FORWARD TO THE FIFTH EDITION

The Fifth Edition of the Manual is being published approximately four years after the Fourth Edition. The Committee continues to receive a large number of complaints concerning individuals allegedly engaged in the unauthorized practice of law and, during the past four years, many complaints have been received concerning individuals providing misleading and downright false information on the Internet.

The Committee congratulates the various County Bar Associations of Pennsylvania which are aggressively pursuing those engaged in the unauthorized practice of law as well as many other state Unauthorized Practice of Law Committees that are now pursuing those engaged in the unauthorized practice of law.

Louann Bell of the Pennsylvania Bar Association continues to provide us with her wonderful support which enables the Committee to fulfill its obligation to pursue and, hopefully, eliminate those engaged in the unauthorized practice of law.

Again, your co-chairs extend their heartfelt thanks to all of those Committee members who travel from all over the Commonwealth to our bi-monthly meetings in Harrisburg in order to provide their very significant contribution to the work of the Committee.

In conclusion, the Committee congratulates Pennsylvania Attorney General Michael Fischer and his staff of the Bureau of Consumer Protection who have so diligently pursued those engaged in the unauthorized practice of law and have consistently and regularly compelled them to cease their unauthorized practice of law.

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G. **Westmoreland County v. RTA Group, Inc.** “A Commonwealth Court of Pennsylvania 2001 decision holding that property tax consultants were engaged, inter alia, in the unauthorized practice of law.

H. **Spirit of the Avenger Ministries v. Commonwealth** “A Pennsylvania Commonwealth Court Opinion holding that, with few exceptions, non-attorneys may not represent parties before the Pennsylvania courts and most administrative agencies.”
I. THE UNAUTHORIZED PRACTICE OF LAW COMMITTEE

A. Make-Up of Unauthorized Practice of Law Committee

The Unauthorized Practice of Law Committee of the Pennsylvania Bar Association consists of members of the Pennsylvania Bar Association who are appointed by the President of the Pennsylvania Bar Association. The President of the Pennsylvania Bar Association also appoints a Chairperson, a Vice or Co-Vice-Chairperson and a Liaison to the Pennsylvania Bar Association Board of Governors. The Chairperson or, in the absence of the Chairperson, the designated Vice or Co-Vice-Chairperson shall preside over all meetings and shall assign matters to members of the Committee for investigation. Committee members shall not participate in any matter in which they have either a material pecuniary interest that would be affected by a proposed advisory opinion or Committee recommendation, or any other conflict of interest that might prevent them from participating.

B. Charter

The duties of the Committee on the Unauthorized Practice of Law shall be:

1. To encourage and assist county bar associations in establishing local unauthorized practice of law committees.

2. To coordinate the activities of the Committee with the activities of the unauthorized practice of law committees of the various county bar associations.

3. To maintain a central registry of all inquiries, complaints and cases, relative to the unauthorized practice of law, which have been
received by the Pennsylvania Bar Association or the bar associations of the various counties.

4. To review, investigate, refer or monitor, as appropriate, to local committees, complaints of a parochial nature against any person or entity not authorized to practice law, who is alleged to be performing acts or services constituting or believed to be constituting the practice of law.

5. To review or investigate, as appropriate, complaints of a statewide nature against any person or entity not authorized to practice law, who is alleged to be performing acts or services constituting or believed to be constituting the practice of law.

6. When it is believed by the Committee that any person or entity is engaged in the unauthorized practice of law, to take appropriate informal action as the circumstances may indicate, including, but not limited to, oral or written requests that any such person or entity cease and desist from performing such acts or services, obtaining the assistance of state or local governmental agencies, meeting informally with district attorneys or members of the judiciary, or taking other similar actions.

7. With the approval of the House of Delegates and the Board of Governors, in each instance first obtain, to institute and prosecute to final conclusion, proceedings at law or in equity, as may be necessary or advisable, to punish and prevent the unauthorized practice of law.
8. To develop a consumer informational program, and as appropriate, to keep local committees, bar associations and the general public aware of situations involving the unauthorized practice of law.

C. Committee Procedures

The Pennsylvania Bar Association Unauthorized Practice of Law Committee has established the following procedures for handling inquiries, complaints and projects:

1. All inquiries relating to the functions of the Committee will be received by the Committee Chairperson or the PBA Representative. Any information received by the PBA Representative will be sent immediately to the Committee Chairperson.

2. Every matter referred to the Committee will receive appropriate attention. The Committee deems it important to timely respond to all inquiries.

3. The Chairperson will assign on a rotating basis all matters which are not directly handled. After review of the project material and after contacting the inquiring party and performing whatever initial investigation is required, the Committee person will forward a communication back to the Chairperson with recommendations for future action. To the extent possible, the Chairperson will assign projects based on the geographical area and area of expertise of the Committee Member.

4. The Committee Member who is assigned the inquiry or project will contact their counterpart with the Local County Unauthorized
Practice of Law Committee or the Local County Bar Association
President or Executive Director for coordination and input if the
matter is of purely local interest.

5. If the matter or project has statewide interest or multi-county impact,
the Committee person assigned will contact the designated
representatives of the various Bar Associations involved in the same
fashion as above.

6. After the initial investigation is completed by the Committee
Members or Members, their recommendations will be sent in writing
to the Committee Chairperson who will in turn bring those
recommendations before the entire Committee for determination of a
final course of action. For those projects which require immediate
action, the Chairperson will arrange a conference call.

7. If the Committee decides upon a course of action which involves
matters of public relations or relationships with other professional
organizations (such as real estate brokers, certified public
accountants, certified financial planners, securities brokers, etc.),
institution of litigation or any other politically sensitive issue, the
Committee will seek the advise and consent of the House of
Delegates and Board of Governors.

8. The party who originally brought the matter to the attention of the
Committee will be advised as to the ultimate course of action decided
upon and the ultimate resolution of the issue.
9. Regardless of the previous procedure, if the conduct is so egregious that the chairperson determines that immediate action is necessary in order to prevent or stop the conduct complained of, the chairperson is authorized to contact the appropriate enforcement agency with a request that immediate action be initiated.

10. Appropriate summaries of the action of the Committee will be disseminated to the Pennsylvania Bar Association news media as well as to the appropriate contact persons at the various County Bar Associations or Committees to keep them advised as to statewide activities and for whatever advice or recommendations the contact persons deem appropriate to make back to the Committee.
II. STATUTORY PROVISIONS

42 Pa. C.S.A. 2521. Office of attorney at law

Persons admitted to the bar of the courts of this Commonwealth and to practice law pursuant to general rules shall thereby hold the office of attorney at law.

42 Pa. C.S.A. 2522. Oath of office

Before entering upon the duties of his office, each attorney at law shall take and subscribe the following oath or affirmation before a person authorized to administer oaths:

I do solemnly swear (to affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this Commonwealth and that I will discharge the duties of my office with fidelity, as well as to the court as to the client, that I will use no falsehood, nor delay the cause of any person for lucre or malice.

Any person refusing to take the oath or affirmation shall forfeit his office.

42 Pa. C.S.A. 2524. Penalty for unauthorized practice of law

(a) General rule. - Except as provided in subsection (b), any person

\[1\] Rule 76 of the Pennsylvania Rules of Civil Procedure defines an attorney-at-law as an individual admitted to practice law by a court of record of this Commonwealth.

Also, Article 2, Section 6 of the Constitution of the Commonwealth of Pennsylvania provides... No member of Congress or other person holding any office (except of attorney-at-law or in the National Guard or in a reserve component of the armed forces of the United States) under the United States or this Commonwealth to which a salary, fee or prerequisite is attached shall be a member of either House during his continuance in office.
including, but not limited to, a paralegal or legal assistant, who within this Commonwealth shall practice law, or who shall hold himself out to the public as being entitled to practice law, or use or advertise the title of lawyer, attorney at law, attorney and counselor at law, counselor, or the equivalent in any language, in such a manner as to convey the impression that he is a practitioner of the law of any jurisdiction, without being an attorney at law or a corporation complying with 15 Pa. C.S. Ch. 29 (relating to professional corporations), commits a misdemeanor of the third degree upon a first violation. A second or subsequent violation of this subsection constitutes a misdemeanor of the first degree.

(b) **Exception** - Subsection (a) shall not prohibit any bona fide labor organization from giving legal advice to its members in matters arising out of their employment or prohibit any person from engaging in any associational activity which is protected under the Constitution of the United States.

(c) **Injunction.** - In addition to a criminal prosecution, unauthorized practice of law may be enjoined in any county court of common pleas having personal jurisdiction over the defendant. The party obtaining such an injunction may be awarded costs and expenses incurred, including reasonable attorneys fees, against the enjoined party. A violation of subsection (a) is also a violation of the act of December 17, 1968 (P.L. 1224, No. 387), known as the Unfair Trade Practices and Consumer Protection Law.

42 Pa. C.S.A. 2525. **Unauthorized solicitation prohibited.**
(a) **Offense defined** - any person not an attorney who shall solicit or procure through solicitation a retainer, power of attorney, or any agreement, written or oral, authorizing an attorney-at-law to perform or render legal services, or who shall solicit any person in this Commonwealth to institute any action or proceeding for damages in which the compensation of any attorney-at-law for instituting or prosecuting such suit shall, directly or indirectly, depend upon the amount of the recovery therein commits a misdemeanor of the third degree.

(b) **Exception** - Subsection (a) shall not prohibit any bona fide labor organization from giving legal advice to its members in matters arising out of their employment or prohibit any person from engaging in any associational activity which is protected under the Constitution of the United States.

\[273\text{ P.S. 201-1 et sec.}\]
III. WHAT CONSTITUTES THE UNAUTHORIZED PRACTICE OF LAW

A. The Need for Guidelines

It is well established in Pennsylvania and in the case law of other jurisdictions, that this exclusive privilege to practice law is the lawyer's because their training is regulated, their intellectual and moral qualifications are investigated, and their responsibility can be readily enforced by the court, whose officer they are. It is, therefore, not to protect the economic interests of the members of the Bar, but rather to safeguard the rights of the general public that the practice of law is restricted to lawyers only. A layman who seeks legal services often is not in a position to judge whether they will receive proper professional attention. Entrustment of a legal matter may well involve the confidences, the reputation, the property, the freedom, or even the life of the client. Proper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless they are subject to the regulations of the legal profession. EC 3-4, Code of Professional Responsibility, adopted by the Supreme Court of Pennsylvania, February 27, 1974. There are times, of course, when it is clearly within the ability of lay persons to appreciate the legal problems and consequences involved in a given situation. Where, however, a judgment requires the abstract understanding of legal principles and a refined skill for the concrete application, the exercise of legal judgment is called for. Dauphin County Bar Association v. Mazzacaro, 465 Pa. 545, 351 A.2d 229 (1976); Shortz v. Farrell, 327 Pa. 81, 193 A.20 (1937). More simply, the activity constitutes unauthorized practice where the application of legal knowledge and technique is required.

For example, in Dauphin County Bar Association v. Mazzacaro, supra, the Court, in
enjoining the activities of a layman who pursued damage claims for tort claimants, states as follows:

When a person holds himself out to the public as competent to exercise legal judgment, he implicitly represents that he has the technical competence to analyze legal problems and the requisite character qualifications to act in a representative capacity. When such representations are made by person not adequately trained or regulated, the dangers to the public are manifest. (465 Pa. at 551)

Each given case turns on an analysis of the particular judgment involved and the expertise that must be brought to bear on this exercise.

B. Basis for Guidelines on What Constitutes the Unauthorized Practice of Law

An attempt to formulate a precise definition of the unauthorized practice of law would be more likely to invite criticism than to achieve clarity. Shortz v. Farrell, supra.

While it is true that court decisions are necessarily made on an ad hoc basis, the Supreme Court did set forth some guidelines in the often cited Shortz case. The court stated:

There is no need for present purposes to venture upon a comprehensive survey of the boundaries--necessarily somewhat obscure--which limit the practice of law. An attempt to formulate a precise definition would be more likely to invite criticism than to achieve clarity. We know, however, that when a lawyer has, through patient years of study, acquired an understanding of the law and obtained a license to engage in its practice, he applies his knowledge in three principal domains of professional activity:

1. He instructs and advises clients in regard to the law, so that they may properly pursue their affairs and be informed as to their rights and obligations.

2. He prepares for clients documents requiring familiarity with legal principles beyond the ken of the ordinary layman - for example, wills and such contracts as are not of a routine nature.

3. He appears for clients before public tribunals to whom is committed the function of determining rights of life, liberty and property
according to the law of the land, in order that he may assist the
deciding official in the proper interpretation and enforcement of the
law. Since, in order to determine such rights, it is necessary first to
establish the pertinent facts, which are frequently uncertain,
controverted, and best ascertainable, as experience has demonstrated,
by the application of rules of evidence tested by centuries of usage, a
lawyer, being technically fitted for the purpose, examines and cross-
examines witnesses, and presents arguments to jurymen to guide
them to a proper determination of the facts. As ancillary to
participation in trials and in legal argumentation, he prepares
pleadings and other documents incidental to the proceedings.

In considering the scope of the practice of law mere nomenclature is
unimportant, as, for example, whether or not the tribunal is called a
court, or the controversy litigation. Where the application of
legal knowledge and technique is required, the activity constitutes
such practice even if conducted before a so-called administrative
board or commission. It is the character of the act and not the place
where it is performed which is the decisive factor. (327 Pa. at 84-85)

These guidelines establish for the committee a framework within which it should
approach each allegation of the unauthorized practice of law.

There are a few statutory provisions in Pennsylvania defining specific prohibited
activities pertaining to the practice of law. For example, in Pennsylvania, judges are
prohibited by statute from practicing law. 42 Pa. P.S.A. 3301. There are statutory
provisions dealing with the practice of law by collection agents. See 18 Pa. C.S.A. 7311.3
However, aside from these specific statutory provisions, the basic statutory guidelines are
contained in the provisions of the Judiciary and Judicial Procedure Act, 42 Pa. C.S.A.
2501, et seq. (See Section II of Manual).

The primary source of guidelines as to the unauthorized practice of law in

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3 Statutory and case law involving collection agents is dealt with in depth in Section IV. A. of this Manual.

In *Childs v. Smeltzer*, 315 Pa. 9, 171 A.883 (1934), the Court held that a stenographer engaged in drafting legal instruments for hire was practicing law where the stenographer held himself out as competent to perform legal services. Although the preparation of an application for a liquor license was held not to constitute the unauthorized practice of law, the court, in *Walker v. Kahn*, 31 Pa. D. & C. 620 (1938), held that such a clerical action must not be accompanied by an interpretation of the law, or by applying the law to the particular facts of a particular applicant, so that the individual performing such service does not give the impression that he is giving legal advice.

In *Re: Matter of Arthur*, 15 Bankr. 541, stay denied in *Re: Arthur*, 18 Bankr. 626 (Bkrtcy. E.D. Pa. 1981), the Court held that preparation of legal instruments and contracts by which legal rights are secured constitutes the practice of law, even though the legal effect of such matters may or may not be pending in the courts. The habitual or regular preparation of legal documents for a fee by an individual not a member of any bar or authorized to practice
law in any jurisdiction, constitutes the unauthorized practice of law. Northampton County Bar Association v. Young, supra.

In O'Connell v. David, 35 Bankr. 141, adopted in part 35 Bankr. 146, aff'd 740 F.2d 958 (3rd Cir. 1983), the Court held that individuals who were not licensed to practice law or were not members of the bar, but who regularly held themselves out through advertisements in media and through direct mailing as being qualified to provide services to individual debtors, and who solicited debtors and provided legal advice and counseling to debtors, were engaged in the unauthorized practice of law and could be enjoined by the bankruptcy court, a court of equity, from continuing the unauthorized practice of law. See also Ginsberg v. Kovrak, 11 Pa. D. & C. 2d 615 (1958), aff'd 139 A.2d 889, 392 Pa. 143, appeal dismissed, 358 U.S. 52, 79 S.Ct. 95, 3 L.Ed. 2d 46.

The foregoing brief outline of pertinent cases is not intended to be all inclusive of the Pennsylvania case law on this subject. However, they do represent a sampling of court decision from which the committee can gain an understanding of the scope of its review of conduct presented to it for investigation.

The following parts of the Manual will address case and statutory law, and the opinions of the Unauthorized Practice of Law Committee, in typical problem areas.
IV. TYPICAL PROBLEM AREAS INVOLVING THE UNAUTHORIZED PRACTICE OF LAW

A. Collection Agents

In addition to being subject to the penalty for unauthorized practice of law, 42 Pa.C.S.A. § 2524, collection agents are governed by another statute, 18 Pa.C.S.A. § 7311, Unlawful Collection Agency Practices. Subsection (c) titled “Furnishing Legal Services” reads:

> It is unlawful for a collection agency to furnish or offer to furnish legal services, directly or indirectly, or to offer to render or furnish such services within or without this Commonwealth. The forwarding of a claim by a collection agency to an attorney-at-law, for the purpose of collection, shall not constitute furnishing legal service for the purposes of this subsection.

In many instances, legal questions are so remote that no one could reasonably insist that only an attorney is competent to address them properly. It is when it comes to giving advice on legal procedure, the preparation of legal papers, and the employment of counsel that intrusions in the field reserved to attorneys occur.

As with claim adjusters, the question of whether certain operations connected with a collection agency constitute the unauthorized practice of law is but one aspect of the broader question of what amounts to the practice of law. It is generally recognized that the operation of a collection agency is not per se the practice of law. However, the following activities of collection agencies have been considered to constitute conduct that may be construed as the unauthorized practice of law:

1. exercising control over an attorney;
2. “holding oneself out” as an attorney;
3. advising or threatening legal proceedings;
(4) procuring or taking assignments for collection; and,

(5) preparing and/or filing legal papers in aid of collections.

1. Exercising Control

One activity condemned as the unauthorized practice of law by a collection agency is the control of an attorney prosecuting a claim in the creditor's name. In *State ex rel. State Bar of Wisconsin v. Bonded Collections, Inc.*, 36 Wis.2d 643, 154 N.W.2d 250, 258 (1967), the Supreme Court of Wisconsin stated: "that no person other than the client [can] direct the attorney in the management of the lawsuit and [such] direction of litigation, [performed by the collection agency] as an agent for client, constitutes the unauthorized practice of law if such agency agreement is not casual, but is done as a regular and usual procedure in the business of collecting claims for others."

In *Richmond Association of Credit Men v. Bar Association of Richmond*, 167 Va. 327, 189 S.E. 153 (1937) an incorporated credit association was engaged in the unlawful practice of law where the association selected and employed a lawyer to effect the collections, had the right to discharge him and to supervise his conduct, gave orders to and received reports from him, fixed his compensation, and also received a portion of any recovery. Despite language in the contract that it was the “agent for the creditor” and the fact that suits were brought by the attorney in the name of the creditor, the association, by

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4 The subject of non-law corporations offering the services of lawyers is covered in more detail in Section IV.1.

As cited above, 18 Pa.C.S.A. Section 7311(c) permits a collection agency to forward a claim to an attorney for purposes of collection without violating the prohibition against furnishing, or offering to furnish, legal services. *See also State ex rel. Porter v. Alabama Assn. of Credit Executives*, 338 So.2d 812, 814 (1976) ("Collection agencies can forward a creditor's accounts to an attorney for collection so long as..."
assuming and maintaining control over the lawyer, had absorbed and destroyed the 
relation of direct personal confidence and responsibility which ought to exist between 
attorney and client. Supra at 339, 189 S.E. at 158. See also, Health Care Collection 
reviewed creditor's files to determine outstanding balances, sent letters to debtors, 
referred files to its "network attorneys", filed suit automatically, retained control of the 
litigation, received all communication from the attorneys, determined whether or not to 
settle the suit, and paid the attorney's fees and expenses out of its share of any recovery, 
the collection agency was engaged in the unauthorized practice of law.) Along these 
lines, a Tennessee court recognized the principle that the control of an attorney as 
distinguished from his mere employment was the factor that stamped conduct as 
practicing law. State ex rel. District Attorney v. Lytton, 172 Tenn. 91, 110 S.W.2d 313 
(1937).

2. Holding Out

In addition to controlling an attorney, it has been held that collection 
agencies are engaged in the unauthorized practice of law when they hold themselves out, 
their agents, or their employees, as being qualified to practice law. This is reminiscent of 
activities prohibited on the part of claim adjusters and is rather self-explanatory. In 
American Auto Association v. Merrick, 73 App. D.C. 151, 153 117 F.2d 23, 25 (1940), 
the court held that the giving of advice prior to the collection of a claim and the urging of 
legal propositions in discussions with the person from whom collection was attempted
did involve the practice of law and could be performed only by lawyers who possessed the required skills.

3. Threatening Legal Action

Related are cases that expressly support the rule that a collection agency is engaged in the unauthorized practice of law when it threatens legal proceedings in an effort to collect a claim on behalf of a creditor. The Supreme Court of Alabama in *State ex rel. Porter v. Alabama Association of Credit Executives*, 338 So.2d 812, 814 (1976), affirmed the lower court's injunction prohibiting the collection agency from threatening debtors with legal action if the debt was not paid, relying on the following statements from the decision in *In re Lyons*, 301 Mass. 30, 16 N.E.2d 74, 76 (1938):

> To determine whether a law suit may properly be commenced, and therefore whether it is justifiable to threaten to commence it, requires special knowledge of the legal elements constituting a cause of action. To make a business of acting for or advising others in these matters partakes of the practice of law...

In *Bump v. Barnett*, 235 Iowa 308, 16 N.W.2d 579 (1944), the Supreme Court of Iowa emphasized that the use by unlicensed persons or agencies of notices simulating legal process designed to intimidate the addressees, from whom collections were being attempted, into compliance with the demands made upon them was improper. One illustration of such a demand was the notation “Final Notice Before Legal or Statutory Action” and the warning that the creditor was about to commence garnishment proceedings.5

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5 Today, such activity would violate the various statutes enacted to regulate debt collection practices, such as the Fair Debt Collection Practices Act of 1977, 15 U.S.C. Sections 1692 et seq. (1994), and Pennsylvania's Fair Credit Extension Uniformity Act, 73 P.S. 2207.3 et seq. (2001), and subject the debt collector to significant civil liability. In Pennsylvania, such actions would also violate the criminal...
However, it has been held that a collection agency which never referred to a legal proceeding in its contact with the debtor, which does not threaten suit or garnishment, and whose notices go only to the point of stating that the claimant will take steps to enforce collection, or that the agency will forward the account to an attorney if the debt is not paid, is not threatening the debtor with court action and is, therefore, not practicing law. *State ex rel. Porter v. Dun & Bradstreet, Inc.*, 352 F.Supp. 1226 (N.D. Ala. 1983), aff’d 472 F.2d 1049 (5th Cir. 1973). In Pennsylvania, a collection agency is permitted to inform "... a debtor that if a claim is not paid, it will be referred to an attorney at law for such action as he may deem necessary ..." 18 Pa.C.S.A. Section 7311(f)(2) (2001).

4. **Taking Assignments**

There is a split of authority among the courts whether a collection agency engages in the unauthorized practice of law when it takes an assignment of a debt from a creditor and institutes a lawsuit in its own name against the debtor. *See generally,* Kathryn D. Folts, Note, Collection Agencies and the Unauthorized Practice of Law: The Divorce of Function from Form in Alco Collections, Inc. v. Poirier, 680 So.2d 735 (La.Ct.App. 1996), 77 Nebraska L. Rev. 365 (1998).

On the one hand, some courts have held that where a collection agency employed attorneys for the purpose of filing suit on claims assigned to the agency, and where the attorneys so employed performed no service for the assignor, but limited their activity to representation of the assignee collection agency, it was held that the collection prohibitions set forth in 73 P.S. Section 7311(f) (2001). *See e.g. Commonwealth v. Tucker*, 187 Pa.Super.
agency was not engaged in the unauthorized practice of law. *Cruz v. Lusk Collection Agency*, 119 Ariz. 356, 580 P.2d 1210 (1978). Along the same lines, a 1932 California case held that where a lay collector agreed to make the collection attempt on an assigned claim at his own expense, including the cost of hiring an attorney to present suit in the name of the assignee, for a fixed percentage of the amount eventually collected, the assignment was enforceable since it did not constitute an agreement to furnish any legal services whatsoever to the assignor. The services to be possibly performed by the attorney were for the assignee alone, who is the real party in interest and who exercised control of the action. *Cohn v. Thompson*, 128 Cal.App.Supp. 783, 16 P.2d 364 (1932).

These cases uphold the assignment of the creditor's claim even though the collection agency pays nothing for the assignment and the creditor retains an equitable interest in the outcome of the collection agency's lawsuit. These cases have determined that the collection agency, by reason of the assignment, is the real party in interest and is entitled to maintain a suit on the claim in its own name and to retain counsel to represent its interests in the suit.

There are, however, numerous cases which hold such assignments to be shams, that the real party in interest is the creditor, not the collection agency, and that the collection agency engages in the unauthorized practice of law when it commences a suit in its own name on the claim, regardless of whether it is also represented by counsel. In *Bump v. Barnett*, 235 Iowa 308, 313, 16 N.W.2d 579, 582 (1944), the Supreme Court of Iowa explained the distinction between what it thought was a valid assignment and an

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61, 142 A.2d 786 (1958).
Undoubtedly one might for example engage in the business of buying claims as investments and might take assignments of them to himself and maintain actions thereon in his own name. But when he does not purchase the claims and only takes colorable assignment of them so he may render or cause to be rendered legal service to others and holds himself out as engaged in such practice, it is quite a different matter. In one case he is dealing in property on his own account, in the other he is selling service and merely adopting the guise of an investor to conceal the real nature of his operations.

