Unauthorized Practice by Law Students: Some Legal Advice About Legal Advice

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J.A., a law student, is home for the Christmas holidays. One day his father-in-law, *G.C.*, interrupts the festivities to discuss an impending suit against him by a patron of his "sports center" who has been hit in the head by a baseball from the automatic pitching machines. *G.C.* does not carry liability insurance and is upset over the prospects of a large claim. He asks *J.A.* what he thinks about the matter.

I. The Law Student's Problem

Under what circumstances will giving free legal advice be considered the practice of law? Virtually every law student must face this problem on some occasion. This is not because law students are tempted to open law offices or appear in court for clients, but because friends and relatives periodically ask them for legal opinions. The typical law student is anxious to talk to anyone who will listen. Like a self-enchanted young chanticleer, fascinated with the first dawns to break from his feeble crows, the young law student is similarly "blown by winds of [his] own blowing,"[1] and conditioned to respond to new dawns with callow crowing. Why should his happy call be quieted?

II. Unauthorized Practice Policy and the Qualifications of Law Students

A. The Law and the Policy

Students are as clearly restrained as other laymen by the Texas statute, similar to provisions in most states,[2] that provides:

"[A]ll persons not members of the State Bar are hereby prohibited from practicing law in this state."[3]

[1] Johnson, Your Most Enchanted Listener 113 (1956).

[2] See, *e.g.*, Cal. Code Ann., Business and Professions §§ 6125–6127 (Deering 1951); Comp. Laws Mich. §§ 601.61–.62 (1948); N.Y. Judiciary Law § 460 (McKinney 1948); Pa. Stat. Ann. tit. 17, § 1610 (Supp. 1956).

[3] Tex. Civ. Stat. art. 320a–1, § 3 (Vernon 1948). District grievance committees have concurrent jurisdiction with the State Unauthorized Practice Committee to investigate and prosecute for unauthorized practice violations. Tex. Bar Rules art. 12, §§ 34, 39 (1956). See also *Id.* §§ 37–41.

Courts almost universally declare that the reason for limiting the practice of law to licensed lawyers is to protect the public from the incompetent or unethical practitioner.[4] As Judge (now Justice) Norvell has said,

"Lawyers are not like the river barons of the middle ages who exacted tribute from commerce because of their strategic location in the arteries of trade. The rule limiting the practice of law to trained and qualified persons is founded upon the principle of public benefit and protection. The rule however does not go beyond the principle upon which it is based and should not be extended beyond the requirements of the common good."[5]

The by-product of there being fewer lawyers who can consequently charge higher fees leaves the underlying foundation of the policy unshaken. A maimed and destitute workman whose $75,000 claim was bungled, the stunned devisee who sees a testator's life-long dreams destroyed with the breaking of a poorly drafted will, or a grim-faced prisoner facing electrocution for a crime he never committed, all bear witness to the dramatic pathos of the human wreckage that can be left in the train of the unauthorized practitioner. If the courts and bar associations did not carry out the vital responsibility of regulation, the public would insist that their legislatures find an immediate alternative.

Every individual has an interest in preventing the potential loss of his property or personal freedom because of reliance upon unethical or incompetent advice.[6] Society has an interest in preventing the judicial delay and expense resulting from unnecessary litigation and mismanaged trials.[7] And the bar as an institution gains in stature as individual contacts with the profession produce public understanding, satisfaction, and confidence.[8]

B. The Qualifications of Law Students

Law students are in limbo between the uninformed layman and the licensed lawyer with years of education and training.[9] Should they not

[4] See People *ex rel.* Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 350, 8 N.E.2d 941, 944 (1937); Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 509, 179 S.W.2d 946, 947–48 (1944). *But see* Depew v. Wichita Ass'n of Credit Men, 142 Kan. 403, 413, 49 P.2d 1041, 1047 (1935) ("monopoly . . . may be a good retaliatory argument, but it cannot affect a licensed privilege while it legally exists.").

[5] Southern Traffic Bureau v. Thompson, 232 S.W.2d 742, 749 (Tex. Civ. App. 1950, error ref'd n.r.e.).

