

Spring 1981

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Recommended Citation

Marlene M. Remmert, *Representation of Clients Before Administrative Agencies: Authorized or Unauthorized Practice of Law*, 15 Val. U. L. Rev. 567 (1981).

Available at: <https://scholar.valpo.edu/vulr/vol15/iss3/4>

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REPRESENTATION OF CLIENTS BEFORE ADMINISTRATIVE AGENCIES: AUTHORIZED OR UNAUTHORIZED PRACTICE OF LAW?

INTRODUCTION

Many courts in a variety of different cases have struggled to find a definition of what constitutes the practice of law. These struggles generally end with the conclusion that so many different concepts are involved that one definition would be unworkable.¹ Questions about which activities make up the practice of law most often occur when someone is charged with the unauthorized practice of law. Accountants, realtors, and architects are but a few professionals who, because of the nature of their businesses, have been caught up in the controversy over precisely what constitutes the unauthorized practice of law.² In an attempt to delineate the realm of the attorney from that of the accountant, the realtor, and the architect, formal agreements have been reached between members of those professions and the American Bar Association (ABA).³ However, even those agreements have not proven wholly satisfactory, and the ABA has recognized that in some instances the in-

1. In each of the following cases the court decided the unauthorized practice issue after specifically refusing to define the practice of law. *E.g.*, *State Bar of Arizona v. Arizona Land & Title Co.*, 90 Ariz. 76, 366 P.2d 1, 8 (1961) (employees of title company preparing deeds and mortgages constitutes unauthorized practice of law); *State v. Sperry*, 140 So.2d 587, 591 (Fla. 1962) (non-lawyer licensed to represent clients before Patent Office engaged in unauthorized practice by doing business in Florida); *Clark v. Austin*, 340 Mo. 467, 101 S.W.2d 977, 982 (1937) (layperson appearing before state public service commission was unauthorized practice); *Auerbacher v. Wood*, 139 N.J. Eq. 599, 53 A.2d 800, 801 (1947), *aff'd*, 142 N.J. Eq. 484, 59 A.2d 863, 864 (1948) (industrial relations consultant using legal knowledge as incidental to non-legal service not practicing law).

2. *E.g.*, *Illinois State Bar Ass'n. v. Schafer*, 404 Ill. 45, 87 N.E.2d 773 (1949) (real estate broker who prepared deeds, mortgages and contracts was guilty of unauthorized practice); *Grace v. Allen*, 407 S.W.2d 321 (Tex. Cir. App. 1966) (accountant admitted to practice before Treasury Department guilty of unauthorized practice in doing legal research); *In Re Welch*, 123 Vt. 180, 185 A.2d 458 (1962) (surveyor enjoined from giving advice on legal rights).

3. These agreements are collected in THE AMERICAN BAR ASSOCIATION, STATEMENTS OF PRINCIPLES WITH RESPECT TO THE PRACTICE OF LAW FORMULATED BY REPRESENTATIVES OF THE AMERICAN BAR ASSOCIATION AND VARIOUS BUSINESS AND PROFESSIONAL GROUPS (1969) [hereinafter cited as ABA STATEMENT OF PRINCIPLES]. The book contains agreements between the ABA and the following ten professional groups: accountants, architects, banks with trust functions, casualty insurers, claims adjusters, collection agencies, life insurance companies, publishing houses, and social workers.

terests of the bar and other professions may be so conflicting that they are irreconcilable.⁴

Members of the organized bar are concerned about providing high standards of competence and adhering to a strict code of professional ethics.⁵ Cases concerning unauthorized practice invariably hold that regulation is not meant to create a monopoly for members of the bar, but instead to protect the public from being represented in legal matters by unqualified persons who cannot be disciplined by the judicial system.⁶ However, it would be naive if not dishonest to ignore a desire to buttress the authority of the organized bar and to increase the income of its members.⁷

4. Forward to ABA STATEMENT OF PRINCIPLES, *supra* note 3. The preamble to the statement of principles made by the ABA and the Council of Certified Public Accountants illustrates how difficult it is to separate the practice of law belonging exclusively to attorneys from the accounting business:

In our complex society, the average citizen conducting a business is confronted with a myriad of governmental laws and regulations which cover every phase of human endeavor and raise intricate and perplexing problems. These are further complicated by the tax incidents attendant upon all business transactions. As a result, citizens in increasing numbers have sought the professional services of lawyers and certified public accountants. . . . Frequently the legal and accounting phases are so interrelated and interdependent and overlapping that they are difficult to distinguish. Particularly is this true in the field of income taxation where questions of law and accounting have sometimes been inextricably intermingled.

ABA STATEMENT OF PRINCIPLES, at 1.

5. Forward to ABA STATEMENTS OF PRINCIPLES, *supra* note 3.

6. The language often repeated in unauthorized practice cases is found in *Lowell Bar Ass'n v. Loeb*, 315 Mass. 176, 52 N.E.2d 27, 31 (1943):

The justification for excluding from the practice of law persons not admitted to the bar is to be found, not in the protection of the bar from competition, but in the protection of the public from being advised and represented in legal matters by incompetent . . . persons, over whom the judicial department could exercise little control.

Id. at 180, 52 N.E.2d at 31. Numerous other cases employ similar language. *See, e.g., Chicago Bar Ass'n v. United Taxpayers of America*, 312 Ill. App. 243, 38 N.E.2d 349 (1941); *Bump v. District Court*, 232 Iowa 623, 5 N.W.2d 914 (1942); *In Re Shoe Mfrs. Protective Ass'n*, 295 Mass. 369, 3 N.E.2d 746 (1936); *Wright v. Barlow*, 132 Neb. 166, 271 N.W. 282 (1936); *Pioneer Title Ins. & Trust Co. v. State Bar of Nevada*, 326 P.2d 408 (Nev. 1958); *New Jersey State Bar Ass'n v. Northern N.J. Mortgage Associates*, 22 N.J. 184, 123 A.2d 498 (1956); *People v. Alfani*, 227 N.Y. 334, 125 N.E. 671 (1919); *Daniel v. Wells*, 191 S.C. 468, 5 S.E.2d 181 (1939).

Ironically, even though protection of the public is the stated reason for excluding unlicensed persons from the practice of law, the above cases all were brought in the first instance by bar associations and not by members of the public.

7. Johnstone, *The Unauthorized Practice Controversy, A Struggle Among Power Groups*, 4 U. KAN. L. REV. 1, 5 (1955). Johnstone concludes that unauthorized practice cases are a device by lawyers to eliminate lay competition and to restrict the

Balanced against the interests of members of the bar and the judiciary are the interests of laypersons in what they believe is their right to pursue the occupation of their choice unfettered by concerns over possible unauthorized practice charges.⁸ Non-lawyers often find themselves in a headlong confrontation with the bar over some aspect of their occupation that impinges upon the law. Realtors, for example, have been the targets of unauthorized practice charges because they fill out deed forms as a routine part of real estate transactions.⁹ The courts are split on whether filling out legal forms constitutes the practice of law.¹⁰ Realtors argue that filling out deeds is a legitimate, although incidental part of their business, while members of the bar say that even filling out simple deeds requires legal knowledge and therefore should be done only by lawyers.¹¹ Many businesses, in addition to real estate, have been targets for unauthorized practice charges by members of the organized bar.¹²

The state of the law regarding laypersons representing clients in administrative proceedings is even more confusing than the area of real estate practice. Statutes setting up administrative agencies sometimes allow representation by non-lawyers, or give the agency

number of lawyers to provide higher incomes for those already licensed. *Id.* Part of the reason for this conclusion is that consumers of these legal-type services, the supposed beneficiaries of unauthorized practice actions, have not been active in bringing these lawsuits. *Id.* at 3.

8. This is almost always one of the arguments made by laypersons in unauthorized practice cases; but the courts refuse to accept the reasoning. For example, in one case the court held that the right to practice law is not a right or privilege guaranteed by the fourteenth amendment to the United States Constitution. *Ginsburg v. Kovrak*, 392 Pa. 143, 139 A.2d 889, *appeal dismissed*, 358 U.S. 52 (1958).

9. *E.g.*, *Reynolds v. Dinger*, 14 Wis. 2d 193, 109 N.W.2d 685 (1961). In *Reynolds* the court held that filling out legal documents by real estate brokers was a form of practicing law, but it was not unauthorized. One basis for the holding was lack of injury to the public from what had become customary practice among realtors. *Id.*

10. A typical example of this lack of consensus is presented by a comparison of *Reynolds*, and *State Bar of Arizona v. Arizona Land & Title Co.*, 90 Ariz. 76, 366 P.2d 1 (1961). The *Reynolds* court held that filling out legal forms is an acceptable incident of the real estate business. That decision was severely criticized by the court in *State Bar of Arizona*, where preparation of legal documents by title company employees was held to be unauthorized practice of law.

11. *E.g.*, *Washington State Bar Ass'n v. Washington Ass'n of Realtors*, 41 Wash. 2d 697, 251 P.2d 619, 620 (1952).

12. *See* J. FISCHER, UNAUTHORIZED PRACTICE HANDBOOK (1972). Just a few of the occupations that have come under fire for practicing law are labor unions, banks and trust companies, and accounting and collection companies.

power to decide who may represent clients.¹³ Again, no uniformity exists among states on the issue of laypersons appearing in a representative capacity before administrative bodies.¹⁴ Not only is there a disagreement on that issue, but also on the more fundamental problem of whether state legislatures have the power to allow non-lawyers to represent clients before a state administrative body.¹⁵

Most courts agree they have the inherent power to regulate matters relating to practice of law and judicial administration.¹⁶ The extent to which the legislature may enact statutes that affect judicial regulation of the practice of law varies from state to state.¹⁷

13. *E.g.*, ARK. STAT. § 81-1323(c) (1960) (claimant in proceeding before workmen's compensation board may be represented by anyone authorized in writing); DEL. CODE ANN. tit. 19, § 3373(a) (1974) (individual claiming benefits before unemployment compensation board may be represented by counsel or other agent); FLA. STAT. § 447.609 (1977) (any fulltime employee or officer of public employer or employee organization may represent an employer or member of bargaining unit in proceedings before Florida Public Employees Relations Commission); MASS. ANN. LAWS ch. 151A, § 37 (1971) (party appearing before unemployment compensation board may be represented by an attorney or agent); S.C. CODE § 41-39-30 (1976) (person claiming benefits may be represented by attorney or agent before unemployment compensation board); WIS. STAT. ANN. § 102.17 (1971) (party before unemployment compensation commission may be represented by an attorney or other agent).

14. *See, e.g.*, *Eagle Indemnity Co. v. Industrial Accident Comm'n of Cal.*, 217 Cal. 244, 18 P.2d 341 (1933) (layperson may represent client before industrial accident commission); *Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N.E.2d 941 (1937) (non-lawyer who appeared before workmen's compensation board held in contempt for unauthorized practice of law); *Johnson v. Childe*, 139 Neb. 91, 295 N.W. 381 (1941) (statutes cannot authorize practice of law by laypersons before state railway commission); *Goodman v. Beall*, 130 Ohio St. 427, 200 N.E. 470 (1936) (assisting workmen or dependents in presenting workmen's compensation claim is not practice of law); *West Va. State Bar v. Earley*, 144 W. Va. 504, 109 S.E.2d 420 (1959) (state compensation commissioner was without power to permit non-lawyer to practice).

15. *See* *Eagle Indemnity Co. v. Industrial Accident Comm'n of Cal.*, 217 Cal. 244, 18 P.2d 341 (1933) (court held legislature could provide statutory exceptions to rule against allowing laypersons to practice); *Clark v. Austin*, 340 Mo. 467, 101 S.W.2d 977 (1937) (judicial branch has sole power to regulate practice both in and out of court); *In Re Applicants for License*, 143 N.C. 1, 55 S.E. 635 (1906) (legislature may in certain circumstances permit practice of law by laypersons); *West Va. State Bar v. Earley*, 144 W. Va. 504, 109 S.E.2d 420 (1959) (legislative enactment allowing administrative agency to promulgate rule allowing practice by non-lawyers is void).

16. *State Bar Ass'n of Connecticut v. Connecticut Bank & Trust Co.*, 20 Conn. Supp. 248, 131 A.2d 646 (1957); *Illinois State Bar Ass'n v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N.E. 901 (1931); *Bump v. District Court*, 232 Iowa 623, 5 N.W.2d 914 (1942); *Meunier v. Bernich*, 170 So. 567 (La. Ct. App. 1936); *In Re Opinion of the Justices*, 289 Mass. 607, 194 N.E. 313 (1935); *Hunter v. Kirk*, 133 Neb. 625, 276 N.W. 380 (1937).