And since the debt collector engaged in these practices as a business and held himself out as peculiarly qualified or equipped, his actions came under the ban of the illegal practice of law.

The decision in *Bump v. Barnett*, supra, was recently reaffirmed by the Supreme Court of Iowa in the face of amendments to the Iowa statutes which permitted "an assignee, including a person who takes assignment for collection in the regular course of business" to sue in their own name. *Iowa Supreme Court Commission on Unauthorized Practice of Law v. A-I Associates, Inc.*, 623 N.W.2d 803 (2001). The court held that the collection agency's status as a bona fide assignee was defeated because the collection agency did not pay anything for the assignment of a claim to it, and the creditor received the proceeds of any recovery on the claim less the collection agency's commission. The assignments, although absolute in form, were in fact transfers intended primarily to secure payment for services rendered and were insufficient to make the collection agency the real party in interest. Thus, the collection agency was representing the interests of the creditor in instituting suit, and was therefore engaged in the unauthorized practice of law.

In *State ex rel. State Bar of Wisconsin v. Bonded Collections, Inc.*, 36
Wis.2d 643, 154 N.W.2d 250 (1967), the Supreme Court of Wisconsin stated that for procedural purposes, the collection agent who receives an assignment may be the real party in interest, but that his interest is a limited one, and that the beneficial owner of the claim remains the creditor. Since the creditor is the one whose property rights are directly affected by the litigation, the creditor is the true client. The collection agency's control of the lawsuit and employment of an attorney not only usurped the creditor's management of its suit, but also diverted the duty and allegiance of the lawyer from his true client to the collection agency to whom he owed his employment fee. The court stated:

When one who is not the actual client, but on the strength of an assignment for collection purports to act as such, advises the true creditor of the necessity for suit and also directs an attorney in the initiation, conduct, and termination of a lawsuit he is practicing law. He is offering in the market the services of an attorney to the creditor and he is furnishing legal services when he is not authorized by law to do so. When this done in the usual and habitual course of business . . . it constitutes the unauthorized practice of law.

36 Wis.2d at 655, 154 N.W.2d at 256.


In Pennsylvania, a collection agency is expressly permitted by 18 Pa.C.S.A. Section 7311(a) (2001) to take an assignment of a claim from a creditor for the purpose of collecting or enforcing the payment of the claim, provided the assignment is in writing, the original agreement between the creditor and the debtor does not prohibit assignments, and the collection agency complies with the Unfair Trade Practices and
Consumer Protection Law, 73 P.S. Sections 201-1 et seq., and the regulations
promulgated thereunder, 37 Pa.Code Sections 303.1 et seq.

Furthermore, a collection agency is permitted to bring legal action on
claims assigned to it and not violate the prohibition against furnishing legal services so
long as the collection agency appears by an attorney. 18 Pa.C.S.A. Section 7311(b).
Otherwise, it is unlawful for a collection agency to appear for or represent a creditor in
any manner whatsoever.

There are no Pennsylvania cases interpreting the scope of Sections
7311(a) and (b). Thus, the question of how a Pennsylvania court would decide a
situation similar to that discussed herein remains unanswered.

5. Preparing Legal Papers

The preparing and/or filing of legal papers by a collection agency has been
deemed to constitute the unauthorized practice of law in several jurisdictions. The court,
in *State ex rel. Norvell v. Credit Bureau of Albuquerque, supra*, held that a collection
agency’s preparations of pleadings, orders, judgments, or appearance in Magistrate Court
on behalf of an individual, partnership, corporation or association on a recurring or
consistent basis, constituted the unauthorized practice of law. Similarly, a 1981 West
Virginia court held that a collection agency which filed a complaint to institute legal
proceedings and took judgment on claims, and which rendered services to creditors as a
part of its regular collection business, was engaged in the unauthorized practice of law.

And, finally, the courts are in disagreement as to whether a collection
agency might lawfully appear on behalf of a creditor in a court not of record. In *Bump v. Barnett*, *supra*, the court rejected the contention that because an Iowa statute provided that in Justice Court either party may appear “in person or by agent,” a collection agency was thereby permitted to engage in the practice of regularly representing clients in Justice Court. The court stated that this conclusion did not logically flow from the statute, reasoning that the purpose of this statute was not to encourage the growth of a class of “Justice Court lawyers’ unfettered by the rules that bind licensed attorneys without training in law and ethics.” However, in *United Securities Corp. v. Pantex Pressing Machinery*, 98 Colo. 79, 53 P.2d 653 (1935), a Colorado court upheld the right of a collection agent who is not duly a licensed attorney to invoke the jurisdiction of the Justice Court on behalf of a corporate client. This court was convinced of the soundness of this statutory distinction between Justice Courts and courts of record, noting that since Justice Courts had limited jurisdiction, the claims and causes there litigated were often of minor importance.  

6. **Public Collection of Debt**

As discussed above, private sector collection activity is generally governed by the Unlawful Collection Agency Practices Act, which prohibits the unauthorized practice of

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5 In the Pennsylvania Rules of Civil Procedure governing actions and proceedings before the district justices, Rule 207 provides: "Rule 207. Representation in District Justice Proceedings. In District Justice proceedings, individuals may be represented by themselves or by counsel and corporations may be represented by their officers or counsel."

The clear implication of Rule 207 is that, if an individual is not representing himself before a District Justice, he must be represented by an attorney. A corporation, on the other hand, may be represented by an officer of the corporation, or by its attorney. However, a corporate collection agency would have to appear by counsel in order to stay within the exception afforded under 18 Pa.C.S.A. Section 7311(b) (2001).
law. Government tax collection is similarly controlled by statutory prohibitions against the unauthorized practice of law.

A local taxing authority is a municipal corporation created by the State. Pennsylvania municipal law provides that a “tax collector” may act in either an elected or duly-appointed position, in the service of the local taxing authority. 72 P.S. §5511.2; *Current Status Inc. v. Hykel, ___A.2d ___* (Pa.Cmwlth. 2001). The tax collector is engaged by a municipal or school board, council or commission to act on its behalf in the collection of taxes as authorized by the elected officials. His or her duties include billing taxpayers for delinquencies and notifying taxpayers of intended enforcement of state and local taxation laws and ordinances. 72 Pa. C.S.A. §5511 et seq. (“Local Tax Collection Law”) and 53 Pa. C.S.A. §6901 et seq. (“Local Tax Enabling Act”).

The corporate taxing authority is guided in legal matters by its solicitor or special counsel. No provision of the school or municipal codes authorizes the tax collector to provide legal counseling or legal representation to a taxing body in a court of law. Rather, the tax collector, as the custodian of the tax records, is the official fact witness in all tax collection matters.7

At the minor judiciary level, Rule 207 mandates that all corporations be represented by counsel or by an officer of the corporation. Pa. R.C.P. District Justice Rule 207; *see also Spirit of the Avenger Ministries v. Commonwealth, ___A.2d ___* (Pa. Cmwlth. 2001). In the case of a local government, a municipal corporation must be represented by its solicitor or special counsel, as selected by the taxing authority.

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7 While a tax collector is not necessarily a collection agency by definition, *any* collection agency is permitted to “inform a debtor that if a claim is not paid, it will be referred to an attorney at law for such action as he may deem necessary.” 18 Pa.C.S.A. § 7311(f). In tax collection cases, legal action must be referred to the solicitor or special counsel, as selected by the taxing authority.
solicitor or special counsel in any formal legal proceeding. 53 Pa. C.S.A. §§36602, 46116 and 56203. As such, while statutory law authorizes the tax collector (the official custodian of the tax records) to select delinquencies for prosecution (see e.g., 53 P.S. §6913 and 72 P.S. §5511.21), these statutes do not supplant the need for counsel in representation of the taxing authority in a court of law.

The Fair Credit Extension Uniformity Act further restricts legal practice by tax collectors. 73 P.S. §2270.1 et seq. Under the Act, an elected or appointed official who attempts to collect a tax or assessment (72 P.S. §7270.3(2)(v)) is prohibited from:

1. Making any false representation or implication that the tax collector is an attorney or that any communication is from an attorney; 73 P.S. §2270.4(b)(5)(iii) and
2. Making any false representation or implication that its documents are legal process; 73 P.S. §2270.4(b)(5)(xii).

Public policy also supports the need for legal counsel in such cases. Indeed, a non-lawyer’s misapplication of taxation laws in a court proceeding could create liabilities for the municipal government. The mishandling of a tax collection case could place the municipality at risk of losing tax revenues (a public trust), as well as actionable violations of disclosure rules, limitations, audit appeal procedures, refund compliance, etc. (see “Taxpayer’s Bill of Rights,” 53 Pa. C.S.A. §8422).

There are few Pennsylvania cases on point with regard to the activities of a collection agent or agency in the context of the unauthorized practice of law. The Unlawful Collection Agency Practices statute has received little scrutiny from the Pennsylvania courts. However, the cases cited above reflect the attitudes of various
states on collection agents’ activities.

The position adopted by the Pennsylvania Bar Association Unauthorized Practice of Law Committee is based on a strict construction of the Pennsylvania statute and is in accord with the case law of our sister jurisdictions which confine the activities of collection agencies to those which do not amount to furnishing legal services.

B. Brokers

This section will be divided into three main categories: insurance brokers, real estate brokers and stock or security brokers.

1. Insurance Brokers

Two 1942 Pennsylvania cases examine the activities of an insurance broker with respect to the unauthorized practice of law. The statutes under which these cases arose have been repealed; however, the statute that did apply is listed as Official Source Note for the current Section 2524. In addition, the decisions do not examine the language of the statute but rather concentrate on analysis of the broker's activities and the skills required to complete them.

In Burch, et al. v. Sigourney, Mellor, et al., 43 Pa. D.&L.597 (1942), the Committee on the Unauthorized Practice of Law of the Philadelphia Bar Association brought suit against defendant, an insurance broker, to restrain him and his partners from using, in connection with their business, a certain advertisement claimed by plaintiffs to be a violation of the Act of April 24, 1933, P.L. 66. The Act prohibited laymen from holding themselves out to the public by advertising or otherwise as practicing, or being entitled to practice, law. The court narrowed its inquiry to a determination of the meaning of a certain advertisement itself,
finding that the record did not justify a finding that defendants had actually been practicing law. Apparently, whatever business of a legal nature that may have been indicated by the advertisement was referred to regularly licensed attorneys. The issue then was whether the ads represented defendants to the public as practitioners of law, lawfully entitled and licensed to sell their legal services.

The Court stated that the advertisement must be interpreted in light of the ordinarily accepted meaning of the words used and the thought which the language employed fairly conveys to the reader. The advertisement used by the defendants insurance broker urged the turning of unfinished business into finished business by its services through life insurance, trust and wills. The court stated that the citizen who neither needed nor desired insurance, but who wished to make a will or place his property in trust, would be as much attracted by this advertisement as the prospective purchaser of insurance. Therefore, defendants were found in violation of the Act by implying that they could perform legal services, even though they did not advertise affirmatively that they were entitled to practice law, or in fact practiced it.

The Committee on the Unauthorized Practice of Law of the Allegheny County Bar Association brought suit against an insurance broker and real estate consultant engineer in Kountz, et al. v. Rowlands, 46 D&C 456. The defendant solicited work in which he would appear before the Board of Assessors as an agent for a property owner. The court stated that if the defendant's activities had been confined to a mere presentation of the facts of each case to the Board, the claimants would be entitled to no relief. But his activities were not so limited. Indeed, he worked on a contingent fee basis founded upon the actual savings in
taxes for the first year of the triennial assessment. In two letters, well described in the case, defendant cited authorities, expressed legal opinions, criticized the opinions of a School Board Solicitor, and generally set himself up as an authority on the law regarding the power of school districts to make refunds and an authority in the interpretation of statutes. The Court stated that he felt free to offer his legal opinions, and to cite court decisions in support of them; as a result, it was decided defendant held himself out to the community as an expert in the law and was engaged in the unauthorized practice of law.

The Allegheny County Bar Association's Unauthorized Practice of Law Committee was confronted with a virtually identical case in 1990 involving a real estate broker who solicited assessment appeals on a contingent fee basis. No legal action was taken because the Committee was able to obtain the agreement of the Board of Property Assessment, Appeals & Reviews to amend the Board's rules so that it would not recognize a non-lawyer other than a person named in an unrevoked power of attorney which states that the person is related to the applicant and is serving without compensation.

2. **Real Estate Brokers**

There are two schools of thought adopted by the courts when addressing real estate brokers. There are cases which hold unequivocally that the drafting or completing of printed forms or instruments related to land sales by laymen constitutes the practice of law. Other courts have held that it does not constitute such practice. In the majority of instances, there are certain factors affecting the result reached, such as the particular statutes involved, whether the work was merely incidental to the business of the one preparing the instrument, whether compensation was paid for the work, or whether the work consisted of the mere
filling in of blanks of a printed form or the compiling of the whole instrument.

It was held, in *Northampton County Bar Association v. Young*, 1 Monroe L.R. 94, 26 North. 363 (1939), that it was not unlawful for a real estate broker to prepare legal documents, such as deeds, leases and mortgages, provided the papers drawn related to a business transaction then pending and which the broker was handling. This was based upon the theory that the drafting or filling in of blanks on printed forms or instruments related to land was incidental to the main business of the real estate broker. The court held that a real estate broker was not prohibited from drawing a deed of conveyance or other appropriate instruments relating to property sold or leased through the efforts of him or his associates, but that drafting and preparation for others of legal instruments such as contracts, deeds of trust, deeds of real estate, mortgages, and leases constituted the unauthorized practice of law.

The Pennsylvania Supreme Court, in *Childs v. Smeltzer*, 315 Pa. 9, 171 A.83 (1934) held that a stenographer who is not an attorney, and whose business consisted of the drawing of deeds, mortgages, leases, and other legal instruments, was engaged in the unauthorized practice of law. However, the court further stated that there would be no objection to the preparation of deeds and other contracts by real estate brokers so long as the papers involved pertained to, and grew out of, transactions they were intimately connected with. The court observed that the drafting and execution of certain legal instruments is a necessary act of many businesses, and may not be considered unlawful.

In Virginia, the distinction was made between simple contracts of sale, options, and leases versus legal instruments whereby the legal title of property passes from the seller to the purchaser. In *Commonwealth v. Jones and Robins*, 186 Va. 30, 41 S.E.2d 720 (1947),
the Virginia Supreme Court held that it is the ordinary and customary business of a real estate broker to negotiate the sale or purchase of real property. As a practical solution, the court deemed it advisable to permit a real estate broker to prepare simple contracts of sale, but to prohibit him from preparing the instruments whereby legal title passed.

3. **Stock or Securities Brokers**

Only two cases have been found dealing with stock or securities brokers. In a 1968 Florida case, In Re: The Florida Bar, 215 So.2d 613 (Fla. 1968), the court ruled that certain activities constituted the practice of law and enjoined the securities broker and his agents from engaging in these activities. These included:

1. giving legal advice concerning legal instruments in connection with the disposition of property;
2. advertising that the broker would give legal advice concerning the manner of ownership or concerning estate planning;
3. giving legal advice concerning the consequences of joint ownership;
4. the holding of out-of-state assets;
5. giving legal advice on the effective laws for one who is no longer able to manage his affairs;
6. offering estate analysis services by providing specific legal information regarding specific facts;
7. and holding or participating in group gatherings for the purpose of discussing legal aspects of retirement planning, joint ownership of property, out-of-state assets, wills and trusts.

The Court also listed a number of activities which the security broker could engage in, including:

1. completing or aiding in the completion of certain routine forms when acting as a broker, dealer, salesman or investment counsel licensed
under state or federal law, discussing with customers or prospective customers common methods of ownership of securities and possible tax effects;

(2) conferring with attorneys for customers or prospective customers regarding manner of registration of ownership of investments for clients and assisting the attorneys in preparing the clients' estate plans; and

(3) advertising to the public the broker services relative to individual financial analysis, including general tax considerations of investments.

In *Grievance Committee of Bar of Fairfield County v. Decey*, 154 Conn. 129, 222 A.2d 339, app. den. 386 U.S. 683, 87 S.Ct. 1325, 18 L.Ed 2d 404, reh. den. 387 U.S. 938, 87 S.Ct. 2048, 18 L.Ed 2d 1006 (1966), it was held that a dealer in shares of mutual funds, also engaged in what he termed estate planning, was engaged in the unauthorized practice of law. In supplying to his customers trust and will forms printed in a booklet, the dealer sometimes materially deviated from the forms in the booklet, prepared them by filling in the blanks, supervised their execution and sometimes orally supplemented the advice in the booklet as to the tax consequences of the instruments. The court concluded that legal judgment is used in the adaptation of the forms to the specific needs and situation of the client, and since the information given is directed toward a particular person and his needs, and to a particular instrument prepared for his execution, it is no longer within the general information classification but has become legal advice embraced within the phrase practice of law. The court dismissed the dealer's claim that the trust arrangement was merely incidental to his main business as an estate planner and dealer in mutual funds.

C. Claims Adjustors

With respect to acts by insurance adjustors, a distinction has been made between
adjustors employed by insurance companies and those licensed by the Pennsylvania Insurance Commission as a public adjustor. In Dauphin County Bar Association v. Mazzacaro, 465 Pa. 545, 351 A.2d 229 (1976), the defendant was engaged in the private practice of adjusting claims as a licensed public adjustor. The Pennsylvania Supreme Court concluded that defendant's public adjustor license did not confer authority to negotiate settlements on behalf of injured claimants against alleged tortfeasors or their insurers. Further, the Court held that lay-adjustors who undertake to negotiate settlements of the claims of third-party claimants must exercise legal judgments in so doing, and such conduct constitutes the unauthorized practice of law. The Court noted that the majority of courts that have confronted the problem are in accord with their conclusion. While the objective evaluation of damages may, in uncomplicated cases, be permitted, an assessment of the extent to which that evaluation should be compromised in settlement negotiations cannot. An assessment of the likelihood that liability can be established in a court of law is a crucial factor in weighing the strength of one's bargaining position. Such an assessment involves an understanding of the applicable tort principles, a grasp of the rules of evidence, and an ability to evaluate the strength and weaknesses of the client's case, vis-a-vis, that of the adversary.

In a footnote, the Court noted that appellant argued that, by logical implication, such a holding would invalidate the longstanding use of lay-adjustors by insurance companies in negotiating settlements with third-party claimants. Here, the court clearly distinguishes the two. The insurance company adjustor is an agent of the company hired to investigate and evaluate claims being made against the company. He does not hold himself out to the public.
as competent to represent their interests and, indeed, only deals with the public from a plainly adversary posture. In his dealings with his employer, he works as an adjunct to a legal department or to a lawyer representing the insurer. The court states, We need not here decide, however, whether representation by insurance company adjustors can constitute the unauthorized practice of law. It is sufficient to say that the two cases are distinct. 351 A.2d at 235.

Other jurisdictions have similarly distinguished between insurance company adjustors and adjustors not employed by or representing insurers. In Professional Adjustors, Inc. v. Tandon, 433 N.E.2d 779 (Ind. 1982), a certified public adjustor who made a determination of the fire loss of the owners of a mobile home and then submitted the claim to the insurance carrier for negotiation of a settlement pursuant to a contingent fee contract with the owners, was engaged in the unauthorized practice of law, even though the negotiations did not reach the stage of a bargaining process of offer and counteroffer. The court held unconstitutional the statute that permitted a public adjustor to represent an insured which did not limit the activity of the adjustor to appraising the loss and reporting back to the client the fair value of the claim, but rather authorized the adjustor to negotiate, in effect, a settlement of the claim as direct agent and representative of the insured, an activity the court characterized as the practice of law pure and simple.

In Fitchette v. Taylor, 191 Minn. 582, 254 N.W. 910 (1934), an individual and his associates doing business as an adjusting association were enjoined from engaging in the unauthorized practice of law where facts showed that the defendants (1) solicited, advertised for, and held themselves out as being engaged in the business of adjusting and settling claims
for personal injuries on a contingency fee basis; (2) defined the legal rights of the injured persons and the legality of the alleged claims and gave legal advice and counsel both with reference to the question of liability against perspective defendants and the amount of damages: (3) interviewed witnesses and secured statements relevant to the claims which they purported to handle in order to give the claimants legal advice and opinion as to the collectability thereof; and (4) negotiated with insurance companies and others for settlement.

The injunction enjoined defendants from furnishing an opinion as to the right to maintain an action against others, and from soliciting, settling, or adjusting personal injury claims.

An automobile association that maintained a department of claims and adjustment staffed by lay persons for the benefit of its membership concerning claims for damages to their automobiles sustained in accidents, and which sometimes dealt with the other parties' insurer, was held by the court, in American Auto Assn. v. Merrick, 73 App.D.C. 151, 117 F.2d 23 (1940), to be engaged in the unauthorized practice of law to the extent that the department's consultation with members involved decisions and advice as to the merits of a claim. However, the court stated it was not prepared to hold that a creditor may not attempt, through an agent, a peaceful collection of a liquidated claim, or that a creditor may not agree, through an agent, to an arbitration of his claim. The court also said that the association's proposal to have its lay employees fill out and file for its members the forms necessary to commence an action in the small claims court was not improper.

As for adjustors employed by or representing insurers, the courts have generally rejected the contention that these adjustors are engaged in the unauthorized practice of law by undertaking activities closely connected with the determination of value or loss,
including, in some cases, the negotiation and settlement of claims under certain circumstances. Each case must be determined upon its own particular facts. The following acts of an independent insurance adjustor who represented insurance companies have been held to constitute the practice of law within a statute defining unauthorized practice as appearing in a representative capacity in any action or proceeding before any court of record, or rendering any legal service for another person or giving professional legal advice not incidental to the usual or ordinary business of a person for compensation or pecuniary reward:

1. appearing in a representative capacity before a Justice of the Peace
2. advising or recommending that an insurance company settle a claim asserted against it for any sum;
3. advising or recommending that an insurance company refuse or reject a claim asserted against it;
4. advising or recommending to others, including insurance companies, of their rights or duties towards insurance companies or certain persons;
5. advising or recommending that insurance companies have subrogation or contribution claims against other insurance companies;
6. advising or offering to advise and construing the rights of insurance companies, claimants or third persons of their respective rights arising out of, or by reason of, a contract of liability, casualty, fire, or indemnity insurance existing between an insurance company and another;
7. where the adjustor employed an attorney on his staff and communicated to the adjustor's employer (the insurance company) as his own the opinion given him by his employee/attorney between whom and the insurance company there was no lawyer-client relationship;
(8) preparing by himself contracts or agreements for the settlement or compromise of claims made against the insurance company employing him. State ex rel. Junior Assn. of Milwaukee Bar v. Rice, 236 Wis 38, 294 N.W. 550 (1940). The court stated that all those activities involved the giving of legal advice and clearly constituted the practice of law.

Applying a statute providing that one who enforces, secures, settles, adjusts or compromises defaulted, controverted, or disputed accounts, claims or demands between persons with which he is neither in privity nor in the relation of employer and employee in the ordinary sense, is practicing law, the Court in Wilkey v. State ex rel. Smith, infra, held that the following activities of an independent insurance adjustor representing an insurance company constituted the unauthorized practice of law:

1. Advising or recommending that insurance companies have subrogation or contribution claims against other insurance companies or individuals;

2. Advising or recommending to an insurance company that the company increase the amount offered the claimant in the absence of evidence that their recommendation was limited to the adjustor's estimate of the amount of loss;

3. Advising a claimant that he could not sue an insurance company to recover for the loss of earnings suffered by the claimant's wife while caring for the claimant after he was injured.

4. Appearing before the courts to have settlements with minors approved by the court.

The Court also held that the adjustor may not prepare release forms or agreements himself, although he may select from those provided by the insurer. Wilkey v. State ex rel. Smith, 244 Ala. 568, 14 So.2d 536, cert. denied. 320 U.S. 787 (1943).

On the other hand, the Wilkey court held that defendant did not engage in the unauthorized practice of law by investigating and reporting the factors and circumstances of
claims, the negotiation of a settlement at an increased figure where no dispute or controversy as to liability existed, and the situation had not reached the point where negotiations were no longer possible. Similarly, in the Rice case cited previously, under the statute described above, the court held that a lay person may engage in the business of adjusting losses for insurance companies, apparently in an independent capacity, if licensed to do so; he may hold himself out as engaged in such business by writing to insurance companies and informing them that he is engaged in such business; he may list his business in the classified section of telephone directories and insurance journals; when employed by an insurance company, he may fully investigate the facts of any loss, either himself or through his employees, obtain written statements and photographs, appraise a loss or damage to property or damages resulting from personal injury; if authorized or so instructed by his employer, he may obtain reports or estimates of losses or damage to property or the extent of personal injuries from experts in a particular field, such as building contractors, garage men, or physicians; he may report all such facts so obtained to his employer and may comment on the facts found. Moreover, under this statute, lay adjustors regularly employed, or lay independent adjustors employed by an insurance company to adjust losses, may properly ascertain the facts and negotiate settlements or adjustments on behalf of insurance companies, and the insurance company may authorize the adjustor to settle small claims or claims generally by insurance companies as uneconomical to contest without the specific approval of the company's counsel or its local attorney. In reaching such a settlement, an independent adjustor may select from his files the proper form applicable to the claim settled, fill out the blank spaces in accordance with the settlement agreement, and have the
claimants sign the same. But he may not himself prepare contracts or agreements for the settlement or compromise of claims made against the insurance companies employing him.

