Accountants, Income Tax and the Unauthorized Practice of Law

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COMMENT
ACCOUNTANTS, INCOME TAX AND THE
UNAUTHORIZED PRACTICE OF LAW

By JAMES K. SMITH

Is a tax problem legal or accounting in nature? Unimportant as the answer may be to the taxpayer, it may have vital significance to the problem solver. Much of an accountant's work involves tax problems. Must he call in a lawyer to answer every legal question that he encounters? The answer to this question is obviously no. Some legal competency is required for most tax questions—the ability to read the directions in filling out forms for example. For such tasks, no one would suggest calling a lawyer. But at the other end of the spectrum are tax problems which are clearly for the lawyer; *McCulloch v. Maryland*¹ was a tax case. How limited an accountant is in his work by the threat of an unauthorized practice suit, and how limited he should be is the subject of this comment.

The practice of accounting is regulated in California by the Business and Professions Code.² In addition to the limitations imposed upon accountants specifically,³ there are some general regulations, which apply to all businesses and professions. One of these, especially important to the accountant engaged in income tax practice, is the restriction of the practice of law to those who are active members of the state bar.⁴ Is there some line that can be drawn to separate the field of income taxation into zones of legal competence and accounting competence? The courts have attempted to draw such a line in cases involving alleged unauthorized practice of law by non-lawyers engaged in tax work.⁵

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¹ 17 U.S. (4 Wheat.) 316 (1819).
³ CAL. Bus. & Prof. Code § 5100.
⁴ CAL. Bus. & Prof. Code § 6125: "No person shall practice law in this State unless he is an active member of the State Bar."
⁵ See Annot., *Services in Connection with Tax Matters as Practice of Law*, 9 A.L.R.2d 797 (1948).
The task of delineating the function of the lawyer from that of the accountant in income tax practice is difficult enough in itself, without the additional complications inherent in the problem. The courts have attempted to draw a line between the professions which will separate lawyers from non-lawyers in general. The cases do not distinguish among non-lawyers who are certified public accountants, public accountants,6 and non-lawyers with no accounting competence. This failure of the courts to discriminate among the various occupational competencies of the non-lawyer has led the American Institute of Certified Public Accountants into litigation not involving one of its members, out of fear that an adverse decision would apply to C.P.A.'s equally with other non-lawyers.

Another inherent difficulty is in the "unauthorized practice" approach to the problem. Some members of the bar are quite unwilling to admit that there can be any practice of law by a non-lawyer that is "authorized."7 The "unauthorized practice" approach so links the problem with ethics of the profession, that to appear conciliatory toward a competing profession is to be in favor of appeasing the unethical.8 This approach is open to the retaliatory accusation that "ethics" is only a blind for protecting lawyers from competition. If the dispute between lawyers and accountants descends to this level, there results what appears to be a jurisdictional dispute between competing unions.9

As a premise upon which to work, it is assumed that the primary interest of the bar in preventing unauthorized practice is to protect the public from the unscrupulous and the incompetent.10 It is also assumed that the accountants in question are neither unscrupulous nor incompetent, but are attempting to serve their client in the best way possible. These premises may not be wholly valid, but since the

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6 The distinction between the certified public accountant and the public accountant is in the titles and not the services performed. The certificate of C.P.A. requires an examination whereas the certificate of public accountant does not. 1 CAL. JUR. 2d Accountants §§ 2, 5 (1952).
8 Id. at 350.
10 [T]he Bar originally "arose from a public demand for the exclusion of those who assumed to practice law without adequate qualifications therefor." . . . The Bar did not come first; it was unauthorized practice which came first, and whose deficiencies were so great as to result in a public demand for a legal profession with special qualifications and restrictions. Report of Standing Committee on Unauthorized Practice of Law, 25 U. P. News 199, 206 (1959).
inquiry here is to determine the proper scope of the accountant’s work in income taxation, they will suffice.

To emphasize the importance to the accountant of drawing the line between what is permissible, and what is “unauthorized practice,” it would be well to note summarily the possible consequences of practicing law without authorization. (1) The unauthorized practice of law is proscribed by criminal sanction in all states. In California the Business and Professions Code declares it to be a misdemeanor.\(^{11}\) (2) The unauthorized practitioner may be found guilty of contempt of court;\(^{12}\) however, an accountant guilty of unauthorized practice in tax matters is not likely to be subject to this sanction. (3) While there appears to be no pertinent California case, an injunction is often used to prevent the unauthorized practice of law, notwithstanding that equity does not generally intervene to enforce a criminal statute.\(^{13}\) (4) In addition to the penal and regulatory powers of the state over the unauthorized practice of law, the accountant may be hit in the pocketbook by his client. A contract for services must be set aside if any of the services rendered were the unauthorized practice of law, because the courts will not enforce a contract to violate a penal statute.\(^{14}\)

The problem of determining whether a given activity in the tax field is to be styled “unauthorized practice” is not new to the courts or to the organized professional associations of lawyers and accountants. The first formal meeting between the American Bar Association

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\(^{11}\) Any person advertising himself as practicing or entitled to practice law or otherwise practicing law, after he has been disbarred or while suspended from membership in the State Bar, or who is not an active member of the State Bar, is guilty of a misdemeanor. **Cal. Bus. & Prof. Code** § 6126.