17. In New York the power to control the practice of law is vested in the legislature, not in the judiciary. *See In Re Cooper*, 22 N.Y. 67 (1860). A strict separa-

With the growth of administrative agencies since the 1930s,¹⁸ corresponding numbers of unauthorized practice lawsuits have increased.¹⁹

A perfect example of the dilemma in which a lay person engaged in a lawful occupation may find himself occurred in Florida. Edward P. Moses was the chief contract negotiator for a school board.²⁰ During the course of negotiations, three unfair labor practice charges were filed against the school board.²¹ The charges ultimately resulted in a trial-like proceeding before an examiner for the Florida Public Employees Relations Commission (PERC).²² Because Moses represented his client in an administrative hearing that was very similar to a courtroom trial, the Florida Bar sought a determination from the Florida Supreme Court that Moses' actions constituted unauthorized practice of law.²³ *Amicus curiae* briefs in support of Moses' right to represent others were filed by the Florida Education Association/United, AFL-CIO and by the Florida Attorney General's office.²⁴

At issue in the *Moses* case, as well as in most other cases dealing with practice before administrative agencies is not just the unauthorized practice of law, or lack of it. Much more fundamental rights are at stake, including the right to rely on statutes allowing representation by lay practitioners²⁵ and the right to have advance

tion of powers doctrine requiring that the judicial branch have sole power over practice of law is followed in Missouri. See *Clark v. Austin*, 340 Mo. 467, 101 S.W.2d 977 (1937). Other states follow the rule that while ultimate control over practice of law rests with the judiciary, the legislature under its police powers may pass laws in aid of the judiciary. See *In Re Baker*, 8 N.J. 321, 85 A.2d 505 (1951); *In Re Bruen*, 102 Wash. 472, 172 P. 1152 (1918).

18. See vom Baur, *Representation Before Administrative Agencies*, 30 N.Y.U.L. REV. 1297, 1308 (1955).

19. Evidence of this increase can be seen in the tremendous number of unauthorized practice cases that have arisen since the 1930's and the few reported cases before that time. See J. FISCHER, *UNAUTHORIZED PRACTICE HANDBOOK* (1972). Perhaps some of this increase in the number of unauthorized practice cases can be attributed to the acknowledged interest of the ABA in the problem. In 1930 the ABA created its Standing Committee on Unauthorized Practice as part of a growing awareness of the problem. See FORWARD TO ABA STATEMENTS OF PRINCIPLES, *supra* note 3.

20. *School Board of Escambia County v. Public Employees Relations Comm'n*, 350 So.2d 819 (Fla. Dist. Ct. App. 1977).

21. *Id.*

22. *Florida Bar v. Moses*, 380 So.2d 412 (Fla. 1980).

23. *Id.*

24. *Id.*

25. *E.g.*, CAL. UNEMP. INS. CODE § 1957 (1972) (individual claiming benefits may be represented before appeals board by counsel or agent); MICH. COMP. LAWS

notice that a particular type of conduct is prohibited. These issues are not peculiar to *Moses*. They arise not only in labor law but also in workmen's compensation²⁶ and other agency proceedings where non-lawyers are allowed to practice.

Administrative agencies are an integral part of the government at both state and federal levels.²⁷ But the states and federal government differ greatly in their treatment of representation before administrative agencies. The federal government is much more liberal than state governments in allowing laypersons to appear in a representative capacity.²⁸ According to the federal Administrative Procedure Act, the matter of who may appear in a representative capacity is left up to each agency.²⁹ Some federal agencies, such as

ANN. § 421.31 (1977) (any person claiming unemployment compensation before the commission or a court may be represented by counsel or other agent); NEV. REV. STAT. § 463.150(k) (1979) (state gaming commission and Nevada tax commission shall prescribe qualifications of attorneys, accountants and others, under which they shall be permitted to appear); S.C. CODE § 40-5-80 (1976) (citizen can prosecute or defend another person so long as they do so without reward).

26. CONN. GEN. STAT. ANN. § 31-298 (1972) (both parties may appear either in person, by attorney or other accredited representative); MINN. STAT. ANN. § 176.261 (1966) (upon request by an employer or employee, industrial commission may designate one of its employees to advise a party of his or her rights); N.H. REV. STAT. ANN. § 282.13(B) (1977) (any individual claiming benefits may be represented by counsel or agent); N.Y. WORKMEN'S COMP. LAW § 24-a (McKinney Supp. 1980) (no person, firm or corporation other than an attorney shall appear on behalf of claimant unless the person appearing is a citizen of the United States and shall have obtained from the board a license).

The most influential case involving appearance before a workmen's compensation board is *West Va. State Bar v. Earley*, 144 W. Va. 504, 109 S.E.2d 420 (1959). In that case, the court held that appearance before a workmen's compensation board by a layperson was unauthorized even though it was permitted by statute. *Id.*

27. In *Public Service Traffic Bureau v. Haworth Marble Co.*, 400 Ohio App. 255, 178 N.E. 703 (1931), the court explains the development and importance of administrative agencies:

We are aware that in recent years the federal and state governments have devised means for settlement and adjustment of disputes other than by resort to courts of justice. In carrying out this plan various commissions and boards have been provided for, and established, which perform these functions, and, generally speaking, practice before these extra-judicial commissions and boards is not confined to attorneys at law, as the principal reason for the creation of these bodies was to avoid the technicalities involved in court procedure.

Id. at 257, 178 N.E. at 705.

28. See vom Baur, *Administrative Agencies and Unauthorized Practice of Law*, 48 A.B.A.J. 715, 716-17 (1962).

29. 5 U.S.C. § 555 (b) (1977).

A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by

the United States Patent Office, require examinations and specific educational qualifications before a layperson or an attorney is admitted to the agency's bar.³⁰

If the states would follow the lead of the federal government and allow quasi-judicial administrative agencies to set up their own bars regulating who may practice, most of the arguments on both sides of the issue would be satisfied. Courts would be less burdened by unauthorized practice lawsuits, and non-lawyers would know where and when they legally could appear to represent a client.

This note will illustrate the breadth of the unauthorized practice problems with respect to state administrative agencies, together with a history of the development of the problem. A discussion of theories used by courts to justify regulation of lay practitioners reveals not only a legitimate concern for protection of the public against unscrupulous persons,³¹ but also a usurpation by many courts of power that properly belongs to state legislatures.³² Inherent judicial power to regulate practice of law has long been the umbrella many courts use to justify usurpation of a broad range of legislative powers.³³ An examination of the inherent power concept

counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.

Id.

30. 37 C.F.R. § 1.341(b)(c) (1980). A person seeking to practice before the United States Patent Office must establish that he is "of good moral character and of good repute and possessed of the legal and scientific and technical qualifications necessary to enable him to render applicants for patents valuable service . . ." *Id.*

The Patent Office is just one federal agency that requires even lawyers to become members of its bar in order to practice. Other such agencies include: Interstate Commerce Commission, Federal Communications Commission and the Treasury Department. For a discussion of the bars of federal administrative agencies, see vom Baur, *Representation Before Administrative Agencies*, 30 N.Y.U.L. REV. 1297, 1305 (1955).

31. See note 6 *supra*.

32. Comment, *Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power*, 28 U. CHI. L. REV. 162 (1960). The author of this comment maintains that in regulating practice of law the courts have failed to distinguish between dominant judicial power and dominant legislative power. *Id.* at 163. The comment states that judicial power over practice of law should be confined to regulation of those activities that directly affect the judicial process. Beyond that, the legislature should be permitted to exercise its traditional police power for protection of the public; where the need is solely to protect the public, the court should not interfere with legislative process. *Id.*

33. It is generally conceded throughout the country that the power to control admissions to the bar and to discipline members of the bar is inherent in the judiciary. . . . But whether inherent or express, these

will show that few courts even attempt to justify the all-encompassing power they claim to have in the area of unauthorized practice.³⁴ However, a look at practice before the National Labor Relations Board (NLRB) and the United States Patent Office will reveal two workable schemes that regulate lay practitioners in the federal administrative system without undue court intervention. The NLRB and the Patent Office both allow lay practitioners to appear before them, the latter upon examination and application, and the former with no examination. The autonomy of these two federal agencies will be explored, together with a look at the hands-off approach taken by lower federal courts and by the United States Supreme Court.³⁵ An historical analysis of the roots of regulation of

powers over admission and discipline of members of the bar would be meaningless and futile if laymen might practice law with impunity. . . . The power to control admissions and to discipline the members of the bar necessarily carries with it the power to prevent laymen from practicing law.

In Re Baker, 8 N.J. 321, 334, 85 A.2d 505, 511-12 (1951).

Since an attorney is an officer of the court, the latter possesses the inherent power to supervise his conduct, to the point of reprimanding or even removing him from office for misconduct. . . . It logically follows that the courts have the inherent power apart from statute, to inquire into the conduct of any person — whether an individual, a lay agency, or a corporation to determine whether he or it is usurping the functions of an officer of the court.

Richmond Ass'n of Credit Men v. Bar Ass'n, 167 Va. 327, 335-36, 189 S.E. 153, 157 (1937).

34. The following is a typical statement of the court's inherent powers:

Though there are some decisions to the contrary [citations omitted] the clear and decided weight of authority . . . is that the judicial department, as one of three separate and independent branches of the government of the state, has the inherent power to define, supervise, regulate and control the practice of law and that the Legislature can not restrict or impair this power of the courts or permit or authorize laymen to engage in the practice of law.

West Va. State Bar v. Earley, 144 W. Va. 504, 109 S.E.2d 420, 436 (1959). Many other courts also adhere to this language. See, e.g., State Bar Ass'n v. Connecticut Bank & Trust Co., 20 Conn. Supp. 248, 131 A.2d 646 (Super. Ct. 1957); Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 8 N.E.2d 941 (1937); Illinois State Bar Ass'n v. People's Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); Bump v. District Court, 232 Iowa 623, 5 N.W.2d 914 (1942); Meunier v. Bernich, 170 So. 567 (La. Ct. App. 1936); Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943); In Re Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935); Johnson v. Childe, 147 Neb. 527, 23 N.W.2d 720 (1946); Hunter v. Kirk, 133 Neb. 625, 276 N.W. 380 (1937); State Bar Ass'n v. Northern N.J. Mortgage Ass'n, 22 N.J. 184, 123 A.2d 498 (1956).

35. Sperry v. Florida Bar, 373 U.S. 379 (1963) (state may not prohibit a person licensed by the Patent Office from conducting patent business in state).

legal practice in the courts and before administrative agencies also will be undertaken.

HISTORICAL PERSPECTIVE

In England, where the American legal profession has its roots, regulation of attorneys has long been shared by the courts and by Parliament.³⁶ The courts share in regulation only by virtue of having been given the power by statutes of Parliament.³⁷ As far back as the Middle Ages, Parliament passed laws that gave the courts authority to control and to admit attorneys.³⁸ In turn, orders of court were issued, requiring examination of prospective candidates; these orders extended also to conduct and discipline of those already admitted to practice.³⁹ A statute passed in 1605 provided penalties for fraud and negligence, and sought to eliminate those who were unqualified to practice law.⁴⁰

Only those of good moral character with a sufficient amount of learning, were sworn and thereby allowed to become members of the legal profession.⁴¹ The English bar was born of a public demand for exclusion of those who were unfit to practice, and it was left up to the justices to decide who would be admitted.⁴² The meaning of the word "attorney" in England was synonymous with the meaning of "agent," and these agents for litigation were controlled by the courts in England and looked upon as officers of those courts.⁴³

It is important to recognize that although English courts played a tremendous part in regulation of early attorneys, this power came about only as a result of statutory authority conferred by Parliament.⁴⁴ The courts did not begin with the power; rather, it was delegated to them by Parliament. Of course the English Parlia-

36. See R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 100 (1953).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*, citing 3 James 1, ch. 7 (1605). The text of the statute is as follows: "An act to reform the multitudes and misdemeanors of attornies and solicitors at law, and to avoid unnecessary suits and charges at law." *Id.*

41. *Id.* at 100.