In a declaratory relief action brought by a group of casualty insurers, the Court, in *Liberty Mutual Insurance Co. v. Jones*, 344 Mo. 932, 130 S.W.2d 945 (1939), upheld the practice of the insurers in employing lay persons to adjust claims against their insureds. Specifically, the Court declared that the following activities of lay investigators or adjustors employed by the insurers did not constitute the practice of law: (1) investigating for his employer the facts and circumstances relating to a casualty or claim arising under a policy of casualty insurance issued by such employer, and of reporting to the latter the facts ascertained in such investigations; (2) affecting settlement of a claim arising under a policy of casualty insurance issued by such company by filling in, on a printed form prepared by counsel for the company, the release to be executed by the claimant; (3) the act, in the negotiation and settlement of a claim arising under a policy of casualty insurance issued by his employer, of truthfully stating to the claimant what the company's attorney has advised such company as to its liability or its insurance upon such claim, provided he shall not state or act upon his own opinion as to the legal rights of the company, the insurer or the claimant; (4) expressing in his reports to his employer his opinion as to the monetary extent of the liability of his employer or of the insured upon any claim that he is charged with investigating or adjusting, irrespective of whether or not liability is disputed, provided he shall not pass on any question of law or legal liability; (5) stating in a report to his employer the opinion, given by the company's counsel on any question of liability upon any given claim; (6) participating in an informal conference with or before the Worker's Compensation
Commission held by, or at the instance of, the Commission or its representative for the purpose of endeavoring to bring about an amicable agreement between the insurer and an injured employee as to punitive compensation; (7) determining for his employer the pecuniary limit which the employer will be willing to offer or pay in settlement of any claim arising under a policy of casualty insurance issued by the employer, provided he does not determine the legal liability of his employer or its insured, but arrives at his conclusion either regardless of legal liability or upon the advice of counsel; and (8) the exercise of his judgment as to which of several forms of release prepared by counsel for the company he will use in the settlement of a claim arising under a policy of casualty insurance issued by such company. Indeed, all of the practices set forth above have become the standard modus operandi of the insurance industry in Pennsylvania and other states.
The Courts, in Wilkey, Rice, Jones, and Shortz, express support for the general principle that the performance of certain acts in a workmen's compensation proceeding, which do not require legal knowledge or skill, such as filing a claim on blanks prepared and supplied by the compensation authority, does not amount to the practice of law, at least if the proceeding has not become an adversary one. The Pennsylvania Supreme Court in Shortz held that the preparation and filing by a layman for a compensation insurer of pleadings in a workmen's compensation proceeding on forms prepared by the compensation authority does not require legal skill and, hence, does not amount to the practice of law.

Once the proceedings reach an adversary stage, however, participation can constitute the practice of law. In Shortz, defendant was employed as a claim adjustor for the Globe Indemnity Company and prepared and filed pleadings in worker's compensation cases in which that company was a party defendant. He also, on its behalf, appeared at hearings before the referees, examined and cross-examined witnesses, and there, in general, conducted the litigation. The court states that the proceedings are less technical, but conducted much the same as in court. While neither the Board nor the referees are bound by technical rules of evidence and testimony, all findings of fact shall be based only upon competent evidence. Therefore, examination and cross-examination of witnesses requires a knowledge of relevancy and materiality. Where the application of legal knowledge and technique is required, the activity constitutes such practice even if conducted before a so-called administrative Board of Commission. It is the character of the act, and not the place where it is performed, which is the decisive factor. Shortz, 193 A. at 21. The court held that if any person other than a member of the Bar participates on behalf of another in
hearings and proceedings before the workmen's compensation board or one of the referees, such a representative is engaging in the practice of law. Defendant was not enjoined, however, from preparing and filing pleadings in workmen's compensation cases. The court stated that such pleadings are so uniformly simple that it cannot fairly be said that legal skill is required in their preparation. The court stated that it is only when a hearing is begun before a referee that the representation of a party constitutes the practice of law.

D. Accountants

Tax law is often viewed as being separate and distinct from other areas of law. Therefore, practicing tax law is often viewed as distinct from the practice of law in general. Accountancy is a separate profession, and accountants may prepare and file income tax and other tax returns. However, accountants must have a sound understanding of the tax laws in order to do their work. When does preparing returns turn into practicing law?

The Supreme Court of New Jersey provided some guidance in its decision in Application of N.J. Soc. of Certified Public Accountants, 102 N.J. 231 507 A.2d 711 (1986).

The state accounting organization challenged a rule that inheritance tax returns may only be filed by attorneys. The Court noted that the preparation and filing of returns may require knowledge of several legal fields, i.e., real estate, corporations, partnerships, trusts and estates. However, in the field of taxation, the legal and accounting aspects are so interrelated and enmeshed that they are often difficult to distinguish. Further, CPA's are sufficiently trained and regulated so as to be able to prepare such returns. The Court decided to strike a balance. An accountant may prepare and file inheritance tax returns, but the accountant must notify clients that a review of returns by an attorney may be desirable if
there are questions involving the application of the tax laws. Therefore, the onus of responsibility is upon the accountants to recognize the limits of their competency and to defer to another profession.

While working with the tax laws to prepare returns is permissible, the rendering of advice or opinion as to the effect of tax laws on a specific situation is impermissible. The State of Florida was faced with the question of when does advice and discussion become the practice of law. An insurance agent was charged with unauthorized practice in providing pension services to clients. Actuarial, accounting, economic, insurance and investment advice in reference to designing, drafting and adopting of a pension plan, without the rendering of legal advice or services, does not constitute the practice of law. A general discussion of the types of pension plans, details of coverage and funding, and other factors of a strictly financial and economic nature are proper for the layperson to discuss. Even discussions of general legal principles, without specific application, are also permissible. It is the application of law to specific facts, as well as the evaluation of the effect of a legal instrument as applied to a specific entity, which is the practice of law and is consequently prohibited. See, In re: The Florida Bar, 355 So.2d 766 (Fla. 1978); See, also, Kountz v. Rowlands, 46 D&C 456, 90 P.L.J. 193 (1942).

Aside from actually practicing law, accountants may not hold themselves out as attorneys. A prohibited representation or advertisement may be express or implied, so long as it conveys the impression that the representor is capable of practicing law. 42 Pa. C.S.A. 2524; Re: Matter of Arthur, supra.
In Re: Appeal of Jefferson Manor, Docket No. 23-93-001 of the Commonwealth of Pennsylvania, Department of Public Welfare involved the accounting firm of Zelenkofske, Axelrod, & Co., Ltd. which filed a Notice of Appeal on behalf of Jefferson Manor, a nursing facility provider which participates in Pennsylvania's Medical Assistance Program. The Notice of Appeal also contained a request by Zelenkofske et al, to be permitted to act as Jefferson Manor's representative in the appeal. The Department of Public Welfare's Office of Legal Counsel objected to the request. The Office of Hearings and Appeals issued an Opinion and Order which denied the request to represent Jefferson Manor. An application for reconsideration was granted. The Opinion of Peter Speaks, Director, Office of Hearings and Appeals for the Department of Public Welfare, dated October 4, 1993, held that Certified Public Accountants may not represent clients before the Office of Hearings and Appeals of the Department of Public Welfare, since it constitutes the unauthorized practice of law. That decision is attached to this manual as EXHIBIT "A."

Zelenkofske then filed an appeal from the decision to the Commonwealth Court of Pennsylvania, which appeal was withdrawn in February, 1994.

The Committee in 1997 issued Formal Opinion 97-102 declaring the preparation and filing of Petitions for Probate and other documents relating to a decedant's estate with the Register of Wills and the Clerk of the Orphan's Court of the various counties and otherwise assisting personal representatives with the Administration of Decedant's estates to constitute the unauthorized practice of law.

Further, the Committee in Formal Opinion 97-103 issued the opinion that persons not authorized to practice law are not permitted to form Associations as that term is defined in
Title 15 Pennsylvania Consolidated Statutes Annotated which includes corporations, partnerships, limited liability companies, business trusts, and limited liability partnerships and to advertise such formation in any of the newspapers of general circulation in the county in which the corporation was formed or in local County Legal Records. See FORMAL OPINIONS OF THE UNAUTHORIZED PRACTICE OF LAW COMMITTEE beginning at page 89.

E. Paralegals

Paralegals are like accountants in that their position forces them to work with the law while trying not to become entangled in the practice of law. Paralegals do a lot of the necessary advance work in preparing cases and other legal matters, such as document preparation and information gathering. Like accountants, paralegals are governed by very much the same factors that determine the boundaries between permissible work and the practice of law.

The practice of law not only includes conducting cases in Court, but also other acts such as giving advice or preparing legal instruments. Childs v. Smeltzer, supra. Paralegals are routinely employed by licensed attorneys to assist in the preparation of legal documents, litigation, complaints, etc. The preparation of legal documents by a paralegal, including research and drafting, is permissible if such activity enables an attorney to carry the matter to conclusion after the attorney’s own examination and approval of the documents. It is the unauthorized practice of law where the final work product is not subject to the approval of a licensed attorney. For instance, if a paralegal has prepared a deed, and the attorney has not examined it or approved it prior to its recordation, or if the parties to the legal document did
not confer with a licensed attorney concerning the deed, then the paralegal is practicing law. See, Matter of Easler, 275 S.C. 400, 272 S.E.2d 32 (1980); State ex rel. or. State Bar v. Lenske, 284 Ore. 23, 584 P.2d 759 (1978). In other words, the preparatory work of a paralegal must merge with the attorney's own work such that the paralegal's work loses its identity and takes on the identity of the attorney's work. Matter of Discipline of Jorissen, 391 N.W.2d 822 (Minn. 1986). Given the above, the drafting of legal documents by a paralegal for hire is unauthorized and prohibited. Childs v. Smeltzer, supra.

Another danger area for paralegals is client contact. Paralegals often must meet with clients to gather information and assist the lawyer in other matters. Because paralegals work with the law, and because they are often responsible for knowing the facts, it would be easy to apply the law to those facts. But, as in the case of accountants, the giving of legal advice as to a client's particular situation by a paralegal is not permitted.

The Bankruptcy Court decision of In re: Anderson, 79 Bankr. 482 (Bkrtcy. S.D. Cal. 1987), exemplifies this idea. Defendant worked for a paralegal service which was contacted by the debtor. Defendant met with debtor, interviewing and soliciting information from her, from which information he selected and prepared bankruptcy schedules. Defendant advised debtor of her rights vis-a-vis creditors, or differences between filing Chapter 7 and Chapter 13, of the necessity of filing amendments to schedules, and he also selected her exemptions. The Court found that the defendant was practicing law. All these acts, which are applications of law to facts, require the exercise of legal judgment beyond the knowledge and capacity of the layperson.
Recently, Bernard Markovitz, United States Bankruptcy Judge in the United States Bankruptcy Court for the Western District of Pennsylvania in the case of Donald Earl Harris and Lois Jean Harris, et al, Debtors, United States Trustee, Plaintiff v. Robert Kasuba, d/b/a Affordable Legal Assistance, Defendant, Bankruptcy No. 92-24875-B-M, Chapter 7, Adversary No. 93-2060-BM, et al, opinion dated Mary 5, 1993 held that the Defendant was not an attorney-at-law and had unlawfully practiced law by preparing petitions and accompanying schedules and statements filed in the above bankruptcy cases. The injunction sought by the United States Trustee prohibiting Defendant from engaging in such activity in the future in the court was upheld by Judge Markovitz in an extremely well written opinion which is included with this manual as EXHIBIT "B."

This problem comes up in other areas of law. The representation of a client by a paralegal at a realty closing, giving advice regarding such closing and signing a letter for a law firm to another attorney without disclosing one's status as a paralegal was illegal. The Florida Bar v. Pascual, 424 So.2d 757 (Fla. 1982). Participating in settlement and negotiation of litigation damages is likewise prohibited. Brown v. Unauthorized Practice of Law Com., 742 S.W.2d 34 (Tex 1987). Perhaps the most egregious violation is in appearing in Court on behalf of a client without disclosing one's status as a paralegal. See Matter of Discipline of Jorrissen, supra.

Obviously, the above examples of prohibited conduct create a corresponding duty for supervising attorneys. A supervising attorney has to reasonably ensure that not only is the paralegal adequately supervised, but also that the paralegal's conduct is compatible with a lawyer's professional obligations. Pa. Rules of Prof. Conduct 5.3(a)(b).
The above situations show that practicing law is a form of holding oneself out to be an attorney. As noted in the discussion concerning accountants, representing oneself to be an attorney is also illegal.

John J. Thomas, U.S. Bankruptcy Judge in the Middle District Bankruptcy Court for the Middle District of Pennsylvania in the case of In Re: John Maloney and Christine Maloney, Debtors, Sears, Roebuck & Company, Movants vs. William G. Schwab, Esquire, Trustee in Bankruptcy for John Maloney and Christine Maloney held that a paralegal, employed in the office of counsel for a creditor, is not permitted to question a debtor at a meeting under 11 U.S.C. 341. This decision is printed in Section VIII. D.

F. Legal Interns/Law Students

The issue of legal interns or students arises in connection with a law firm's use of services of first, second and third year law students as part of its recruiting program, and with the employment of graduates of law schools as new associates, pending their admission to the Bar of the Commonwealth of Pennsylvania (each such category being called Students). Students may appropriately engage in the same activities as those in which it is appropriate for paralegals to engage. These activities include preparation of pleadings, written discovery requests, responses and other documents normally prepared by paralegals, conducting the legal research and drafting memoranda based thereon, gathering information, filing documents and performing general clerical duties. As is true with paralegals, these activities must be performed under the supervision of a lawyer. The Student may not hold himself out, nor be represented to anybody as, a lawyer. See: Opinion 86-97, Legal Ethics
Pennsylvania Bar Admission Rules Nos. 321 and 322 do permit certification of certain law students as Certified Legal Interns to appear on behalf of the Commonwealth before all governmental units (except the three state higher courts) on behalf of any indigent. These provisions give the general rules regarding requirements for certification and authorized activities (some of which are required to be performed in the personal presence of the supervising attorney) of certified legal interns, and discuss preparation of papers.

G. Corporate In-House Attorneys

Corporations present a unique problem. Unlike individuals, a corporation cannot appear pro se in litigation, but must always appear represented by a lawyer who is properly admitted to practice, not by an officer who is not an attorney. Industrial Valley Bank & Trust Co. v. Miller Realty Development Co., Inc., 44 Pa.D.& C.2d 207 (1968) (construing statutory predecessor to 42 Pa. C.S.A. 2501(a)). Often, in-house counsel are not properly admitted to practice in all the jurisdictions in which the corporation operates or may be liable to suit. See, e.g., Pa. Rules of Prof. Conduct 5.5(b). This not only applies to litigation but also to the practice of law as it relates to commercial and other nonlitigation matters. Childs v. Smeltzer, supra.

Given the above, it should be obvious that a corporation may not represent or practice law on behalf of another. 42 Pa. C.S.A. 2524. Of course, a professional legal corporation may provide legal services but only through its duly licensed agents. 15 Pa.C.S.A. 2924(a).
A related and interesting issue is whether the in-house attorneys of an insurer may represent insureds. On the one hand, this would be covered by the above rule that prohibits corporations representing clients. This was the approach of North Carolina in the decision of *Gardiner v. N.C. State Bar*, 316 N.C. 285, 341 S.E.2d 517 (1986). The North Carolina Supreme Court viewed the issue solely as a corporate entity appearing for another person. They rejected the notion that, since the insured had an interest in the litigation, the insurer's in-house attorney could represent the insured.

A contrary conclusion was reached by the Supreme Court of Missouri. In the case of *In re: Allstate Ins., Co.*, 722 S.W.2d 947 (Mo. 1987), the Court recognized that there existed a relationship of insured and insurer, which is of a special nature and may not fit readily into the traditional notion of an attorney and client relationship. As such, the insurer has a substantial interest in the litigation and is entitled to hire counsel of its own choosing to protect that interest. There would be no problems if the insured hired an outside counsel, or independent contractor. Since the main goal is to prevent a corporation with non-professional shareholders from having a proprietary interest in the emoluments of a law practice, it makes no difference if the legal service are rendered by lawyers as employees or by lawyers as in independent contractors.

Pennsylvania has not ruled on this issue. However, absent a legislative action to the contrary, the Missouri approach appears to be more sensible and appropriate.

**H. Practice By Out-Of-State Attorneys in Pennsylvania**

In a case where an attorney admitted to practice in another state seeks to institute an action in a court in this Commonwealth, special permission of the court must be obtained.

In Washko v. Platz, 368 Pa. Super. 449, 534 A.2d 522 (1987), appeal denied, 518 Pa. 642, 542 A.2d 1371 (1988), the court held that where a pleading is filed by an attorney not admitted to practice in Pennsylvania, nor specially admitted, the defect is not a nullity; only if the defect is not cured after opportunity to amend has been provided may the pleading be stricken.

The case of Ginsburg v. Covrak, Pa. Supreme Court, 139 A.2d 889 (1958) involved the Defendant who was admitted to practice before the United States Supreme Court, the Court of Appeals of the District of Columbia and the United States District courts for the District of Columbia and the Eastern District of Pennsylvania, but was not admitted to practice before the Courts of the Commonwealth of Pennsylvania.

The Defendant maintained a home and a law office in Philadelphia. On his window were the words: "Law Offices" and his name. Further, Defendant held himself out to the public in the County of Philadelphia as entitled to practice law in that county, was listed in the Philadelphia telephone book as an attorney and in the legal directory published by one of the county banks.

The Opinion held that the practice of law is not open to all and sundry, nor is it an inherent or vested right. It is a personal privilege subject to exacting moral character and mental grasp of legal principles. The lives, liberties and property of the public are at stake, and the state may attach conditions to an attorney's license aimed at the public's protection.
The Court, stating that when a stranger comes to a community he must meet the standards set out by the people of that community, just as these citizens must expect to meet the local standards if they go elsewhere to live and work, held that the defendant was conducting the unauthorized practice of law.


I. Non-Law Corporations Offering Services of Lawyers

By various statutes and legal decisions, non-lawyers are prohibited from forming corporations or partnerships that offer the services of lawyers to the public. Moreover, lawyers are prohibited from combining with, or working for, non-lawyers to offer lawyers' service to the public. For example, lawyers may not form a partnership, joint venture or corporation with non-lawyers to provide total legal and financial services. Professional Ethics Comm'n of the Board of Overseers of the Maine Bar, Advisory Opinion 79 (1987).

In 1969, the ABA enacted the Model Code of Professional Responsibility (Model Code), adopted by virtually all states either officially or unofficially. Canon 33 became Disciplinary Rule (D.R.) 3-103(A) and provided in part:

A lawyer shall not form or continue a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.\(^4\)

Ethical Consideration (E.C.) 303 made it clear that the Disciplinary Rules prohibit a lawyer from submitting to the control of others in the exercise of his judgment.

In 1975, the Model Code was amended to permit profit-making entities to furnish legal services to members or beneficiaries provided that the entity does not derive any profit

\(^4\)Pennsylvania Supreme Court. Rules of Professional Conduct. 5.4(b)
from legal services. The prohibition on derivation of profit by the lay organization was based on a concern that otherwise the lay organization might interfere with the exercise of the lawyers professional judgment.

In 1983, the ABA's Ethics Code was further revised, but without change in the above mentioned prohibitions. Although the ABA has no authority over the practice of law, the Model Rules have been relied upon by state courts to enforce their own rules. The Ethics Code opinions of the ABA continue to make it clear that lawyers ethically may not form partnerships or other businesses with non-lawyers if any part of the business would involve the practice of law. Business associations between lawyers and accountants, in which the lawyer is to give tax or legal advice, have been condemned regularly in local ethics opinions. N.Y. State Bar Association, Ethics Opinion 557 (1984). Maryland State Bar Association, Ethics Opinion 77-37 (1976). Through a combination of statutes and judicial decisions, non-lawyers are prohibited not only from practicing law directly, but also from forming partnerships or corporations that offer the services of lawyers to the public. Similarly, lawyers are prohibited from combining with, or working for, non-lawyers to offer the lawyers' services to the public. For a more complete discussion of this issue, see Lawyers' Liability Review Quarterly Journal, pp. 1-9 (January, 1991).

A widely influential case involving a corporation organized for profit to provide legal services to its subscribers by a staff of competent attorneys is In Re: Cooperative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910). The court concluded that the corporation was illegal because (1) corporations cannot become members of the Bar; (2) an attorney employed by the corporation would be responsible to the corporation rather than to the client; (3) the
corporation might be controlled by non-lawyers; and (4) the public would have no remedy to protect itself from the corporation. The court's conclusion that corporations controlled in part by non-lawyers may not offer the services of lawyers to the public has been followed in practically every jurisdiction. For example, banks have been enjoined repeatedly from selling the services of in-house lawyers to customers to prepare wills and trusts, among other legal services. In a preceding section of this manual, the discussion of the practice of collection agencies and real estate agencies provides other examples of such unlawful conduct.

J. Notaries

The Notary Public Law (57 P.S. 147 et seq.) is the statutory framework which dictates the appointment, eligibility and duties of a notary public. The Secretary of the Commonwealth is authorized to appoint and commission for a term of four years as many notaries as, in his judgment, the interest of the public may require. It is not required that a notary public be an attorney. The powers and duties of a notary public are as set forth in 57 P.S. 162 through 165. Essentially, these duties involve the power to administer oaths and affirmations, the power to receive proof of acknowledgments on all instruments of writing and the power to take depositions and affidavits. Nothing in the statute authorizes a notary to prepare any documents or writings which would have any legal effect.

57 P.S. 149. Any citizen of Pennsylvania, being eighteen (18) years of age or over, of known character, integrity and ability, shall be eligible to the Office of Notary Public, if he shall have resided within this Commonwealth for at least one (1) year immediately preceding the date of his appointment, and if he shall be a registered elector in the Commonwealth.
Unfortunately, over the years, the Committee of the Unauthorized Practice of Law has encountered a number of incidents where notaries are preparing legal documents such as wills and deeds. It appears that the public has a perception that notaries are entitled to prepare such documents and, in fact, are qualified to do so. As noted above, notaries are not required to be lawyers and the statute creating the office of notary provides no authorization for the preparation of such documents.

See Formal Opinion 94-107, page 91.

K. Labor Unions and Associations

Labor unions and associations hold a unique position under the unauthorized practice of law statute. As recited in Section II of this Manual, bona fide labor unions or other associations are not prohibited from giving legal advice to their members:

(b) Exception - Subsection (a) [the prohibition for those other than attorneys to practice law] shall not prohibit any bona fide labor organization from giving legal advice to its members in matters arising out of their employment or prohibit any person from engaging in any associational activity which is protected under the constitution of the United States.

(42 PA C.S.A. 2525(b))

While there are no Pennsylvania cases in which 2525(b) has been at issue or interpreted, the seminal cases decided by the United States Supreme Court, **NAACP v. Button**, 371 U.S. 415, 9 L.Ed 2d 405, 83 S.Ct. 328 (1963) and **The United Mine Workers of America v. Illinois State Bar Association**, 389 U.S. 217, 19 L.Ed, 2d 426, 8 S.Ct. 353 (1967) illustrate the reach and rationale of this exception.

**NAACP v. Button**, supra, involved a program of the National Association for the Advancement of Colored People, Inc. (NAACP) in the state of Virginia, to provide assistance to persons willing to pursue litigation to achieve desegregation. The NAACP
reviewed requests for litigation assistance and, if such requests were approved, the NAACP provided a staff lawyer to represent the litigant. The NAACP agreed to defray all expenses of litigation and paid the staff lawyer involved in the litigation directly.

Further, the NAACP sponsored meetings of parents and children in which NAACP staff lawyers instructed the attendees on the legal steps necessary to achieve desegregation. The NAACP also actively sought out litigants who were willing to engage in such desegregation litigation.

In 1956, Virginia amended its statutes governing the unethical and non-professional practice of attorneys by forbidding solicitation of legal business by a ‘runner’ and defined as a ‘runner’ an agent for an individual or an organization which retains a lawyer in connection with an action to which it is not a party and had not pecuniary right or liability. The Virginia Supreme Court of Appeals held that this statutory provision: (i) applied to the activities of the NAACP in Virginia; (ii) was constitutional; and (iii) thus prohibited the NAACP litigation program.

The Supreme Court, in an opinion written by Justice Brennan, faced the question of whether the Virginia statute as construed and applied by the Virginia Supreme Court of Appeals abridges the freedoms of the First Amendment protected against state action by the Fourteenth. 9 L.Ed 2d at 415. The Court held that the activities of the NAACP were modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession, as improper solicitation of legal business. 9 L.Ed 2d at 415. The Court held that the First Amendment protects advocacy against governmental intrusion and found that the NAACP
practices complained of were a form of political expression protected by the Constitution.

In *The United Mine Worker's of America v. Illinois State Bar Association*, *supra*, the United Mine Workers employed a licensed attorney and paid his entire salary. The attorney's duties were to represent union members to prosecute their workmen's compensation claims before the Illinois Industrial Commission. The Illinois State Bar Association filed a complaint in the Illinois Circuit Court of Sangamon County attempting to restrain the labor union from engaging in such activities, alleging that those activities constituted the unauthorized practice of law. The terms of the union's employment of the attorney were outlined in a letter which stated as follows:

> You will receive no further instructions or directions and have no interference from the district [union], nor from any officer, and your obligations and relations will be to and with only the several persons you represent.

(19 L.Ed. 2d at 429)

The record showed that the union had not departed from this Agreement. Despite these findings of fact, the Illinois trial court enjoined the union from continuing its practice and the Illinois Supreme Court affirmed.

The United States Supreme Court overruled the Illinois Court and found the union's activities to be constitutionally protected. The court held that while states have broad power to regulate the practice of law, their powers cannot be allowed to impair the rights, guaranteed by the First and Fourteenth Amendments of the Constitution, to the freedom of speech, petition and assembly. Protected by the First and Fourteenth Amendment was the right of union members to join together to assist one another in the assertion of their legal rights by collectively hiring an attorney to handle their claims.