\(^{12}\) The judicial department of government, and no other, has power to license persons to practice law. Statutes may aid by providing machinery and criminal penalties, but may not extend the privilege of practicing law to persons not admitted to practice by the judicial department.

**Lowell Bar Ass’n v. Loeb**, 315 Mass. 176, 179, 52 N.E.2d 27, 30 (1943). The position is amply supported that the ultimate responsibility for regulation of the practice of law is an inherent power of the judiciary, unless otherwise provided by the state constitution. **Bennett, Non-Lawyers and the Practice of Law Before State and Federal Agencies**, 46 A.B.A.J. 705, 706 (1960). See **Bradwell v. State**, 83 U.S. (16 Wall.) 130 (1872) where it was held that the power of a state to prescribe the qualifications for admission to the bar of its own courts is unaffected by the fourteenth amendment, and the Supreme Court of the United States cannot inquire into the reasonableness or propriety of the rules the state may prescribe.

\(^{13}\) \(6\) **Cal. Jur. 2d Attorneys At Law** § 32 (1952).

\(^{14}\) **Ibid.**

\(^{14}\) **Agran v. Shapiro**, 127 Cal. App. 2d Supp. 807, 273 P.2d 619 (App. Dep’t Super. Ct. Los Angeles, 1954), where even though not pleaded as a defense, it was the imperative duty of the court to deny the plaintiff recovery because a contract to violate a penal statute may not give rise to a cause of action.
and the American Institute of Certified Public Accountants was in 1932, to discuss a proposal that only attorneys be permitted to practice before the Board of Tax Appeals; the proposal produced no agreement.\textsuperscript{15} The disputes between the two associations from 1932 until 1942 indicated that their differences could be better settled by negotiation than by litigation or legislation. One of the early litigations in which bar and accountants met head on occurred in 1942.

In \textit{Lowell Bar Ass'n v. Loeb},\textsuperscript{16} the Bar Association of Lowell, Massachusetts, sought to restrain the American Tax Service, headed by defendant Birdie Loeb, from holding itself out as authorized to practice law, and from practicing law. The defendant, the wife of a practicing attorney, had formed the Service in answer to the demand for tax assistance created by the then recent laws requiring tax returns from many wage earners not previously covered. The Service had several branch offices, about one hundred employees—none of whom were lawyers—and an extensive advertising program. It did not attempt to assist in filing tax returns for corporations, partnerships, estates, fiduciaries, or businessmen. The Service was solely for those whose income came principally from wages, and the return was filed for all at a uniform price: two dollars for either a state or a federal return, three dollars and seventy-five cents for both.

In refusing to grant the injunction to the Bar Association, the court held that the preparation of simple income tax returns was not the practice of law—a question that seems to have been without doubt in most circles, as non-lawyers had virtually pre-empted the income tax field by 1939.\textsuperscript{17} The court noted the difficulty that courts in general have had in formulating a definition of the practice of law.\textsuperscript{18} This court set forth a definition based upon a division of income tax work into three broad areas: that clearly within the sole competence of a lawyer; that clearly within the sole competence of an accountant; and a middle area or "penumbra," in which the tasks performed may have significant legal consequences and yet are commonly performed by non-lawyers. The preparation of income tax returns is not, the court decided, in the area within the sole competence of a lawyer.\textsuperscript{19} In other words, the

\textsuperscript{15} Queenan, \textit{An Inquiry into the Relationship of Law and Accounting}, 36 U. Det. L.J. 422 (1959).

\textsuperscript{16} 315 Mass. 176, 52 N.E.2d 27 (1943).

\textsuperscript{17} Levy, \textit{The Scope and Limitations of Accountants' Practice in Federal Income Taxation}, 89 J. Accountancy 470 (1950).

\textsuperscript{18} "It is not easy to define the practice of law. Since it undertakes to determine all controversies as to rights that may arise among men . . . ." 315 Mass. at 180, 52 N.E.2d at 31.

\textsuperscript{19} There are instruments that no one but a well trained lawyer should even undertake to draw. But there are others, common in the commercial world, and
preparation of tax returns does not lie "wholly within the practice of law," but any service that does lie "wholly within the practice of law" can lawfully be performed only by a lawyer. This test for determining whether the work of an accountant is unauthorized practice is not satisfactory. In fact it seems not to be a test at all, but a restatement of the conclusion. That is, the preparation of income tax returns is not the practice of law because it is not wholly within the practice of law; this seems to be nothing more than a rephrasing of the conclusion and not a formulation of the principle from which the conclusion was deduced.