[6] Haverty Furniture Co. v. Foust, 174 Tenn. 203, 210, 214, 124 S.W.2d 694, 697, 698 (1939); and see note 4 *supra.*

[7] Nelson v. Smith, 107 Utah 382, 387, 154 P.2d 634, 637 (1944).

[8] AMERICAN BAR ASSOCIATION, PUBLIC RELATIONS FOR BAR ASSOCIATIONS 187 (1953). See also BELDEN, WHAT TEXANS THINK OF LAWYERS (1952); TEXAS BAR ASSOCIATION, PUBLIC RELATIONS HANDBOOK (undated).

[9] Law students should delight in the court's sympathetic description of their burden in Shortz v. Farrell, 327 Pa. 81, 91, 193 Atl. 20, 24 (1937).

be free to practice at least a little bit of law? Of course, nearly every practitioner of forty years experience is more qualified than the most outstanding law student. But it is not so apparent that a third year student at the top of the class is appreciably less qualified to advise a client than an attorney who barely passed the last bar examination and did no better in law school. One answer is, a student is not subject to ethical standards or the discipline of courts and bar associations; nor is he supervised by an older lawyer, as are many young attorneys. Even the third year students have not yet completed their legal education, and none have met the test of the bar examination. Any law student, especially a freshman, is apt to overlook relevant facts, to base his opinion of the law upon a century-old case in a minority jurisdiction, to be unaware of statutory or administrative regulation which has supplanted the common law, and to fail to recognize available defenses. Because the law is, in fact, a "seamless web," it is impossible to give competent advice in one area without a partial understanding of all the law.

But perhaps the most practical reason is administrative. To avoid a situation in which anyone could practice law and have his qualifications passed on only *after* his capabilities were brought into question, a line has had to be drawn. Courts or legislatures have chosen to restrict the practice of law to those who have had a satisfactory legal education, and have passed an examination of character, substantive legal knowledge and skills. This arbitrary line could be redrawn, and perhaps it should be, but until it is the present scheme permits no alternative.

III. LAW STUDENTS' ADVICE AS UNAUTHORIZED PRACTICE

A. A General Definition of "Practice of Law"[10]

As a general proposition, the "practice of law" encompasses any activity, including the giving of advice, which requires knowledge of the law. Although this may be accurate as a general proposition, it is too broad for regulatory purposes. Every occupational group, from architects to zoo keepers, knows something about the law peculiar to its work. And every layman knows something about the criminal law and the tax code. He may not be capable of learned discourse distinguishing murder with and without malice, and he may not know the exceptions to the general filing deadline for income tax returns. But he knows that it is against the law to kill people, and that he may get in trouble if he does not return

[10] Throughout this discussion it is assumed that *J.A.* has no interest in the case about which his advice is sought. Everyone may practice law upon himself, just as he may practice medicine. *Dietzel* v. *State*, 131 Tex. Crim. 279, 281, 98 S.W.2d 183, 184 (1936); *Nelson* v. *Smith*, 107 Utah 382, 388, 154 P.2d 634, 638 (1944). Of course, this may be just as dangerous as giving problems to an unlicensed practitioner, but in Holmes' famous phrase, "the law does not spread its protection so far." *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303, 309 (1927).

his income tax forms by April 15th. Not only is it desirable that everyone know some law,[11] but so many persons do that it would be impossible to prosecute all who freely give their legal opinions. Simple advice or transactions with little financially involved do not seriously threaten the public welfare. Furthermore, lawyers only add fuel to the cynics' fire when they insist that every act requiring any degree of legal skill must be performed by an attorney. Obviously, there must be some situations in which "legal advice" may be given without invoking the "unauthorized" prohibition.

B. The Defenses to Unauthorized Practice for Gratuitous Advice

There are five reasons why a law student might believe that he is not engaged in the practice of law when he gives gratuitous legal advice. Insofar as the courts have discussed these presumed defenses in other contexts they have given insight into their availability to law students.