The conclusion to be drawn from these cases is that it is unlikely in almost any case where a union or other association employs an attorney to represent either its members in personal litigation, or others in litigation seeking to achieve the ends of the association, that
the entities will be found to be engaged in the unauthorized practice of law.

L. **Estate Planning and the Unauthorized Practice of Law**

See the **MEMORANDUM** from Paul A. Lundberg, attached to this Manual as EXHIBIT "C."

M. **Miscellaneous Cases**

The unauthorized practice of law may involve individuals who, acting independently or in concert, try to fill a role of advisor, counselor or advocate for others in certain specific types of cases. For example, the Unauthorized Practice of Law Committee has had occasion to investigate individuals who have held themselves out to give advice, including legal advice, in the areas of wills and estates, divorce, support and custody, landlord and tenant claims, and litigation.

In a case involving an individual who advertised estate planning services and will forms, the committee has taken action to terminate such activities because they constitute holding out to engage in the practice of law.

The committee has been presented with several situations where an individual prepared, signed and filed pleadings in court on behalf of another person, an obvious violation of the law.

In several cases, the committee was confronted with law school graduates who, before passing the bar exam, had established offices and were holding themselves out to represent clients in legal matters.

Non-lawyers engaged in the unlawful practice of law have been found to use many guises to conceal their conduct, including such deceptive names as consultant, arbitrator,
advisor, representative, counselor, and other similar pseudonyms. In *McCain v. Curione*, 106 Pa. Cmwlth. 552, 527 A.2d 591 (1987), the Court had before it a motion for summary relief and the brief in support thereof prepared and signed by a so-called jail house lawyer who designated himself as the attorney-in-fact for the petitioner, another convict. The Court held that the petitioner did not have the right to be represented by a non-lawyer and the pleading was deemed a nullity.

The Allegheny County Unauthorized Practice of Law Committee had occasion to investigate and challenge the practices of Legal Advocates for Women (LAW), a non-profit corporation funded by the City of Pittsburgh and staffed by non-attorney advocates who provided emotional support to persons who allegedly could not afford an attorney in support proceedings. Clients were not screened as to financial ability to retain an attorney. Volunteers for LAW appeared at support and custody hearings and sat at counsel tables, gave advice privately to clients, and filed exceptions to support orders. In some cases, lawyers were used by LAW on a pro bono basis. LAW used business cards that contained the term legal advocates thereby misleading clients that they were receiving legal representation. The committee received permission from the Board of Governors to seek a cease and desist order against the use of the business card. A consent decree was entered which required LAW to discontinue the use of the initials LAW, to stop speaking to lawyers or the opposing parties at counseling sessions, to provide no legal advice to clients, to not sit at counsel table, and to change its business card to delete the term legal advocates.

**N. Practice Before Administrative Agencies**

1. **State Agencies**
(a) Pennsylvania Public Utility Commission

The PUC has several regulations dealing directly with practice before this agency by non-lawyers.

1.21. Appearance in person.⁶

(a) An individual may appear in his own behalf in a proceeding. In nonadversarial proceedings a member of a partnership may represent the partnership, a bona fide officer of a corporation, trust or association may represent the corporation, trust or association, and an officer or employee of another agency or of a political subdivision may represent the agency or political subdivision in presenting a submittal to the Commission subject to this chapter and Chapter 5 (relating to formal proceedings). Participants, except individuals appearing in their own behalf and as otherwise provided in Chapter 56 (relating to standards and billing practices for residential utility service) shall be represented in adversary proceedings only under 1.22 (relating to appearance by attorney).

(b) Subsection (a) is identical to 1 Pa. Code 31.21 (relating to appearance in person).

1.22. Appearance by attorney.

(a) A person may be represented in a proceeding by an attorney at law admitted to practice before the Supreme Court of Pennsylvania, or, if a public utility regulatory agency of another jurisdiction accords like privileges to members of the bar of this Commonwealth, the highest court of the other jurisdiction.

(b) Subsection (a) is identical to 1 Pa. Code 31.22 (relating to appearance by attorney).

1.23. Other representation prohibited at hearings.

(a) A person may not be represented at a hearing before the Commission or a presiding officer except:

(1) As stated in 1.21 or 1.22 (relating to appearance in person; and appearance by attorney).

(2) As otherwise permitted by the Commission in a specific case.

(b) Subsection (a) is identical to 1 Pa. Code 31.23 (relating to other representation prohibited at hearings).

The PUC has strictly enforced its regulations dealing with attempted representation of parties by non-lawyers. In Moore v. I. Berman & Cross, Inc., 49 Pa. P.U.C. 427 (1975), the PUC ruled that an officer of a corporation could not appear before the PUC as its representative and that a corporation must be represented by an attorney authorized to practice law in this Commonwealth.

In Re: Checker Cab Co., Inc., 49 Pa. P.U.C. 159 (1975), the PUC held that a corporation's pleadings must be filed by an attorney in good standing authorized to practice before courts of record of the Commonwealth of Pennsylvania.

(b) Department of Environmental Resources

Title 25 of the Pennsylvania Code contains regulations pertaining to procedures before the Environmental Hearing Board of the Department of Environmental Resources. Section 21.21 of Title 25 provides:

(a) An individual may appear in his own behalf; a partnership may be represented by its members; a corporation or association may be represented by its officers; and an authority or governmental agency, other than the Department, may be represented by an officer or employee.

Section 21.22 of the regulations provides that a person may be represented in a proceeding by an attorney-at-law admitted to practice before the Supreme Court of Pennsylvania. Furthermore, in appropriate circumstances, the board may require that a party be represented...
by an attorney.

Based on an informal inquiry to the Environmental Hearing Board, it was determined that the board strongly encourages parties to seek counsel to represent them before the board. However, there are no guidelines or regulations upon which to determine what appropriate circumstances may compel the board to require that a party be represented by counsel. Most parties appearing before the board have legal counsel.

In King v. Commonwealth of Pennsylvania Department of Environmental Resources, EHB Docket No. 87-111-M, September 25, 1990, the hearing officer permitted a non-attorney to represent a friend to appear in a proceeding and denied a continuance so as not to interfere with the performance of the board's statutory duties involving the presentation of its case. The hearing officer did recess for 30 days to enable the appellant to either appear in person or through legal counsel. The decision indicated that the board treated the appellant with a leniency not ordinarily tolerated in board proceedings.

(c) Department of Revenue

The regulations pertaining to the procedures before the Department of Revenue are set forth in Title 61 of the Pennsylvania Code. Section 7.5 of the Code, which governs procedures before the Board of Appeals, provides in pertinent part:

(b) Representation

(1) An individual may appear on his own behalf or be represented by a person possessing the requisite technical education, training or experience. There is no requirement that a petitioner be represented before the Board by an attorney or certified public accountant. . .

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(2) Only an attorney-at-law representing a petitioner, or the petitioner acting without representation before the Board, shall be permitted to raise or argue a legal question at a hearing before the Board.

It is further provided that action before the Board taken by petitioner's authorized representative shall have the same force and effect as if taken by the petitioner. 61 Pa. Code 7.5(b)(3).

Appearance before the Board of Finance and Review is governed by 701.6 of Title 61 which provides:

(a) The Board may require in any case that a power of attorney, signed and executed by the petitioner or claimant, be filed with the Board before recognizing any person or persons as representing the petitioner or claimant.

(b) Only an attorney-at-law representing any petitioner or other applicant in any proceeding before the Board, or an applicant acting in his own behalf, shall be permitted to raise any legal question in any petition or application filed with the Board or to argue or discuss any legal questions at a hearing before said Board.

Any person who is found, after notice and due hearing, not to possess the requisite qualifications to represent others before the Board, may be temporarily or permanently denied the privilege of practicing before the Board in any capacity. 61 Pa. Code 701.6(c)(1).

(d) **Unemployment Compensation Board**

In accordance with Title 34 of the Pennsylvania Code 101.41, a claimant may be represented before the Unemployment Compensation Board or referee by counsel or other authorized agent. There is no other reference in this board's regulations
regarding representation of a claimant by counsel.

(e) Pennsylvania Securities Commission

The 1972 Pennsylvania Securities Act (70 Pa. C.S.A.) does not contain any provisions as to practice before the Pennsylvania Securities Commission. Therefore, reference to 1 Pa. Code 31.21-31.28 is necessary. That section states an individual may appear on his own behalf. A member of a partnership may represent the partnership; a bona fide officer of a corporation, trust or association may represent the corporation, trust or association; and an officer or employee of another agency or of a political subdivision may represent the agency or political subdivision in presenting any submittal to an agency subject to these rules. Parties, except individuals appearing in their own behalf, shall be represented in adversary proceedings only under 31.22 (relating to appearance by attorney).

(f) Workmen's Compensation Board

The 1915 Workmen's Compensation Act, as amended, (most recently in 1972), Title 77, does not contain any provisions as to practice before the Board. Only by implication is representation by counsel indicated. 996 on Contested cases regarding liability provides for a reasonable sum for costs incurred for attorney's fees, etc. Apparently, a pro se petitioner may represent himself and gain an award without the assistance of counsel.

2. Federal Agencies

(a) Interstate Commerce Commission

The Interstate Commerce Act authorized the ICC to regulate the
admission of individuals to practice before it and to impose a reasonable admission fee. To be permitted to practice as an ICC practitioner an individual must qualify in accordance with the ICC’s regulations governing procedures before the Interstate Commerce Commission. Attorneys-at-law need only show that they are members in good standing of the bar of the highest court of any State, possession, territory, commonwealth or the District of Columbia to represent parties appearing before the Commission. Non-attorneys who file an application for admission to practice, successfully complete the ICC practitioners' examination, and show that they possess the necessary legal and technical qualifications to enable them to render valuable service before the Commission and that they are otherwise competent to advise and assist in the presentation of matters before the ICC may be permitted to practice before the Commission.

A non-attorney applicant seeking admission to practice before the ICC must meet one of the following requirements: (1) completion of two years of post-secondary education and possession of technical knowledge, training or experience in the field of transportation which is regarded by the Commission as the equivalent of two additional years of college education; (2) worked in the field of transportation for at least 10 years; (3) received a bachelor's degree with at least 12 semester hours or 18 quarter hours in transportation or business; or (4) received a bachelor's degree and worked in the field of transportation for at least one year. These qualification standards are intended as general guidelines, and individual situations that vary from these standards will be evaluated on their own merits. The Commission will maintain a register containing the individual names of all non-attorneys entitled to practice before the Commission.

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(b) Department of Veterans Administration (VA)

Title 38 of the United States Code houses the Veterans Administration provisions. Chapter 15 in that title, entitled Agents and Attorneys sets forth the authority of the Administrator to recognize claimants, agents, or attorneys before the agency. Under 3401, no individual may act as an agent or attorney in the preparation, presentation or prosecution of any claim under the laws administered by the Veterans Administration unless he has been recognized for such purposes by the Administrator. These sections are stated in permissive terms. Generally, the Administrator may recognize any individual as an agent or attorney for the preparation, presentation and prosecution of claims under laws administered by the Veterans Administration. The Administrator may require that individuals, before being recognized under this section, show that they are of good moral character and in good repute, are qualified to render claimants valuable service and otherwise are competent to assist claimants in presenting claims. 38 U.S.C.S. 3404(a) (1980) (emphasis added).

Beyond the permissive authority granted to the Administrator in the Code, the VA's regulations set forth the exact requirements for individuals to appear before the agency. The procedure of instituting an administrative claim is codified in Title 38 of the Code of Federal Regulations. Section 14.603 identifies a proper claimant as the individual injured or his or her authorized agent or legal representative. Once a claim reaches an adjudicatory level, specific qualifications for representatives appear. The purpose for the representation requirements is, [t]o assure that claimants for Department of Veteran Affairs benefits have qualified representation in the preparation, presentation and prosecution of claims for

The relevant regulations break down into two sections. First, the regulations provide for accreditation of attorneys, agents, and representatives of recognized organizations. Representatives and agents need not be attorneys. Any questions of current qualifications are resolved by the District counsel of the Department. 38 C.F.R. 14.629 (1990).

A recognized organization must certify that its designated representative:

1. Is of good character and reputation; and
   
   (i) Has successfully completed a VA approved course of instruction on veterans' benefits; or
   
   (ii) Has passed an examination approved by the VA; or
   
   (iii) Has otherwise demonstrated an ability to represent claimants before the VA;

2. Is either a member in good standing or a full-time paid employee of such organization, or is accredited and functioning as a representative of another recognized organization; and

3. Is not employed in any civil or military department or agency of the United States.


To be accredited as an agent before the Department, applicants of good character and reputation must file with the Office of General Counsel and pass a written examination. The examination is administered by the Department. No applicant may sit for the examination more than twice in any six-month period. 38 C.F.R. 14.629(b) (1990).

Subsection (c) provides the proper procedure for attorneys to be accredited. As a point of interest, legal interns, law students, and paralegals may not be independently accredited to represent claimants. 38 C.F.R. 14.629(c)(3) (1990).
The second section of the regulations states when a person may be authorized for a particular claim.

Any person may be authorized to prepare, present and prosecute a particular claim. A proper power of attorney and a statement signed by the person and the claimant that no compensation will be charged or paid for the services shall be filed with the office where the claim is presented. A signed writing which may be in letter form identifying the claimant and the type of benefit or relief sought, specifically authorizing a direct access to records pertinent to the claim, will be accepted as a power of attorney. A person accredited under this section shall represent only one claimant; however, in unusual circumstances, appeal of such limitation may be made to the General Counsel.


Appeals of these department decisions then go to the Board of Veterans Appeals. Recognition of representatives before the Board of Appeals is subject to the same criteria as that above.

(c) **Food and Drug Administration (FDA)**

The administrative procedures for actions taken by the Food and Drug Administration are found in Title 21 of the Code of Federal Regulations in parts 10, 12, 13, 14 and 15. The United States Code is silent on the issue. This section will address the representational requirements proffered at each level of the administrative process.

Part 10 provides for general administrative procedures. Section 10.3 defines an interested person as a person who submits a petition, or comment, or objection, or otherwise
asks to participate in an informal or formal administrative proceeding or court action. In order to initiate an administrative proceeding, an interested person petitions the Commissioner to issue, amend or revoke a regulation or order, or to take or refrain from taking any other form of administrative action. Under 10.65, meetings may be held and correspondence may be exchanged between representatives of the FDA and interested parties outside of the FDA. These submissions to the Commissioner may be made by any person or any attorney or authorized representative of such person. 21 C.F.R. 10.20 (1990).

Beyond the initial petition by the interested person upon which an FDA employee will make a decision, a hearing on the petition may be appropriate. Part 12 of the FDA regulations sets forth the procedures for a formal evidentiary public hearing. Under 12.40, any person may be heard concerning all relevant issues subject to a notice of participation. Also, all participants must comply with 12.90, which provides that they must conduct themselves with dignity and observe judicial standards of practice and ethics.

Thus, the FDA promotes a liberal policy on who may appear before it. However, the agency will not answer questions about the strengths or weaknesses for the party's position, including advice about hearings, litigation strategy or similar matters. 21 C.F.R. 12.50 (1990). In a formal evidentiary public hearing, the regulations provide for the manner of filing and service of submissions (12.80), receipt of evidence (2.94), briefs and arguments (12.96), and motions (12.99); but apparently, one need not be an attorney nor pass any type of competency exam to practice before the agency.

Parts 13, 14 and 15 of the regulations concerning public hearings before a public board of inquiry, public hearings before a public advisory committee, and public hearings
before the Commissioner, respectively, all refer to persons appearing before the agency as the interested party. This reference implies that anyone may be the interested party and, therefore, anyone may appear.

(d) Federal Trade Commission (FTC)

The regulations of the FTC clearly set forth who is qualified to appear before the Commission. Section 4.1 of Title 16 of the Code of Federal Regulations limits persons practicing before the Commission to attorneys, certain corporate officers and certain experts in the same discipline as an expert witness. In pertinent part, the regulations read:

4.1 Appearances

(a) Qualifications.

(1) Members of the bar of a Federal Court or of the highest court of any State or Territory of the United States are eligible to practice before the Commission.

(2) Any individual or member of a partnership involved in any proceeding or investigation may appear on behalf of himself or of such partnership upon adequate identification. A corporation or association may be represented by a bona fide officer thereof upon a showing of adequate authorization.

(3) At the request of counsel representing any party in an adjudicative proceeding, the administrative law judge may permit an expert in the same discipline as an expert witness to conduct all or a portion of the cross-examination of such witness.


Subsection (b) of 4.1 provides for proper conduct of former members and employees in practicing before the Commission.

(e) Federal Communications Commission (FCC)

Any party may appear before the Federal Communications
Commission and be heard in person or by his attorney. 47 C.F.R. 1.21(a) (1990). Where a corporation appears before the Commission, whether a representative may appear before the Commission may depend upon whether the hearing is evidentiary in nature. Where the matter has not been designated for an evidentiary hearing, a duly authorized corporate officer or employee may act for the corporation. Where the matter does entail an evidentiary hearing, the presiding officer, in his discretion, may allow such an authorized corporate officer or employee to be heard. 47 C.F.R. 1.21(d) (1990) (emphasis added). Section 1.25 of the regulations provide for when former Commissioners and employees practice before the Commission.

(f) Nuclear Regulatory Commission (NRC)

In accordance with the rules of the Nuclear Regulatory Commission, a person may appear in an adjudication on his or her own behalf or by an attorney-at-law. 10 C.F.R. 2.713(b) (1991). Furthermore, a partnership, corporation or unincorporated association may be represented by a duly authorized member or officer or by an attorney-at-law. Id.

(g) United States Patent & Trademark Office (PTO)

Under regulations issued by the Commissioner of Patents, (37 C.F.R.) with approval of the Secretary of Commerce, pursuant to 35 U.S.C. 31, non-lawyer practitioners may be authorized to practice before the United States Patent & Trademark Office in patent matters. As part of that practice, a non-lawyer practitioner may represent patent applicants, prepare and prosecute applications, and advise patent applicants in connection with their applications. Per 37 C.F.R. 10.7, all individuals must be of good
moral character and repute and must pass a qualifying examination given by the PTO to become a non-lawyer practitioner.

In *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963), the Supreme Court held that the Florida Bar Association may not prohibit a non-lawyer practitioner from performing within the State of Florida tasks which are incident to the preparation and prosecution of patent applications before the United States Patent Office. The court held that there cannot be read into the federal statute and regulations a condition that such practice must not be inconsistent with state law, thus leaving registered patent practitioners with the unqualified right to practice only in the physical presence of the patent office and in the [District of Columbia] State of Virginia where the office is now located.

The 1946 Lanham Act (federal trademark law) is silent as to whom may practice in trademark matters, except to authorize the making of rules and regulations for conduct of proceedings in such matters. Per 37 C.F.R. 10.14(a), an attorney at law may represent others before the Office (PTO) in trademark and other non-patent cases. Exceptions are provided for long-standing non-agents (grandfathering) and for foreign-registered agents in (b) and (c). Per paragraph (e): No individual other than those specified in paragraphs (a), (b), and (c), will be permitted to practice before the Office in trademark cases. In sum, only individually-registered non-lawyers may practice in patent matters, and only attorneys may practice in trademark matters, save those grandfathered and certain foreigners.
Securities and Exchange Commission

Appearances before the SEC are governed by 17 Code of Federal Regulations, Part 201, Subpart A - Rules of Practice, 201.2(a), which sets out who may practice before the Commission. An individual may appear in his own behalf before the SEC. A member of a partnership may represent the partnership; a bona fide officer of a corporation, trust or association, and an officer or employee of a state commission or of a department or political subdivision of a state may represent the state commission or the department or political subdivision of the state, in any proceeding.

When an individual appears in his own behalf before the Commission or a hearing officer in a particular proceeding which involves a hearing or an opportunity for hearing, he is required to file with the Commission or otherwise state on the record an address at which any notice or other written communication required to be served upon him or furnished to him may be sent (see 201.2(d)). This section further states: Any person appearing or practicing before the Commission in a representative capacity may be required to file a power of attorney with the Commission showing his authority to act in such capacity.

Under 201.2(e), the Commission may deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after notice of, and opportunity for, hearing in the matter (i) not to possess the requisite qualifications to represent others, or (ii) to be lacking in character or integrity or to have engaged in unethical or improper professional conduct, or (iii) to have willfully violated, or willfully aided and abetted the violation of any provisions of the Federal Securities Laws (15 U.S.C. 77a-80b-20), or the rules and regulations thereunder.
Additional restrictions upon practice by former employees of the Commission are contained in Rule 6 of the Commission's Conduct Regulation (200.735.8).

(i) **Department of Treasury - Internal Revenue Service**

Title 31 of the CFR recites a Department of Treasury/Internal Revenue Service regulation in Part 10 - PRACTICE BEFORE THE IRS.

Section 10.2 defines an attorney much like elsewhere in other regulations. It also defines Certified Public Accountant (CPA). Section 10.3 states that practice includes: (a) attorneys; (b) Certified Public Accountants; (c) enrolled agents; (d) enrolled actuaries; (e) others qualifying under 10.5(c) (Temporary Recognition) or 10.7 (Representing oneself); (f) government officials; and (g) state officers.

In 10.4, **Eligibility for Enrollment** is extended to one who demonstrates a special competence in tax matters by written examination . . . and is not engaged in any conduct that would justify disbarment of an attorney, CPA, or enrolled agent. It is limited to natural persons.

Subpart B covers DUTIES AND RESTRICTIONS RELATING TO PRACTICE BEFORE THE IRS. Section 10.2 relates to information to be furnished to the IRS, but says nothing about declarations to the public seeking representation before the IRS. In 10.24 the Section warns against associating with, or seeking assistance from, disbarred or suspended persons from the practice before the IRS.

Section 10.32 states that nothing in the regulations in this part shall be construed as authorizing persons not members of the bar to practice law.
O. Attorneys Associating with Non-Attorneys in Business

In Waychoff et al. v. Waychoff, Pa. Supreme Court, 163 A. 678 (1932) an attorney and two (2) laymen, all of whom were brothers, entered into a partnership agreement by which the lay person brothers gathered together a number of claims of World War I Veterans and brought them to the attorney-brother for prosecution against the government. The partnership agreement provided that the attorney's fees resulting from the prosecution of the claims would be split between the three (3) brothers.

The Court held that laymen are not bound by any professional oath or discipline, nor by the exulted sense of honor which comes from membership in a fraternity whose aim is the lofty one of the pursuit of justice, and when they have a contingent interest in the spoils of litigation they are more apt to suborn perjured testimony and to instigate corruption.

The practice by the two laymen brothers was held to be the unauthorized practice of law. The decision upheld the unbending legal rule that all agreements which provide that laymen are to receive from lawyer's a portion of their fees, in consideration of procuring the litigation for them, or for assisting in its prosecution, are void because contrary to public policy.

P. Non-Attorneys (Other than Paralegals, Notaries, Etc.)

In Childs et al. v. Smeltzer, Pa. Supreme Court, 117 A. 83 (1934) a stenographer made a practice of drafting legal instruments for hire. She drew a great variety of legal instruments according to the testimony including Wills, Deeds of Trusts, Bills of Sale, Leases, Partnership agreements and more than a thousand Deeds and mortgages.
The Court held that there is a wealth of authority for the proposition that the habitual drafting of legal instruments for hire constitutes the practice of law, even though the individual so engaged makes no attempt to appear in Court or to give the impression they are entitled to do so.

The Court quoted the decision in *People v. Alfani*, 227 N.Y. 334, 125 N.E. 671, in stating that to make it a business to practice as an attorney at law, not being a lawyer, is a crime. Therefore, to prepare as a business legal instruments and contracts, by which legal rights are secured and to hold oneself out as entitled to draw and prepare such as a business, is a violation of the law.

In citing *People v. Title Guarantee and Trust Company*, 227 N.Y. 366, 125 N.E. 666, the Court stated that the preparation of legal papers may be ancillary to the daily business of the actor or it may be the business itself. The emphasis may be upon the services of the (real estate) broker or the business of the trader, or it may be upon their practice of law. The drafting and execution of legal instruments is a necessary concomitant of many businesses, the Court stated, and cannot be considered unlawful. Such practice only falls within the prohibition of the act when the documents are drawn in relation to matters in no manner connected with the immediate business of the person preparing them, and when the person so drafting them is not a member of the Bar and holds himself as specially qualified and competent to do that type of work.

**Q. Trust Officers**

The case of *In Re: Umble's Estate*, Pa. Superior Court, 117 Pa. Superior Court, 117 Pa. Super. 15 involved an appeal from an order of an Orphan's Court refusing to negate
the validity of a Will which had been probated and which had been prepared by a trust officer of a financial institution, which had been appointed as Executor in the Will. The trust officer had not been admitted to practice law in any Court in the Commonwealth of Pennsylvania.

Citing Child's v. Smeltzer, Supra. The Court held that:

The substance of the offense is the habitual preparation for consideration of legal documents for others. To make it a business to practice as an attorney at law, not being a lawyer, is the crime. The preparation of one (1) Will by a trust company acting through an officer not authorized to practice law, where the Will names the trust company as executor, as is here alleged, is not of itself a violation of statute.

The Court concluded by stating that it did not wish to be understood as approving the practice of trust companies and layman drawing wills. The Court continued by stating that, in fact, such practice has been condemned, not only by Bar Associations, but by Banker's Associations, as approaching upon dangerous ground. If the practice is allowed, the Opinion stated, it is not difficult to conceive of circumstances under which the person so acting would make themselves liable under the statute. The drafting of a Will, in many cases, calls for the service of the best legal talent that is available. The decision was upheld by the Pennsylvania Supreme Court as reported in 186 A. 75 (1936).