The Loeb decision proved unsatisfactory to accountants. The American Institute of Accountants was forced to take the side of defendants whose advertising and other business methods were not palatable, because the work of accountants in general would be affected by the decision. The holding that simple income tax returns could be prepared by non-lawyers naturally raised such questions as whether future decisions would be limited to "simple" returns, and if so, what was "simple"? The "test" set forth did not satisfy the demand for a predictable standard. And finally the litigation gave both the bar and the A.I.A. some bad publicity. In short, the Loeb case was a Pyrrhic victory for the accountants.

In 1944 the A.B.A. and the A.I.A. organized the National Conference of Lawyers and Accountants to draft a treaty between the professions concerning their respective spheres of competence. The result of the efforts of the Conference was a resolution stating that the public would be best served if tax returns were prepared by either lawyers or C.P.A.'s, but that accountants should not prepare legal documents such as partnership agreements, trust arrangements, and similar technical papers. The resolution ushered in a period of calm that was to last only until 1947, for it was then that a C.P.A by the name of Bercu...
was hauled into the courts of New York by the Bar Association of that state.24

Bercu was charged with the unauthorized practice of law in giving advice on tax liability to a corporate client for whom he had performed no other service. He advised the client that a proposed expenditure was deductible for federal income tax purposes in a certain year. The advice was in the form of a memorandum based upon one ruling of the Income Tax Unit of the Treasury Department. The Supreme Court of Kings County ruled that Bercu had not practiced law; that the advice given by him was based upon a ruling of a department staffed principally by accountants, and was nothing more than an indication of proper accounting practice.25 In other words, Bercu had advised his client concerning the accounting practice approved by the Treasury Department rather than the applicable law.

The appellate division did not sustain the reasoning of the lower court.26 Here it was found that the question posed for Bercu was a


25 The advice which the respondent Bercu gave in this case was based upon a ruling of the Income Tax Unit of the Treasury Department. This is an administrative ruling which does not even bind the department, much less the courts. The department promulgating these rulings is staffed principally by accountants. Bercu undoubtedly knew this and treated the ruling as amounting to what was considered by accountants to be sound accounting practice.

New York County Lawyers' Ass'n v. Bercu, 188 Misc. 406, 420, 69 N.Y.S.2d 730, 742 (Sup. Ct. 1947). The case was described by a certified public accountant as follows:

Specifically, the corporate client, which maintained its books of account on an accrual basis, had negotiated a settlement with the City of New York in 1943 whereby the corporation was to pay the city $12,000 in settlement of New York City Sales taxes incurred in the years 1935, 1936, and 1937, liability for which had been disputed. There had been no ruling as to the corporation's liability for the tax until 1943 and the corporation had not billed its customers for their applicable share of the taxes during the years in question. The question which arose, and on which Bercu rendered his advice, was whether the payment to the city could be deducted for federal income tax purposes in 1943 or whether the payments had to be allocated back to the years 1935, 1936, and 1937. Bercu advised the client that under the tax law the payment was deductible in 1943. From a technical accounting standpoint under the accrual basis of accounting, a cost is accrued when incurred, not when paid. A cost is not incurred, however, until the obligor is legally liable to make payment. Here the liability was contingent and contested by the corporation until 1943, when the liability for the tax was finally adjudicated, and hence the tax, although it might previously have been considered a contingent liability, did not accrue for accounting purposes until 1943. In this particular the tax practice would seem to conform to good accounting practice.


legal question; unfortunately the opinion does not indicate how this conclusion was reached. But the conclusion that Bercu had passed upon a legal question did not automatically place him in the category of the unauthorized practitioner of law. The court said that there are some legal questions that can be passed upon by an accountant and some that cannot. The line between the two cannot be readily drawn, but at least it must be drawn where the accountant passes upon a legal question apart from his regular accounting work. Thus the court held that a C.P.A. who advises a client as to the deductibility of an item for federal income tax purposes, is engaged in the practice of law if he has performed no other accounting services for the client. This rather limited holding is not the proposition for which the case is usually cited.

In addition to the holding of the case, the court went on to comment that if the legal question there passed upon had been incidental to accounting work, the decision might have been different. This dictum has been referred to as the "incidental test" to determine whether an accountant has been practicing law. Bercu raised an objection to the test by pointing out that under it the conduct of two accountants might be virtually the same, and yet one would be practicing law and the other not, depending on whether the conduct was incidental to accounting work. The court recognized the objection but did not find it controlling.

In answering the contention that its decision would drive accountants from the tax field, the court said: "When . . . a taxpayer is confronted with a tax question so involved and difficult that it must go beyond its regular accountant and seek outside tax law advice, the considerations of convenience and economy in favor of letting its accountant handle the matter no longer apply, and considerations of public protection require that such advice be sought from a qualified lawyer." The reference in this concluding part of the opinion to a question so "involved and difficult" is the germ of a test that another jurisdiction was to amplify to the exclusion of the "incidental test." The dictum of Bercu so overshadowed the limited holding that much of the criticism of the case has been criticism of the dictum only.

