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ATTORNEY AND CLIENT - DRAFTING LEGAL INSTRUMENTS AS PRACTICE OF LAW

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ATTORNEY AND CLIENT — DRAFTING LEGAL INSTRUMENTS AS PRACTICE OF LAW¹— In citation of defendant for contempt for unlicensed practice of law, *held*, that the preparing of a note and chattel mortgage and advising as to the legal effect thereof constitutes practice of law. “. . . [The practice of law] includes . . . drawing of wills, deeds, mortgages and other instruments of like character, where a legal knowledge is required, and where counsel and advice are given with respect to the validity and legal effect of such instruments. . . .”² *State v. Barlow*, (Neb. 1936) 268 N. W. 95.

A lay draftsman who merely records the dictation of another, without advising in any way, is clearly not guilty of unauthorized practice of law.³

¹ Most of the statutes on this subject are couched in such general language that the courts have had a free hand in determining what constitutes “practice of law.” The Missouri statute is one of the few containing a specific enumeration of the prohibited acts. See *State v. St. Louis Union Trust Co.*, 335 Mo. 845, 74 S. W. (2d) 348 (1934), construing Mo. Stat. (1929), §§ 11692, 11693. See Hicks and Katz, “The Practice of Law by Laymen and Lay Agencies,” 41 YALE L. J. 69 at 73, note 12 (1931), for a summary of the legislation on the subject.

In general, as to what constitutes practice of law, see HICKS and KATZ, UNAUTHORIZED PRACTICE OF LAW (1934); 73 A. L. R. 1331 (1931); 84 A. L. R. 749 (1933); 105 A. L. R. 1366 (1936).

² *State v. Barlow*, (Neb. 1936) 268 N. W. 95 at 96.

³ *State v. Barlow*, (Neb. 1936) 268 N. W. 95; *People v. Title Guarantee & Trust Co.*, 227 N. Y. 366, 125 N. E. 666 (1919) (corporate amanuensis); *Childs v. Smeltzer*, 315 Pa. 9, 171 A. 883 (1934). Occasionally the decree in an injunction suit appears sufficiently broad to include even this type of drafting. But in such cases it invariably appears that the defendant rendered legal advice in connection with the drafting, and presumably the decree should be interpreted in the light of the facts of the case. See, for example, *Paul v. Stanley*, 168 Wash. 371, 12 P. (2d) 401 (1933); *Abstract & Tr. Co. v. Dworken*, 129 Ohio St. 23, 193 N. E. 650 (1934).

Moreover, despite frequent and unqualified repetition of the definition of the principal case,⁴ the courts have unanimously modified the proposition that lay drafting is not permissible where "legal knowledge is required" and "counsel and advice given"⁵ in the following important respects: (1) A single, isolated instance of drafting will in no event create liability.⁶ The very term "practice" of law connotes a substantial degree of continuity. (2) The immediate parties to a transaction may prepare the necessary documents and mutually advise as to their legal effect.⁷ (3) The same privilege has been accorded the intermediaries of the parties,⁸ such as real estate brokers,⁹ and insurance agents,¹⁰ in deference to what is considered ineradicable business usage. However, a quite different situation is presented when the parties rely on the advice or judgment of a lay draftsman not their intermediary. Recently, lay agencies, particularly corporations such as banks, trust companies, and title companies, have been rendering such advice as a regular independent "service" to their cus-

⁴ See, for example, *In re Opinion of the Justices*, 289 Mass. 607, 194 N. E. 313 (1935); *People v. People's Stock Yards Bank*, 344 Ill. 462, 176 N. E. 901 (1931). The Georgia court has propounded a much more extensive definition: "the practice of law . . . [includes] the preparation of all legal instruments whereby a legal right is secured. . . ." *Boykin v. Hopkins*, 174 Ga. 511 at 519, 162 S. E. 796 (1932). It seems unlikely, however, that the court will apply this definition literally.

⁵ It should be noted that rendering legal advice may in itself constitute practice of law. See, for example, *State v. Barlow*, (Neb. 1936) 268 N. W. 95 at 97. The present note is confined to a consideration of the narrower question arising where the only advice given pertains to the appropriate method of integrating the parties' negotiations, or to the legal effect of the instruments prepared.