R. Justice of the Peace (District Justice)

The case of In Re: Graham, Erie County Orphan's Court, 30 D&C 525 (1937) involved a justice of the peace who was not a member of the Bar drawing, preparing and giving legal advice with respect to Wills, inventories, inheritance tax returns, personal property tax returns, accounts, petitions sur audit, and other petitions and the papers incident
to the practice of law in the Orphan's Court and before the Register of Wills.

The Opinion quoted *Shortz et al. v. Ferral, Supra.* as stating that an attempt to formulate a precise definition of the practice of law "would be more likely to invite criticism than to achieve clarity." In this case, there was no question that the justice of the peace was engaged in the unauthorized practice of law.

S. Insurance Brokers

The case of *Walker v. Kahn, Allegheny Court of Common Pleas, 31 D&C 920 (1938)* involved an insurance agent who was engaged in the business of agency for insurance companies and surety companies. He made a specialty of executing bonds for restaurant liquor licenses and for club liquor licenses.

In conjunction with the business of writing bonds for applicants to the Pennsylvania Liquor Control Board, for restaurant liquor licenses or for club liquor licenses, and as a convenience to his customers, Defendant and his employees filled out on behalf of many applicants the forms by which the application is made for the issuance or for the renewal of the liquor license. The Court was satisfied from the evidence that the Defendant and his employees at times interpreted and applied the liquor license laws to the particular facts of a case so as to constitute the practice of law.

The Court stated that the hap-hazard practice and half-baked interpretation of laws by those who had not seemed fit to qualify themselves by special training is dangerous to the citizen. Such action jeopardizes the rights and property of the trusting public. The law of the land is not composed of a miscellaneous, disconnected heap of statutes. The law is a definitely correlated system of statutes and decisions, tied together and based upon a

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constitution, and the whole goes to make up what is known as the body of the law.

To allow persons who are not versed by study of the whole body of the law to practice law or to interpret statutes, in even a minor way, would be as absurd as to permit persons who lack a study of the whole human body to practice medicine and tinker with the human anatomy. The public has a right to depend upon the Courts for a guarantee of the fitness, the ability, the experience and the integrity of lawyers to render the legal services which are needed.

It is a duty of the Courts, the Court continued, to enforce proper standards among the lawyers, but there is no way by which the Court could impose the same high standards by persons who are not members of the bar who undertake to guide or instruct other persons in legal matters.

The lawyer is amendable to strict discipline and for bad faith, dishonesty or negligence. He himself may be put on trial. He may be disbarred and his career blasted if he fails to observe the ethics of his profession. He may be called to account if he fails in his high duty to his client or violates his oath, which requires of him due thought in the matter of law and order. He is liable to his client if he negligently performs his duty. He is liable to the Court if in the performance of those duties he disregards the due course of law and order.

The man in business, the Court continued, although he may be of the highest character, is not under such constraint. If under circumstances of competing business he should undertake to perform an extra service of illegal nature for his customers, he is faced with no dire consequences for wrong advice.

Thus, the Court concluded, to allow the incidental rendering of legal service by a
person who is not a lawyer and not accountable to the courts would open the door to irresponsibility.

T. Tax Assessment Appeals

In *Kountz et al. v. Rowlands*, Allegheny Court of Common Pleas, 46 D&C 456 (1943) a Defendant entered into contracts with owners of real estate, whereby he was to endeavor to procure reductions in the assessed valuations of their properties. His compensation was to be 50% of his savings effected in the first year. Pursuant to his employment, Defendant appeared before the Board of Assessment Appeals and urged that the valuation of various properties be reduced. On one occasion he represented an owner who was attempting to procure from a school board a refund of taxes claimed to have been paid in error. In that endeavor, the Defendant admittedly argued the interpretation of statutes and decisions.

The Court held that the Defendant was engaged in the unauthorized practice of law.

In its opinion, the Court stated that the appearance before the Board of Assessment Appeals, the making of contracts with owners of real estate to effect reductions and assessments, the attempting to persuade the school board that its solicitor had interpreted the law erroneously, when taken together as a picture of the Defendant's conduct over the period, exhibited conduct throughout constituting the unauthorized practice of law.

In *Westmoreland County et al. vs. Rodgers*, Westmoreland County Court of Common Pleas, (1997) a Westmoreland County Court of Common Pleas rended a similar decision, which decision was affirmed by the Pennsylvania Commonwealth Court, 693 A.2d 996 (1997). The Pennsylvania Supreme Court denied allocatur in April, 1998.
U. Title Insurance Agents

The Defendant in LaBrum et al. v. Commonwealth Title Company of Pennsylvania, Pa. Supreme Court, 56 A.2d 246, (1948) prepared Deeds, mortgages, assignments of mortgages, agreements (but relating solely to real estate matters), releases of real estate and declarations of no set-off allegedly only for persons to or for whom applications for title insurance had been issued, or were contemplated to be issued by it, and then only in situations, instances and circumstances in which such instruments were incidental to the insuring by it of titles to real estate.

The Court citing the Pennsylvania Statute prohibiting the unauthorized practice of law, emphasized two important facts:

(1) the Defendant does "not hold itself out to the public as willing, able or authorized to do any business except title insurance business," and (2) "Defendant prepares Deeds, mortgages, . . . only for persons to or for whom application for title insurance had been issued or were contemplated to be issued, and then only in situations, instances and circumstances in which such instruments were incidental to the insuring of title to real estate."

The Court, citing Child's v. Smeltzer, Supra., stated that:

The drafting and execution of legal instruments is a necessary concomitant of many businesses and cannot be considered unlawful. Such practice only falls within the prohibition of the act when the documents are drawn in relation to no matter connected with the immediate business of the person preparing them and when the person so drafting them is not a member of the bar and holds himself out as specially qualified and competent to do that type of work.

V. Corporations Appearing Without Legal Counsel Before Courts of the
Commonwealth of Pennsylvania

In *Walacavage v. EXCELL 2000, Inc.*, Pa. Superior Court 48 A. 2d 281, (1940), the plaintiff sought in one action to recover on a loan to a corporate defendant and sought in a second action to recover for an alleged breach of a partnership agreement. The Court held that a corporation may not be represented by a person who is not an attorney before the courts of the Commonwealth of Pennsylvania. The underlying issue, which was one of first impression in Pennsylvania, was whether the trial court erred in denying the defendant corporation the right to be represented in court by a non-lawyer who in this case was a corporate officer. All of Excell’s pleadings, motions and briefs filed with both the lower court and the superior court were signed by an individual who described himself as the President and Stockholder of the corporate defendant. He was not a member of the bar of the Commonwealth of Pennsylvania or any other jurisdiction.

Judge Beck, speaking for the Court, continued by stating that the reasoning behind the rule is that a corporation can do no act except through its agents and that such agents representing the corporation in Court must be attorneys at law who have been admitted to practice, are officers of the court and subject to its control. She continued by stating that this rule holds even if the corporation has only one shareholder.

W. Bankruptcy Document Preparers

The case of *in re Skobinsky (April 25, 1994)*, O Neill, J. PICS Case No. 94-0389 (20 pages) involved an individual who operated from his home a Chapter 13 bankruptcy petition preparation service designed to facilitate debtors in the preparation and filing of Chapter 13 petitions. The U.S. District Court for the Eastern District of Pennsylvania found
him to have engaged in the unauthorized practice of law and affirmed the Bankruptcy Courts order enjoining the operation of this service.

The operator of the service testified that he discussed various chapters with his customers and that he instructed them how to fill out the forms. He also testified that he actually filled out the forms in some cases and filed the forms with the clerk at the bankruptcy court on his customers’ behalf. He further acknowledged that he instructed debtors not to fill out the exemptions schedules in their petitions based upon his erroneous interpretation of the bankruptcy law.

(ALSO SEE SECTION VIII. B., INVOLVING A SIMILAR CASE FROM THE WESTERN DISTRICT OF PENNSYLVANIA.)

X. Non-Attorney Divorce Providers

An Allegheny County business that provided divorce services agreed to go out of business, provide restitution to consumers and to pay more than $1,000 to settle allegations that it violated state law. Sunrise Divorce Center, Inc., agreed to the settlement terms under an assurance of voluntary compliance negotiated by the Attorney General’s Bureau of Consumer Protection.

The assurance alleges that the Mr. Gene Sanes, doing business as Sunrise Divorce Center, Inc. was advertising, preparing and filing divorces for consumers, despite not being licensed to practice law, which could put consumers at considerable risk of losing potential alimony or other support. In addition, the assurance stated that non-lawyers do not carry malpractice insurance that provides solid protection to consumers.

The assurance was filed in the Allegheny Court of Common Pleas.
Y. Sale of Kits for Preparation of Legal Documents

David A. Scholl, Chief Judge of the United States Bankruptcy Court Eastern District of Pennsylvania, in his April 10, 1997, opinion in the case of In Re: Anthony J. Campanella, Debtor, 207 B.R. 435 provides an excellent overview of the case decisional law from numerous states with regard to the sale of various kits concerning the preparation of legal documents and what constitutes the unauthorized practice of law with regard to the contents of such kits. See Section VIII. E.
V. REMEDIES

The Unauthorized Practice of Law Committee of the Pennsylvania Bar Association has endeavored to resolve complaints without resorting to litigation in an effort to minimize potential adverse publicity to the Bar Association. The public may view some practices by non-lawyers on behalf of the poor or underprivileged as meritorious, while at the same time it is being viewed by the Bar as improper or unlawful.

After an investigation of the complaint is completed by members of the Committee, and the Committee determines that an unauthorized practice of law is being performed, notice is given to the person or entity under investigation to discontinue the practice. Once the accused person or entity is informed as to the law in Pennsylvania, the practice of the Committee is to first attempt to obtain a statement in writing from the accused that the unauthorized practice of law will be discontinued. In many cases, such efforts are successful and the case is closed. However, if the conduct is so egregious that the chairperson determines that immediate action is necessary in order to prevent or stop the conduct complained of, the chairperson is authorized to contact the appropriate enforcement agency with a request that immediate action be initiated. A record is kept of every case investigated in the event the offending practice occurs again.

Whether a request to desist is sent to the offending non-attorney by the Pennsylvania Bar Association Unauthorized Practice of Law Committee or the Unauthorized Practice of Law Committee of a Local Bar Association, a civil complaint in equity may have to be filed seeking injunctive relief if the offending non-attorney refuses to cease.
In other cases, the matter may be turned over to the Local District Attorney, to the Pennsylvania Attorney General's Office, Department of Consumer Affairs or to the appropriate office of the U.S. Department of Justice.

The District Attorney may prosecute a person or entity engaged in the unauthorized practice of law.

The Pennsylvania Attorney General's Office may prosecute an individual engaged in the unauthorized practice of law under the provisions of the Unfair Trade Practices and Consumer Protection Law.

The United States Justice Department has initiated action against non-attorneys engaged in the unauthorized practice of law in the bankruptcy realm.
VI. PARALEGALS

1. What is a Paralegal?

One definition holds a paralegal to be "a person not admitted to the practice of law, who acts as an employee or an assistant to an active member of the Bar." (See "Unauthorized Practice and Legal Assistants" - Richard R. Whidden, Jr., The Journal of the Legal Profession, Volume 13:327 (1988); Dunlap "Guidelines for Utilization of Legal Assistant Services" 66 Mich.B.J.168 (1987)).

Another definition provides that a paralegal is "a person qualified through education, training or work experience, who is employed or retained by a lawyer, law office, governmental agency or other entity in a capacity or function which involves the performance, under the ultimate direction and supervision of an attorney of specially-delegated substantive legal work, which for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform. (American Bar Association, Formal Definition of a Legal Assistant, See "Legal Assistant; a strong case for professional recognition," Lucy D. Strange, Lawyer's Title News, September-October 1991. Article 1, Section 6 of the Bylaws of the State Bar of Michigan, See "Legal Assistants in Michigan: Ethical Standards for Legal Assistants," Vicki Voysin, Michigan Bar Journal, November 1991.)

Although in Pennsylvania we have no formal, statutory definition for a "paralegal/legal assistant," the above definitions certainly promulgate the
concept of a "paralegal/legal assistant" as espoused by the Unauthorized Practice of Law Committee.

2. Rules of Professional Conduct Applicable to the Unauthorized Practice of Law

a. **Rule 5.3** speaks to the responsibility of a Pennsylvania lawyer concerning supervision of non-lawyer assistants.

   It provides that with respect to a non-lawyer employed or retained by, or associated with, a lawyer, that a **PARTNER** in a law firm should make reasonable efforts to ensure that the firm has measures in effect giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.

   The **Rule** also provides that a lawyer having direct supervisory authority over the non-lawyer should make reasonable efforts to ensure that the person's conduct is compatible with professional obligations of the lawyer.

   The **Rule** continues that a lawyer shall be responsible for the conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if the lawyer orders, or with knowledge of the specific conduct, ratifies the conduct involved or, if the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and in either case knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable
remedial action.

The **COMMENTS** to **RULE 5.3** state that non-lawyer assistants, whether acting in a capacity as employees or as independent contractors, act for the lawyer in rendition of the lawyer's professional services. The **COMMENT** continues by stating that the lawyer should give such assistants appropriate instructions and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to the representation of the client, and should be responsible for their work product.

The **COMMENT** further states that the measures employed in supervising non-lawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. Further, the **COMMENT** provides that a partner in a law firm should make reasonable efforts to ensure that the firm has measures in effect giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer.

The **COMMENT** concludes that a lawyer having direct supervisory authority over the non-lawyer should make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.
b. **RULE 5.4** of the **RULES OF PROFESSIONAL CONDUCT** of a Pennsylvania lawyer, speaks of the responsibility of a lawyer regarding non-lawyer assistants and fees and association.

This **RULE** provides that a lawyer or law firm shall not share legal fees with a non-lawyer, except that . . . a lawyer or law firm may include non-lawyer employees in a compensation or retirement plan, even though a plan is based in whole or in part on a profit-sharing arrangement.

The **RULE** further provides that a lawyer shall not form a partnership with a non-lawyer, if any of the activities of the partnership consists of the activity of the practice of law.

The **RULE** continues by stating that a lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit if a non-lawyer owns any interest therein, a non-lawyer is a corporate director or officer thereof, or a non-lawyer has the right to direct or control the professional judgment of a lawyer.

c. **RULE 5.5** of the **RULES OF PROFESSIONAL CONDUCT** of a Pennsylvania lawyer, speaks to the responsibility of a lawyer regarding non-lawyer assistants and the unauthorized practice of law. The **RULE** provides that a lawyer shall not aid a non-lawyer in the unauthorized practice of law . . .
The **COMMENT** to the **RULE** indicates that it does not prohibit a lawyer from employing the services of a para-professional and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. The **COMMENT** then references **RULE 5.3**.

The **RULE** further provides that it likewise does not prohibit lawyers from providing professional advice and instruction to non-lawyers whose employment requires knowledge of the law, as for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies.

In addition, the **COMMENT** indicates that a lawyer may counsel non-lawyers who wish to proceed pro se.

The **COMMENT**, in conclusion, states that the definition of the practice of law is established by law and varies from one (1) jurisdiction to another. It continues by stating that whatever the definition, limiting the practice of law to the members of the Bar protects the public against the rendition of legal services by unqualified services.

d. What is the **Bottom Line** of these rules of professional conduct?

(1) It is contemplated by these **RULES** that a non-lawyer employee, independent contractor, paralegal, legal assistant,
para-professional will always be working under the supervision of a lawyer.

The lawyer is given the complete responsibility to properly supervise the non-lawyer.

The lawyer is absolutely responsible for the conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer, as long as the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved.

The lawyer is obviously liable and responsible whether the non-lawyer is an employee or an independent contractor providing a service for the lawyer or the lawyer is a partner in the law firm for which the non-lawyer is employed, or has direct supervisory authority over the person, and in either case, knows of the conduct at a time when the consequences can be avoided or mitigated, but fails to take reasonable remedial action.

The lawyer is LIABLE for both disciplinary action by the Supreme Court of Pennsylvania (which includes suspension and disbarment) for misconduct of a non-lawyer's employee, independent contractor, paralegal, legal assistant, para-professional, as well as being civilly liable for their
misconduct.

The non-lawyer employee, independent contractor, paralegal, legal assistant, para-professional is NOT subject to any of the Rules of Professional Conduct of the Pennsylvania Supreme Court that govern the conduct of lawyers, but MAY BE liable for a loss suffered by a client as a direct result of their misconduct.

3. What Conduct is Permitted by Paralegals that Does Not Constitute the Unauthorized Practice of Law?

a. **BUSINESS CARDS** of paralegals employed by a law firm are permitted as long as the business cards clearly identify the paralegals as employees of the firm, and that their employment status is that of a paralegal. Independent paralegals may also have business cards, as long as their services are available solely for a lawyer/law firm and as long as the business card clearly indicates that their services are available only to lawyers/law firms.

b. **LAW FIRM LETTERHEADS** may include the name of a paralegal on the firm's letterhead, as long as the paralegal or non-lawyer status is clearly indicated on the letterhead (see Philadelphia Bar Association's Professional Guidance Committee's Opinion 87-18, dated June 25, 1987, as quoted in article by Samuel C. Stretton, Esquire, in the Pennsylvania Trial Lawyer's Association Magazine).

c. **LAW FIRM CORRESPONDENCE** may be signed by a paralegal,
provided that the paralegal's signature is followed by the appropriate designation, so that the recipient will fully understand that the paralegal is not a lawyer. Obviously, the paralegal can offer no legal advice in the letter. They operate only as a conduit for information. Any letter drafted by a paralegal containing advice for a client must be reviewed and signed by a lawyer. (see Article Vol. 70, Michigan Law Journal, Vicki Voisin, "Ethical Standards for Legal Assistants," page 1178, November 1991.)

d. CONSULTATIONS by paralegals are satisfactory, i.e., if the consultation is strictly a fact-finding consultation, and the client subsequently speaks with the attorney. Paralegals can certainly also interview witnesses and experts for purposes of fact-finding and fact-gathering. The American Bar Association in FORMAL OPINION 998 (August 26, 1967) stated that paralegals can conduct initial interviews with the clients as long as no legal advice was given, and as long as the client subsequently spoke with the lawyer.

4. What Conduct is Not Permitted By a Paralegal That Constitutes The Unauthorized Practice of Law?

a. PLEADINGS may never be signed by a paralegal and a paralegal should never sign the attorney's name. Only the attorney is an officer of the Court.

b. FEES may not be shared between the attorneys and paralegals other than as same may constitute part of a contribution to a pension/profit.
sharing plan for the law firm. No bonus may be tied to a particular case.

c. **UNDER RULE 5.4** of the **RULES OF PROFESSIONAL CONDUCT** of the PENNSYLVANIA SUPREME COURT, it is unethical for paralegals to share fees with their employers and no bonus can be directly tied to a particular case. This does not prohibit a paralegal from participating in the firm's retirement plan as set forth in the RULES.

d. **VOICING PERSONAL OPINIONS** concerning other law firms, other attorneys, judges and the justice system in general should not be engaged in by paralegals. The public views a paralegal as a member of the legal system and places more weight on their pronouncements than they would on a non-member of the legal system.

e. **IDENTIFICATION AS A LAWYER** is permitted only to lawyers, never to non-lawyers.

f. **LEGAL ADVICE** can be proffered only by a lawyer, never by a non-lawyer.

g. **COURT APPEARANCES** are permitted only to attorneys because they are officers of the Court. No non-officer of the Court may appear before any judge.

h. **CONFLICT OF INTEREST** is a very real problem for paralegals when they change employment from one law firm to another law
firm. It is the responsibility of the law firm to completely shield the paralegal joining their firm from any case in which that law firm is involved, which also involves the law firm which was the previous employer of the paralegal.

The new employer law firm/lawyer would be fully liable and responsible under RULE 1.7 of the PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT if they would permit a newly employed paralegal to have any exposure or any involvement with a case in their offices in which the paralegal had previous exposure with a former employer.

i. **CLIENT CONFIDENCES AND SECRETS** may not be divulged to anyone, including spouses, significant others, boyfriends, girlfriends, parents, other relatives, etc.

j. **SOLICITATION OF LEGAL BUSINESS** is not permitted by paralegals although the paralegal is certainly permitted to advise friends, relatives and acquaintances that they work for a law firm and if the subject of the possible employment of an attorney is brought to their attention, under the appropriate circumstances, they certainly may bring to the individual's attention that they work for a law firm and that they recommend that particular law firm. This is nothing more than displaying loyalty to one's employer.

k. **A PARALEGAL MAY NOT ACT INDEPENDENTLY**
WITHOUT A LAWYER'S SUPERVISION. A paralegal must always act under the supervision of a lawyer.

5. Independent Paralegal v. Paralegal Employed By Law Firm

a. The decision of the New Jersey Supreme Court, Supreme Court in Re: Opinion No. 24 of the Committee on the Unauthorized Practice of Law, 91 September 1991; opinion by Garibaldi, J.; decided May 14, 1992, on review of a decision by the Supreme Court Committee on the Unauthorized Practice of Law very clearly holds that there is no distinction between an independent paralegal and a paralegal employed by a law firm with regard to their obligations, and with regard to the concept of the Unauthorized Practice of Law.

The New Jersey Supreme Court Committee on the Unauthorized Practice of Law concluded in Advisory Opinion No. 24, 126 N. J. L. J. 1306, 1338 (1990), that:

Paralegals functioning outside the supervision of an attorney-employer are engaged in the unauthorized practice of law.

The New Jersey Supreme Court decision held that neither case law nor statutes distinguished paralegals employed by a lawyer or a law firm from independent paralegals retained by a lawyer or law firm. Rather, the Court held, the IMPORTANT INQUIRY is whether the paralegal, whether employed or retained, is working directly for a lawyer under that lawyer's supervision. (emphasis added)
Safeguard, the Court stated, against the unauthorized practice of law exists through that supervision. Realistically, a paralegal can engage in the unauthorized practice of law whether he or she is an independent paralegal or employed in a law firm. Likewise, the Court continued, regardless of the paralegal's status, a lawyer who does not properly supervise a paralegal is in violation of the ethical rules.

The Court stated that:

Although fulfilling the ethical requirements of the [New Jersey Supreme Court] Rules of Professional Conduct, Rule 5.3, is primarily the lawyer's obligation and responsibility, a paralegal is not relieved from an independent obligation to refrain from illegal conduct and to work directly under the supervision of the attorney. (Emphasis added.)

Justice Garibaldi stated that a paralegal who recognizes that a lawyer is not directly supervising their work, or that such supervision is illusory because the lawyer knows nothing about the field in which the paralegal is working must understand that the [paralegal] is engaged in the unauthorized practice of law. In such a situation, an independent paralegal must withdraw from the representation of a client. The key is supervision, and that supervision must occur regardless of whether the paralegal is employed by the attorney or retained by the attorney.
The Opinion stated that as with other lay persons, paralegals are not subject
to any ethical rules governing the practice of law. The ethical prohibitions
against paralegals focus on the lawyer's conduct (as do the Pennsylvania
Rules of Professional Conduct).

Justice Garibaldi stated that the distance between the independent paralegal
and the lawyer may create less opportunity for efficient, significant and
rigorous supervision. Nonetheless, Justice Garibaldi held, the site at which
the paralegal performs the services should not be the determinative factor.

The Opinion concluded by stating that although the paralegal is directly
accountable for engaging in any unauthorized practice of law and also has an
obligation to avoid contact that otherwise violates the Rules of Professional
Conduct, the lawyer is ultimately accountable. Therefore, the Opinion stated,
with great care, the attorney should ensure that the legal assistant is informed
of and abides by the provisions of the Rules of Professional Conduct.
VII. Formal Opinions of the Unauthorized Practice of Law Committee Nos. 94-101 to 94-107, 96-101 to 96-108, 97-101 to 97-103, 98-101 and 99-101

OPINION 94-101

SUBJECT: May an attorney who has not be licensed to practice law in Pennsylvania appear before a Court or Commission pursuant to the rules of that Court or Commission which does not permit admission pro hac vice?

It is the OPINION of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that if there are no rules which permit such admission, that Court or Commission is without the ability to authorize the out-of-state attorney to practice law before it.

OPINION 94-102

SUBJECT: Whether an individual who possesses a Paralegal Certificate from Pennsylvania State University and has worked for a lawyer for several years as a Paralegal/Secretary can open her own business to specifically assist laypersons in filing legal documentation in various types of matters without being engaged in the unauthorized practice of law as set forth in 42 Pa. C.S.A. 2524.

It is the Committee’s OPINION that such a business would be a violation of Pennsylvania Statute prohibiting the Unauthorized Practice of Law, Pa. C.S.A. Section 2524. The Committee further cites the opinion by Judge Markovitz in the case of In Re Harris, 152 B.R.440 (W.D.Pa. 1993) wherein the Court noted that a typing service engaged in preparing bankruptcy forms for its clients, made determinations as to whether property could be claimed as exempt, determined whether clients and creditors were holding secured or unsecured claims, determined whether clients were parties to any executory contracts or unexpired leases, determined whether clients had any co-debtors, advised clients as to the penalties for making false oath on forms, and otherwise exercised legal judgement, training and skill in excess of what the average lay person reasonably could be expected to possess and, therefore, was in violation of the Pennsylvania Statute above quoted.

OPINION 94-103A

SUBJECT: May an independent title insurance agent prepare documentation, i.e. deeds, mortgages, powers of attorney, and other such documents connected with the real estate transaction in which they are NOT issuing title insurance?