42. vom Baur, *supra* note 28, 48 A.B.A.J. at 716. As authority for this conclusion, vom Baur cites Rhode Island Bar Ass'n v. Automobile Service Ass'n, 55 R.I. 122, 179 A. 139 (1935). In *Rhode Island Bar*, the court looked at early English statutes on conduct of members of the legal profession and concluded such statutes were the result of public pressure for regulation of the legal profession. *Id.*

43. R. POUND, *supra* note 36, at 98.

44. *Id.* at 100.

ment, unlike the United States Congress, exercises supreme, transcendental power that can be judicial as well as legislative.⁴⁵ This important aspect of English government has to be kept in mind in any comparison between the English and American systems of regulation and control of attorneys. But however different the United States and England might be on the source of court power, it has become the well-established rule in both countries that representation of clients inside the courtroom is restricted to those officers of court who are sworn and licensed to practice based on academic and moral examination.⁴⁶

Practice of law inside the courtroom was reserved for attorneys in the United States long before the beginning of the Industrial Revolution.⁴⁷ But with the rise of the industrial age came an increase in government regulations,⁴⁸ and one consequence of the increased government regulations was an upsurge in the amount of legal practice outside the courtroom.⁴⁹ As administrative agencies with quasi-judicial power were created at both state and federal levels, new questions arose with respect to the realm of the attorneys and that of non-lawyers. Part of the confusion has been attributed to the character of an adversary administrative pro-

45. In *Re Applicants for License*, 143 N.C. 1, 55 S.E. 635 (1906). This case contains a lengthy and complete discussion of the history of regulation of the legal profession in England. At issue in the case was whether applicants to practice law must be admitted if they complied with requirements set down by the legislature. The court held that applicants must be admitted if they possessed the requisite qualifications, because to do otherwise would be an invasion of legislative prerogative by the judiciary. *Id.* at 2, 55 S.E. at 636.

46. Statutes in many states establish the principle. *E.g.*, ALA. CODE § 34-3-6 (1975); GA. CODE § 9-401 (1980); LA. REV. STAT. § 37:212 (1974); N.C. GEN. STAT. § 84-2.1 (1975); R.I. GEN. LAWS § 11-27-2 (1969); TENN. CODE ANN. § 23-3-103 (1980).

47. See vom Baur, *supra* note 28, 48 A.B.A.J. at 716. The exception to allowing only attorneys in courtroom practice is that a party may appear *pro se* pursuant to statute in most jurisdictions. See, *e.g.*, COLO. REV. STAT. § 12-5-101 (1973); FLA. STAT. ANN. § 454.18 (1965); WASH. REV. CODE § 2.48.190 (1961).

48. See vom Baur, *supra* note 28, 48 A.B.A.J. at 716. According to vom Baur, the increase in governmental regulations was a response at least in part to the growth of corporations as a result of the Industrial Revolution. *Id.*

49. Federal and state governments have used administrative agencies to deal with complex problems that cannot be handled effectively by the legislature or the courts. 73 C.J.S. *Public Administrative Procedure* § 1 (1951). In fact, the principal reason for creation of administrative agencies was to settle disputes without the technicalities involved in the court process. *Public Service Traffic Bureau Inc. v. Haworth Marble Co.*, 40 Ohio App. 374, 178 N.E. 703 (1931) (layperson negotiating freight rates was not practicing law). The Interstate Commerce Commission is an example of an administrative body allowing non-lawyers who possess requisite legal and technical skills to appear. 49 C.F.R. § 1100.9(a) (1980).

ceeding—that is, it looks like a trial in most instances, and yet it is more informal than courtroom proceedings.

POWERS OF REGULATION

With the advent of the more informal administrative forum, the trend has been to appoint laypeople as members of administrative bodies.⁵⁰ For example, at the federal level there is no requirement that members of the National Labor Relations Board be attorneys.⁵¹ The same is also true for certain state agencies.⁵² In creating administrative agencies, legislatures are concerned about keeping the proceedings informal to facilitate easy access to the agencies.⁵³ Another primary concern has been to create a system that will function as speedily and inexpensively as possible.⁵⁴ As a result of this concern for informality and easy access, it is not uncommon for legislatures to enact statutes authorizing representation by non-lawyers before administrative agencies.⁵⁵ The same result is reached when legislatures grant the agencies rulemaking power to determine who may appear, and pursuant to that power an agency allows practice by laypersons.⁵⁶ Conflict is inevitable when the legislature or the agency allows practices that courts say they have inherent power to regulate.

Inherent Power of State Courts

State courts almost unanimously agree they have inherent power⁵⁷ to control unauthorized practice of law as a corollary of

50. See vom Baur, *supra* note 28, 48 A.B.A.J. at 716.

51. *E.g.*, 29 U.S.C. § 153 (1970) (National Labor Relations Board); 49 C.F.R. § 1100.9(a) (1980) (Interstate Commerce Commission); 26 C.F.R. § 601.502(b)(ii) (1980) (Internal Revenue Service).

52. See, *e.g.*, FLA. STAT. § 447.205 (1977) (members of Public Employees Relations Commission not required to be attorneys).

53. See note 49 *supra*.

54. See note 49 *supra*.

55. See note 25 *supra*.

56. See note 26 *supra*.

57. Inherent power of the judiciary is usually defined as the power which is essential to the existence, function and dignity of the court by the very fact that it is a court. *Ralston v. Turner*, 141 Neb. 556, 4 N.W.2d 302, 310 (1942); *Hunter v. Kirk*, 133 Neb. 625, 276 N.W. 380 (1937); *In re Integration of Neb. State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265, (1937); *In re Bledsoe*, 186 Okla. 264, 97 P.2d 556 (1939).

The justification for use of inherent power by the courts in regulating practice of law is that the legal profession is so intimately connected with judicial power in the administration of justice that such power is essential to the court's functions. See *generally*, 21 C.J.S. *Courts* § 31 (1940). Inherent powers are implied by the courts from a general grant of jurisdiction. See *In re Integration of the Neb. State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265, 266 (1937).

their right to discipline and to regulate licensed attorneys. Perhaps the most explicit description of the extent of a court's inherent power was set forth in *Martin v. Davis*.⁵⁸ The case involved an attorney, licensed to practice in both Kansas and Missouri, but with his principal office in Missouri.⁵⁹ A Kansas court rule required that attorneys whose regular practices were in other states must associate with local counsel, even though the attorneys were licensed to practice in Kansas.⁶⁰ For the source of power to promulgate this rule, the Kansas Supreme Court in *Martin* looked to the state constitution, which distributed powers of government among the executive, legislative, and judicial branches of government.⁶¹ Such a distribution of powers, patterned after the federal government,⁶² is common in state constitutions.⁶³ Judicial power in Kansas, as well as in other states, is vested in a court system typically headed by the state supreme court. According to the Kansas Supreme Court, express power to regulate the practice of law is not necessary in order for the court to exercise its power; the court considers itself vested with inherent power under the constitution, arising from its creation, to accomplish objectives logically within the judicial sphere.⁶⁴

Because attorneys are officers of the court, the task of regulating practice of law seems logically to fall to the judicial branch. Consequently, most courts find as the Kansas Supreme Court did in *Martin*, that they have the inherent right to "prescribe conditions for admission to the Bar, to define, supervise, regulate and control the practice of law, whether in or out of court."⁶⁵ In-

58. 187 Kan. 473, 357 P.2d 782 (1960).

59. *Id.* at 474, 357 P.2d at 786.

60. *Id.* at 476, 357 P.2d at 785. Association with local counsel requires engaging an attorney with a regular practice in Kansas. The Kansas attorney then would make the court appearances with the other attorney only assisting. *Id.* at 474, 357 P.2d at 786. Although the case does not so state, the implication is that the local counsel will split the fee with the foreign attorney. For an in-depth account of problems regarding association that were encountered by the military, see F. MARKS, *MILITARY LAWYERS, CIVILIAN COURTS, AND THE ORGANIZED BAR* (1972).

61. 187 Kan. 473, 357 P.2d 782, 787.

62. See U.S. CONST. arts. I, II, and III.

63. Forty states have separation of powers provisions in their constitutions. The following fourteen jurisdictions have no explicit constitutional provisions for separation of powers: Alaska, Delaware, District of Columbia, Guam, Hawaii, Kansas, New York, North Dakota, Pennsylvania, Puerto Rico, South Carolina, Virgin Islands, Washington and Wisconsin. See J. FISCHER, *supra* note 12, at 5.

64. *Martin v. Davis*, 187 Kan. 473, 357 P.2d at 787. For a discussion of inherent judicial power, see note 57 *supra*.

65. *Martin v. Davis*, 187 Kan. 473, 357 P.2d 782, 788 (1960). See also *Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N.E.2d 941 (1937); *Illinois State Bar Ass'n v. Peo-*

herent power is necessary to preserve the being and dignity of the court, and is not to be exercised as "an arbitrary and despotic power . . . or because of passion, prejudice or personal hostility."⁶⁶ Although acknowledging this limitation, which is essentially one of reason, the court in *Martin* does not follow its own limitation, for in the next sentence it arbitrarily refuses to define the limits of its inherent power.⁶⁷ In fact, the *Martin* court held that its power to regulate practice of law exists notwithstanding the power of the legislature to exercise its police power.⁶⁸ Furthermore, the court was not content to leave the legislature with its traditional police powers to provide for the health, safety and welfare of its citizens; this court said, for reasons it declined to disclose, the court may exercise police powers in regulating attorneys.⁶⁹

While few courts extend their inherent powers as far as in *Martin*,⁷⁰ the case is an important illustration of how inherent power is the means used to justify almost any end. Since inherent power is implied, it is left up to the courts to decide how far the powers extend.⁷¹ The exercise of inherent power in regulating attorneys can be justified because they are officers of the court, and it is necessary that the court be able to rule its own officers. However, the implied power has been stretched even further to include those who are not attorneys. Courts exercising inherent power regulate laypersons who may be relying on legislative authority in appearances before administrative bodies.⁷²

ple's Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); *Bump v. District Court*, 232 Iowa 623, 5 N.W.2d 914 (1942); *In re Baker*, 8 N.J. 321, 85 A.2d 505 (1951).

66. *Martin v. Davis*, 187 Kan. 473, 357 P.2d 782, 787 (1937).

67. *Id.* Regarding the limits of the court's power, the opinion stated: It is unnecessary here to explore the limits of judicial power conferred by that provision, but suffice it to say the practice of law is so intimately connected and bound up with the exercise of judicial power in the administration of justice that the right to regulate the practice naturally and logically belongs to the judicial department of government.

Id. at 479, 357 P.2d at 787-88 (citations omitted).

68. *Id.*

69. *Id.* at 481, 357 P.2d at 790.

70. The *Martin* court cites only two cases as authority for extension of inherent power to include police power. See *Workmen's Compensation Board of Kentucky v. Abbott*, 212 Ky. 123, 278 S.W. 533 (1930); *In re Petition of Fla. State Bar Ass'n*, 40 So.2d 902 (Fla. 1949). However appealing the *Martin* court may have found this Florida case, later courts in Florida have not followed the case. See note 107 *infra* and accompanying text.

71. See note 57 *supra*.

72. See note 73 *infra* and accompanying text.

Inherent Power Extended To Administrative Agencies

Many courts that have dealt with regulation of the practice of law in the courtroom, have also had to deal with legal work before quasi-judicial tribunals, namely, administrative agencies. Most courts have very little trouble in finding that their power extends outside the courtroom to proceedings before administrative bodies.⁷³ "[I]t is the character of the act and not the place where the act is performed, which is the decisive factor"⁷⁴ in determining if a particular case involves unauthorized practice of law.

The power to enforce rules prohibiting practice by unauthorized persons is a function of the court's authority to license those who are fit to practice and to forbid others from practice.⁷⁵ From these powers, it follows that the court also may regulate those who are practicing without licenses, even though those persons may never have been before the court.⁷⁶

73. *E.g.*, *Eagle Indemnity Co. v. Industrial Accident Comm'n of Cal.*, 217 Cal. 244, 18 P.2d 341 (1933) (Industrial Accident Commission); *Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N.E.2d 941 (1937) (Workmen's Compensation Board); *Public Service Comm'n v. Hahn Transportation*, 253 Md. 571, 253 A.2d 845 (1969) (Public Service Commission); *Clark v. Austin*, 340 Mo. 467, 101 S.W.2d 977 (1937) (Public Service Commission); *Stack v. P.G. Garage, Inc.*, 7 N.J. 118, 80 A.2d 545 (1951) (County Tax Board).