27 The first discovered reference to the "incidental" test is in the concurring opinion of Judge Pound in People v. Title Guarantee & Trust Co., 227 N.Y. 366, 125 N.E. 666 (1919).
28 273 App. Div. at 538, 78 N.Y.S.2d at 221, 9 A.L.R.2d at 796 (emphasis added).
The Minnesota court was the first to attack the "incidental test," in 1951.30 Conway, a public accountant, had advertised himself as an "Income Tax Expert." A local unauthorized practice committee sent out a private detective posing as a prospective client to lay a trap. The detective spun a story loaded with legal complexities and asked Conway to handle his tax returns and to help with the associated problems. Conway complied. The Minnesota Bar Association then sought an injunction. Although the defendant was not a C.P.A., the Minnesota Association of Public Accountants, the National Society of Public Accountants, the Minnesota Society of Certified Public Accountants, and the American Institute of Accountants filed briefs for him. On the other side appeared the Minnesota and American Bar Associations.

The questions presented to Conway by the private detective were: (1) under given facts were he and his wife business partners; (2) could he claim his wife as an exemption although there had been no formal marriage; and three other more elementary questions about income tax filing. The court found that at least in answering question number one, Conway was practicing law. The determination of the character of Conway's conduct was based upon yet another test.

The Minnesota court denounced the "incidental test," and offered its own test, placing more emphasis on the nature of the question posed to the accountant than the manner in which the question was answered. But before the Conway test can be administered there must be a preliminary determination whether the question presented was legal or non-legal. The court did not indicate the test for resolving the preliminary question, but assumed that a legal question was presented to a non-lawyer. The following test was then invoked to determine whether giving advice on a legal question is the practice of law.

Generally speaking, whenever, as incidental to another transaction or calling, a layman, as part of his regular course of conduct, resolves legal questions for another—at the latter's request and for a consideration—by giving him advice or by taking action for and in his behalf, he is practicing law if difficult and doubtful legal questions are involved which to safeguard the public, reasonably demand the application of a trained legal mind. What is a difficult or doubtful question of law is not to be measured by the comprehension of a trained legal mind, but by the understanding thereof which is possessed by a reasonably intelligent layman who is reasonably familiar with similar transactions. A criterion which designates the determination of a difficult or complex question of law as law practice, and the application of an elementary or simple legal principle as not, may

30 Gardner v. Conway, 234 Minn. 468, 48 N.W.2d 788 (1951).
indeed be criticized for uncertainty if a rule of thumb is sought which can be applied with mechanical precision to all cases. Any rule of law which purports to reflect the needs of the public welfare in a changing society, by reason of its essential and inherent flexibility, will, however, be as variable in operation as the particular facts to which it is applied.  

This test presents three essential elements in determining whether conduct is the practice of law: (1) a legal question—the method of distinguishing between legal and non-legal is not given—(2) that is difficult and doubtful, and (3) which must reasonably demand the application of a trained legal mind. It may well be that element (3) should be listed as (2)(a), for it may serve better as explaining what is difficult and doubtful than as adding an independent element. The existence of the elements of the Conway test will be determined by one who is a lawyer—a fact that the accountant-non-lawyers are not likely to overlook.

It was in 1951 that the National Conference of Lawyers and Accountants published the Statement of Principles Applicable to Legal and Accounting Practice in the Field of Taxation. The Statement set forth general guide lines defining the areas of competency of both professions, recognizing the three broad areas in tax practice: exclusively accounting, exclusively legal, and a twilight zone between. It was recommended that in the middle ground the professions maintain mutual respect and resolve questionable distinctions in favor of the client. The Conference also recommended that the professional associations of the individual states establish joint practice committees of lawyers and C.P.A.’s to deal with controversies between the professions without resort to litigation. The court decisions determining the dividing line between the professions were viewed as not helpful to the spirit of cooperation. The Statement of Principles has been adopted by the professional associations of several states, but California is not among the group. The California contribution to the resolution of lawyer-accountant friction came in the form of yet another case.

Both the California State Bar and the California Society of Certified Public Accountants were attracted to the case of Agran v. Shapiro in 1954. Here the accountant, Agran, had persuaded the Internal Revenue Service that Mr. and Mrs. Shapiro owed the Treasury Department 200 dollars instead of the over 6,000 dollars claimed. The

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31 Id. at 481, 48 N.W.2d at 796-97 (emphasis added).
33 Latham, supra note 23.
tax liability of the Shapiros depended upon whether a carry back which Agran, as the Shapiros' tax accountant, had claimed for a previous year was a "net operating loss" within the meaning of the Internal Revenue Code. To convince the agents, Agran spent five days in the county law library reading over one hundred cases to support his argument. The Shapiros settled with the Internal Revenue Service for 200 dollars after informing Agran that his services were no longer needed. Agran sent a bill for 2,000 dollars; the Shapiros refused to pay. The decision was that Agran's contract with the Shapiros was not enforceable because it called for the performance of services constituting the unauthorized practice of law.