It is the OPINION of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that independent title insurance agencies may not prepare any documentation connected with a real estate transaction in which they are not directly involved in the issuance of title insurance to the buyer/borrower.

OPINION 94-103B

-106-
SUBJECT: May an independent title insurance agency represent BUYERS or SELLERS in a real estate transaction in which no title insurance is being issued.

It is the OPINION of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that a title insurance agency cannot represent a seller or buyer in any real estate transaction in which insurance is not being issued.

The ability of any title insurance company or title insurance agency or any independent title insurance abstractor/title agent to prepare any documentation and be involved in any real estate settlement is strictly ruled by the case of LaBrum v. Commonwealth Land Title Insurance Company, PA Supreme Ct. (1948) 56 A.2d 246, in which case the Pennsylvania Supreme Court authorized the preparation of documentation directly involved in a real estate transaction by a title insurance agency only when the title insurance agency was specifically issuing title insurance in the transaction. The representation of the buyer or seller in any real estate transaction in which the title insurance agent is not issuing title insurance constitutes the unauthorized practice of law within the Mandates of 42 Pa. C.S.A. 2524 as amended.

OPINION 94-104

SUBJECT: Is an attorney authorized to have an office in Philadelphia for the practice of Immigration Law as a sole practitioner for the purpose of interviewing clients and preparing cases on their behalf when that attorney is not licensed to practice law in the Commonwealth of Pennsylvania?

It is the OPINION of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that an attorney practicing Immigration Law in Pennsylvania, without being admitted to practice before the Bar or the Courts of Pennsylvania, is guilty of the Unauthorized Practice of Law citing the Pennsylvania Supreme Court decision in Ginsburg v. Kovrak, 139 A.2d 889 (1958), in which the Court upheld, under the predecessor to 42 Pa. C.S.A. Section 2524, an injunction against the Defendant that enjoined him from practicing law or advertising his practice of law in spite of the fact that the Defendant was admitted to practice law before the United States Supreme Court, the Court of Appeals of the District of Columbia, the District of Columbia and the Eastern District of Pennsylvania but not before the Court of Pennsylvania, even though the Defendant claimed that he only practiced federal questions such as tax law.

OPINION 94-105

SUBJECT: Is an out-of-state attorney who represents clients in Pennsylvania at a real estate settlement and provides them with advice on Pennsylvania Law with regard to that settlement engaged in the authorized practice of law?

It is the OPINION of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that a title insurance agency cannot represent a seller or buyer in any real estate transaction in which insurance is not being issued.
Committee that an out-of-state who appears in Pennsylvania at real estate settlements, whether representing the seller or the buyer and who provides them with advice on the effect of Pennsylvania Law on the legal aspects of the transaction is engaged in the unauthorized practice of law in Pennsylvania.

**OPINION 94-106**

SUBJECT: Is an out-of-state attorney representing an out-of-state financial institution who conducts a settlement out-of-state for the financing of Pennsylvania real estate secured by a mortgage to be recorded in Pennsylvania engaged in the unauthorized practice of law in Pennsylvania?

It is the **OPINION** of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that an out-of-state attorney who represents an out-of-state lending institution lending money to a Pennsylvania resident which loan is secured by a mortgage on Pennsylvania real estate but which financing settlement is held out-of-state is not engaged in the unauthorized practice of law in Pennsylvania.

**OPINION 94-107**

SUBJECT: Authority of Notary Publics to prepare legal documents.

It is the **OPINION** of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that the Office of Notary Public is a creature of statute, specifically created by The Notary Public Law, 1953 Aug. 21 P.L. 1323 1, etc., that notaries are specifically limited to the powers and authority therein granted to them, and that there is nothing in the law which authorizes a notary public to prepare any documents or writings which would have any legal effect, and that such preparation of any such documents or writings by a Notary Public is the unauthorized practice of law, within the meaning of 42 Pa. C.S.A. 2524. The duties of a Notary Public are set forth in 57 P.S. Sections 162-165.

**OPINION 96-101**

SUBJECT: Ability of non-Pennsylvania admitted attorneys to open offices for the practice of "immigration law," "social security law," or other types of "federal administrative practice."

It is the **OPINION** of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that attorneys who ostensibly practice in a field of federal law specialty cannot open an office in Pennsylvania for the practice of law limited to that particular specialty, without being admitted to practice before the Supreme Court of Pennsylvania. The purpose of the Unauthorized Practice Laws is to prevent individuals who are not admitted to practice before the Supreme Court of Pennsylvania from opening offices that indicate that they are engaged in any phase of the practice of law, since to hold otherwise would permit unregulated and uncontrolled expansion into other areas of state law which require the
unique knowledge and abilities possessed only by attorneys who have been admitted to practice before the Supreme Court of Pennsylvania, and would permit such expansion into the dissemination of advise based upon Pennsylvania law by attorneys who are not admitted to practice and consequently are not required to adhere to the Rules of Professional Conduct, and the discipline inherent in the violation thereof, by the Supreme Court of Pennsylvania.

OPINION 96-102

SUBJECT: Attendance at real estate settlements by paralegals, real estate secretaries and other "lay persons/non-attorneys" in place of designated legal counsel.

It is the OPINION of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that the attendance at real estate settlements in the capacity of representing either the seller or the purchaser by anyone other than an attorney licensed to practice before the Supreme Court of Pennsylvania constitutes the unauthorized practice of law.

The representation of a seller or purchaser at a real estate settlement inevitably involves the legal interpretation of documents presented at settlement, the legal interpretation of the effect of matters which arise at the time of settlement, whether brought to the attention of the parties by the seller, the buyer, legal counsel for the other party, members of the title insurance profession, members of the real estate profession or representatives of the financial institution, and advice to the seller or purchaser as to the course of action they should take based upon the opinion of the person giving such advice.

Only an attorney admitted to practice before the Supreme Court of Pennsylvania has the educational background and the knowledge to be able to properly identify all of the potential issues that arise from a real estate transaction, assimilate and analyze those issues and apply the statutory and case law of Pennsylvania to a satisfactory rendition of advice on that particular matter.

By permitting a non-attorney to attend a real estate settlement in place of a Designated Legal Counsel potentially places that legal counsel in direct violation of Pennsylvania Rules of Professional Conduct 5.3, 5.4 and 5.5 due to the unauthorized practice of law of the non-attorney being supervised by the attorney.
OPINION 96-103

SUBJECT: Independent paralegal organization.

It is the OPINION of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that an organization of paralegals who form for the sole purpose of providing services only to legal counsel admitted to practice before the Supreme Court of Pennsylvania is not in violation of the Unauthorized Practice of Law statutes of the Commonwealth of Pennsylvania.

It is the further OPINION of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that if those paralegals at any time offer their services to the general consumer public with regard to the preparation of legal documents or with regard to providing legal advice or representation, the organization and the individual members thereof would be in violation of 42 Pa. C.S.A. Section 2524, which violation would constitute a Misdemeanor of the Third Degree.

OPINION 96-104


It is the OPINION of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that no non-attorney can circumvent the unauthorized practice of law statutes of the Commonwealth of Pennsylvania as set forth in 42 Pa. C.S.A. Section 2524 by means of the obtention of a POWER-OF-ATTORNEY which authorizes the non-attorney to represent the individual in a dispute or other legal matter with third parties.

The recent case of Kohlman v. Western Pennsylvania Hospital, et al., of the Superior Court of Pennsylvania has again reiterated that an individual cannot circumvent the unauthorized practice of law by obtaining a power of attorney from a plaintiff in a legal action in order to "represent them" when they are not an attorney themselves.

OPINION 96-105

SUBJECT: Representation of corporations by non-attorney corporate officers in the courts of the Commonwealth of Pennsylvania.

It is the OPINION of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that an officer or share holder of a corporation who is not an attorney admitted to practice in the Commonwealth of Pennsylvania cannot represent that corporation in the courts of the Commonwealth of Pennsylvania.
The opinion of Judge Beck of the Pennsylvania Superior Court in the case of Walacavage v. Excell 2000, Inc., filed July 27, 1984, to No. 480 A. 2d 281 etc., very clearly held that it is the law of the Commonwealth of Pennsylvania that a corporation may appear and be represented in the courts of the Commonwealth of Pennsylvania only by an attorney duly admitted to practice except in those few areas excepted by statute or rule.

Judge Beck, in quoting several federal cases, stated that the reasoning behind the rule is that a corporation can do no act except through its agents and that such agents representing the corporation in Court must be attorneys at law who had been admitted to practice, are officers of the Court and subject to its control. The purpose of the law, she continued, in citing Shamey v. Hickey, 43 A. 2d 1111 (D.C. A. 2p. 1981) "was not the protection of stockholders, but the protection of the courts and the administration of justice" and a person who accepts the advantages of incorporation for his or her business must also bear the burdens, including the need to hire counsel to sue or defend in court. The policy underlying the rule was summarized in Simbraw, Inc. v. United States, 367 F. 2d 373 (3rd Cir. 1966) as the need to eliminate confusion results from pleadings awkwardly drafted and motions inarticulately presented.

OPINION 96-106

Not Issued.

OPINION 96-107

Not Issued.

OPINION 96-108

SUBJECT: Does the appearance of an attorney’s non-lawyer representative at a Bankruptcy 341 Meeting, at which meeting the non-attorney is asking questions that are focused on certain legal matters in the Bankruptcy Code as opposed to merely general information gathering, constitute the unauthorized practice of law, as does the representation of petitioning bankrupts by non-attorneys?

It is the OPINION of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that non-attorneys participating in Bankruptcy 341 Meetings and whose questioning goes beyond mere information gathering to questions focused on legal matters in the Bankruptcy Code are engaged in the unauthorized practice of law as set forth in 42 Pa. C.S.A. 2524.
OPINION 97-101

SUBJECT: Preparation of separation/marriage termination agreements by non-attorney divorce mediators.

It is the OPINION of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that providing advice on equitable distribution, support, visitation and alimony by a non-attorney Divorce Mediator and the preparation of a separation/marriage termination agreement constitute the unauthorized practice of law.

OPINION 97-102

SUBJECT: Unauthorized practice of law by public and certified public accountants and other unlicensed persons before the Register of Wills and the Orphans' Court Division of the Courts of Common Pleas of the Commonwealth of Pennsylvania.

It is the OPINION of the Unauthorized Practice of Law Committee of the Pennsylvania Bar Association that the preparation and filing of Petitions for Probate and other documents relating to a decedent's estate with the Register of Wills and the Clerk of the Orphans' Court of the various counties and otherwise assisting personal representatives with the Administration of Decedent's Estates constitutes the Unauthorized Practice of Law as set forth in 42 Pa. C.S.A. 2524, et seq.

BRIEF IN SUPPORT OF OPINION 97-102:

It has come to the attention of the Committee that Public and Certified Public Accountants and other persons not licensed to practice law have been preparing and filing Petitions for Probate and other documents relating to a decedent's estate with the Register of Wills and Clerk of the Orphans' Courts of the various counties and otherwise assisting personal representatives in the Administration of Decedent's Estates without the personal representatives having retained legal counsel.

It has likewise been reported that Public and Certified Public Accountants and other persons not licensed to practice law have been filing Original and Amended Inheritance Tax Returns with the Register of Wills as Agent for the Department of Revenue of the Commonwealth of Pennsylvania without the advice and direction of legal counsel for the personal representative.

Furthermore, Public and Certified Public Accountants and other persons not licensed to practice law have been publicly advertising the preparation of Inheritance Tax Returns alone or in conjunction with estate planning services, without an express disclaimer in the advertisement that the person is not authorized to practice law in the Commonwealth of Pennsylvania.

ISSUES PRESENTED:
I. Does the preparation of a petition for probate, or other document relating to a
decedents estate, by a public or certified public accountant or other person
not licensed to practice law, acting in a fiduciary capacity and not acting pro
se, constitute the unauthorized practice of law?

Suggested Answer: Yes.

II. Does the preparation of an inheritance tax return by a public or certified
public accountant or other person not licensed to practice law acting in a
fiduciary capacity and not acting pro se, without the advice and direction of
counsel for the personal representative, constitute the unauthorized practice
of law?

Suggested Answer: Yes.

III. Does the public advertisement of preparation of inheritance tax returns, alone
or in conjunction with the advertisement of estate planning services, by a
public or certified public accountant or other person not licensed to practice
law, constitute a misleading public representation that one is qualified to
perform legal services?

Suggested Answer: Yes.

BACKGROUND:

I. REGULATION OF THE PRACTICE OF LAW IN THE COMMONWEALTH
OF PENNSYLVANIA

The Office of Attorney-at-Law is limited to those "[p]ersons admitted to the Bar of the
Courts of this Commonwealth..." 42 Pa. C.S.A. 2521. "The power to regulate and define
what constitutes the practice of law is vested in the judiciary, and not in the executive or
legislative branches of government". In re Matter of Arthur, 15 B.R. 541, 545 (U.S.
Bankruptcy Court E.D. Pennsylvania 1981, applying Pennsylvania Law). This does not
prevent the Legislature from imposing additional penalties against persons engaged in the
Unauthorized Practice of Law. Id.

The penalty for engaging in the Unauthorized Practice of Law is set forth in 42 Pa. C.S.A.
2524, as amended, which reads in pertinent part:

(a) General Rule - Except as provided in subsection (b), any person, including, but
not limited to, a paralegal or legal assistant, who within this Commonwealth shall practice
law, or who shall hold himself out to the public as being entitled to practice law, or use or
advertise the title of lawyer, attorney at law, attorney and counselor at law, counselor or the
equivalent in any language, in such a manner as to convey the impression that he is a practitioner of the law of any jurisdiction, without being an attorney at law or a corporation complying with 15 Pa. C.S.A. ch. 29 (relating to professional corporations), commits a misdemeanor of the third degree upon a first violation. A second or subsequent violation of this subsection constitutes a misdemeanor of the first degree.

(b) **Injunction** - In addition to a criminal prosecution, unauthorized practice of law may be enjoined in any County Court of Common Pleas having personal jurisdiction over the defendant. The party obtaining such an injunction may be awarded costs and expenses incurred, including reasonable attorney's fees, against the enjoined party. A violation of subsection (a) is also a violation of the act of December 17, 1968 (P.L. 1224, No. 387), (73 P.S. Section 201 - 1, etc.) known as the Unfair Trade Practices and Consumer Protection Law.

However, restraining the Unauthorized Practice of Law is not limited to the imposition of Statutory Penalties. The Courts of this Commonwealth have recognized that, in most cases, the imposition of a criminal penalty alone is not sufficient to protect the public from the continued unauthorized practice of law. See *Dauphin County Bar Assoc. v. Mazzacaro*, 465 Pa. 545 (1976).

Additionally, the Courts of this Commonwealth have held that duly licensed members of a profession, including licensed attorneys, have standing to file an Action in Equity to enjoin the unauthorized practice of that profession. See *Childs v. Smeltzer*, 315 Pa. 9 (1934); *Shortz v. Farrell*, 327 Pa. 81 (1937); *Dauphin County Bar Assoc. v. Mazzacaro*, supra.

### III. CONSUMER PROTECTION AFFORDED BY THE PROHIBITION AGAINST UNLICENSED PRACTICE.

The purpose of prohibiting the Unauthorized Practice of Law is not to "secure to lawyers a monopoly, however deserved, but by preventing the intrusion of inexpert and unlearned persons in the practice of law, to assure to the public adequate protection in the pursuit of justice...which society knows no loftier aim." *Shortz*, *supra* at 91. When representations of competence to practice law are "made by persons not adequately trained or regulated, the dangers to the public are manifest." *Dauphin County Bar Assoc. v. Mazzacaro*, *supra*, at 551.

"A layman who seeks legal services often is not in a position to judge whether he [or she] will receive proper professional attention. The entrustment of a legal matter may well involve the confidences, the reputation, the property, the freedom, or even the life of the client. Proper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he [or she] is subject to the regulations of the legal profession."
Id. citing E.C. 3-4 Code of Professional Responsibility. Furthermore, the "client" may be left without any way to recover for their losses in the event of malpractice by an unlicensed individual.

III. JURISDICTION OF THE REGISTER OF WILLS.

The Constitution of the Commonwealth of Pennsylvania lists the Register of Wills as one of the several Enumerated County Officers. PA. CONST. ART. 9, 4, adopted April 23, 1968. The jurisdiction of the Register is set forth in 20 Pa. C.S.A. 901, as follows:

"Within the County for which [he or she] has been elected or appointed, the Register shall have jurisdiction of the probate of Wills, the Grant of Letters to a Personal Representative, and any other matters as provided by law."

The Register of Wills has long been recognized as a Judicial Officer of a Court not of record. See Morris v. Vanderen, 1 Dall. 67 (1780). Pennsylvania Supreme Court Orphans' Court Rule 10.1 dictates "The practice, procedure and forms used before a Register of Wills, shall be in substantial conformity with the practice, procedure and forms approved by the Supreme Court of this Commonwealth or, in the absence thereof, the practice, procedure and forms approved by the local Orphans' Court Division."

Furthermore, Pennsylvania Supreme Court Orphans' Court Rule 10.2 dictates "Appeals from Judicial Acts or proceedings of the Register of Wills and the practice and procedure with respect thereto, shall be prescribed by local rules." All Appeals and proceedings from the Register are filed with the Clerk of the Orphans' Court Division.

IV. JURISDICTION OF THE CLERK OF THE ORPHANS' COURT.

The Constitution of the Commonwealth of Pennsylvania provides that:

"...The Clerk of the Orphans' Court in a judicial district now having a separate Orphans' Court should become the Clerk of the Orphans' Court division of the Court of Common Pleas, and these officers shall continue to perform the duties of the office and to maintain and be responsible for the records, books and dockets as heretofore. In judicial districts where the Clerk of the Orphans' Court is not the Register of Wills, he shall continue to perform the duties of the office and to maintain and be responsible for the records, books and dockets as heretofore and otherwise provided by law."

PA. CONST. ART. 5, Section 15.

Additionally, 42 Pa. C.S.A. 2771, et seq. establishes a Clerk of the Orphans' Court division of the Court of Common Pleas in each county or multi-county Judicial District of this Commonwealth, and provides inter alia that the Clerk shall be the keeper of the record and seal of the Orphans' Court Division."
ARGUMENT:

I. THE PREPARATION OF A PETITION FOR PROBATE OR OTHER DOCUMENT RELATING TO A DECEDEENT'S ESTATE BY A PUBLIC OR CERTIFIED PUBLIC ACCOUNTANT OR OTHER PERSON NOT LICENSED TO PRACTICE LAW ACTING IN A FIDUCIARY CAPACITY, AND NOT PRO SE, CONSTITUTES THE UNAUTHORIZED PRACTICE OF LAW.

A. DEFINITION OF THE PRACTICE OF LAW.

The Supreme Court of this Commonwealth has repeatedly held that the boundaries of the practice of law are without precise definition. Furthermore, the Court recognized that "An attempt to formulate a precise definition [of the practice of law] would be more likely to invite criticism than to achieve clarity." Shortz v. Farrell, supra at 84.

While a precise definition has not been articulated, it is clear that an attorney-at-law applies [his or her] knowledge in three principal professional activities:

(1) The attorney instructs and advises clients in regard to the law, so that they may properly pursue their affairs and be informed as to their rights and obligations.

(2) The attorney prepares client's documents requiring familiarity with legal principles beyond the ken of the ordinary layman...

(3) The attorney appears for clients before public tribunals to whom are committed the function of determining rights of life, liberty and property according to the law of the land, in order that [he or she] may assist the deciding official in the proper interpretation and enforcement of the law...

Shortz, supra. at 84-85.

Furthermore, in considering when activity is encompassed within the scope of the practice of law, the type of tribunal or character of the proceeding is unimportant. "Where the application of legal knowledge and the technique is required, the activity constitutes [the practice of law] even if conducted before a so-called Administrative Board or Commission. It is the character of the Act and not the place it is performed which is the decisive factor." Id. at 85.

"When a person holds [himself or herself] out to the public as competent to exercise legal judgment, [he or she] implicitly represents that [he or she] has the technical competence to
analyze legal problems and the requisite character qualifications to act in a representative capacity." *Dauphin County Bar Assoc. v. Mazzacaro*, *supra* at 551.

B. **PRACTICE BEFORE THE REGISTER OF WILLS AND THE ORPHANS' COURT.**

Practice before the Register of Wills and the Orphans' Court involves much more than rote preparation and filing of pre-printed forms. The form "Petition for Probate and Grant of Letters" approved by our Supreme Court, clearly recognizes this fact as it specifically provides a location for the personal representative's attorney to enter his or her appearance of record. See Pa. O.C. Rule 10.1, together with the Section Comment and corresponding published form.

The preparation and filing of a Petition for Probate, and all of the other documents relating to a Decedent's Estate, requires an intricate knowledge of the **Probate, Estates & Fiduciaries Code**, (20 Pa. C.S.A. Section 102), the **Supreme Court Orphans' Court Rules** (42 Pa. C.S.A. 101 et seq.,) the **Local Orphans' Court Rules**, and the **Inheritance and Estate Tax Law** (72 Pa. C.S.A. 1701, et seq.). Determining who is entitled to Letters, the type of Letters to be requested, the requirements of Notice to Beneficiaries and Government Agencies, and whether Letters are required or a Small Estate Petition is desirable, are only a few of the preliminary issues a personal representative must understand prior to filing any Petition with the Register or the Clerk.

Further, **Supreme Court Orphans' Court Rule 3.1** provides that "the pleading and practice shall conform to the pleading and practice in equity of the local Court of Common Pleas".

**Supreme Court Orphans' Court Rule 6.12(a)** specifically states that in the situation when the administration of an estate has not been completed within two (2) years of the decedent's death, "the personal representative or counsel" shall file ... a report with the Register of Wills showing the date by which the personal representative or counsel reasonably believes administration will be completed".

**Supreme Court Orphans' Court Rule 6.12(b)** provides that "Upon completion of the administration of an estate, the personal representative or his, her, or its counsel shall file with the Register of Wills a report..."
Supreme Court Orphans' Court Rule 6.12(e) states that "Upon the grant of letters, the Register shall give a copy of this Rule to each personal representative and his, her, or its counsel".

Supreme Court Orphans' Court Rule 6.12(f) provides that "after at least ten (10) days prior notice to a delinquent personal representative and counsel, the Clerk of the Orphans' Court shall inform the Court of the failure to file the report required by this Rule with a request that the Court conduct a hearing to determine what sanctions, if any, should be imposed".

The form of STATUS REPORT UNDER RULE 6.12 requires the signator of that form to indicate whether they are the "personal representative" or "counsel for personal representative".

Supreme Court Orphans' Court Rule 13.1 provides that "A foreign distributee or claimant may be represented by counsel who possesses a valid duly authenticated Power of Attorney executed by the distributee or claimant".

Supreme Court Orphans' Court Rule 13.3, pertaining to a REPORT BY FIDUCIARY pertaining to the unknown existence, identity or whereabouts of a distributee, etc. provides that ... "the fiduciary or his counsel shall submit ... a written report ...".

When a Public or Certified Public Accountant or other person not licensed to practice law solicits for hire the preparation and filing of a Petition for Probate or other document related to a Decedent's Estate or attempts to give legal advice to the personal representative during the Administration of the Estate, that person expressly or impliedly holds himself or herself out to the personal representative as being qualified to analyze and interpret the Probate, Estate & Fiduciaries Code, Supreme Court and Local Orphans' Code Rules and Inheritance and Estate Tax Law. A Public or Certified Public Accountant or other person not licensed to practice law is not qualified by education or expertise to render such advice and counsel and is not a legal counsel as set forth in the Pennsylvania Supreme Court Orphans' Court Rules.

In Re: Graham, 30 Pa. D. & C. 53 l (Erie. Co. 1937) (en banc) directly addressed these issues. In Graham, the Respondent, a Justice of the Peace, regularly prepared Wills, Inventories, Inheritance Tax Returns, Petitions for Guardians, Petitions Sur Audit, and advertised himself as "Agent" in many estates. The Respondent also filed papers before the Register of Wills, advertised in the newspaper the drawing of legal papers, and even appeared in open Court. See Graham, supra, at 533 - 534. President Judge Waite, speaking for the Graham Court, held that the Orphans' Court had "the authority to pass upon persons appearing before it" and the Register of Wills, who is the Clerk and Record Keeper of the Court". Id., at 532. The Court denounced Respondent's conduct as constituting the Unauthorized Practice of Law and entered its Decree enjoining him from further violation as follows:
That Respondent be and he is hereby enjoined from drawing Wills or preparing or giving legal advice with respect to Wills, Inventories, Inheritance Tax Returns, Personal Property Tax Returns, Accounts, Petitions Sur Audit, and without limiting the foregoing, preparing for others, all Petitions or papers incidental to the practice of law in the Orphans' Court or before the Register of Wills;

That Respondent be and he hereby is enjoined from advertising or holding himself out as [an] attorney or one authorized to draw legal papers; and

That Respondent be and hereby is enjoined from the practice of law, without prejudice, however, to his right to act solely in his personal business...

**Graham, supra,** at 534.

Although the Register of Wills has been replaced by the Clerk of the Orphans' Court, as official keeper of the record, protection of the public interest requires today, as it did then, that unlicensed persons be enjoined from the practice of law before the Register of Wills and the Clerk of the Orphans' Court. There is no less restrictive alternative. Compare **Commonwealth v. Heydt,** 47 Pa. D. & C. 287 (Lebanon Co., 1943) (Preparation of Statement of Claim by Justice of the Peace, constitutes the Unauthorized Practice of Law); **Walker v. Kahn,** 31 Pa. D & C 620 (Allegheny Co. 1938) (Preparation of Liquor License Application by Insurance Agent where issues requiring legal interpretation enjoined as the Unauthorized Practice of Law); **Blair et al. v. Motor Carriers Service Bureau, Inc. et al.,** 40 Pa. D. & C. 413 (Phila. Co. 1939), (appearance before Pennsylvania Public Utility Commission, preparation of documents for said pleadings, and rendering advice concerning the construction of statutes by a corporation service enjoined as the Unauthorized Practice of Law.)