74. *Shortz v. Farrell*, 327 Pa. 81, 193 A. 20, 21 (1937). This language often is used in unauthorized practice cases to counter the argument that one can only practice law in a courtroom. *See, e.g.*, *Illinois State Bar Ass'n v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N.E. 901, 907; *Johnson v. Childe*, 139 Neb. 91, 295 N.W. 381, 382 (1941).

75. *Illinois State Bar Ass'n v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N.E. 901, 906 (1931). This case dealt with a bank which, through its attorneys, conducted almost every imaginable form of legal business, with the possible exception of divorce. *Id.* at 464, 176 N.E. at 903. A corporation cannot practice law, nor can it hire attorneys to practice law for it. *E.g.*, *Los Angeles Bar Ass'n v. California Protective Corp.*, 76 Cal. App. 354, 244 P. 1089 (1926); *Dworken v. Apartment House Owners Ass'n*, 38 Ohio App. 265, 176 N.E. 577 (1931).

Although the *People's Stock Yards* case involved practice of law by a bank through its attorneys, it is often cited for the proposition that prohibition of unauthorized practice follows from the court's authority to license attorneys. There are many other cases in the same vein. *See, e.g.*, *Arkansas Bar Ass'n v. Union Nat'l Bank*, 224 Ark. 48, 273 S.W.2d 408 (1954); *State Bar Ass'n v. Connecticut Bank & Trust Co.*, 145 Conn. 222, 140 A.2d 863 (1958); *Bassi v. Langloss*, 22 Ill. 2d 190, 174 N.E.2d 682 (1961).

76. Persons who may find themselves before the court on unauthorized practice charges without ever having represented anyone in court include: realtors, accountants, debt poolers, labor officials, architects, insurance adjusters, and estate planners. *E.g.*, *Florida Bar v. Moses*, No. 53,305 (Sup. Ct. Fla., filed 1978) (labor contract negotiator); *Fatzer v. Schmitt*, 174 Kan. 581, 258 P.2d 228 (1953) (advice on trusts); *Fitchette v. Taylor*, 191 Minn. 582, 254 N.W. 910 (1934) (insurance adjuster); *Automobile Club v. Hoffmeister*, 338 S.W.2d 348 (Mo. App. 1960) (auto club representative).

To deny the power of the court to deal with such offenders would be tantamount to a destruction of the power [to license attorneys] itself. Perhaps the major portion of the actual practice of law under modern conditions consists of the work of attorneys outside of any court and has nothing to do with any court.⁷⁷

Courts do not exercise these broad powers regulating legal practice without some justification, which is usually phrased as protection of the public.⁷⁸

Reasons For Regulation

"The practice of law is affected with a public interest."⁷⁹ Therefore it must be regulated primarily in order to promote the public welfare. A secondary or incidental purpose for regulating unauthorized practice is to assure licensed attorneys the protection of their professions.⁸⁰ It is not the selfish interest of lawyers that is being protected, but the public's right to skilled, competent and qualified persons.⁸¹ "Not only this, he must be served disinterestedly by a lawyer who is his lawyer, not motivated or controlled by a divided or outside allegiance."⁸² One cannot seriously argue that the practice of law in the courtroom, with its complex evidentiary and procedural rules, should not be restricted to licensed attorneys, for all of the reasons set forth above. But there are some countervailing considerations which should be articulated before any court adopts the "public interest" as an all-important consideration to guide a decision on unauthorized practice of law outside the courtroom.

77. *Illinois State Bar Ass'n v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N.E. 901, 906 (1931).

78. See note 6 *supra*.

79. *Rhode Island Bar Ass'n v. Automobile Service Ass'n*, 51 R.I. 122, 179 A. 139, 143 (1935) (automobile club representative could not make court appearance for someone else). For more on the automobile club and unauthorized practice, see Collins, *Automobile Club Activities: The Problem from the Standpoint of the Clubs*, 5 L. & CONTEMP. PROB. 3 (1938).

80. *Rhode Island Bar Ass'n v. Automobile Service Ass'n*, 51 R.I. 122, 179 A. 139 (1935). See also *Depew v. Wichita Ass'n of Credit Men*, 142 Kan. 403, 49 P.2d 1041 (1935), *cert. denied*, 297 U.S. 710 (1936) (attorneys possess privilege and duty to protect themselves and courts from illegal conduct); *Fitchette v. Taylor*, 191 Minn. 582, 254 N.W. 910 (1934) (attorneys as officers of the court have a franchise and a property right to protect).

81. *Florida Bar v. Brumbaugh*, 355 So.2d 1186 (1978) (person legally may sell do-it-yourself divorce kits, but may not give assistance in preparing the forms).

82. *Bump v. District Court*, 232 Iowa 623, 5 N.W.2d 914, 922 (1942).

It may be in the public interest to allow laypersons to represent clients before administrative agencies. In some instances laypersons are more familiar with the legal intricacies of cases than an attorney would be. Labor law is one area where knowledge of the law of the shop may be more important than basic legal skills such as knowledge of relevancy and materiality of evidence.⁸³ An attorney, for example, who spends all of his or her time drawing up documents relating to real estate transactions will be ill-suited to represent a client before a state or national labor tribunal on an issue that deals with intimate knowledge of the steel industry. Likewise, an attorney is best qualified to appear in courtroom proceedings when the emphasis is on formality, strict adherence to the rules of evidence, and where trial tactics can be the all-important difference between winning or losing. For the most part, cases involving lay practitioners before administrative agencies overlook these considerations. Courts should stop to consider that in creating administrative agencies the legislature might have considered precisely the public interest and decided such an interest would benefit from representation by laypersons. On the contrary, however, the courts often summarily dismiss any legislative action as encroach-

83. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). This case involved an alleged breach of a collective bargaining agreement. The agreement had an arbitration clause, and the court was called upon to decide whether the contracting-out of certain work in alleged violation of the agreement was a question for the courts or for the arbitrator.

In deciding the issue in favor of an arbitrator, Justice Douglas said:

The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion a judgment may indeed be foreign to the competence of the courts. . . . The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

Id. at 581-82.

Warrior & Gulf recognizes the value of experts in the informal setting of arbitration. An analogy can be made between the value of experts in arbitration, and their value in an administrative proceeding. One state court has come out solidly in favor of lay experts, even though the weight of state authority is to the contrary. See *Auerbacher v. Wood*, 139 N.J. Eq. 599, 53 A.2d 800 (1947), *aff'd*, 142 N.J. Eq. 484, 59 A.2d 863 (1948) ("The most important body of experts in industrial relations are the officers and business agents of the labor unions—and few of them are lawyers.") *Id.* at 602, 53 A.2d at 802. *Contra*, *Dunbar v. McClellan*, 168 Colo. 202, 434 P.2d 126 (1967) (laypersons advising on taxes and trusts was unauthorized practice); *Johnson v. Childe*, 139 Neb. 91, 295 N.W. 381 (1941) (transportation expert guilty of unauthorized practice).

ment upon the judiciary, without sufficient consideration of the powers that attach to the respective branches of government.⁸⁴

Legislative Powers

One major consideration should be the wishes of state legislatures. Courts have for the most part ignored state legislatures as sources of guidance for definitions of the practice of law.⁸⁵ Courts are faced with separation of powers problems⁸⁶ when a legislature creates an administrative agency and gives it rulemaking power. When, pursuant to that power, the agency makes a rule that anyone may appear by counsel or other representative,⁸⁷ it is the lay specialist who suffers when he or she represents a client and later ends up becoming the target of a lawsuit charging unauthorized practice of law.⁸⁸

The remedy for this takeover by the judiciary of legislative functions is a respect for legislative policy decisions.⁸⁹ In regulating the practice of law, courts have moved from their historic function

84. One of the theories behind administrative law is that experts should decide certain issues in the first instance, as opposed to having the issues first decided by a judge or a jury. See *Palmer v. Mass.*, 308 U.S. 79 (1939); *Weyerhaeuser Timber Co. v. Galloway*, 168 Or. 85, 121 P.2d 469 (1942).

85. Statutes in each of the following cases were struck down as unconstitutional. See *Heiberger v. Clark*, 148 Conn. 177, 169 A.2d 652 (1961); *Meunier v. Bernich*, 170 So. 567 (La. Ct. App. 1936); *In re Brown, Weiss & Wohl*, 175 Ohio St. 149, 192 N.E.2d 54 (1963); *Lineberger v. Beeler*, 174 Tenn. 538, 129 S.W.2d 198 (1939).

86. See Comment, *Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power*, 28 U. CHI. L. REV. 162 (1960). The basic thesis of this comment is that courts fail to distinguish between their realm of power and that of the legislatures. This failure has resulted in judicial restraint on legislative authorization of practice before administrative bodies. *Id.* at 163. A more general discussion of separation of powers as it relates to unauthorized practice can be found in Robertson and Buehler, *The Separation of Powers and the Regulation of the Practice of Law in Oregon*, 13 WILLAMETTE L.J. 273 (1976).

87. See note 13 *supra*.

88. The punishment for unauthorized practice is criminal contempt of court. *E.g.*, *Indianapolis Bar Ass'n v. Fletcher Trust Co.*, 211 Ind. 27, 5 N.E.2d 538 (1937); *In re Pilini*, 122 Vt. 385, 173 A.2d 828 (1961). See also Annot., 36 A.L.R. 533 (1925); Annot., 100 A.L.R. 236 (1936) (practicing law unauthorized is contempt of court).

In addition to a contempt charge, the court may issue an injunction to restrain unauthorized practice of law. See, *e.g.*, *Conway-Bogue Realty Investment Co. v. Denver Bar Ass'n*, 135 Colo. 398, 312 P.2d 998 (1957); *Smith v. Illinois Adjustment Finance Co.*, 326 Ill. App. 654, 63 N.E.2d 264 (1945); *Bump v. Barnett*, 235 Iowa 308, 16 N.W.2d 579 (1944).

89. See Comment, *Control of Unauthorized Practice of Law: Scope of Inherent Judicial Power*, 28 U. CHI. L. REV. 162, 166 (1960).

of protecting the judicial process to protecting the public.⁹⁰ In so doing, courts have confused their goals of protecting the judicial system with the legislative police power over health, safety and welfare of citizens.⁹¹ Any practice by laypersons that will harm the public can be the subject of judicial action, as a result of this reversal of roles.⁹² Justification for assumption of this power is that the court's ability to regulate members of the bar would be ineffective if laypersons could practice without restriction.⁹³ Exactly how much authority the court reserves for itself depends in large measure upon its view of the degree of legislative power it has over the practice of law.⁹⁴

Four Theories of Legislative Power

Four theories have emerged from decisions by the courts in recognition of legislative powers regarding the practice of law. One theory is that the legislature has concurrent power with the court to regulate and control the practice of law.⁹⁵ This theory recognizes that legislative powers are at the very least equal to those of the judiciary and thus places some limitations on the scope of the

90. *Id.* For a good example of a court's confusion of powers, see Rhode Island State Bar Ass'n v. Automobile Service Ass'n, 55 R.I. 122, 179 A. 139 (1935). (automobile association charged with unauthorized practice). The Rhode Island court first considered a statute giving the supreme court power to regulate admission of attorneys to the courts. R.I. GEN. LAWS § 2 ch. 322 (1923). From that specific grant of power, the court said it derived inherent power to control practice of law, both in and out of court. Later in the opinion the court conceded that it was the legislature's duty under the police power to protect the public welfare. But the court said it also could exercise power to protect the public. *Id.* at 126, 179 A. at 143. In effect, the court decided to legislate on unauthorized practice, even though the General Assembly already had defined what it considered to be unauthorized practice.

91. See, e.g., West Va. State Bar v. Earley, 144 W. Va. 504, 109 S.E.2d 420, 435 (1959); Washington State Bar Ass'n v. Washington Ass'n of Realtors, 41 Wash. 617, 251 P.2d 619, 621 (1952).

92. See *In re Baker*, 8 N.J. 321, 85 A.2d 505, 511-12 (1951) (broad concept of inherent powers); *Petition of Fla. Bar Ass'n for Promulgation of New Fla. Rules of Civil Procedure*, 199 So. 57 (1940) (court refused to issue new rules of civil procedure, leaving the matter to the legislature). The opinion states: "[T]his court was powerless to promulgate a rule which had the effect of enacting or repealing a statute involving jurisdiction or substantive law." *Id.* at 59.