The court held that whether the loss was incurred was a question of fact, but insofar as the determination involved an interpretation of a statute, there was an issue of law. The question to be decided was whether, under admitted facts, the loss was one which could be "carried back." The answer depended on whether the loss was "attributable to the operation of a trade or business regularly carried on by the taxpayer" within the meaning of that phrase in the Internal Revenue Code. The court could "see no escape from the conclusion that under the circumstances this question was purely one of law."\(^3\)

The determination that Agran had dealt with a question of law seems to have been based upon the method in which the question was answered; unless the problem facing the accountant can be solved solely by the use of accounting principles and procedures, he is practicing law if he continues. The court also noted that the particular question presented to Agran was a difficult and doubtful question of law, but whereas the Conway test contains the two elements of (1) a question of law that is (2) difficult and doubtful, the California court seemed to rely wholly on element (1), adding element (2) merely for good measure. Although the court quoted at length from the Conway denunciation of the "incidental test" of Bercu, there is no indication that it adopted the Minnesota test.\(^3\) There is no reason to believe that the result would have been different if the question posed to Agran had been clear and unambiguous. It appears from Agran that in California "unauthorized practice of law" means that only lawyers can handle questions of law, as opposed to questions of fact. The fine line that this case presents was well illustrated in a later California decision.

In Zelkin v. Caruso Discount Corp.\(^3\) the accountant, a law school graduate but not a member of the bar, had resolved a deduction with

\(^3\) Id. at 814, 273 P.2d at 623.
\(^3\) See Comment, 28 So. CAL. L. REV. 303, 306 (1955), where the writer concludes that the Conway test was adopted by the California court.
the Internal Revenue Service, as did Agran. The Treasury Department in conducting an audit of Caruso Discount Corporation had proposed large deficiency assessments on monies held by Commercial Credit Corporation as reserves on conditional sales contracts sold to Commercial by Caruso. The question was what percentage could Commercial legitimately hold as a reserve, for the excess would have been taxable income available to Caruso on demand. In determining the percentage permissible for Commercial to retain, Zelkin did research at two law libraries and “reviewed” the original reserve agreement between Caruso and Commercial. The defendant sought to avoid his contract with Zelkin for services rendered by relying on Agran, and contending that Zelkin had practiced law and could not enforce the contract for the crime.

The trial court awarded a judgment to Zelkin. Throughout the trial Zelkin argued, in true lawyer-like fashion, that his research in the law libraries was directed toward the accounting methods that the cases had approved and not toward the law of the cases. He insisted that the issue was one of fact only, i.e. what percentage was permissible for Commercial to retain. The court distinguished Agran on the ground that there the accountant testified that he had cited cases to the Internal Revenue agent and had spent four days reading and reviewing over one hundred cases on “the proposition of law involved.” In Zelkin the plaintiff-accountant testified that he had read and cited no law. Thus the accountant had been practicing law only if on the face of the problem which he was negotiating, no discussion would have been possible without reference to legal issues and no persuasive argument could have been made without reference to legal principles.

One gets a discomforting sensation in comparing Agran with Zelkin, for it appears that the distinguishing feature of the two cases is the method in which the plaintiff-accountant’s case was presented. In Agran the use of the word “law” was made without thought for the consequences, whereas counsel for Zelkin sedulously avoided use of any legal term in presenting his case to the court. The distinction seems to be more one of semantics than of substance, but if it were not possible in some way to limit the broad scope of the Agran decision, it would be virtually impossible for a non-lawyer to practice in the federal or state income tax field.

Agran presented a related holding that is of interest. Agran was enrolled as an agent to practice before the tax courts. He argued that

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38 Id. at 806, 9 Cal. Rptr. at 223 (emphasis the court’s).
39 Compare with a similar attempt in Bercu, note 25 supra.
40 Latham, supra note 23.
his conduct had been in pursuance of his federally granted privilege to deal with federal tax matters, and that California could not limit that privilege by interpreting his conduct as unauthorized practice of law. The court disagreed.