Furthermore, any fee generated in the performance of "legal services" by a person not authorized to practice law will be subsequently ordered "disgorged" or "refunded" as a matter of public policy. See **In Re: Arthur, supra,** at 548; See also **In Re: Pine Grove Bank,** 7 Sch. Reg. 136, 141 (1939).

C. **UNAUTHORIZED PRACTICE OF LAW BY ACCOUNTANTS**

The **CPA Law** as amended 1966, Dec. 4, P.L. 851 No. 140, is found in **63 P.S. 9.1 etc.**

The term "public accounting" is defined in **9.2** as "offering to perform or performing for a client or potential client: (1) Attest activity. (2) Other professional services involving the use of accounting skills, including, but not limited to, management advisory or
consulting services, business valuations, financial planning, preparation of tax returns or furnishing of advise on tax matters by a person holding out as a certified public accountant, public accountant or firm."

Section 9.3(a) pertaining to the "Examination and Issuance of Certificate" provides that the written examination by an individual for their obtention of a certificate of certified public accountant must cover business law and professional responsibilities, auditing, accounting, reporting and financial accounting and reporting.

Section 9.4 entitled "Education Requirements" provides that an individual is permitted to take the examination provided that he has graduated with either a Baccalaureate Degree from an approved college or university and has completed courses in accounting, auditing, business law, finance and tax subjects of a content satisfactory to the State Board of Accountancy, as well as other courses.

Section 9.4(a) entitled "Experience Requirements" sets forth the amount of experience that is required which must be in public accounting or as an internal auditor or an auditor with a unit of Federal, State or Local government and must include a minimum number of hours of Attest Activity.

The term "Attest Activity" is defined in 9.2 to mean "an examination, audit, review, compilation or other agreed-upon procedure with respect to financial information, together with the issuance of a report expressing or disclaiming an opinion or other assurance on the information."

Section 9.8(b) provides for the issuances of biennial licenses to engage in the practice of public accounting.

Section 9.9(a) entitled "Grounds for Discipline" in (a)(16) provides for discipline for those engaging in unprofessional conduct.

Section 9.9(a)(c) defines "unprofessional conduct" to mean the undertaking to perform professional services that the certified public accountant, public accountant or firm cannot reasonably expect to complete with professional competence, failure to exercise due professional care and the performance of professional services, failure to adequately plan and supervise the performance of professional services, the failure to obtain sufficient data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed, or failure to comply with any standard promulgated by any recognized public or private standard-setting body that is applicable to the professional service being performed.
49 Pa. Code 11.1 etc. contains the *Rules and Regulations* of the State Board of Accountancy

Section 11.1 entitled "Definitions", defines the following:

1. **Attest Function**- A written communication that expresses a conclusion about the reliability about a written assertion which may take the form of an audit, review or compilation of a financial statement or an examination of perspective financial information.

2. **Client**- The person or entity which retains a licensee for the performance of professional services.

3. **Financial Statement**- A statement and footnotes related to the statement that purport to show a financial position which relates to a point in time or changes in financial position which relate to a period of time. The term includes statements which use a cash or other incomplete basis of accounting. The term also includes balance sheets, statements of income, statements of retained earnings, statements of changes in financial position and statements in changes in owner's equity. The term does not include incidental financial data included in management advisory services reports to support recommendations to a client, tax return or supporting schedules.

4. **Practice of public accounting**- The offering to perform, or the performing, for a client or potential client services involving the use of accounting or auditing skills, management advisory or consulting services, preparation of tax returns or furnishing of advice on tax matters, while holding oneself in a manner that states or implies that one is a licensee.

5. **Professional service**- A service performed or offered to be formed by a licensee for a client in the course of the practice of public accounting.

Section 11.8 entitled "Use of the Designation "Certified Public Accountant" and the abbreviation "CPA" in the practice of public accounting indicates that only the identified individuals may use the designation Certified Public Accountant, the abbreviation CPA, and other designations which suggest that the user is a Certified Public Accountant in the practice of public accounting.

Section 11.7 entitled "Use of the Designation "Public Accountant" and the abbreviation "PA," provides that only the identified individuals and entities may use the designation Public Accountant, the abbreviation PA and other designations which suggests that the user
is a public accountant.

Section 11.23 entitled "Competence" provides that a licensee may not undertake any engagement for the performance of professional services which he cannot reasonably expect to complete with due professional competence including compliance, when applicable, with 11.27 and 11.28 (relating to auditing standards and other technical standards; and accounting principles).

Section 11.26 entitled "Incompatible Occupations," provides that a licensee may not concurrently engage in the practice of public accounting and in another business or occupation which impairs his independence or objectivity in rendering professional services.

Section 11.32 entitled "Acting Through Others" provides that a licensee may not permit others to carry out on his behalf, either with or without compensation, acts which, if carried out by the licensee, would place him in violation of this Chapter or of the Act.

Section 11.53 entitled "Classification of Candidates" provides that candidates who hold either Baccalaureate Degrees or Master Degrees must have minimum semester credits in accounting subjects and qualified experience in public accounting or as an auditor with a unit of government.

Section 11.5 entitled "Qualified Experience" provides that a minimum of 800 hours of total qualified experience must be obtained in (1) audits of financial statements in accordance with GAAS, (2) reviews of financial statements in accordance with SSARS, (3) compilations of financial statements with complete disclosure in accordance with SSARS, (4) internal audits in an established internal auditing department which meet accepted standards, (5) training sessions on the attest function, (6) other auditing in accordance with accepted standards which leads to the expression of a written opinion, including: (i) reviews regarding internal control, (ii) government audit agencies rendering an opinion and report, (iii) operations audit review, (iv) compliance audits and (v) expressing an opinion on financial forecasts and projections.

Section 11.55 provides that the remaining hours of qualified experience may be obtained in one (1) or more of the following: (1) preparation of income and non-profit tax returns, (2) tax research which is properly documented, (3) representation before a government agency on a tax matter, (4) financial forecasts, analysis and projections, (5) management advisory services which meet AICPA standards, (6) management and supervision of accounting functions and preparing financial statements for profit or not-for-profit entities, and (7) professional accounting-related work in an accounting firm.

Section 11.63 entitled "Continuing Education Subject Areas" identifies acceptable areas for continuing education to be (1) accounting and auditing (2) advisory services, (3) management, (4) professional skills development, (5) specialized knowledge and applications, (6) taxation.
Section 11.65 entitled "Criteria for Continuing Education Programs" provides that in order to qualify as a continuing education program, a program shall be a program of learning which contributes directly to the maintenance of professional competence of a certified public accountant or public accountant or offer subject matter enumerated in 11.63.

A review of all of the above unequivocally indicates that the Profession of Accountancy is confined to those matters set forth in 11.55 as matters customarily undertaken by accountants, whether public or certified public accountants. There is nothing in either the Licensing Act or the rules and regulations, which suggest that a public accountant or a certified public accountant is authorized or qualified to represent clients in court or before court related officers or to provide legal advice to clients.

II. THE PREPARATION OF AN INHERITANCE TAX RETURN BY A PUBLIC OR CERTIFIED ACCOUNTANT OR OTHER PERSON NOT LICENSED TO PRACTICE LAW, ACTING IN A FIDUCIARY CAPACITY AND NOT ACTING PRO SE, WITHOUT THE ADVICE AND DIRECTION OF LEGAL COUNSEL FOR THE PERSONAL REPRESENTATIVE, CONSTITUTES THE UNAUTHORIZED PRACTICE OF LAW.


For example, there are instances when a Decedent's Will directs the payment of specific and general legacies (taxable and charitable) in excess of available funds. There are also instances where property identified in a Will is no longer owned by the Decedent at the time of death. A determination must then be made whether the gift is specific or general, and whether or not ademption occurs in full or in part. In either instance, abatement or ademption occurs as set forth in the Probate, Estates & Fiduciaries Code and the identification and extent of taxable or charitable bequests cannot be determined for Inheritance Tax purposes until these matters are resolved.

Although a Public or Certified Accountant or other person not licensed to practice law may be technically competent to prepare and file an Inheritance Tax Return after all legal issues have been identified and resolved, any person not licensed to practice law who prepares and files an Inheritance Tax Return, without the advice and consent of legal counsel for the personal representative, renders legal advice, and, therefore, engages in the Unauthorized Practice of Law. See Graham, supra at 534. Compare Kountz et al. v. Rowlands, 46 Pa. D. & C. 461 (Allegheny Co. 1942) (appearance before Board of Assessors by Laymen seeking refund of tax improperly paid required statutory interpretation and were therefore enjoined as Unauthorized Practice of Law); Blair et al. v. Motor Carriers Service Bureau, Inc. et al., 40 Pa. D. & C. 413 (Phila. Co. 1939) (rendering of legal advice by laymen concerning construction of tax statute or decision affecting tax return enjoined as Unauthorized Practice of Law).
Moreover, a Public or Certified Public Accountant or other person not licensed to practice law may not claim that their conduct is immune from prosecution or injunction as the mere preparation of a legal document in conjunction with their normal course of business. Nowhere in the definition of the practice of public or certified public accounting or in the definition of the practice of any other profession, is the interpretation of statutes or rendering legal advice authorized. See Code of Professional Conduct, American Institute of Certified Public Accountants, Definitions: "Practice of Public Accounting", and the Pennsylvania CPA Law,

supra.

III. THE PUBLIC ADVERTISEMENT OF THE PREPARATION OF INHERITANCE TAX RETURNS, ALONE OR IN CONJUNCTION WITH THE ADVERTISEMENT OF ESTATE PLANNING SERVICES, BY A PUBLIC OR CERTIFIED ACCOUNTANT OR OTHER PERSON NOT LICENSED TO PRACTICE LAW WITHOUT AN EXPRESS DISCLAIMER THAT THE PERSON CAN ONLY DO SO UNDER THE ADVICE AND DIRECTION OF LEGAL COUNSEL FOR THE PERSONAL REPRESENTATIVE CONSTITUTES A MISLEADING PUBLIC REPRESENTATION THAT ONE IS QUALIFIED TO PERFORM LEGAL SERVICES.

The proper preparation of Inheritance Tax Returns requires construction and interpretation of the Probate, Estates & Fiduciaries Code and Inheritance Tax Law. Therefore, advertising the preparation of Inheritance Tax Returns alone or in conjunction with the advertisement of estate planning services, without an express disclaimer that the person can only do so under the advice and direction of legal counsel for the personal representative, implies competence and authority to engage in the practice of law.

The inherent danger to the public lies not in the words of the advertisement itself, which often appear benign, but rather in its interpretation, which when limited to the express intentions of the advertiser, thus opens the door to his or her "secret accomplishment of the prohibited purpose after the customer has been lured by the advertisement to [his or her] office." Burch et al. v. Mellor, et al., 43 Pa. D. & C. 597, 601 (1942).

If the Public or Certified Public Accountant or other person not licensed to practice law were permitted to advertise the preparation of Inheritance Tax Returns without a proper disclaimer and advice to the contrary, a personal representative could reasonably believe that the advertiser was competent to analyze relevant legal issues and was competent to give continuing legal advice on related administrative matters. This is clearly not permitted!

For example, the administration of a Decedent's Estate cannot be properly concluded without
either a Formal Audit, Audit and Adjudication, or an Informal Account, indemnification, receipt and release. A Public or Certified Public Accountant or other person not licensed to practice law has neither the technical competence to prepare these legal documents nor the authority to file them with the Clerk of the Orphans' Court.

To allow a Public or Certified Public Accountant or other person not licensed to practice law to attract "estate business" without giving the perspective "client" notice that [he or she] will have to go "elsewhere and hire the services of a lawyer to [finish the job]..." constitutes a material misrepresentation that the person is competent and authorized to perform said legal services. See Burch, supra at 603.

Finally, Courts have enjoined similar activities that were believed to fall "within the shadow zone between legitimate activity and the Unauthorized Practice of Law." See Kountz, supra, at 463. Clearly, the advertisement of Inheritance Tax Return preparation, without the necessary disclaimer, falls within this "shadow zone."

**OPINION 97-103**

**SUBJECT:** Concerning the Unauthorized practice of law by public and certified public accountants and other persons not licensed to practice law in the creation of associations, as defined in Title 15, Pennsylvania Consolidated Statutes Annotated, and the advertisement of those Associations as required by law.

It is the **OPINION** of the Unauthorized Practice of Law Committee of the Pennsylvania Bar Association that persons not authorized to practice law are not permitted to form Associations as that term is defined in Title 15 Pennsylvania Consolidated Statutes Annotated which includes corporations, partnerships, limited liability companies, business trusts and limited liability partnerships and to advertise such formation in either newspapers of general circulation in the county in which the Corporation was formed or in local County Legal Records.

**BRIEF IN SUPPORT OF OPINION 97-103:**

It has been brought to the attention of the Committee that Associations, as that terms is defined in Title 15 Pennsylvania Consolidated Statutes Annotated to include corporations, partnerships, limited liability companies, business trusts and two (2) or more persons associated in a common enterprise or undertaking, are being allegedly formed by persons not licensed to practice law in the Commonwealth of Pennsylvania who are also advertising the formation of those associations in the various newspapers of general circulation and in the local Legal Records as required by the various laws set forth in Title 15 Pennsylvania Consolidated Statutes Annotated.

15 Pa. C.S.A. Section 512 pertaining to the **Standard of Car and Justifiable Reliance** by directors provides in Subsection (a) that "a director of a domestic corporation shall stand in a
fiduciary relationship to the corporation and shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, in good faith, in a manner he reasonably believes to be in the best interest of the corporation and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances. In performing his duties, a director shall be entitled to rely in good faith on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by any one of the following: ... (2) Counsel, Public Accountants or other persons as to matters which the director reasonably believes to be within the professional or expert competence of such person...”.

The vast majority of the cases brought to the attention of the Committee involve Public or Certified Public Accountants and "Paralegals."

The decision to create, or not to create, a Corporation, (or association as above defined) whether for profit or not-for-profit, involves myriad legal issues including, but not limited to, the choice of legal form i.e. sole proprietorship, partnership, limited partnership, limited liability partnership, registered partnership, corporation (whether Subchapter C or Subchapter S), limited liability corporation, business trust, etc.

Tax and accounting issues comprise only a small portion of the total overall analysis required to determine the type of organization that is best suited for the particular client under the particular set of circumstances. Other issues involve the estate planning aspects which require knowledge of the Pennsylvania Probates, Estates & Fiduciaries Code, Federal Estate Tax Law, Pennsylvania Inheritance Tax and Estate Law, The Law of Trusts, and various Rules and Regulations as well as various programs available for minority-owned organizations, to name a few.

A. UNAUTHORIZED PRACTICE OF LAW BY ACCOUNTANTS

The CPA Law as amended 1966, Dec. 4, P.L. 851 No. 140, is found in 63 P.S. 9.1 etc.

The term "public accounting" is defined in 9.2 as "offering to perform or performing for a client or potential client: (1) Attest activity. (2) Other professional services involving the use of accounting skills, including, but not limited to, management advisory or consulting services, business valuations, financial planning, preparation of tax returns or furnishing of advise on tax matters by a person holding out as a certified public accountant, public accountant or firm."

Section 9.3(a) pertaining to the "Examination and Issuance of Certificate" provides that the written examination by an individual for their obtention of a certificate of certified public accountant must cover business law and professional responsibilities, auditing, accounting, reporting and financial accounting and reporting.
Section 9.4 entitled "Education Requirements" provides that an individual is permitted to take the examination provided that he has graduated with either a Baccalaureate Degree from an approved college or university and has completed courses in accounting, auditing, business law, finance and tax subjects of a content satisfactory to the State Board of Accountancy, as well as other courses.

Section 9.4(a) entitled "Experience Requirements" sets forth the amount of experience that is required which must be in public accounting or as an internal auditor or an auditor with a unit of Federal, State or Local government and must include a minimum number of hours of Attest Activity.

The term "Attest Activity" is defined in 9.2 to mean "an examination, audit, review, compilation or other agreed-upon procedure with respect to financial information, together with the issuance of a report expressing or disclaiming an opinion or other assurance on the information."

Section 9.8(b) provides for the issuances of biennial licenses to engage in the practice of public accounting.

Section 9.9(a) entitled "Grounds for Discipline" in (a)(16) provides for discipline for those engaging in unprofessional conduct.

Section 9.9(a)(c) defines "unprofessional conduct" to mean the undertaking to perform professional services and that the certified public accountant, public accountant or firm cannot reasonably expect to complete with professional competence, failure to exercise due to professional care in the performance of professional services, failure to adequately plan and supervise the performance of professional services, the failure to obtain sufficient data to afford a reasonable basis for conclusions or recommendations in relation to any professional services performed, or failure to comply with any standard promulgated by any recognized public or private standard-setting body that is applicable to the professional service being performed.

49 Pa. Code 11.1 etc. contains the Rules and Regulations of the State Board of Accountancy.
Section 11.1 entitled "Definitions" defines the following:

1. **Attest Function** - A written communication that expresses a conclusion about the reliability about a written assertion which may take the form of an audit, review or copulation of a financial statement or an examination of perspective financial information.

2. **Client** - The person or entity which retains a licensee for the performance of professional services.

3. **Financial Statement** - A statement and footnotes related to the statement that purport to show a financial position which relates to a point in time or changes in financial position which relate to a period of time. The term includes statements which use a cash or other incomplete basis of accounting. The term also includes balance sheets, statements of income, statements of retained earnings, statements of changes in financial position and statements in changes in owner's equity. The term does not include incidental financial data included in management advisory services reports to support recommendations to a client, tax return or supporting schedules.

4. **Practice of Public Accounting** - The offering to perform, or the performing, for a client or potential client services involving the use of accounting or auditing skills, management advisory or consulting services, preparation of tax returns or furnishing of advice on tax matters, while holding oneself in a manner that states of implied that one is a licensee.

5. **Professional Service** - A service performed or offered to be formed by a licensee for a client in the course of the practice of public accounting.

Section 11.8 entitled "Use of the Designation 'Certified Public Accountant'" and the abbreviation "CPA" in the practice of public accounting indicates that only the identified individuals may use the designation Certified Public Accountants, the abbreviation CPA, and other designations which suggest that the user is a Certified Public Accountant in the practice of public accounting.

Section 11.7 entitled "Use of the Designation 'Public Accountant'" and the abbreviation "PA," provides that only the identified individuals and entities may use the designation Public Accountant, the abbreviation PA and other designations which suggest that the user is a public accountant.

Section 11.23 entitled "Competence" provides that a licensee may not undertake any
engagement for the performance of professional services which he cannot reasonably expect to complete with due professional competence including compliance, when applicable, with 11.27 and 11.28 (relating to auditing standards and other technical standards; and accounting principles).

Section 11.26 entitled **Incompatible Occupations**, provides that a licensee may not concurrently engage in the practice of public accounting and in another business or occupation which impairs his independence or objectivity in rendering professional services.

Section 11.32 entitled **Acting Through Others** provides that a licensee may not permit others to carry out on his behalf, either with or without compensation, acts which, if carried out by the licensee, would place him in violation of this Chapter or of the Act.

Section 11.53 entitled **Classification of Candidates** provides that the candidates who hold either Baccalaureate Degrees of Master Degrees must have minimum semester credits in accounting subjects and qualified experience in public accounting or as an auditor with a unit of government.

Section 11.5 entitled **Qualified Experience** provides that minimum of 800 hours of total qualified experience must be obtained in (1) audits of financial statements in accordance with GAAS, (2) reviews of financial statements in accordance with SSARS, (3) compilations of financial statements with complete disclosure in accordance with SSARS, (4) internal audits in an established internal auditing department which meet accepted standards, (5) training sessions on the attest function, (6) other auditing in accordance with accepted standards which leads to the expression of a written opinion, including: (i) reviews internal control, (ii) government audit agencies rendering an opinion and report, (iii) operations audit review, (iv) compliance audits and (v) expressing an opinion on financial forecasts and projections.

Section 11.55 provides that the remaining hours of qualified experience may be obtained in one (1) or more of the following: (1) preparation of income and non-profit tax returns, (2) tax research which is properly documented, (3) representation before a government agency on a tax matter, (4) financial forecasts, analysis and projections, (5) management advisory services which meet AICPA standards, (6) management and supervision of accounting functions and preparing financial statements for profit or not-for-profit entities, and (7) professional accounting-related work in an accounting firm.

Section 11.63 **Continuing Education Subject Areas** identifies acceptable areas for continuing education to be (1) accounting and auditing, (2) advisory services, (3) management, (4) professional skills development, (5) specialized knowledge and applications, (6) taxation.
Section 11.65 entitled "Criteria for Continuing Education Programs" provides that in order to qualify as a continuing education program, a program shall be a program of learning which contributes directly to the maintenance of professional competence of a certified public accountant or public accountant or other subject matter enumerated in 11.63.

A review of all of the above unequivocally indicates that the Profession of Accountancy is confined to those matters set forth in 11.55 as matters customarily undertaken by accountants, whether public or certified public accountants. There is nothing in either the Licensing Act or the rules and regulations of the State Board of Accountancy, which suggest that a public accountant or a certified public accountant is authorized or qualified to provide legal advice to clients with regard to any matters concerning the creation of associations for the conduct of business other than those matters relating to the tax and accounting aspects of that business.

Consequently, it is the OPINION of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that the creation of associations, as defined in Title 15, Pennsylvania Consolidated Statutes Annotated, of whatever nature, by any person not licensed to practice law, constitutes the Unauthorized Practice of Law.

**OPINION 98-101**

**SUBJECT:** Unauthorized practice of law Before County Boards of Assessment Appeals by persons not licensed to practice law such as tax consultants, certified public accountants, public accountants, real estate brokers and/or salespersons and state certified real estate appraisers or other appraisers and any other persons not licensed to practice law.

It is the OPINION of the Unauthorized Practice of Law Committee of the Pennsylvania Bar Association (the "Committee") that the counseling, preparation and/or filing of real estate tax assessment appeal forms and/or representation of real property owners by persons not licensed to practice law in Pennsylvania ("Unlicensed Persons") such as tax consultants, certified public accountants, public accountants, real estate brokers and/or salespersons and state certified real estate appraisers and other appraisers before the various county boards of...
assessment appeals\(^8\) throughout Pennsylvania constitutes the Unauthorized Practice of Law.\(^9\)

**BRIEF IN SUPPORT OF OPINION 98-101:**

It has come to the attention of the Committee that persons not licensed to practice law, such as tax consultants, certified public accountants, public accountants, real estate brokers and/or salespersons, and state certified real estate appraisers or other appraisers (hereinafter collectively referred to as non attorney tax consultants or tax consultants) solicit owners of real property, or are solicited by such owners, for the purpose of providing services in the preparation and filing of real estate tax assessment appeals and representation therein, and subsequently represent or attempt to represent such owners in negotiations with assessors, and in proceedings before the several Pennsylvania county boards of assessment appeals. Such representation typically involves either the tax consultant's personal appearance before a Board of Assessment, or alternative arrangements between the tax consultant and licensed attorneys acting on behalf of (aiding and abetting)\(^10\) the tax consultants pursuant to which the attorney purports to "represent" the owner. The tax consultant typically solicits the real estate owner to appoint the tax consultant, or the tax consultant's attorney as attorney or attorney in fact for the owner, or resorts to some other subterfuge or sham.\(^11\) Such representation in real estate tax assessment appeal proceedings is undertaken by the tax consultant for compensation, which may vary from a fee based upon a contingent percentage of real estate taxes saved by virtue of a reduction in the property's assessment, to a flat fee or hourly fee. The tax consultant's fee may or may not include the cost of preparation and presentation of an appraisal report of the subject property and/or the fee, costs and expenses to provide the real property owner with attorney representation at the board of assessment.

\(^8\)The General County Assessment Law, 72 P.S. 5020-101, et seq., applies to each of Pennsylvania's 67 counties. The term board of assessment appeals generically refers to the following similarly titled entities: board of revision of taxes (Counties of the First Class, 72 P.S. 5341.1, et seq.); board of assessment and revision (Counties of the Second Class A and Third Class, 72 P.S. 5342, et seq.); board of property assessment, appeals and review (Counties of the Second Class, 72 P.S. 5452.1, et seq.); and board of assessment and revision of taxes (Counties of the Fourth to Eighth Classes, 72 P.S. 5453.101, et seq.).


\(^10\)Pa. R.P.C. 5.5(a) prohibits a lawyer from aiding a non-lawyer in the unauthorized practice of law. Additionally, Pa. R.P.C. 5.4(a) prohibits a lawyer from sharing legal fees with a non-lawyer.

\(^11\)Pa. R.P.C. 7.3 prohibits in person or telephone solicitation for representation of most clients by attorneys. Non-attorney tax consultants are not subject to this restriction and freely employ such means.
appeals and/or the Court of Common Pleas of the particular county.\textsuperscript{12}

It has further been reported to the Committee that if the matter should be appealed to a Board of Assessment, many of the real property owners do not personally appear before the board or, if they do appear, take no part in the prosecution of the appeal. Tax consultants frequently utilize consulting-agency agreements, or powers of attorney, authorizing the consultant to act as the property owner's attorney-in-fact. The tax consultant generally prepares the appeal form, including the factual and legal basis thereof; appears at the board hearing on behalf of the owner, without the owner or counsel present; argues on behalf of the property owner; negotiates with the assessors; and advises the property owner as to whether the matter warrants an appeal to the Court of Common Pleas. Tax consultants also frequently employ an attorney (with whom the property owner usually has no prior or ongoing relationship) to "represent" the taxpayer. It is the tax consultant, rather than the property owner, who instructs the attorney as to how to proceed with the appeal. The tax consultant typically communicates directly with the real estate owner on legal and factual matters notwithstanding the involvement of the attorney selected by the tax consultant.