93. *In re Baker*, 8 N.J. 321, 85 A.2d 505, 511-12 (1951).

94. For a summary of states and how their courts view legislative power to govern practice of law, see Annot., 144 A.L.R. 138, 152 (1943).

95. See *Barr v. Watts*, 70 So. 2d 347 (Fla. 1953); *Petition of Fla. State Bar Ass'n for Promulgation of New Fla. Rules of Civil Procedure*, 199 So. 57 (Fla. 1940); *Gould v. State*, 99 Fla. 662, 127 So. 309 (1930).

court's inherent power. This position is a minority view, with Florida being the only state in which it is operative.⁹⁶

A second theory, which is held in the majority of jurisdictions, is that the legislature may pass laws only in aid of the judiciary where the practice of law is concerned.⁹⁷ Any attempts by the legislature to encroach upon the court's territory are regarded with great suspicion, even to the extent of powers that traditionally lie with the legislature.⁹⁸ As a result of this theory, administrative practice by persons other than lawyers is severely curtailed, if not eliminated, even though it may be based upon statutory authority.⁹⁹ Because the statutory authority is open to question, courts adopting this theory feel free to strike down any statute which is at odds with the court's authority. Under this theory, the legislature's power clearly is subordinate to judicial power.

The third theory embodies the fullest extension of the court's power. With this theory, the legislature has no power over the practice of law, and any law that is even remotely controlling of the legal profession is subject to being summarily struck down as a

96. See note 95 *supra*.

97. See, e.g., *In re Bailey*, 30 Ariz. 407, 248 P. 29 (1926) (statute cannot limit court's power to disbar attorney); *Jones v. State*, 61 Ga. App. 860, 7 S.E.2d 398 (1940); *Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N.E.2d 941, *cert. denied*, 302 U.S. 728 (1937) (neither General Assembly nor state agency could authorize practice of law before state industrial commission); *Illinois State Bar Ass'n v. People's Stock Yards State Bank*, 344 Ill. 462, 176 N.E. 90 (1931) (practice of law by using bank's attorneys as intermediaries was unauthorized); *Meunier v. Bernich*, 70 So. 567 (La. Ct. App. 1936) (statute excepting adjusters from unauthorized practice regulations violates separation of powers); *In re Baker*, 8 N.J. 324, 85 A.2d 505 (1951) (legislature may pass statutes in aid of, but not superseding power of judiciary); *In re Bledsoe*, 186 Okla. 264, 97 P.2d 556 (1939) (legislature may prescribe rules and regulations for admission to bar, but such regulations must not be unreasonable); *Rhode Island Bar Ass'n v. Automobile Service Ass'n*, 55 R.I. 122, 179 A. 139 (1935) (act defining unauthorized practice does not take matter out of supervision of court).

98. For example, the police powers are traditionally thought to be in the realm of the legislature but in one case the court said it, and not the legislature, could exercise the police power. See *Martin v. Davis*, 187 Kan. 473, 357 P.2d 782 (1960).

99. See, e.g., *Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N.E.2d 941, *cert. denied*, 302 U.S. 728 (1937) (administrative rule pursuant to legislative act was unconstitutional because it allowed practice by non-lawyers); *Meunier v. Bernich*, 170 So. 567 (La. Ct. App. 1936) (statute excepting lay adjusters from regulation of practice of law violates separation of powers); *In re Brown, Weiss & Wohl*, 175 Ohio St. 149, 192 N.E.2d 54 (1963) (state constitution does not authorize industrial commission to permit practice of law by laypersons).

usurpation of inherent judicial power.¹⁰⁰ Here, again, inherent judicial power is the key word used in justification of the great power wielded.¹⁰¹

Theory four lies at the opposite end of the spectrum from theory three, in that the legislature exercises full power over the area of the practice of law.¹⁰² The courts exercise power, clearly subordinate to legislative power, only if such power has been delegated by the legislature.¹⁰³ New York¹⁰⁴ and North Carolina¹⁰⁵ are the only states following this rule. Although these two state courts are a minority, the federal government apparently follows this theory, and the federal judiciary has continued to exist and to function without the broad powers that so many state courts feel they need.¹⁰⁶ A consideration of all four theories, together with a look at the system used by the federal government, will illustrate exactly how the courts use their power in relation to the legislature in matters affecting the practice of law.

100. See, e.g., *Johnson v. Childe*, 139 Neb. 91, 295 N.W. 381 (1941) (power to define what constitutes practice of law is an exclusive judicial function); *Clark v. Austin*, 340 Mo. 467, 101 S.W.2d 977 (1937) (any effort by legislature to regulate practice of law would be unconstitutional); *West Va. State Bar v. Earley*, 144 W. Va. 504, 101 S.W.2d 977 (1937) (Workmen's Compensation Commission has no power to authorize appearance by laypersons).

101. See note 57 *supra*.

102. In re *Bercu*, 69 N.Y.S.2d 730 (1947), *rev'd on other grounds*, 273 App. Div. 524, 78 N.Y.S.2d 209 (1948), *aff'd mem.*, 299 N.Y. 728, 87 N.E.2d 451 (1949); In re *Cooper*, 22 N.Y. 67, 11 Abb. Pr. 301 (1860).

103. See note 102 *supra*.

104. See In re *Cooper*, 22 N.Y. 67, 11 Abb. Pr. 301 (1860). See generally *J. FISCHER*, *supra* note 12, at 5.

105. *Seawell v. Carolina Motor Club, Inc.*, 209 N.C. 624, 184 S.E. 540 (1936) (legislature has plenary power to regulate admission to bar); In re *Applicants for License*, 143 N.C. 1, 55 S.E. 635 (1906).

106. See Statement of Walter Gellhorn, in *Cincinnati Conference on Law and Lawyers in the Modern World*, 15 U. CIN. L. REV. 196, 197-98 (1941). Commenting on practice before federal administrative agencies, Gellhorn said:

Eradication of whatever defects there may be in prevailing controls over practice before federal agencies is peculiarly a matter within the competence of the national legislature and of the administrative bodies themselves. The Supreme Court has never expressed the belief apparently held by some state courts, that prescribing qualifications for administrative practice is an inherently judicial power. On the contrary, in *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926), the court held that an administrative tribunal, even in the absence of explicit statutory authorization to do so, may properly establish standards of admission to practice before it.

Id.

*Theory One—Supreme Court and Legislature
Have Concurrent Jurisdiction*

The Florida Supreme Court recognizes that its jurisdiction over the practice of law is concurrent with that of the legislature.¹⁰⁷ In *Barr v. Watts*¹⁰⁸ the legislature's power to control practice of law received a direct challenge; respondents in the lawsuit alleged that the legislature had withdrawn from the field, and left it to the exclusive jurisdiction of the court. At issue was a statute that delegated power to the supreme court to establish procedures for the state's board of bar examiners.¹⁰⁹ In addition, the statute gave the court authority to establish qualifications and requirements for admission to practice in Florida.¹¹⁰ The court recognized its concurrent authority with the legislature, citing a previous case in which the state bar association had attempted to have the court promulgate new rules of civil procedure.¹¹¹

The case cited by the *Barr* court construed the Florida Constitution as dividing rulemaking power regarding practice of law between the legislature and the judiciary.¹¹² Further, the cited case recognized that when the legislature has entered the field, its acts should be respected.¹¹³ Inherent power of the court is asserted, but limited to areas where the field has not been narrowed by legislative occupation.¹¹⁴ Notwithstanding the separation of powers

107. *Barr v. Watts*, 70 So. 2d 347 (Fla. 1953) (legislature has power to prescribe qualifications for admission to practice law; the power is concurrent with Supreme Court's power); *Petition of Fla. State Bar Ass'n for Promulgation of New Fla. Rules of Civil Procedure*, 199 So. 57 (1940) (Florida Constitution vests concurrent jurisdiction with court and legislature); *Gould v. State*, 99 Fla. 662, 127 So. 309 (1930) (admission to practice law is subject of legislative regulation).

108. 70 So. 2d 347 (Fla. 1953).

109. *Id.* at 349.

110. *Id.*

111. *Id.*, citing *Petition of Fla. State Bar Ass'n for Promulgation of New Fla. Rules of Civil Procedure*, 199 So. 57 (1940).

112. *Petition of Fla. State Bar Ass'n for Promulgation of New Fla. Rules of Civil Procedure*, 199 So. 57 (1940). The Florida Constitution of 1885 states that: "The Legislature shall not pass special or local laws . . . regulating the practice of courts of justice, except municipal courts." FLA. CONST. art. 3, § 20. Regarding the powers of the supreme court, the constitution of 1885, as amended in 1902, states: "[T]he [Supreme] Court may . . . exercise any of its powers . . . under such regulations as may be prescribed by law or by the rule of said Court not inconsistent therewith." FLA. CONST. art. 5, § 4.

113. *Petition of Fla. State Bar Ass'n for Promulgation of New Fla. Rules of Civil Procedure*, 199 So. 57 (1940).

114. The limitation was expressed by the court as follows: "[T]he Legislature may prescribe rules of practice and the court may prescribe such rules not inconsistent

doctrine, the court recognized that in fact it often is difficult to separate the legislative from the judicial functions. The court stated: "There has never been a time in the history of this doctrine [separation of powers] when the powers of one department have not depended on or have been aided in some way by those of another."¹¹⁵

The concurrence of powers in the legislature and the supreme court was illustrated further in *Florida Bar v. Moses*.¹¹⁶ *Moses* involved representation by a layperson in a quasi-judicial proceeding.¹¹⁷ The representation was pursuant to Florida's Administrative Procedure Act, which allowed representation by a "qualified representative."¹¹⁸ In *Moses* the court acknowledged its own power to regulate the practice of law and to prohibit unauthorized practice.¹¹⁹ But the court also found that under Florida's constitution the legislature may oust the court's jurisdiction over the practice of law and convert unauthorized practice into authorized practice.¹²⁰ Although the legislature had validly delegated power in the Administrative Procedure Act, the agency's exercise of the delegated power was held to be invalid because the agency had not complied with the statutory requirement of determining who should be allowed to practice as a "qualified representative."¹²¹ The

with those passed by the Legislature, but those passed by the Legislature will not be respected if they hamper administration of justice or are for any reason unconstitutional." *Id.* at 59.

115. *Id.* Illustrative of this point is the joint venture of the legislature and judiciary in making procedural rules. The legislature passes enabling acts allowing the court to make rules affecting its procedure. *Id.*

116. 380 So. 2d 412 (Fla. 1980).

117. *Id.* *Moses* was a labor contract negotiator who represented a school board in an unfair labor practice proceeding before Florida's Public Employees Relations Commission.

118. FLA. STAT. ANN. § 120.62(2) (West 1975). The pertinent section of the Administrative Procedure Act states: "Any person compelled to appear, or who appears voluntarily, before any hearing officer or agency in an investigation or in any agency proceeding has the right, at his own expense, to be accompanied, represented, and advised by counsel or other qualified representative." *Id.*

119. *Florida Bar v. Moses*, 380 So. 2d 412, 417 (1980). Article V, Section 15 of the Florida Constitution sets forth the supreme court's power: "The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted."

120. FLA. CONST. art. 5, § 1. "Commissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices." *Id.*

121. *Florida Bar v. Moses*, 380 So. 2d 412, 418 (1980). The court held that the agency should have specific standards of competency and professional responsibility. *Id.* In the absence of those standards, *Moses* was found to have been practicing law unauthorized.

court pointed out that in the absence of legislative authorization for representation by laypersons, the court has constitutional power to regulate unauthorized practice of law.¹²²

Theory Two—Legislature May Pass Laws In Aid of the Judiciary

The Florida court's liberality in finding that the legislature may oust the court's jurisdiction over the practice of law is in stark contrast to the way the court treated the legislature's power in Illinois. In Illinois the rule was that the legislature could pass laws "in aid of the judiciary."¹²³ *Chicago Bar Association v. Goodman* involved practice before the state's industrial commission, which is an administrative agency created by the legislature. As a result of power delegated by the Illinois legislature, the commission promulgated a rule allowing representation by an "agent" of the parties.¹²⁴ Pursuant to the rule, defendant had built up a business representing clients before the commission.¹²⁵ Although not a lawyer, he performed services that required substantial knowledge of the Workmen's Compensation Act and the Federal Employers' Liability Act, as well as the common law liability for damages from injury.¹²⁶ Those things constituted the practice of law, according to the court, even though the activities were allowed by the agency, and apparently also by the legislature.¹²⁷ The *Goodman* case is strikingly similar to the *Moses* case, but the outcome was the exact opposite. It is clear from the outcome in *Goodman* that while the court is willing to give some consideration to legislative power, the court considers the legislature subordinate in matters relating to the practice of law.