Reduced to its simplest form, plaintiff's argument in effect is this: By virtue of the Treasury Regulation (C.F.R. 10.2) an enrolled agent although a non-lawyer is at liberty to perform any and all services and give advice upon legal questions which constitute the practice of law within the meaning of that term as generally understood so long as the work is performed or the advice is given in connection with a matter involving or arising under the Federal Internal Revenue Code and pending before the Treasury Department. . . . If this be true the same act which would constitute the practice of law under the law of this State, if performed here, and which if performed by a non-lawyer not enrolled as an agent by the Treasury Department would subject him to criminal prosecution, would not constitute the practice of law if performed by a non-lawyer so enrolled. To accept the plaintiff's argument would simply mean that the individual states are in effect deprived of their traditional and long-recognized right to regulate the practice of law within their borders, at least insofar as such practice involves matters of so-called "tax law." If this is to be the rule we feel it should be announced by some higher authority.41

The "higher authority" has spoken. In Sperry v. Florida ex rel. the Florida Bar,42 the Supreme Court of the United States held that Florida could not enjoin a non-lawyer registered to practice before the United States Patent Office from preparing patent applications and prosecuting them, notwithstanding that such conduct constituted the practice of law under state court decisions. According to the opinion, prior to 1952 all state courts had agreed that the authority to participate in administrative proceedings conferred by federal agencies such as the Patent Office, was either consistent with or pre-emptive of state law.43 The Court noted that Agran was decided after 1952. Certainly the Agran denunciation that a federal license is subordinated to state law must now be scuttled. Dean Griswold had warned44 that if the bar became too technical in its insistence that only lawyers be allowed to practice "law," the federal government would be forced to take the position which in fact it did take in Sperry, and put the states in their

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43 Cases are collected id. at 400 n.43.
place for the sake of federal uniformity. Thus, if Agran could convince the court that he was acting within the scope of his Treasury agency—a fact assumed by the court only to denounce its significance—the Sperry case would call for a different result today.

The holding of Agran that an accountant cannot indulge in conduct which the principles and procedures of accounting will not suffice to handle is still the unquestioned precedent in California. It is disregarded every day. The attitude of accountants toward such an interpretation of "practice of law" can well be seen by leafing through any issue of the Journal of Accountancy, or the Journal of Taxation, and noting the wealth of advertisements encouraging accountants to buy "law" books in order to keep up on ever-changing tax "law." Even a federal court has taken judicial notice that accountants regularly give legal advice in their income tax practice.

That case arose in Louisiana when the clients of a C.P.A. sued his insurance carrier to recover income tax assessed in connection with stock sales that the accountant had advised would be tax free. The insurance company defended on the ground that the policy covered only losses due to the C.P.A.'s neglect, error, or omission, and did not include a loss caused by his erroneous legal advice. The court sidestepped the issue of unauthorized practice and decided merely that the contract did cover the particular conduct causing the loss.

Without judging the merits of the accounting profession's de facto rendition of quasi-legal services, we must take judicial notice of the fact that, in Monroe, Louisiana, as elsewhere, C.P.A.'s regularly render opinions and advise their clients on matters of federal and state income tax liability as a routine matter in performance of their professional services. As a matter of fact, attorneys-at-law frequently refer such clients to C.P.A.'s for such advice, which is in a specialized field; and attorneys also seek such advice directly from C.P.A.'s. In writing the policy here sued upon, defendant is bound to have known of this almost universal practice.

In other words, the client of the C.P.A. is not to be left without a remedy because of the inability of the legal and accounting professions to define the scope of their respective competence.

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45 The Decision appears to hold that the States have control over the practice of law within their borders, except to the limited extent necessary for the accomplishment of Federal Objectives provided the Federal Objectives are set forth in a valid Federal Statute and in valid Administrative Regulations.
47 Id. at 56.
The most recent case on the subject is from the courts of New York, where, for once, the interests of the lawyer and the interests of the accountant were arrayed on the same side. In *Blumenburg v. Neubecker* the defendant, Neubecker, came to the plaintiff-attorney and an accountant, Glickman, and contracted that the two of them represent him in connection with a tax matter involving a deficiency of over 900,000 dollars. The contract provided for the plaintiff-lawyer and his colleague-accountant to be paid one-third of the difference between the deficiency claimed by the Internal Revenue and the final sum paid in settlement. The lawyer and the accountant saved Mr. Neubecker over 600,000 dollars; he refused to pay the fee of 200,000 dollars; the accountant assigned his interest to the plaintiff-lawyer, and the battle began.

The trial court awarded a judgment for over 200,000 dollars on the jury verdict. The appellate division reversed on the ground that the contract violated a New York statute prohibiting attorneys from sharing compensation with non-lawyers, or fee splitting—a misdemeanor. The court said there is “good authority” that where a contract is made jointly by two persons to perform legal services, and one is unlicensed to practice, no recovery may be had. The contract made no distinction between the services of the lawyer and those of the accountant—who was not enrolled before the Treasury Department as was the lawyer—but rather called for one fee for indivisible services. There was no evidence of the value of the services of either one alone, and the result must be that if recovery were allowed on the contract, the accountant and the attorney would share in a fee for legal services. The finding of the jury that the accountant, Glickman, confined his efforts solely to accounting matters, was not supported by the record as seen by the appellate division. A vigorous dissent maintained that the record did support the finding that the services were distinct and that the accountant did not give any legal advice, or check any statutes, or study any previous decisions.