1. The Gratuitous Service

The fact that the practice of law is intended by most lawyers to be an income-producing business supports the presumption that a gratuitous service should not be punishable as the unauthorized "practice of law." An old Texas statute, now repealed, included receipt of consideration in its definition of unauthorized practice.[12] Moreover, the problem of enforcement only concerns the profiteer. A law student would surely comply with a request that he refrain from giving gratuitous legal advice.

However, as the New Jersey court said in the case of *In re Baker*,

> "[T]he underlying purpose of regulating the practice of law is not so much to protect the public from having to pay fees to unqualified legal advisors as it is to protect the public against the often drastic and far-reaching consequences of their inexpert legal advice."[13]

Lack of compensation should in no way relieve a law student from responsibility for the untoward results of his inexpert advice. Gratuitousness is no defense.

2. The Simple Transaction

Courts that sternly prohibit contract, will, and deed drafting as unauthorized practice, sometimes permit laymen to perform the "mere

[11] "After a law has taken effect, no person shall be excused for its violation upon the ground that he was ignorant of its provisions." Tex. Pen. Code art. 12 (Vernon 1948). See also *Id.* arts. 39–46.

[12] "For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, ..." Tex. Pen. Code art. 430a (Vernon 1948). Repealed Tex. Sess. Laws 1949, c. 301, § 1. But the courts had read the compensation requirement out of the statute even earlier. Grievance Comm. v. Dean, 190 S.W.2d 126 (Tex. Civ. App. 1945); Grievance Comm. v. Coryell, 190 S.W.2d 130 (Tex. Civ. App. 1945).

[13] 8 N.J. 321, 339, 85 A.2d 505, 514 (1951).

clerical task" of filling in blanks in printed forms.[14] Of course, blanks are not complicated, but reading between lines is usually desirable, and reading between blanks is essential.[15] Obviously, laymen are not able to explain the significance of the small print—or even the large print. Practical necessity, rather than simplicity, should be the reason for this distinction. By the same token, states that allow laymen to appear as counsel in justice of the peace courts also do so because of economic realities (some representation is better than none), not because the legal problems are less complicated.[16]

The most extreme, and most frequently quoted case regarding simple advice as unauthorized practice, is *In re Duncan*.[17] A woman asked Duncan how she might get her husband from jail. He suggested she pay her husband's fine. Unable to do so, she borrowed ten dollars from Duncan and agreed to repay him for his "money and trouble." The court found that he had thereby practiced law, and found him in contempt of court. In order to do so they defined the practice of law as "all advice to clients, and all action taken for them in matters connected with the law."[18] This language would seem to compel the conclusion that giving any legal advice, no matter how commonplace, constitutes the practice of law. If the courts do not apply the extreme standard of the *Duncan* case to law students, the reason is practical reality, not theoretical distinction. A law student should be just as responsible for his minor blunders as his devastating ones.

3. THE SINGLE TRANSACTION

Those courts that emphasize in dicta that the case before them is *not* one involving a single act imply that just as "every dog is allowed his first bite,"[19] so every layman is allowed one ill-advised client.[20] The late

[14] "[T]he mere clerical filling out of skeleton blanks . . . is generally regarded as the legitimate right of any layman. . . . The preparation . . . of legal instruments . . . comes within the term 'practice of law.' " Crawford v. McConnell, 173 Okla. 520, 523, 49 P.2d 551, 555–56 (1935).

[15] "The gravamen of the conduct said to be improper is making for others the determination of what constitutes a proper blank and then filling in what he conceives to be the proper substance to carry out the transaction." *In re* Gore, 58 Ohio App. 79, 82–83, 15 N.E.2d 968, 970 (1937).

[16] See Gray v. Justice's Court of Williams Judicial Tp., 18 Cal. App. 2d 420, 63 P.2d 1160, 1162 (1937); Bump v. Barnett, 235 Iowa 308, 313–14, 16 N.W.2d 579, 582–83 (1944). "There were other cases that involved more money, but . . . . the most important case I had in Ohio was an action of replevin for a harness worth fifteen dollars." DARROW, THE STORY OF MY LIFE 34 (Grosset ed. 1957).