Holding that the General Assembly had no authority to grant non-lawyers the right to practice law, the court said any attempt at

122. *Id.* at 417. See FLA. CONST. art. 5, § 15.

123. *Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N.E.2d 941, *cert. denied*, 302 U.S. 728 (1937).

124. *Id.* at 352, 8 N.E.2d at 945. The legislature, in an attempt to simplify the proceedings, passed the following law regarding operation of the Workmen's Compensation Board: "The board shall make and publish rules and orders for carrying out the duties imposed upon it by law . . . and the process and procedure before the board shall be as simple . . . as reasonably may be." ILL. ANN. STAT. ch. 48, § 155 (Smith-Hurd 1935). It was as a result of this statutory grant of power that the board allowed representation by an "agent."

125. *Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 348, 8 N.E.2d 941, 943, *cert. denied*, 302 U.S. 728 (1937).

126. *Id.* at 356, 8 N.E.2d at 946.

127. *Id.* at 358, 8 N.E.2d at 947.

giving the privilege to one not a licensed attorney was void.¹²⁸ In reaching that conclusion, the court had to deal not only with the legislation in question, but with an identical case that arose in Ohio and reached a directly opposite result.¹²⁹ The Ohio court presented the other side of the coin. Rather than focusing on encroachment into the legal profession, the court looked at the purpose of the Workmen's Compensation Act. Finding that one of the main purposes of the act was to provide a speedy, inexpensive disposition of claims, the court went on to say that in most instances no special skill is required in the preparation and presentation of claims.¹³⁰

One characteristic of cases in which laypersons are prohibited from appearing before administrative bodies is over-emphasis on the amount of legal skills required, without a corresponding look at the objectives of the administrative agency.¹³¹ Often the administrative body itself is composed of non-lawyers, or at least there is no requirement that its members be attorneys.¹³² Further adding to the overall informality of the proceedings, there is generally no requirement of adherence to the rules of evidence or procedure.¹³³ This be-

128. *Id.* at 352, 8 N.E.2d at 945.

129. *Goodman v. Beall*, 130 Ohio St. 427, 200 N.E. 470 (1936). In *Goodman* the Ohio Workmen's Compensation Board was created with full power to make its own rules. The board was not bound by rules of evidence or procedure. *Id.* at 428, 200 N.E. at 471. The court held that a non-lawyer may appear in a representative capacity without violating unauthorized practice rules. *Id.*

130. *Id.*

131. *See, e.g.*, *Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 350, 8 N.E.2d 941, 946 (1937) (workmen's compensation action involves many delicate questions of law and fact); *West Va. State Bar Ass'n v. Earley*, 144 W. Va. 504, 109 S.E.2d 420, 434 (1959) (difficult and complicated questions arise under workmen's compensation act). *But see, e.g.*, *Goodman v. Beall*, 130 Ohio St. 437, 200 N.E. 470, 471 (1936) (vast majority of cases require no special skill in the preparation of claims).

132. *Goodman v. Beall*, 130 Ohio St. 427, 200 N.E. 470 (1936). *See National Labor Relations Act* § 3(a), 29 U.S.C. § 151-59 (1970).

133. *See, e.g.*, CAL. LAB. CODE § 5708 (1971); MASS. GEN. LAWS ANN. ch. 30A, § 11(2) (1979).

Although administrative hearings look like regular courtroom non-jury trials, there are basic differences where the law of evidence is concerned. In the first place, agency hearings usually produce evidence of general conditions, rather than facts relating to the respondent. *See generally* 1 DAVIS, ADMINISTRATIVE LAW TREATISE, ch. 1 (1970 Supp.). Another important difference is that an administrative hearing is tried before an examiner instead of a judge or jury. Consequently, since many of the rules governing admission of evidence are designed to protect the jury from unreliable evidence, the rationale for using these rules becomes less important. *See* BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 174-75 (1942). Recognizing these differences in administrative hearings, Congress passed 5 U.S.C. § 556(d) (1946), which provides that "any oral or documentary evidence may be received in an administrative hearing."

ing so, there is little reason to require attorneys to appear before a board of laypersons.¹³⁴ Recognizing that principle, the United States Court of Appeals for the Fifth Circuit said:

The [Federal Interstate Commerce] Commission is an administrative body. The validity of its proceedings is not dependent upon compliance with procedural rules as to pleading and practice which prevail in courts of law. It may conduct its proceedings in such a manner as will best be conducive to the proper dispatch of business and to the ends of justice.¹³⁵

Rather than leave the regulation of agency business to the legislature, as the federal courts have done,¹³⁶ a majority of state courts feel they must regulate the practice of law before agencies.¹³⁷

When the legislature has enacted a law, obviously there is an intent to enter the field and not to leave it to the discretion of the courts; in the interest of predictability and judicial economy, the best course of action for the courts would be to honor the legislative action.¹³⁸ The validity of this reasoning is best illustrated by the many lawsuits involving lay practice before administrative agencies.¹³⁹ If the courts must exercise inherent power to regulate practice of law, a certain amount of restraint is advisable, especially when no harm to the public is alleged.¹⁴⁰

A good example of judicial discretion is set forth in *Reynolds v. Dinger*.¹⁴¹ The court said the filling out of deed forms was the prac-

134. See generally *Goodman v. Beall*, 130 Ohio St. 427, 200 N.E. 470 (1936).

135. *Louisville & Nashville R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 295 F. 53, 56 (5th Cir. 1923), *aff'd*, 269 U.S. 217, *cited with approval* in *Goodman v. Beall*, 130 Ohio St. 427, 200 N.E. 470, 472 (1936).

136. *Sperry v. Florida*, 373 U.S. 379 (1963); *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926).

137. See note 206 *infra*.

138. This idea was vividly expressed by the court in *Barr v. Watts*, 70 So.2d 347, 351 (Fla. 1953):

We now have in this state [Florida] to carry on the state's business almost 100 state agencies, boards and commissions, most of whose members hold office by executive appointment. The people of this state have the right to expect that each and every such state agency will promptly carry out and put into effect the will of the people as expressed in the legislative acts of their duly elected representatives.

Id.

139. See, e.g., cases cited note 14 *supra*.

140. See generally *Reynolds v. Dinger*, 14 Wis. 2d 193, 109 N.W.2d 685 (1961).

141. *Id.* In *Reynolds* the legislature had created a real estate board, endowing it with rulemaking power. A challenge to the rule was filed on the ground that it

tice of law, but because the bar had acquiesced in the activity for one hundred years, at least it was not unauthorized.¹⁴² With the following language the court stated that a commonsense approach, taking into consideration the current practices, would be best:

It is the duty of this court so to regulate the practice of law and to restrain such practice by laymen in a commonsense way in order to protect primarily the interest of the public and not to hamper and burden such interest with impractical technical restraints no matter how well supported such restraint may be from the standpoint of pure logic.¹⁴³

Feeling that it was in the public interest to allow realtors to continue filling out simple conveyances, the court chose not to use its inherent power to ban such a practice.¹⁴⁴ All jurisdictions have not followed this precedent. In some states the courts refuse to acknowledge any power in the legislature over the practice of law.¹⁴⁵

allowed realtors to fill in standardized legal forms and thereby practice law without a license. *Id.*

142. *Id.* at 199, 109 N.W.2d at 691. Having acknowledged that the practice had been occurring for 100 years, the court was forced to say it was authorized, or else admit that the court itself had been lax for a long time in not putting a stop to it. One hundred years of experience without harm to the public convinced the court that little would be gained by imposing a requirement that attorneys be used for all real estate conveyances. *Id.*

143. *Id.*

144. *Id.* Besides *Reynolds*, the latest major case involving realtors filling in standard forms was *Chicago Bar Ass'n v. Quinlan & Tyson*, 34 Ill. 2d 116, 214 N.E.2d 771 (1966). In *Quinlan* the court held that a real estate broker may fill out standard earnest money contracts, but all other documents require the services of an attorney. *Id.* Jurisdictions other than Illinois and Wisconsin have a wide variety of rules regarding which documents may be prepared by a broker. *See, e.g., Arkansas Bar Ass'n v. Block*, 230 Ark. 430, 323 S.W.2d 912 (1959) (offers and acceptances may be completed by brokers); *Conway-Bogue Investment Co. v. Denver Bar Ass'n*, 135 Colo. 398, 213 P.2d 998 (1957) (receipts, options to purchase, contracts of sale, deeds, promissory notes, mortgages, releases, leases and demands to vacate may be prepared by brokers); *Keyes Co. v. Dade County Bar Ass'n*, 46 So. 2d 605 (Fla. 1950) (brokers may prepare sale contracts, deposit receipts); *Ingham Bar Ass'n v. Weller Co.*, 342 Mich. 214, 69 N.W.2d 713 (1955) (deeds, land contracts, mortgages, can be completed by brokers). *See generally* Adler, *Are Real Estate Agents Entitled to Practice A Little Law?* 4 ARIZ. L. REV. 188 (1963); Marks, *Lawyers and Realtors: Arizona's Experience*, 49 A.B.A.J. 139 (1963).

145. Missouri and West Virginia are the two jurisdictions adhering to a strict separation of powers doctrine regarding unauthorized practice of law. *See Clark v. Austin*, 340 Mo. 467, 101 S.W.2d 977 (1937); *West Va. State Bar v. Earley*, 144 W. Va. 504, 109 S.E.2d 420 (1959).

Theory Three—Strict Separation of Powers

In jurisdictions that require a strict construction of the separation of powers doctrine, no intrusion into judicial regulation of the practice of law is allowed. According to the court in *Clark v. Austin*,¹⁴⁶ if control of the practice of law is judicial in nature, then an anomalous result would be reached if the legislature had the same power.¹⁴⁷ Statutes involved in the case defined the practice of law in Missouri, and provided penalties for unauthorized practice.¹⁴⁸ The court, in effect, struck down the statutes and found the defendants in contempt of court, based upon the court's inherent power to regulate unauthorized practice of law.¹⁴⁹ Without discussion, the court concluded that appearances on behalf of others before the public service commission constituted the practice of law by non-lawyers.¹⁵⁰ Inherent power to make this determination is found in the Missouri Constitution, which vests judicial power in the courts.¹⁵¹ No other grounds were listed for the decision, which puts all matters related to the practice of law exclusively within the court's province.¹⁵² And the court is free to decide for itself what it believes is in the realm of practice of law. Needless to say, this reasoning leaves the court free to exercise broad powers, not strictly judicial.

Although purporting to exercise its judicial power, the court is in reality encroaching upon the police powers of the legislature.¹⁵³ As the concurring opinion by Judge Ellison in *Clark* points out, if the court, by virtue of its inherent powers, completely excludes the legislature from the field of legal practice and procedure, many statutes in addition to the ones questioned in the case are unconstitutional.¹⁵⁴ To illustrate the extent of the powers being taken by the court:

146. 340 Mo. 467, 101 S.W.2d 977 (1937).

147. *Id.*

148. MO. ANN. STAT. § 11692 (1929) (practice of law defined to include any act performed in representation of another before commission); MO. ANN. STAT. § 11693 (1929) (forbids engaging in practice of law as defined in § 11692 unless person is an attorney).

149. *Clark v. Austin*, 340 Mo. 467, 101 S.W.2d 977 (1937) (unauthorized practice charges stemmed from appearance before state public service commission).

150. *Id.* at 478, 101 S.W.2d 985.

151. MO. CONST. art. 2, § 1.

152. *Clark v. Austin*, 340 Mo. 467, 101 S.W.2d 977, 980 (1937).

153. *Id.* at 489, 101 S.W.2d at 985 (Ellison, C.J., concurring).

154. *Id.* at 484, 101 S.W.2d at 986.