On further appeal to the New York Court of Appeals, the dissent in the appellate division was expressly adopted, the court holding that the contract did not, on its face, contemplate any legal service by the accountant. This decision upholding the contract accords with the Joint Statement of Principles adopted by the New York State Bar and the New York State Society of Certified Public Accountants. The court quoted from it with approval:


50 *MCKINNEY'S CON. LAWS OF N.Y., Book 39, Part 1, Penal Law § 276.*
In the large areas in the tax field where the legal and accounting aspects are interrelated and overlap, it is often in the public interest that the services of both professions be utilized. Indeed, experience has shown that a lawyer and a certified public accountant working together on behalf of a common client in the tax field constitute a very effective team. When the lawyer and accountant have joined hands in the preparation and presentation of a case before the Internal Revenue Service, the taxpayer is most effectively represented.51

A decision against the contract in this case would have been a torpedo to cooperation of the professions on the basis of the Joint Statement of Principles. The primary significance of Blumenberg is that it did not sink the effort of cooperation in New York, and so augurs well for further cooperation between lawyers and accountants in tax practice.52

The dissenter in the appellate division was opposed to a construction of the contract that would deny the plaintiff recovery, for the result would be an unfair and unconscionable advantage to the defendant.53 This attitude harkens back to the federal court in Louisiana54 where the damaged client was not left without a remedy because the accountant might have "practiced law" in giving him advice. Although this form of reasoning might be labelled as appeasing the unethical,55 the concern of these courts in avoiding an unconscionable advantage to one party is laudable, notwithstanding that the result may not fit neatly into a legally symmetrical definition of the practice of law. Perhaps the question whether the work of an accountant in


Contingent fees: An enrolled attorney or agent shall not enter into a wholly contingent fee agreement with a client for representation in any matter before the Internal Revenue Service unless the client is financially unable to pay a reasonable fee on any other terms. Partially contingent fee agreements are permissible where provision is made for the payment of a minimum, substantially in relation to the possible maximum fee, which minimum fee is to be paid and retained irrespective of the outcome of the proceeding.

The majority did not refer to this.
53 Concededly, defendant has received a benefit which was remarkable, unusual and eminently satisfactory. There is no basis in the record for any claim that either in the making of the retainer-contract or in the rendition of services there was any fraud, bad faith or overreaching on the part of plaintiff or Glickman. Under the circumstances, the construction by the majority of this court of the retainer-contract will result in an unfair and unconscionable advantage to defendant. Such a result should be avoided wherever possible. . . . Here, it is possible.
54 Supra note 46.
55 Supra note 7.
tax matters is the practice of law cannot be answered by recourse to
the traditional approach to defining unauthorized practice.\textsuperscript{56}

An apparently tailor-made solution would be to foster the develop-
ment of a new profession of lawyer-accountants, and encourage these
people to take over the tax field.\textsuperscript{57} However, the so-called dual practi-
tioner is one issue upon which the American Bar Association and the
American Institute of Certified Public Accountants have agreed, their
opposition being expressed in a proposed code of conduct.\textsuperscript{58} Dean
Griswold sees an insurmountable barrier preventing one person from
actively practicing both professions at the same time.\textsuperscript{59} His reasoning

\textsuperscript{56} Dean Griswold has said:

\begin{quote}
It is obvious that the separation of functions between lawyers and qual-
ified accountants in this area is an extremely difficult matter. To me it is rather
clear that there can be no sharp dividing line. You cannot say: “These things
are for accountants, and no lawyer shall ever do that; and these things are for
lawyers, and no accountant shall ever do any of that.” The two fields clearly
overlap. But even then it is not like two circles laid one over a part of the
other with common sectors. For as I see it, there are not three clear zones
either. You can’t say: “This is for accountants only; this is always for either
accountants or lawyers; and this is for lawyers only.” On the contrary, while
the legal field and the accounting field clearly overlap, they shade into one
another, with no clear line between them. In a particular problem, many fac-
tors may come into play, such as, the amount involved, the difficulty or routine-
ness of the question, whether the practitioner, either lawyer or accountant, is
considering the question in the course of his work as regular adviser for the
client, and so on. These are very difficult questions of degree, of more or less.
This makes them hard to grasp and state. But they are not in this respect
unique. They are not different from many other questions arising in human
relationships. A factor which may be quite relevant in a particular case may
well be the degree of training and the professional standing of the person whose
actions are called into question. It may well be appropriate for a certified public
accountant to do things which would be over the line for another with less status.
\end{quote}


Compare the remarks of a respected accountant:

\begin{quote}
Many individuals have made efforts to draw an exact line of demarcation,
the one side representing the province of the legal profession and the other that
of the certified public accountant. After decades of attempts, it is quite ap-
parent that exact line-drawing of this kind leads only to disagreements. In a
case some years ago a jurist in his opinion stated, “the line which divides the
domain of the lawyer from that of the accountant ... is often shadowy and
wavering. ...” ... In my experience with attorneys there have been no lines.
Each practitioner has respected the other for his qualifications, thus permitting
and encouraging maximum participation by both.
\end{quote}

Queenan, An Inquiry Into the Relationship of Law and Accounting, 36 U. Det. L.J.
422, 434 (1959).