[17] 83 S.C. 186, 65 S.E. 210 (1909).

[18] *Id.* at 189, 65 S.E. at 211.

[19] PROSSER, TORTS 324–25, n.1 (2d ed. 1955) ("that 'every dog is entitled to one bite' is not the law.").

[20] "The results cannot be serious. . . . [S]uch occasions are seldom frequent enough to make it a business, ..." People v. Alfani, 227 N.Y. 334, 341, 125 N.E. 671, 674 (1919).

Chief Justice Vanderbilt has emphasized the absurdity of considering "how many times he [the unlicensed practitioner] may defraud the public by his impositions before he be deemed to be engaged in the practice of law."[21] His conclusion was that a "single act, . . . may in appropriate circumstances constitute the practice of law."[22] One dose is often sufficient.

4. The Location of the Activity

Though all courts agree that a layman may not take a Federal Employers' Liability Act case into court, they divide as to his right to appear in a representative capacity before a workmen's compensation board.[23] Yet even those states that do not restrict practice before administrative agencies recognize that "it is the character of the act and not the place where the act is performed which is the decisive factor."[24] It is unlikely that the legal advice of a jaunty, crew-cut youth at a swimming pool will be relied upon as heavily as that of his gray-haired father downtown, but the student is no less responsible for any detrimental reliance that does result. Location per se is no defense.

5. Holding Self Out as an Attorney

Some courts have implied that if unauthorized practitioners had not held themselves out as qualified attorneys they would not be quite so guilty.[25] This is related to the reliance factor discussed above. Legal advice from one claiming to be an attorney is more apt to be relied upon than the same advice from a layman. But even if a law student does not fraudulently misrepresent his qualifications to his advisee, his advice will often be relied upon. Not only is the law student's lack of misrepresentation no defense, but the very fact that he is a law student tends to increase the possibility of detrimental reliance.

IV. Law Students' Advice as Permissible Practice

Some law students clerk in law offices or work in legal aid clinics prior to being admitted to the bar. These students may not only give off-hand legal advice, but draft involved legal opinions. How is this practice restricted, and why is it permitted?

[21] *In re* Baker, 8 N.J. 321, 338, 85 A.2d 505, 514 (1951).

[22] *Ibid.*

[23] Goodman v. Beall, 130 Ohio St. 427, 430, 200 N.E. 470, 471 (1936) ("no special skill is required"); People *ex rel.* Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 356, 8 N.E.2d 941, 946 (1937) ("a service that exacts a high degree of skill").

[24] State *ex rel.* Johnson v. Childe, 139 Neb. 91, 93, 295 N.W. 381, 383 (1941).

[25] Application of New York County Lawyers Ass'n, 207 Misc. 698, 139 N.Y.S.2d 714, 715 (Sup. Ct. 1955) (newspaper advertisements); *In re* Ripley, 109 Vt. 83, 87, 191 Atl. 918, 919 (1937) (use of letterhead).

Canon 35 provides that "a lawyer's relation to his client should be personal, and the responsibility should be direct to the client."[26] Thus, a lawyer may use clerks only if *he* creates and maintains the attorney-client relationship. According to an opinion of the American Bar Association, students may do research for attorneys, search court records, collect claims and interview witnesses, but an attorney may not delegate to them any "professional functions" such as "those involving directly the confidence of the client and the lawyer's trained discretion."[27] The Wyoming Supreme Court has said that "the interviewing of clients . . . is unquestionably the duty of a lawyer and not that of a layman."[28] Another court declared that law clerks may only do such work "as loses its separate identity and becomes either the product, or else merged in the product, of the attorney himself."[29] Similarly, the A.B.A. requires that an attorney "supervise" the work of his clerk.[30] Any threat to the public welfare from this arrangement comes from the attorney's unwarranted delegation of responsibility, not the law student's inaccurate advice. Advising licensed attorneys would seldom be unauthorized practice.