[I]f, by reason of the fact that we have inherent power to prescribe rules of practice and procedure, the General Assembly is excluded from the field of procedural law, then it necessarily follows that our whole code of civil procedure of nearly 1,000 sections, our code of criminal procedure of about 500 sections, and the statutes providing a procedure for the liquidation of insolvent banks and the reorganization of building and loan associations are unconstitutional and must fall. . . .¹⁵⁵

As the above quotation shows, a strict separation of powers in practice would entail revamping the entire state government, a result which obviously is not practical. Not only is such a drastic separation impractical, but it destroys the legislature's prerogative to exercise its police powers.¹⁵⁶ Instead of promoting a separation of powers, the court has set itself up as supreme legislator in any field that it might find impinging upon the practice of law. Of course, the practice of law has implications for so many different fields in so many areas of government that even the courts themselves admit they cannot define what is or is not the practice of law.¹⁵⁷

In those decisions that use inherent power to justify regulation of administrative practice, the courts apparently disregard the fact that legislatures have police powers to protect the health, safety and welfare of its citizens.¹⁵⁸ The police power ought to extend to prescribing qualifications for those who practice before commissions

155. *Id.*

156. Although Article III of the Missouri Constitution provides for a separation of powers, in practice the separation is not complete. *See Manion v. Davison*, 284 Mo. 469, 506, 225 S.W. 97, 100 (1930), *cited in Clark v. Austin*, 340 Mo. 467, 486, 101 S.W.2d 977, 979 (1937) (Ellison, C.J., concurring).

157. This hesitancy may be in large part due to the language in the ABA CANONS OF PROFESSIONAL ETHICS No. 3-5: "It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law."

When definitions are attempted, they often border on the absurd for someone looking at the definition and trying to apply it to a fact situation. *See, e.g., Arizona State Bar v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 366 P.2d 1 (1961) (practice of law consists of acts lawyers customarily carried on from day to day through the centuries); *Gardner v. Conway*, 234 Minn. 468, 481-82, 48 N.W.2d 788, 797 (1951) (in tax practice, a layperson may not solve a difficult legal question); *Fichette v. Taylor*, 191 Minn. 582, 584, 254 N.W. 910, 911 (1934) (if compensation is exacted, all advice to clients in connection with the law is practice of law); *Clark v. Austin*, 340 Mo. 467, 101 S.W.2d 977, 982 (1937) (person is practicing law when for valuable consideration he or she gives advice on legal rights).

158. *Clark v. Austin*, 340 Mo. 467, 496, 101 S.W.2d 977, 995 (1937).

that exercise delegated legislative power.¹⁵⁹ Any regulation by the judiciary should be declared a usurpation of legislative powers, although few courts recognize it as such.¹⁶⁰ Instead, the courts torture logic to retain complete control of every aspect of the legal profession, without regard to whether the public is in fact being harmed by an alleged unauthorized practice.

Protection of the public was one of the main reasons given for decision in *West Virginia State Bar v. Earley*.¹⁶¹ The court said:

It would indeed be an anomaly if the power of the courts to protect the public from the improper or unlawful practice of law were limited to licensed attorneys and did not extend or apply to incompetent and unqualified laymen and lay agencies. Such a limitation would reduce the legal profession to an unskilled vocation, destroy the usefulness of licensed attorneys, as officers of the courts, and substantially impair and disrupt the orderly administration of justice. . . .¹⁶²

Logically, if detriment to the public from unskilled persons was the main consideration, and no issue of incompetence was raised, it would seem the court should have allowed the man to continue his practice, since the public was not being harmed by him.¹⁶³ However, the court in *Earley* held that representing others before administrative bodies is the practice of law.¹⁶⁴ The holding overlooks clear legislative intent to allow the workmen's compensation commission to regulate the agency's hearing procedure.¹⁶⁵ An analysis of the court's reasoning in *Earley*¹⁶⁶ reveals the same judicial encroachment on legislative power that was the hallmark of the *Clark* decision.¹⁶⁷ But unlike the courts in *Clark* and *Earley*, one state court gave explicit recognition to legislative action regarding administrative agencies.

159. *Id.* at 499, 101 S.W.2d at 996.

160. See Comment, *Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power*, 28 U. CHI. L. REV. 162 (1960).

161. 144 W. Va. 504, 109 S.E.2d 420, 435 (1959).

162. *Id.* at 524, 109 S.E.2d at 440 (statute empowering state compensation commissioner to adopt rules of procedure does not authorize him to promulgate rules allowing practice by non-lawyers.)

163. It should be noted that "the public" did not bring this lawsuit—the West Virginia Bar did. *Id.* at 504, 109 S.E.2d at 420.

164. *Id.*

165. *Id.* at 523, 109 S.E.2d at 439.

166. *Id.*

167. *Clark v. Austin*, 340 Mo. 467, 101 S.W.2d 977 (1937) (Ellison, C.J., concurring).

**Auerbacher v. Wood: State Court
Recognition of Congressional Authority**

Such recognition was granted the United States Congress in *Auerbacher v. Wood*,¹⁶⁸ a case involving practice before the National Labor Relations Board. The New Jersey court in *Auerbacher* said an agency of the federal government, acting pursuant to authority granted by Congress, may regulate representation before such agency, and the state court is without power to interfere.¹⁶⁹ In addition to the statutory basis for the decision, the court recognized that labor relations is a specialty where laypersons traditionally have been allowed free reign, because factual knowledge of industry is often more important in those cases than legal knowledge.¹⁷⁰ Indeed, in the field of labor relations, the most important body of experts are officers and business agents of labor unions.¹⁷¹ Any legal skills that such a person might employ are purely incidental to his or her primary job as an industrial relations expert.¹⁷²

Where the primary service is non-legal, purely incidental use of legal knowledge does not characterize the service as wrongful practice of law.¹⁷³ In *Auerbacher* the court exercised restraint in dealing with industrial relations experts charged with unauthorized practice in the following words:

The court should be very cautious about declaring a widespread, well-established method of conducting business is unlawful, or that the considerable class of men who customarily perform a certain function have no right to do so, or that the technical education given by our school cannot be used by the graduates in their business.¹⁷⁴

168. 139 N.J. Eq. 599, 53 A.2d 800 (1947), *aff'd*, 142 N.J. Eq. 484, 59 A.2d 863 (1948) (defendant was a labor relations expert who opened an office and was soliciting clients when unauthorized practice charges were filed against him).

169. *Id.* at 604, 53 A.2d at 803. *Auerbacher* was cited as authority in Fla. Bar v. Moses, 380 So.2d 412 (Fla. 1980).

170. *Id.* at 602, 53 A.2d at 802. Industrial relations is in itself a recognized profession. The major universities offer courses in industrial relations. *Id.* at 603, 53 A.2d at 802.

171. *Id.* at 602, 53 A.2d at 802. Use of non-lawyer experts by labor unions is largely a matter of custom.

172. *Auerbacher v. Wood*, 142 N.J. Eq. 484, 59 A.2d 863 (1948). The appeals court recognized that in the field of industrial relations, there is an overlap into the legal area. Solving a particular labor problem might well involve use of some legal knowledge.

173. *Id.*

174. *Auerbacher v. Wood*, 139 N.J. Eq. 599, 600, 53 A.2d 800, 802 (1947).

Realistic guidelines in *Auerbacher* are set up to determine the dividing line between when use of legal knowledge is incidental and when use of legal skills becomes unauthorized practice of law. One should look at the person's work as a whole for a particular client; if the primary nature of the work is advice as to legal obligations, then it is unauthorized practice.¹⁷⁵ An analogy is made to the work of the architect and its relationship to the law: "The law only provides the frame within which he must work, just as the zoning code limits the kind of building the architect may plan."¹⁷⁶ In *Auerbacher*, at both the trial and the appellate levels, any separation of powers concerns were clearly subordinate to a practical consideration of the kinds of activities that a given occupation might encompass. In fact, it is only at the end of the trial court's opinion that there is any discussion of the statutory authorization for representation before the NLRB.¹⁷⁷ The court summarily acknowledges the power of Congress as providing authority for such a rule.¹⁷⁸

Theory Four—Legislature has Sole Control Over Practice of Law

If Congress can statutorily regulate the practice of law before administrative agencies, it would seem logical that state legislatures exercise the same powers within their jurisdictions. However, in most jurisdictions the power lies with the courts, while in some other areas the courts and the legislature share the task, often in a manner determined solely by the courts. In New York, however, the tables are turned.

Since 1822 the power to regulate and to control the practice of law has been vested in the legislature, and only by virtue of delegation of power from the legislature can the courts exercise any control over the field.¹⁷⁹ More importantly, there is no inherent power in the courts to regulate admission and disbarment of attorneys, nor is there inherent power to define what constitutes the unauthorized practice of law.¹⁸⁰

175. *Id.*

176. *Id.*

177. *Id.* at 604, 53 A.2d at 803.

178. *Id.*

179. In re Bercu, 69 N.Y.S.2d 730 (1947), *rev'd on other grounds*, 293 App. Div. 524, 78 N.Y.S.2d 209 (1948), *aff'd mem.*, 299 N.Y. 728, 87 N.E.2d 451 (1949).

180. In re Bercu, 69 N.Y.S.2d at 738 (1947), *aff'g* In re Cooper, 22 N.Y. 67, 11 Abb. Pr. 301 (1860). *Cooper* set forth the derivation of control over the practice of law in New York. In the Constitution of 1777, the power of appointing attorneys was vested in the courts. *Id.* at 80, 11 Abb. Pr. at 332. Another constitution enacted in 1822 made no mention of the power of courts to appoint attorneys to the bar, and so the courts have assumed the power impliedly went back to the legislature. *Id.* Thus, the

With the legislature's power in mind, a New York court was faced with a case in which it had to determine whether it was unauthorized practice of law for an accountant to research a taxation question that had been decided by an administrative agency.¹⁸¹ The case, *In Re Bercu*, involved an accountant who remembered a decision that he thought would help a particular client, and offered to find the decision.¹⁸² The accountant was charged with illegal practice of law, but the court held the advice went to a matter of accounting practice, rather than the practice of law.¹⁸³

Acknowledging that it might not be sound public policy to allow accountants to do this kind of legal research, the court said the issue was for the legislature, not the courts.¹⁸⁴ If the policy was to be changed, it was up to the legislature to make the change. At the appellate level, the court said giving of legal advice would be tolerated, but the court found that the accountant was practicing law, because his research was not incidental to accounting.¹⁸⁵ This holding recognizes that the accountant must know and use tax law in his or her work, but it also realizes that the boundary between legal and illegal advice on tax law depends on the context in which it occurs:

An accountant may know more about tax law than some law practitioners, just as a labor relations advisor, trust officer or customs broker may know more about the law relating to their businesses than many lawyers not specializing in the law relating to such business. He may not, however, set himself up as a public consultant on the law of his specialty. If the services of a specialist in some particular branch of the law are required, the public must still turn to the bar. . . .¹⁸⁶

The bar then retains its full status as primary source of legal information even on specialized questions of law, and yet the lay practi-

legislative power in New York is absolute and unqualified, much like the power of Parliament in England. *Id.* at 91, 11 Abb. Pr. at 335. For an interesting journey into New York legislative history, see Lee, *The Courts and Admissions to the Bar*, 13 HARV. L. REV. 252 (1899).

181. *In re Bercu*, 69 N.Y.S. 2d 730 (1947), *rev'd on other grounds*, 293 App. Div. 524, 78 N.Y.S.2d 209 (1948); *aff'd mem.* 299 N.Y. 728, 87 N.E.2d 451 (1949).

182. *Id.*

183. *Id.* at 743.

184. *Id.*

185. *In re Bercu*, 273 App. Div. 524, 78 N.Y.S.2d 209, 276 (1948).

186. *Id.* at 537, 78 N.Y.S.2d at 218.

tioner in the tax field or any other field is relieved of the necessity of seeking the advice of an attorney on a legal question that is merely incidental to the main work being done by lay specialists.

PRACTICE BEFORE FEDERAL ADMINISTRATIVE AGENCIES

The New York approach to dealing with questions of unauthorized practice follows most closely the approach used by the federal government.¹⁸⁷ This is so because the New York Legislature delegates power to the courts to deal with unauthorized practice, or else it simply passes its own regulatory laws much like Congress does. The courts, then, have the task of interpreting the laws. In no case do the New York courts exercise broad powers under what is termed inherent power by many state courts. This approach is comparable to the one taken by the federal government.

