advice* applies only to *causes of action pending in any court of record*.

So that if one, not an attorney, habitually stirs up strife or quarrels or claims, without actually exciting a judicial proceeding or action, he would not violate the present statute defining common barratry, unless his pretenses constituted a mere subterfuge, and his real purpose was to solicit a judicial proceeding or action; nor would he violate the statute which forbids stirring up strife, or the solicitation of personal injury claims (which applies only to lawyers.) If he practiced as an attorney, but not in a court of record, and did not hold himself out as an attorney, although he performed acts which actually constitute the practice of law, such as the giving of legal advice, but did not do so in relation to causes or matters pending in a court of record, he would not be violating the statute of this state forbidding unlicensed practice<sup>6</sup>; nor would he be violating the "holding out" statute<sup>7</sup> even as amended by Ch. 458, Laws of 1927. It will be seen that that amendment, in a measure, narrows rather than broadens the statute as to what constitutes a "holding out" as an attorney.

Even the new statute of Wisconsin<sup>8</sup> prohibiting fee splitting, applies only to fees for professional services *in an action or special proceeding*.

A large portion of the professional work of the modern lawyer is rendered within the confines of his law office. The Wisconsin statute, seemingly ignoring the changed conditions which the lawyer of today must face, still clings substantially to the ancient function of the advocate arguing the cause of his client before a court of justice.<sup>9</sup>

As contrasting with the Wisconsin statutes it is interesting to compare a few of the laws of other states which I have had opportunity to examine.

<sup>6</sup> Sec. 256.30 Wis. Statutes.

<sup>7</sup> Sec. 256-31 Wis. Statutes.

<sup>8</sup> Chap. 459, Laws of 1927, Sec. 256.45.

<sup>9</sup> 31 Harvard Law Rev. p. 887.

The Missouri statute is very broad. Among other things its prohibition against fee-splitting is much more comprehensive than ours. It defines the terms "practice of law" and "law business" and prohibits engaging in either without a license. Included in the definition of "law business" is the advising, for a valuable consideration, of any person as to any secular law, or the drawing of any instrument affecting secular rights, or the doing of any act tending to secure for any person any property or rights.<sup>10</sup>

The Oregon statute embodies in effect the statement concerning the "practice of law" which is contained in the opinion of Mr. Justice Clifford in the case of *National Savings Bank v. Ward*, 100 U.S., \*195, \*199, \*200, which is: "Persons acting professionally in legal formalities, negotiations or proceedings by the warrant or authority of their clients may be regarded as attorneys-at-law within the meaning of that designation as used in this country." The Court adds: "And all such, when they undertake to conduct legal controversies or transactions, profess themselves to be reasonably well acquainted with the law and the rules and practice of the courts, and they are bound to exercise a reasonable degree of care, prudence, diligence, and skill. Authorities everywhere support that proposition," etc.

The Michigan statute prohibits the practice of law or engaging in the law business without a license without defining the terms. It does not limit the prohibition to courts of record.<sup>11</sup>

The Mississippi statute likewise prohibits the practice of law without a license although it contains some weaknesses similar to the Wisconsin statute.<sup>12</sup>

In his recent book upon *Legal Ethics* Henry W. Jessup gives a concise and comprehensive definition which was approvingly quoted by the Committee on Canons of Ethics in its report of the American Bar Association at Buffalo in 1927. The consideration of the report was deferred until the 1928 meeting. That definition reads:

The practice of law is any service involving legal knowledge, whether of representation, counsel, or advocacy, in or out of court, rendered in respect of the rights, duties, obligations, liabilities, or business relations of the one requesting the service.

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<sup>10</sup> Laws Mo. 1915, p. 99-101, S.B. 275.

<sup>11</sup> Mich. Judicature Act, 12066, Sec. 61.

<sup>12</sup> Code of 1917, Sec. 207.

NOTE: On the general subject interesting statutes, much broader than the Wisconsin law, and particularly with reference to the practice of law by corporations, will be found in the New York Penal Code, Sections 270, 277, 280; Mass. Statutes, Ch. 221, Secs. 41, 46 and 47.

This definition does not appear to have been acted upon in the 1928 meeting.

Just where the line should be drawn in setting forth the acts or services which constitute the practice of law may be quite difficult to determine.

It was the view of the circuit judges who signed the report of May 28, 1928, filed in the Milwaukee special proceeding, that the Wisconsin statute ought to be broadened "so as to include professional legal services customarily or regularly rendered *even though there be no action pending*."<sup>13</sup>

By way of amplification I would add my personal view, in order to meet fair objections to the perhaps too comprehensive Jessup definition, if proposed as a statutory enactment, that there should be no limitation to the effect that the services must be performed for fee or reward, but that the limitation should apply only to the performance of professional services as a regular occupation and not in isolated instances. There are many encroachments in the field of the practice of law where no fee is charged for the legal advice offered or for the drafting of papers. The absence of a fee charge has been held not to remove the act from the field of law practice.<sup>14</sup> Possibly there should also be some exceptions such as the work of title-guaranty companies.<sup>15</sup>

The rather startling inadequacy of our present narrow statute obviously calls for some action.

It is believed, therefore, that the profession and the public generally, will be interested in the following suggested amendments of our statutes:

That the language of Section 256.30 providing: "Any person who shall practice as an attorney in any court of record without having first obtained a license" etc., and providing a penalty, be amended so as to read: "Any person who shall engage in the practice of law without having first obtained a license" etc.

That Section 256.31 (the "holding out" statute above referred to) be amended in one of the following forms:

(1) So as to read (in the parts material to this discussion), ". . . Every person whose business it is, for fee or reward or otherwise, to prosecute or defend causes in any court of record or other judicial tribunal of the United States or of any of the states, or customarily and as a part of his business, to render service involving legal

<sup>13</sup> Page 145 of Report of May 28, 1928.