Students in legal aid clinics interview clients and give them legal advice. They even draw up pleadings and appear in court when necessary.[31] One or two directing attorneys cannot possibly "supervise" the work of thirty-five law students in any meaningful way. It is neither possible nor educationally desirable that the students' work become "merged in the product" of his professor. And the conclusion of the Wyoming court that interviewing clients is "unquestionably the duty of a lawyer" is directly violated.

This practice is ethically justified by an exception in Canon 35 for "charitable societies."[32] In addition, "since cases should be decided on practicalities and not theoreticals,"[33] it becomes relevant again that "some representation is better than none."[34] The exception is also based upon the widespread acceptance of the desirability of legal aid clinics and

[26] A.B.A., CANONS OF PROFESSIONAL ETHICS 35 (1956); TEX. BAR RULES art. 13, canon 32 (1956).

[27] A.B.A. OPINION No. 85 (1932); reprinted in Reece, *Problems in Professional Ethics*, 2 STUD. L.J. 18, 19 (Feb. 1957).

[28] State *ex rel.* Wyoming State Bar v. Hardy, 61 Wyo. 172, 190, 156 P.2d 309, 315 (1945).

[29] Ferris v. Snively, 172 Wash. 167, 177, 19 P.2d 942, 946 (1933).

[30] A.B.A. OPINION No. 85 (1932).

[31] See Comment, 21 TEXAS L. REV. 423 (1943).

[32] "Charitable societies rendering aid to the indigents are not deemed such intermediaries [as otherwise would be forbidden by this Canon]." A.B.A., CANONS OF PROFESSIONAL ETHICS 35 (1956); TEX. BAR RULES art. 13, canon 32 (1956).

[33] Tropical Marine Products, Inc. v. Birmingham Fire Ins. Co., 247 F.2d 116, 121 (5th Cir. 1957) (per Brown, J.).

[34] See text at note 16 *supra*.

their amenability to supervision and regulation.[35] The Massachusetts Supreme Court extended this exception beyond legal aid clinics when it declared,

"[T]he gratuitous furnishing of legal aid to the poor and unfortunate without means in the pursuit of any civil remedy, as a matter of charity, . . . do[es] not constitute the practice of law."[36]

An extreme example of such a defense was explored in *Rosenthal* v. *Shepard Broadcast Service*.[37] A radio station claimed that its legal advice programs were not unauthorized practice because of its charitable motivation. This theory was rejected by the court only because they considered the evidence insufficient to find a charitable motive.

V. Conclusion

All this while *J.A.* has patiently awaited some legal advice about legal advice. This Comment has been directed at his question, "Under what circumstances will giving free legal advice be considered the practice of law?"

The primary concern is only that no one rely to his detriment upon legal advice from the unqualified. The reasons involve law, ethics, and intellectual honesty. When *J.A.* prevents reliance he satisfies them all. He can do this by explaining, simply and briefly, why he is unqualified to give legal advice, but nevertheless happy to talk about the law. No student wants to harm his friends and relatives with inaccurate advice about their legal problems.[38] On the other hand, if he is confident that his statements are not being relied upon as "legal advice," his legal discussion need not be further restricted.

Law professors are fond of prompting student classroom participation by posing a question in the form of, "What would you do if a client came to you with this problem?" Perhaps *J.A.'s* safest and most honest retort to his advice-seekers is the same one he sometimes gives the professor: "I'd advise him to see a lawyer."[39]

[35] Admittedly, neither do they arouse the ire of those attorneys most concerned with the loss of paying clients to unauthorized practicioners.

[36] *In re* Opinion of the Justices, 289 Mass. 607, 615, 194 N.E. 313, 317–18 (1935).

[37] 299 Mass. 286, 12 N.E.2d 819 (1938).

[38] This is true even if prosecution is unlikely. The emphasis of local unauthorized practice committees is illustrated by the following sample subject headings from the index to volumes 20 and 21, in 22 Unauthorized Practice News 53–64 (1956): accountants, ambulance chasing, banks, bond houses, collection agencies, income tax, realtors, title companies, unions, and wills.

[39] All statements and conclusions herein are those of a law student, not a member of any bar. The Comment is only intended to be suggestive of the problems involved in the area, and should not be relied upon as valid legal advice.