Administrative Procedure

Under the Administrative Procedure Act,¹⁸⁸ a person compelled to appear before an agency is entitled to be represented by counsel or other agent.¹⁸⁹ The Administrative Procedure Act is an act of Congress,¹⁹⁰ which allows each agency to decide who may appear before it in a representative capacity.¹⁹¹ At least part of the reason for allowing parties to be represented by counsel or qualified layperson is to assure adequate protection for the rights of the parties, especially when the government may be represented in proceedings by someone appointed because of his or her expertise in a particular field.¹⁹² Since the government has its experts in the agencies, the

187. See *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117 (1926); *Auerbacher v. Wood*, 139 N.J. Eq. 599, 53 A.2d 800 (1947), *aff'd*, 142 N.J. Eq. 484, 59 A.2d 863 (1948) (agency of federal government acting on authority granted by Congress may regulate representation of parties before such agency).

188. 5 U.S.C. § 555(b)(1966).

189. *Id.* For the text of this section of the Act, see note 29 *supra*.

190. The Act first became law in 1946 under 5 U.S.C. § 1005. Section 1005 and its modern counterpart, § 555(b), are just one segment of the act, which governs the entire scheme of federal administrative agencies. For in-depth discussions of federal and state administrative procedure see J. DAVISON & N. GRUDSTEIN, *ADMINISTRATIVE LAW AND THE REGULATORY SYSTEM* (1966); P. WALL, *ADMINISTRATIVE LAW: THE INFORMAL PROCESS* (1963).

191. 5 U.S.C. § 555(b)(1966).

192. See *Waterman, Legislation and Administration*, 3 U. CHI. L. REV. 261, 262 (1936).

There is authority to the effect that even without an act of Congress, a party to an administrative proceeding probably has a right to be represented by an agent or attorney. See 33 Op. Att'y Gen. 17, 19 (1921). See also *Manning v. French*, 149 Mass. 391, 21 N.E. 945 (1889).

parties to an administrative proceeding ought to be allowed representation by someone at least as skilled as the person representing the government.¹⁹³ If a party does not desire to represent himself or herself, in some cases that person must choose someone from the roster of persons admitted to practice before the particular agency.¹⁹⁴

The Administrative Procedure Act leaves it to each agency to decide who may represent clients in its proceedings.¹⁹⁵ Some agencies, like the United States Patent Office, have stringent requirements for admission to practice,¹⁹⁶ while others, like the National Labor Relations Board, allow anyone chosen by a party to appear in a representative capacity.¹⁹⁷ The Patent Office, in addition to stiff admission requirements, has an elaborate disciplinary scheme for the protection of the public.¹⁹⁸

The requirement of some administrative bars that even licensed attorneys prove their specific qualifications has been criticized as an undue burden on lawyers.¹⁹⁹ According to a 1953 study, eleven federal agencies had enrolled bars with formal requirements for ad-

193. See note 192 *supra*.

194. Practice before federal administrative agencies is governed by the rules of each agency. Recognition of this principle is set forth in 5 U.S.C. § 555(b)(1966) ("A person compelled to appear . . . is entitled to be accompanied . . . by counsel or, if permitted by the agency, by other qualified representative."). The source of this independence by each agency is found in the Judiciary Act of 1789, which states that "the parties may plead and manage their own cases personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts, respectively, are permitted to manage, and conduct causes therein." Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 92 (1789) (codified in 28 U.S.C. 394 (1928)).

Some agencies have admission requirements for both attorneys and laypersons akin to the state bar examinations. See, e.g., 37 C.F.R. § 1.341 (1980) (requirements for practice before United States Patent Office).

195. 5 U.S.C. § 555(b) (1966). Several years before passage of the Administrative Procedure Act, there was a growing sentiment among lawyers that practice before administrative agencies should be limited to attorneys. However, the Attorney General's Committee, which studied administrative procedure with a view toward procedural reform, concluded that it doubted "a sweeping interdiction of non-lawyers would be wise. . . ." ATT'Y GEN. COMM. ON AD. PROC. FINAL REPORT 124 (1941).

196. 37 C.F.R. § 1.341 (1980).

197. 29 C.F.R. § 102.38 (1980).

198. See, e.g., 37 C.F.R. § 1.343-1.348 (1980) (Patent Office); 49 C.F.R. § 1100.11 (1980) (Interstate Commerce Commission).

199. See vom Baur, *Representation Before Administrative Agencies*, 30 N.Y.U.L. REV. 1303 (1955). vom Baur says these requirements serve no useful purpose, and in addition are an annoying and troublesome burden for attorneys who have already proven they are qualified as to character and legal skills. *Id.*

mission of both attorneys and laypersons.²⁰⁰ Attorneys, for example, who are members of one or more state bars, authorized to appear before the United States Supreme Court and the federal courts, could not appear before the Patent Office without becoming a member of that office's bar.²⁰¹

Practice Before the United States Patent Office

To ensure that its agents have a full range of qualifications, the Patent Office has formal requirements for admission to practice.²⁰² From the very beginning, a large number of those who represented clients were engineers or chemists; they were not lawyers.²⁰³ Present rules set down specific guidelines for admission to practice.²⁰⁴

Not only are there strict rules on admission to practice, but it is illegal to hold oneself out as a patent agent without being duly qualified by the Patent Office.²⁰⁵ The regulations for practice, promulgated by the Patent Office have been upheld in the courts and strict requirements for admission have been granted great deference by the courts.²⁰⁶ Just as practice before the Patent Office is stringently controlled, practice before the National Labor Relations Board is at the other end of the spectrum with few regulations.

200. See F. VOM BAUR, STANDARDS OF ADMISSION TO PRACTICE BEFORE FEDERAL ADMINISTRATIVE AGENCIES (1953).

201. 37 C.F.R. § 1.341(a) (1980).

202. It was first authorized to regulate persons who practiced before it in 1861. Act of March 2, 1861, ch. 88, § 8, 12 Stat. 247 (1861). In 1869, the Patent Office regulations provided that "[a]ny person of intelligence and good moral character may appear as attorney in fact or as an agent of an applicant . . ." *Rules and Directions for Proceedings in the Patent Office*, § 127 (1869).

203. Letter from Howard S. Rogers, Hearings Before House Comm. on Patents on H.R. 5527, 70th Cong., 1st Sess. 84 (1928).

204. 37 C.F.R. § 1.341 (1980). Application must be made on a prescribed form and proof of good moral character must be submitted in addition to a showing that the person possesses legal and scientific knowledge for admission to practice. *Id.* Examinations are given to determine the qualifications of the applicant. *Id.*

205. 35 U.S.C. § 33 (1952). Once having been admitted to the bar, practitioners are subject to its disciplinary rules. 37 C.F.R. § 1.344 (1980). A person may be suspended or disbarred from practice for incompetent, disreputable or gross misconduct. 35 U.S.C. § 32 (1952).

206. See *Sperry v. Florida*, 373 U.S. 379 (1963) (Florida cannot prohibit an agent registered with the Patent Office from conducting business regarding patents in Florida); *Spector v. Ladd*, 296 F.2d 420 (D.C. Cir. 1961) (*per curiam*) (patent agent excluded from practice for violating rules regarding advertising); *Gager v. Ladd*, 212 F. Supp. 671 (D.D.C. 1963) (commissioner did not abuse his discretion in holding that plaintiff failed to demonstrate requisite scientific skills).

Practice Before the National Labor Relations Board

The National Labor Relations Board traditionally has allowed anyone, whether a layperson or an attorney, to represent clients in its hearings.²⁰⁷ Congress, in creating the board, provided that the board would have authority to make such rules as might be necessary for carrying out the purposes of the National Labor Relations Act.²⁰⁸ The only regulation on appearances applies to former regional employees of the board, who are prohibited from practicing in cases pending while the employee worked for the regional office.²⁰⁹ In addition to making no prerequisites for admission to practice, the board exercises no disciplinary measures regarding persons who do practice before it, except that the board may exclude a person for contemptuous conduct during a hearing.²¹⁰

The custom of the National Labor Relations Board, together with that of the Patent Office, shows both ends of the spectrum on regulation of administrative appearances, one being very tightly controlled and the other being very liberal. In both instances, the choice of whether or not to regulate is left up to the agency in question. Powers of regulation are delegated by Congress, and the courts defer to the congressional mandate and to rules passed pursuant to it by the agencies. As a result, there is less interference by courts claiming inherent powers, than there is at the state level.

SOLUTION

The mutifarious holdings of the state courts on unauthorized practice indicate an area that deserves scrutiny by the courts, as well as by the state legislatures.²¹¹ Problems with unauthorized practice before federal administrative agencies rarely occur,²¹² but great numbers of people daily face uncertainty at the state level as to whether their activities involve a legal or illegal use of the law. One way to create a degree of certainty would be to model state administrative procedure after the federal system. While it is not a perfect solution, at least the prospective practitioner before an ad-

207. 29 C.F.R. § 102.38 (1980). See generally *Camp v. Herzog*, 104 F. Supp. 134, 138 (D.D.C. 1952). Any person may appear by counsel or other representative. 29 C.F.R. § 102.38 (1980). The rule contains no prerequisites for appearance. Unlike the Patent Office, the National Labor Relations Board has no enrolled bar. *Id.*

208. See generally *Camp v. Herzog*, 104 F. Supp. 134 (D.D.C. 1952).

209. 29 C.F.R. § 102.91 (1978).

210. 29 C.F.R. § 102.44 (1980).

211. See notes 14 and 15 *supra*.

212. A lack of cases on unauthorized practice seems to prove this point.

ministrative agency would know what qualifications were required in advance of being served a summons for a lawsuit. Such a solution has a solid basis in history.

Federal System Adaptable to State Use

In England, the courts acquired authority to regulate attorneys through a delegation of power from Parliament.²¹³ Like its English ancestor, the federal system takes its cue from Congress in matters relating to administrative practice.²¹⁴ Under the Administrative Procedure Act,²¹⁵ Congress has left it to each individual agency to decide what qualifications are required for practice before the agency.²¹⁶ And the federal courts, all the way up to the Supreme Court,²¹⁷ have given great deference to the system and laws set up by Congress to govern administrative procedure.

On the other hand, the state courts generally do not recognize any clear-cut guidelines in regulating the practice of law. The four theories²¹⁸ discussed previously, indicate the four primary ways in which the courts view their relationships with state legislatures. This becomes important when the courts must deal with a law purporting to grant laypersons the right to represent clients in an agency proceeding. The outcome of an unauthorized practice case is likely to turn on which theory the court deciding the case picks. If, as in New York, the courts recognize sole power over practice of law in the legislature, the court will give great weight to the legislative act. On the other hand, some courts, under the umbrella of inherent power, assume all power over the practice of law, ostensibly to make sure the public is protected.

In federal cases on administrative appearance, generally there is little discussion of the source of the court's power, for the federal courts assume that Congress can delegate administrative rulemaking power to the agencies. If states would adopt a similar system, much of the present uncertainty would be eliminated. The administrative agencies could then decide what types of qualifications

213. See note 37 *supra*.

214. See note 29 *supra*.

215. 5 U.S.C. § 555(b) (1966).

216. The statute states that a person may be represented by counsel or "if permitted by the agency, by other qualified representative" 5 U.S.C. § 555(b) (1966). Even before the Administrative Procedure Act, the agencies had power to regulate who appeared before them. See *Herman v. Dulles*, 205 F.2d 715 (D.C. Cir. 1953).

217. *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117 (1926).

218. See notes 95-106 *supra* and accompanying text.

are necessary for effective representation, and the requirements for admission could be as simple as those of the NLRB or as complex as those of the Patent Office. The public would be protected because lay practitioners would be subject to the disciplinary rules of the agency where they practice.

Although the federal system is far from perfect, federal agencies operate without producing the volume of unauthorized practice litigation that comes from the states. The federal system routinely allows laypersons to practice before its agencies. And while this system might seem anathema under some of the rules set down by state courts, it should be examined carefully before being dismissed as without merit.

CONCLUSION

A study of unauthorized practice decisions reveals that there is no uniformity of definition on unauthorized practice. The courts have added to the problem by disregarding legislative intent with the result that the prudent lay practitioner dare not rely on state law for authorization to appear before administrative agencies. Many courts disregard or strike down state statutes that they feel might impinge upon inherent judicial powers.

In the federal government, the Administrative Procedure Act leaves it up to each agency to decide who may represent clients. Federal courts defer to congressional intent, and laypersons who appear before federal agencies can depend on agency rules as precedent. Since this is a workable alternative to the confusion that exists among the states, it would behoove state courts and legislatures to consider carefully the federal system in revising administrative law.

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