\textsuperscript{57} Suggested in Comment 28 So. Cal. L. Rev. 303 (1955).

\textsuperscript{58} Jameson, A Proposed Code of Conduct: The Relationship of Lawyers and Ac-
countants, 44 A.B.A.J. 1049 (1958); also published as A Proposed Code of Conduct for
Lawyers and Certified Public Accountants Who Practice in Association and for Individ-

\textsuperscript{59} Griswold, supra note 44, at 1115.
is that the accounting side of dual practice would serve as a feeder for the law practice, and would violate Canon 27 of the Canons of Ethics.\(^6\) Furthermore, Griswold sees an irreconcilable gulf separating the nature of the accountant's work from the lawyer's, in that the accountant as an auditor is an independent examiner whereas the lawyer as an advocate is to give his all for the client.

The argument in opposition to the proposed code is that the dual-practitioner would provide a valuable service at a lower cost to the client than that for two professional men. It is also argued that there is no more of a "feeder" problem with the dual practitioner than there is with an attorney licensed to sell real estate or insurance. The code does not recognize that much of what an attorney does "feeds" his practice without violating Canon 27. And the argument that the auditor-advocate role places the dual practitioner in a "schizophrenic position" is probably more theoretical than practical, because the vast majority of auditing today is done by national accounting corporations, and not individuals. In light of these considerations, the conclusion of one writer is that the primary reason for the opposition of the National Conference to the dual practitioner scheme is that there are only about 450 dual practitioners, and this one point of agreement would step on a relatively small number of toes.\(^8\)

Despite the objections, it seems that the dual practitioner will become more of a factor in the solution to the income tax problem of lawyers and accountants. Even if the bar opposes dual practice, it favors lawyers learning about accounting and accountants learning

\(^6\) The Canons of Professional Ethics of the American Bar Association, Canon 27:

*Advertising, Direct or Indirect.* It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. . . . It is not improper for a lawyer who is admitted to practice as a proctor in admiralty to use that designation on his letterhead or shingle or for a lawyer who has complied with the statutory requirements of admission to practice before the patent office, to so use the designation "patent attorney" or "patent lawyer" or "trademark attorney" or "trademark lawyer" or any combination of those terms.

Opinion 272 (Oct. 25, 1946) of the Committee on Professional Ethics and Grievances of the American Bar Association:

The Committee all agree that a lawyer, who is also a C.P.A. may perform what are primarily accounting services, as an incident to his law practice, without violating our Canons. We are also agreed that he may not properly hold himself out as practicing accounting at the same office as that in which he practices law, since this would constitute an advertisement of his services as accountant which would violate Canon 27 as construed in our opinions. 33 A.B.A.J. 162, 163 (1947). See 63 Harv. L. Rev. 1457 (1950) where a conflicting opinion of the New York County Lawyers Ass'n is noted and the problem is discussed.

about law. Continued participation of accountants in federal income tax law was assured by the Supreme Court in *Sperry.* Although the Court did not say how far a federal agency could permit a non-lawyer to encroach upon the territory of the lawyer, it did say that enrollment before a federal administrative tribunal would protect the agent from prosecution for those activities necessary to the agency. The *Sperry* decision would apply to both of the California cases referred to. The argument by Agran that his enrollment immunized him from a state finding of unauthorized practice would be given more weight; and Zelkin would have an argument to add to his semantic exercise. Both accountants might successfully argue that their enrollment before the Treasury Department included the privilege to negotiate with revenue agents outside the Tax Courts as well as to practice before the tribunals themselves. However, it remains that the individual states have absolute control over what the "practice of law" shall be respecting non-lawyers who appear before state tax and other administrative tribunals.

Perhaps the ultimate solution was set forth admirably many years ago by the editor of the *Journal of Accountancy.* As to the improper preparation of federal tax returns and other tax work "does not the proper remedy lie with the United States Treasury Department, which already regulates other branches of federal tax practice, is directly interested, and is familiar with all phases of the problem? Would not the appropriate procedure be for strong representations to be made to the Treasury Department by organizations of the responsible practitioners, both lawyers and accountants, in the tax field? It seems to us that such procedure would be infinitely better from all points of view than for local bar associations to institute scattered proceedings which, if successful, would eliminate the qualified, as well as the unqualified, from tax practice, and perhaps lay the bar open to the charge of attempting to regulate tax practice in its own interest through the use of its extraordinary status in state courts, which are not familiar with all the practical facets of the problem."