⁶ See *In re Umble's Estate*, 117 Pa. Super. 15, 177 A. 340 (1935); *People v. Weil*, 237 App. Div. 118, 260 N. Y. S. 658 (1932); *In re Opinion of the Justices*, 289 Mass. 607, 194 N. E. 313 (1935); *Childs v. Smeltzer*, 315 Pa. 9, 171 A. 883 (1934). The writer has discovered no case holding the defendant liable for unauthorized practice in which the element of habitualness, though perhaps not emphasized by the court, did not appear as a fact, except possibly the principal case, which is not clear on the point.

⁷ The only decision on this point seems to be *Copeland v. Dobbs*, 221 Ala. 489, 129 So. 88 (1930). But the proposition seems implicit in the numerous holdings to the effect that it is not objectionable for a layman to draft instruments at the parties' sole dictation. See note 3, *supra*.

It is not clear whether the parties are exempted on the ground that they are not practicing law, or by virtue of state constitutional provisions which in terms merely grant them the privilege of conducting their own litigation. The Alabama court in *Copeland v. Dobbs*, *supra*, seems to rely on section 10 of the Alabama constitution which provides "That no person shall be barred from prosecuting or defending before any tribunal in this state by himself or counsel, any civil cause to which he is a party." But it is arguable that the court is referring to the constitutional provision merely by way of analogy.

⁸ *State v. Barlow*, (Neb. 1936) 268 N. W. 95; *Childs v. Smeltzer*, 315 Pa. 9, 171 A. 883 (1934). And see opinion of Hiscock, C. J., in *People v. Title Guarantee & Trust Co.*, 227 N. Y. 366, 125 N. E. 666 (1919).

⁹ *Childs v. Smeltzer*, 315 Pa. 9, 171 A. 883 (1934); *People v. Title Guarantee & Trust Co.*, 227 N. Y. 366, 125 N. E. 666 (1919).

¹⁰ *State v. Barlow*, (Neb. 1936) 268 N. W. 95.

tomers.¹¹ This now widespread development has not received the wholehearted endorsement of the bench for several reasons. First, it is argued that laymen lack the knowledge and training necessary to properly supervise the preparation of legal instruments, and their inept efforts multiply litigation and often defeat the parties' purpose entirely.¹² Secondly, it is pointed out that withdrawing advisory drafting from the domain of practice of law precludes the exercise of the court's summary jurisdiction over corrupt and unethical practices, a powerful instrument of public protection when available.¹³ Finally, it has been urged that a contrary view might deprive the average lawyer of an important source of income with disastrous effects on his morale and, consequently, on the ethical standards of the legal profession as a whole.¹⁴ Despite the force of these considerations, courts have been moved to make some practical concessions to the public preference for the certainty of fees and the supposed integrity of corporate lay agencies.¹⁵ There is considerable disagreement, however, as to where the compromise line should be drawn. (1) Some courts permit supervisory preparation of only those instruments which are "incidental" to some other transaction to which the lay draftsman is a party.¹⁶ Thus, it has been held that the corporate guarantor of a mortgage may draft the instruments renewing the mortgage.¹⁷ Also, a title insurance company has been permitted to draft the instruments, such as contract of sale, deed and mortgage, necessary to "put the title in an insurable condition."¹⁸ (2) Other courts permit drafting of "simple" but not "complex" instruments, irrespective, however, of whether the transaction is "incidental" to another to which the lay draftsman is a party.¹⁹

¹¹ Indeed, an abortive attempt has been made to organize a corporation for the sole purpose of rendering legal services of every character. See *Boykin v. Hopkins*, 174 Ga. 511, 162 S. E. 796 (1932).

¹² See *In re Opinion of the Justices*, 289 Mass. 607, 194 N. E. 313 (1935). The case of *In re Flynn's Estate*, 142 Misc. 7, 253 N. Y. S. 638 (1931), represents a "horrible example" of the consequences of inept lay drafting.

¹³ See *People v. Alfani*, 227 N. Y. 334 at 339, 340, 125 N. E. 671 (1919); *People v. Title Guarantee & Trust Co.*, 227 N. Y. 366 at 372, 125 N. E. 666 (1919). See also, Gleason, "Unauthorized Practice of Law," 21 A. B. A. J. 243 (1935).

¹⁴ *Hicks and Katz*, "The Practice of Law by Laymen and Lay Agencies," 41 *YALE L. J.* 69 (1931).