<sup>14</sup> *People v. Peoples Trust Co.* 167 N.Y.S. 767.

<sup>15</sup> See Ch. 221, Sec. 47 of the Mass. statute, and Sec. 280 of the New York Penal Code.

knowledge, whether of representation, counsel, or advocacy, in or out of court, whether for compensation or otherwise, in respect to the rights, duties, obligations, liabilities, or business or domestic relations of the one requesting the service, or to whom it is rendered, shall be deemed to be holding himself out as an attorney, counselor, or lawyer, within the meaning of this section, . . . .”

Or (2), by amending the 1927 amendment (quoted above, in part) which limits the “holding out,” in the cases specified, to one who prosecutes or defends causes *in any court of record*, etc., so as to read: “. . . . Every person whose business it is, whether for fee or reward or otherwise, to prosecute or defend causes in any court of record or other judicial tribunal of the United States or of any of the states, or to give legal advice or render professional legal services, whether in relation to causes or matters therein pending, or otherwise, shall be deemed to be holding himself out as an attorney, counselor or lawyer within the meaning of this section. . . .”

These proposals are, of course, tentative, and are made in the above form so as to create as little disturbance as possible of the theory underlying the two sections.

As between the first and second alternative proposals of amendment of Section 256.31, I am inclined to favor the second alternative proposal. The first proposal is based on the Jessup definition (quoted above) with some modifications. The second is briefer than the first, is quite general in scope, and covers broadly the rendering of “professional legal services,” the meaning of which I think can be safely left to the courts.<sup>16</sup>

The second proposal makes the fewest changes in the present statute. The words “whose business it is” in the second proposal, which words are also contained in the present statute, will, I believe, exclude the isolated cases of the occasional drafting of a will or deed by a non-lawyer, or the giving of legal advice in emergencies by laymen. The second proposal includes the elements which the 1927 amendment omitted.

In dealing with lawyers—members of its bar—the court either possesses, or may invoke, certain summary powers to remedy and to discipline.<sup>17</sup> For it is thus acting to protect its own household and to discipline its own officers. It cannot proceed summarily against others. “The Court has no disciplinary supervision of business enterprises.”<sup>18</sup>

But we find laymen who are engaged in some of the important func-

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<sup>16</sup> See *National Savings Bank v. Ward*, 100 U.S. \*195 et seq.

<sup>17</sup> 2 R.C.L. p. 1026.

<sup>18</sup> *Re Gray*, 172 N.Y.S. 648.

tions of the lawyer. In giving legal advice to those towards whom they occupy a fiduciary relation they are engaged in the practice of law, as that term is generally understood in the absence of statutory limitations. Notwithstanding the assumption of such a function they are not bound by the statutory oath of an attorney, and they regard themselves as free from the ethical obligations of a lawyer. They venture into the domains of an office which is "quasi-judicial."<sup>19</sup> But they nevertheless regard their dealing with human rights as but a "game." As stated in one of the reports of the Milwaukee judges: "If the Canons of Ethics are to be applicable to those practicing law we must have a clear and comprehensive definition of what constitutes such practice, otherwise we will have a hybrid class which cannot be subjected to legal control or discipline. Where it is evident that one has assumed the prerogative of a lawyer, he should be subject to the responsibilities of the profession."

Speaking of the various encroachments on the practice of the law, Mr. Julius Henry Cohen, the chairman of the Committee on Unlawful Practice of the Law of the New York County Lawyers' Association, said at the Buffalo meeting of the American Bar Association:

Either we ought to repeal the Canons of Ethics entirely, or else we ought to insist that in the field of the practice of law lay agencies shall stop. . . . I detect in movements hereabout an effort to break down the constructive work that has been done for twenty or twenty-five years by this association in the field of professional conduct, and if we do not set our teeth firmly against this effort of laymen throughout the country to commercialize what is the practice of the law, we shall find that we have handicapped ourselves by our own standards.<sup>20</sup>

"The right to act as an attorney is a privilege of a personal nature, not open to all, but limited to persons of good moral character, possessing special qualifications ascertained and certified after a long course of study, both general and special."<sup>21</sup>

There should be none who exercise that privilege who have not been shown to possess the necessary qualifications; who are not subject to the oath which every attorney is bound by; and who are not amenable to the disciplinary power of the court. Many qualified men and women in the legal profession are struggling to maintain themselves, their self-respect, and the honor of their high calling. Not only in justice to them, but in justice to the people of the state whose welfare demands the very highest standard of conduct on the part of lawyers, these con-

<sup>19</sup> *Langen v. Borkowski*, 188 Wis. 277, 301; *Hepp v. Petrie*, 185 Wis. 350, 361; *Ellis v. Frawley*, 165 Wis. 381.

<sup>20</sup> 1927 Report of A.B.A., pp. 107-108.

<sup>21</sup> *In re Morse* (Vt.) 36 A.L.R. 527; 2 R.C.L. p. 940.

scientious practitioners should not be subjected to the temptations, nor be obliged to meet the improper competitive operations which emerge from points of vantage just beyond the lines of the legal profession or its Canons of Ethics.

The situation, as disclosed in the Milwaukee inquiry, called not only for remedies respecting lawyers who were blind to the standards of their profession. It called not only for remedies affecting actions and proceedings pending in courts of record. It clearly demanded that those who rendered services of a distinctly legal character, whether in or out of court, whether an action be pending or not, be alike subject to such supervision and regulation as will make the practice of law an honorable service of man "by diligent study and true counsel of the municipal law," and an "aid in solving the questions and guiding the business of society, according to the law."<sup>22</sup>

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<sup>22</sup> Quotation is from address by Chief Justice Ryan.