¹⁵ That these are the factors responsible for the resort to lay agencies is asserted by Shinn, "How to Deal with the Unlawful Practice of Law," 17 A. B. A. J. 98 (1931).

¹⁶ *Childs v. Smeltzer*, 315 Pa. 9, 171 A. 883 (1934); *In re Umble's Estate*, 117 Pa. Super. 15, 177 A. 340 (1935). This view is also approved in *Ashley*, "Unauthorized Practice of Law," 16 A. B. A. J. 558 (1930).

¹⁷ *Wollitzer v. Nat. Title Guaranty Co.*, 148 Misc. 529, 266 N. Y. S. 184 (1933).

¹⁸ *People v. Title Guaranty & Trust Co.*, 191 App. Div. 165, 181 N. Y. S. 52 (1920), affirmed without opinion in 230 N. Y. 578, 130 N. E. 900 (1920).

¹⁹ *In re Eastern Idaho Loan & Trust Co.*, 49 Idaho 280, 288 P. 157 (1930). See also, *People v. Denver Clearing House Banks*, (Colo. 1936) 59 P. (2d) 468. But see opinion of Pound, J., concurring in *People v. Title Guarantee & Trust Co.*, 227 N. Y. 366 at 379, 125 N. E. 666 (1919): "I am unable to rest any satisfactory test

The "simple" instruments are those which are relatively standardized, such as notes, chattel mortgages, and warranty deeds; per contra, the "complex" instruments are those least susceptible to formalization, such as wills, and trust deeds.²⁰ Drafting the former, it is believed, may be entrusted to laymen without serious, untoward consequences; the latter require the application of a lawyer's specialized training. (3) The North Dakota court has said that "simple" instruments alone may be prepared, and *only if* "incidental."²¹ (4) The Washington court has proscribed supervisory drafting by laymen altogether.²² No doubt these indirect efforts of the courts to protect the public and ameliorate the economic position of the average lawyer by application of penal statutes,²³ and use of contempt²⁴ and injunctive process²⁵ against what each considers the most pernicious aspects of lay drafting have had an appreciable effect. However, a permanent and substantial improvement of the situation can hardly be expected without the elimination of the basic reasons for its existence, namely the indeterminate character of the average attorney's fees, and public distrust of the legal profession.

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on the distinction between simple and complex instruments. The most complex are simple to the skilled and the simplest often trouble the inexperienced."

²⁰ In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 P. 157 (1930).

²¹ Cain v. Merchants' Nat. Bank & Trust Co. of Fargo, (N. D. 1936) 268 N. W. 719 (dictum).

²² Paul v. Stanley, 168 Wash. 371, 12 P. (2d) 401 (1933).

²³ As in Atlanta Title & Trust Co. v. Boykin, 172 Ga. 437, 157 S. E. 455 (1931); People v. Alfani, 227 N. Y. 334, 125 N. E. 671 (1919); People v. Title Guarantee & Trust Co., 227 N. Y. 366, 125 N. E. 666 (1919).

²⁴ As in State v. Barlow, (Neb. 1936) 268 N. W. 95; Rhode Island Bar Assn. v. Automobile Service Assn., 55 R. I. 122, 179 A. 139 (1935). Contempt jurisdiction will be invoked even though unlicensed practice is punishable criminally. State v. Barlow, (Neb. 1936) 268 N. W. 95; Unger v. Landlords' Management Corp., 114 N. J. Eq. 68, 168 A. 229 (1933); Rhode Island Bar Assn. v. Automobile Service Assn., supra. *Contra*: In re McCallum, (Wash. 1936) 57 P. (2d) 1259; In re Frederick Bugasch, Inc., 12 N. J. Misc. 788, 175 A. 110 (1934). In several cases the court has refused to punish for contempt on the ground that the defendant did not know the law. In re Estes, (Wash. 1936) 57 P. (2d) 1262; In re Eastern Idaho Loan & Trust Co., 49 Idaho 280, 288 P. 157 (1930); People v. Denver Clearing House Banks, (Colo. 1936) 59 P. (2d) 468.

²⁵ As in Paul v. Stanley, 168 Wash. 371, 12 P. (2d) 401 (1933). Injunctive relief is available even though unauthorized practice is punishable criminally. *Ibid*.