**ISSUES PRESENTED**

I. Does the representation of a property owner before a board of assessment appeals by a non-attorney tax consultant, or other person not licensed to practice law in Pennsylvania, constitute the unauthorized practice of law?

Suggested Answer: Yes.

II. Does the preparation of an appeal form by a non-attorney tax consultant, or other person not licensed to practice law in Pennsylvania, acting on behalf of a property owner who is not acting pro se, constitute the unauthorized practice of law?

Suggested Answer: Yes.

III. Does a power of attorney granted pursuant to 20 pa.c.s.a. 5601, et seq., properly authorize a non-attorney tax consultant, or other person not licensed to practice law in Pennsylvania, to represent a property owner before the board of assessment appeals?

Suggested Answer: No.

\textsuperscript{12}This is not to be confused with the retention by a real estate owner of an independent appraiser to express an opinion of value. At a Board of Assessment hearing either the owner in person or an attorney, appearing with or without the owner, typically offers the appraiser's value testimony, and then makes the argument for assessment reduction based upon the facts and the law. In that instance, the appraiser is not practicing law.
BACKGROUND

1. REGULATION OF THE PRACTICE OF LAW IN THE COMMONWEALTH OF PENNSYLVANIA


Persons engaging in the unauthorized practice of law are subject to the penalties set forth in 42 Pa.C.S.A. 2524:

(a) General rule. Except as provided in subsection (b), any person, including, but not limited to, a paralegal or legal assistant, who within this Commonwealth shall practice law, or who shall hold himself out to the public as being entitled to practice law, or use or advertise the title of lawyer, attorney at law, attorney and counselor at law, counselor, or the equivalent in any language, in such a manner as to convey the impression that he is a practitioner of the law of any jurisdiction, without being an attorney at law or a corporation complying with 15 Pa.C.S. Ch. 29 (relating to professional corporations), commits a misdemeanor of the third degree upon the first violation. A second or subsequent violation of this subsection constitutes a misdemeanor of the first degree.

(c) Injunction. In addition to criminal prosecution, unauthorized practice of law may be enjoined in any county court of common pleas having personal jurisdiction over the defendant. The party obtaining the injunction may be awarded costs and expenses incurred, including reasonable attorney fees, against the enjoined party. A violation of subsection (a) is also a violation of the act of December 17, 1968 (P.L. 1224, No. 387), known as the Unfair Trade Practices and Consumer Protection Law.

In order to protect the public, stringent requirements have been imposed to gain admission to and remain a member of the bar. See Kohlman, 438 Pa.Super. at 356, 357, 652 A.2d at 851. A duly admitted attorney is an officer of the court and answerable to it for dereliction of duty. Childs et al. v. Smeltzer, 315 Pa. 9, 14, 171 A. 883, 886 (1934). As stated by the Supreme Court in Shortz v. Farrell the object of the legislation forbidding practice to laymen is not to secure to lawyers a monopoly, however deserved, but, by preventing the intrusion of inexpert and unlearned persons in the practice of law, to assure to the public adequate protection
in the pursuit of justice, than which society knows no loftier aim.


The Courts have not precisely delineated the boundaries which limit the practice of law since such an attempt to formulate a precise definition would be more likely to invite criticism than achieve clarity.  Shortz, 327 Pa. at 84, 193 A. at 21. Although such an exact description does not exist, one can identify those areas which are reserved for licensed attorneys at law:

Where . . . a judgment requires the abstract understanding of legal principles and a refined skill for their concrete application, the exercise of legal judgment is called for.  Shortz v. Farrell, 327 Pa. 81, 85, 193 A. 20, 21 (1973). While at times the line between lay and legal judgments may be a fine one, it is nevertheless discernible. Each given case must turn on a careful analysis of the particular judgment involved and the expertise that must be brought to bear on its exercise.


II. JURISDICTION OF THE BOARD OF ASSESSMENT APPEALS

A board of assessment appeals, or other similarly titled entity, exists in each of Pennsylvania's 67 counties. The Second Class A and Third Class County Assessment Law mandates the use of the three traditional approaches to value, namely cost, comparable sales and income approaches, in order to arrive at a fair market value. 72 P.S. 5348(d). A ratio of assessed value to actual value determines the amount of the property's assessment for tax purposes.

Any property owner wishing to contest an assessment may file a written notice of appeal with the board. 72 P.S. 5349(c). The board must then hold a public hearing at which the property owner and the affected taxing districts may present evidence of the property's fair market value.14 After the hearing, the Assessment Law requires the board to determine the market value of the subject property as of the date of the appeal and the appropriate ratio of assessed value to actual value. 72 P.S. 5349(d.1). If dissatisfied by the board's determination, the property owner or taxing districts may appeal to the Court of Common Pleas of that county. 72 P.S. 5350.

13For the sake of brevity and for illustrative purposes only, reference will be made to the Second Class A and Third Class County Assessment Law. Similar provisions exist in the other Specific County Assessment Laws.

14In such events, legal counsel represents the taxing districts (the school district, municipality, county or board of assessment appeals). The opposing parties have the opportunity to cross-examine the taxpayer and present evidence supporting the county's opinion of value.
ARGUMENT

1. THE REPRESENTATION OF A PROPERTY OWNER BEFORE THE BOARD OF ASSESSMENT APPEALS BY A NON ATTORNEY TAX CONSULTANT, OR PERSON NOT LICENSED TO PRACTICE LAW IN PENNSYLVANIA, CONSTITUTES THE UNAUTHORIZED PRACTICE OF LAW.

The Supreme Court's ability to regulate the practice of law is not restricted to courts of record. Where the application of legal knowledge and technique is required, the activity constitutes such practice even if conducted before a so-called administrative board or commission. It is the character of the act, and not the place where it is performed, which is the decisive factor. Shortz, 327 Pa. at 85, 193 A. at 21.

Shortz focused solely on the issue of whether proceedings before the Workmen's Compensation Board required the application of legal knowledge and technique, and therefore whether laymen can appear on another's behalf. 327 Pa. at 90, 193 A. at 24. According to the Court, the Workmen's Compensation Board considers legal questions, applies legal rules, and weighs facts in light of legal principles. It has the power to issue subpoenas, administer oaths, and require the attendance of witnesses and the production of books and documents. 327 Pa. 81, 86, 193 A. 20, 22 (citations omitted). In light of these factors, the proceedings before this administrative agency were considered to be essentially of a judicial character and therefore constituted the practice of law. Id.

A. ASSESSMENT APPEALS

Despite the fact that many issues decided by the board of assessment appeals are questions of valuation, one must still be familiar with court decisions and a variety of statutes. In Blair, Jr. v. Service Bureau, Inc., the Court determined that tax consultants who held themselves out to the public as capable of reducing or eliminating tax liability, committed the unauthorized practice of law because this service requires thorough familiarity with complicated statutes and with multitudinous court decisions. Blair, Jr. v. Service Bureau, Inc., 87 Pgh. Legal Journal 155, 165 (1939).

A taxpayer must not only present his or her case of fair market value of the appealed property, but must also be prepared to have any evidence presented to be subject to scrutiny and questioned not only by the Board, but also by the Taxing Districts through their legal counsel. Furthermore, the assessor and/or the Taxing Districts may present its own evidence which attempts not only to sustain the present assessment, but in many instances argument is made for an increase in assessment. A non-attorney clearly cannot adequately protect the rights of the taxpayer in such matters without a knowledge of the legal principles set forth infra, as well as an understanding of the basic rules of evidence. While an appeal to the Court of Common Pleas is de novo, an increase in assessment due to inadequate
representation takes effect immediately in the ensuing tax year, forcing the taxpayer to pay the increased amount notwithstanding a pending court appeal. While an owner always has the right to present his or her case pro se to the Board, to permit a non-attorney tax consultant to represent tax assessment appellants presents a great danger to the public because a taxpayer who mistakenly relies on the "expertise" of such a non-attorney tax consultant is subject to great harm for which the tax consultant has no accountability.

In order to determine the propriety and advancement of an assessment appeal, one must be familiar with a variety of statutes and court rulings. For example, In Re Johnstown Associates states that rents fixed by the Department of Housing and Urban Development at below the prevailing market rate are to be considered when determining fair market value. In Re Johnstown Associates, 494 Pa. 433, 431 A.2d 932 (1981). The so-called Marple Springfield doctrine applies to commercial properties with long-term leases that contractually set the rent at a level which is below that which could be presently obtained in the market. Appeal of Marple Springfield Center, 530 Pa. 122, 607 A.2d 708 (1992), appeal after new trial, ___ Pa.Commw. ___, 654 A.2d 635, appeal denied, 542 Pa. 679, 668 A.2d 1140 (1995). In addition, in Appeal of Marple Springfield Center, Inc., the Commonwealth Court determined that the owner could not be assessed for improvements built by tenants on property that is already subject to a long term lease fixing the rental return to the owner. Appeal of Marple Springfield Center, Inc., ___ Pa.Commw. ___, 654 A.2d 635, appeal denied, 542 Pa. 679, 668 A.2d 1140 (1995). This holding may apply to any property on which a tenant assigns a ground lease and the sublessor erects improvements, and in fact has implications with regard to any industrial, commercial or residential income producing property.\[15\]

F & M Schaeffer Brewing Company v. Lehigh County Board of Assessment Appeals states that the "value in use" standard of valuation is not acceptable for assessment purposes. F & M Schaeffer Brewing Company v. Lehigh County Board of Assessment Appeals, 530 Pa. 451, 610 A.2d 1 (1992). Accordingly, in valuing a hotel, nursing facility or other mixed real estate and business operation, one must apply the Schaeffer doctrine in formulating a legal argument on value.

Further, the presence of environmental contamination is a relevant factor to consider when determining fair market value for assessment purposes. Credible expert testimony can establish that contamination has a negative impact on the property's fair market value. B.P. Oil Company, Inc. v. Board of Assessment Appeals of Jefferson County, 159 Pa.Commw. 414, 633 A.2d 1241 (1993). Environmental contamination can impact the property to the extent that it is worthless or has only nominal value if left uncured. Monroe County Board

\[15\] Based upon Appeal of Marple Springfield Center, Inc., supra., the actual value of a given property for real estate tax assessment purposes may substantially differ from a state certified real estate appraiser's opinion of fair market value based upon the Uniform Standards of Professional Appraisal Practice (USPAP).

In many situations, each of the above case decisions must be considered when arriving at the actual value mandated in the Assessment Law. See 72 P.S. 5348. Certain properties such as hotels, nursing facilities and recreation facilities require the application of abstract legal principles to separate out from real estate the business value, which is considered non taxable personal property for the purpose of real estate tax assessment. An attorney must apply the growing body of assessment law to the facts to determine if an appeal is appropriate.

Many tax consultants believe that since the issue is market value, they are the ones who can provide the best service for the taxpayer. Real estate appraisers and CPAs\(^\text{16}\) do provide valuable services to clients in valuation matters. They are, however, ill-prepared to deal with the legal and factual contexts of a tax assessment appeal.

In Dauphin County Bar Association v. Mazzacaro, our Supreme Court upheld the injunction issued against a lay public insurance adjuster engaged in the unauthorized practice of law. Dauphin County Bar Association v. Mazzacaro, \textit{supra}. For a contingent percentage of any settlement, Mazzacaro, the adjuster, solicited and investigated claims by injured parties against alleged tort-feasors. 465 Pa. at 547, 351 A.2d at 230. The adjuster estimated the potential damages, sent demand letters to parties and tried to negotiate a settlement. \textit{Id.} Mazzacaro claimed that he did not engage in the unauthorized practice of law because the claims he handled were uncontested, and the damage valuation and settlements did not involve the exercise of legal judgement. 465 Pa. at 553, 351 A.2d at 233.

The Supreme Court, in dismissing the adjuster’s arguments, stated

\[\text{While the objective valuation of damages may . . . be accomplished by a skilled lay judgment, an assessment of the extent to which that valuation should be compromised in settlement negotiations cannot. Even when liability is not technically contested, an assessment of the likelihood that liability can be established in a court of law is a crucial factor in weighing the strength of one’s bargaining position. A negotiator cannot possibly know how large a settlement he can exact unless he can probe the degree of willingness of the other side to go to court. Such an assessment, however, involves an understanding of the applicable tort principles . . ., a grasp of the rules of evidence, and an ability to evaluate the strengths and weaknesses of the client’s case vis a vis that of the adversary.}\]

\(^{16}\)CPAs are not qualified to value real estate. A thorough reading of the CPA Law, 63 P.S. 9.1, et seq., indicates that issues of real estate valuation, and tax assessment law and procedure are beyond the education, training and licensure of certified public accountants. Additionally, the Real Estate Appraisers Certification Act 63 P.A. 457.16 requires no training or even familiarization with tax assessment law and procedure.
acquisition of such knowledge is not within the ability of lay persons, but rather involves the application of abstract legal principles to the concrete facts of the given claim.

465 Pa. at 554, 351 A.2d at 233, 234 (emphasis added).

The same principles apply to non-attorney tax consultants. As previously discussed, the body of assessment law has grown and evolved in recent years. The value a property may command on the open market may differ from its taxable value. Only a licensed attorney is able to weigh the potential impact of the assessment law when evaluating a potential settlement or further appeal. If one is to determine value in isolation, a real estate appraiser may be better suited to render an opinion. Such a person, however, does not possess the requisite training to protect the legal rights of a property owner.

B. CLASS ACTION APPEALS

The Second Class A and Third Class County Assessment Law states that any person or taxing district desiring to make an appeal shall . . . file with the board an appeal, in writing, setting forth:

(1) The assessment or assessments by which such person feels aggrieved;

(2) The address to which the board shall mail notice of the time and place of hearing.

For the purpose of assessment appeals under this act, the term person shall include, in addition to that provided by law, a group of two or more persons acting on behalf of a class of persons similarly situated with regard to assessment . . .

72 P.S., 5349(c) (emphasis in original). As well as providing an expedient means to initiate assessment appeals, this statute authorizes the board of assessment appeals to hear class actions. See Garret v. Bamford, 582 F.2d 810 (3d Cir. 1978). Even though the Rules of Civil Procedure do not apply to tax appeals, Appeal of the Borough of Churchill, 525 Pa. 80, 575 A.2d 550 (1990), it is highly illustrative to consider Pa. R.C.P. 1701, et seq., when determining whether a putative class meets the statutory requirement of being similarly situated with regard to assessment. Pa. R.C.P. 1702 states:

One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709; and

(5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Pa.R.C.P. 1702 (emphasis added).

Legal judgment must be brought to bear in appeals heard as a class by the Board of Assessment Appeals. Even though the Second Class A and Third Class County Assessment Law establishes a very simple requirement for the use of a class suit, one cannot apprehend the meaning of the statute without being trained in the Rules of Civil Procedure. A value conclusion is not the only determination to be made. Legal issues, such as commonality and typicality, are also present. A lay person cannot make the legal judgment necessary to determine whether a class suit is appropriate, or even in the best interests of the property owner or the client.

C. REAL ESTATE TAX EXEMPTIONS

The Pennsylvania Constitution authorizes the exemption of certain properties from real estate taxation. Pa. Const. art. III, 2(a). These exemptions are enumerated in the General County Assessment Law at 72 P.S. 5020-204. Any organization seeking exemption must initiate the appeal process at the board of assessment appeals. Aquarian Church of Universal Service v. County of York, 90 Pa.Commw. 290, 494 A.2d 891 (1985). This party has the affirmative burden to prove that it is entitled to exemption. Four Freedoms House of Philadelphia, Inc. v. Philadelphia, 443 Pa. 215, 279 A.2d 155 (1971). If the entity intends to receive an exemption as a purely public charity, it must demonstrate that it:

(1) is one of purely public charity;

(2) was founded by public or private charity;

(3) is maintained by public or private charity.

See Woods School Tax Exemption Case, 406 Pa. 579, 178 A.2d 600 (1962). An organization qualifies as a purely public charity if it:

(1) advances a charitable purpose;

(2) donates or renders gratuitously a substantial portion of its services;
benefits a substantial and indefinite class of persons who are legitimate subjects of charity;

relieves the government of some of its burden; and

operates entirely free from private profit motive.


Exemption hearings clearly focus on legal issues rather than issues of valuation, thus requiring the use of legal judgment. A party must have the ability to interpret the salient constitutional provisions, statutes and case law. Furthermore, the primary inquiry focuses on the characteristics of the party seeking exemption rather than the characteristics of the real estate itself. One must make a legal judgment to determine if there is an exemption to pursue in cases involving such owners as churches, hospitals and parsonages. Tax consultants are wholly unqualified to represent property owners in exemption proceedings. To allow non-attorneys to represent organizations seeking exemption before boards of assessment appeals would circumvent the safeguards imposed on the legal profession which are intended to protect the public.

D. SPOT REASSESSMENT

The issue of spot reassessment appeals further underscores the need for competent representation by a licensed attorney before a board of assessment appeals. The Pennsylvania Constitution provides that all taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax. Pa. Const. art. VII, 1.

In addition, the Second County A and Third Class County Assessment Law defines spot reassessment as [t]he reassessment of a property or properties that is not conducted as part of a countywide revised reassessment and which creates, sustains or increases disproportionality among properties assessed value. 72 P.S. 5342.1. The Assessment Law specifically prohibits the practice of spot reassessment, and in the event that the board undertakes such practice, the property owner may appeal the assessment to the board or the court . . . . 72 P.S. 5348.1. Therefore, the issue of spot reassessment is one of constitutional dimension implicating the requirement of uniformity of taxation.

A lay person cannot properly make decisions as to questions of uniformity and constitutionality. Both issues require the abstract application of legal principles and the use of legal judgment. The amount of the change in the assessment is not the focus of the inquiry, but rather the fact that the assessment has changed as a result of a spot reassessment. Only a licensed attorney can make such a reasoned determination. Our Supreme Court has stated that an action in equity for the violation of the uniformity provisions of the Pennsylvania Constitution may be heard by the Courts, even if the appellant has not exhausted the administrative remedies. Borough of Greentree v. Board of Assessment,
Appeals and Review of Allegheny County, 459 Pa. 268, 328 A.2d 819 (1974). The Green Tree Court reasoned that the board’s expertise would be of little use in determining constitutional issues. It follows that tax consultants would not be qualified to deal with these questions since they concern legal issues, not issues of valuation. A licensed attorney at law must be utilized to ensure the full protection of the rights of the taxpayer.

II. THE PREPARATION OF AN APPEAL FORM BY A NON-ATTORNEY TAX CONSULTANT, OR OTHER PERSON NOT LICENSED TO PRACTICE LAW IN PENNSYLVANIA, ACTING ON BEHALF OF A PROPERTY OWNER AND NOT ACTING PRO SE, CONSTITUTES THE UNAUTHORIZED PRACTICE OF LAW.

Our Supreme Court has held that the preparation of appeal forms for the Workman’s Compensation Board by a lay person on behalf of another does not constitute the unauthorized practice of law since

the pleadings . . . are so uniformly simple that it cannot fairly be said that legal skill is required in their preparation. They are executed on forms prepared by the Board, are elementary in character, and do not rise to the dignity of pleadings as that term is understood in other judicial proceedings. Shortz, 327 Pa. at 92, 193 A. at 25. Citing Shortz, the Court of Common Pleas of Allegheny County held that a "real estate consultant engineer" did not commit the unauthorized practice of law by completing preprinted assessment appeal forms on behalf of property owners. Kountz et al. v. Rowlands, 46 D. & C. 461 (1942). This Committee believes that these rulings may not apply to the growing body of tax assessment appeal law. Even though the many boards of assessment appeals preprint their assessment appeal forms, these documents still require the use of legal judgment for their completion and a taxpayer must specify on what legal grounds an appeal is sought. While Kountz does seem to permit the completion of a tax appeal form by a lay person, it is more important to understand that in the nearly sixty years since the Shortz Court issued its decision, the body of assessment appeal law has grown considerably in complexity. In light of this evolution, it stands to reason that the mere length of an appeal form should not govern who is permitted to complete it for the property owners.

As discussed supra., one must apply abstract legal principles in order to state the basis of an assessment appeal. For example, the issues of contract rent discussed in the Marple Springfield Decision, supra. and value in use set forth in F & M Schaeffer, supra. mandate

17Even though the Kountz Court determined that the completion of real estate tax assessment appeal forms on behalf of another at that time was not the unauthorized practice of law, the same Court held that the lay representation of property owners before a board of assessments was the unauthorized practice of law. 46 D. & C. at 464. Defendant in Kountz pressed for the reduction of assessments and argued the interpretation of statutes and court decisions. Id. at 462.
the exercise of legal judgment to determine whether they apply. The entire tax appeal area has become much more complicated, requiring application of an abundance of new statutes and case law. Therefore, the Committee believes that the preparation of assessment appeal forms by a lay person on behalf of another constitutes the unauthorized practice of law.

III. A POWER OF ATTORNEY, 20 Pa. C.S.A. 5601, ET SEQ., DOES NOT AUTHORIZE A TAX CONSULTANT, OR OTHER PERSON NOT LICENSED TO PRACTICE LAW IN PENNSYLVANIA, TO REPRESENT A PROPERTY OWNER BEFORE THE BOARD OF ASSESSMENT APPEALS.

Many non-attorney tax consultants point to Chapter 56 of the Probate, Estates and Fiduciaries Code (hereinafter referred to as Probate Code), 20 Pa. C.S.A., 5601, et seq., as a statutory authorization to appear before a board of assessment appeals on behalf of property owners. The Probate Code does not grant such authority in this situation. Furthermore, the power of attorney does not cloak a lay person with the power to act as an attorney at law.

Section 5602 of the Probate code provides that a principal may . . . empower his attorney-in-fact . . . to pursue tax matters. 20 Pa.C.S.A. 5602(a)(22). The power to pursue tax matters, as defined in 20 Pa.C.S.A. 5603(u), entitles the attorney-in-fact to

(3) Represent the principal before any taxing authority; protest and litigate tax assessments; claim, sue for and collect tax refunds; waive rights and sign all documents required to settle, pay and determine tax liabilities; sign waivers extending the period of time for the assessment of taxes or tax deficiencies.

(4) In general, exercise all powers with respect to tax matters that the principal could if present.

20 Pa.C.S.A. 5603(u).

The Rules of Statutory Construction state that the title and preamble of a statute may be considered in the construction thereof. 1 Pa.C.S.A., 1924. Furthermore, statutes relating to the same person or thing are in pari materia. 1 Pa.C.S.A., 1932(a). Statutes in pari materia shall be construed together, if possible, as one statute. 1 Pa.C.S.A., 1932(b). Therefore, the title of the Probate, Estates and Fiduciaries Code may be used when construing the statute and 20 Pa.C.S.A., 5601, et seq. must be read in pari materia with the remaining provisions of the Probate Code, since they all pertain to probate, estates, fiduciaries and other similar matters. In light of the Rules of Statutory Construction, it is clear that the use of powers of attorney in Chapter 56 of the Probate Code is limited to matters which involve decedents estates, probate, fiduciaries and other matters of the same class.
Furthermore, with Kohlman v. Western Pennsylvania Hospital, supra., the Superior Court specifically limited the scope of powers enumerated in the Probate Code to probate and administrative matters. In Kohlman, an attorney-in-fact attempted to represent a principal before the Court of Common Pleas of Allegheny County pursuant to 20 Pa.C.S.A. 5601, et seq. The Superior Court held that the attorney-in-fact was engaged in the unauthorized practice of law. 438 Pa.Super at 358, 652 A.2d at 849.

Even though Kohlman deals with the unauthorized practice of law before the Court of Common Pleas, rather than an administrative board, this decision sets forth important principles that constrain the uses of powers of attorney, and 20 Pa.C.S.A. 5601, et seq., in particular. First, and most importantly, the powers listed in sections 5602 and 5603 [of the Probate Code] are best characterized as authorizing the agent to act as the client in an attorney-client relationship, with respect to probate and administrative matters. 438 Pa.Super at 359, 652 A.2d at 852 (emphasis added). Second, the power of attorney cannot be used as a device to license laypersons to act as an attorney-at-law. Id. (emphasis added). Third, [t]he attorney-in-fact may . . . engage in all activities authorized under sections 5602 and 5603 that do not constitute the unauthorized practice of law. 438 Pa.Super 360 n.3, 652 A.2d 852 n.3 (emphasis added).

More recently, the Commonwealth Court applied the Kohlman rationale to a case that involves a lay tax consultant who represented taxpayers before the board of assessment appeals of Westmoreland County. See Westmoreland County v. Rodgers, ___ Pa. Commw. ___, 693 A.2d 996 (1997). In Rodgers, the defendant solicited and represented property owners for a contingent percentage of real estate tax savings. The defendant prepared tax appeal forms, introduced the taxpayer’s appraiser to the board, hired an attorney for the property owner, and advised the client as to whether to appeal the board’s decision or pay taxes. The Rodgers Court upheld the injunction issued by the Court of Common Pleas of Westmoreland County, based upon the board of assessment’s rule prohibiting persons not licensed to practice law from representing property owners. The Court, citing Kohlman, further held that [j]ust as the attorney-in-fact provisions of the Probate Code . . . cannot

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18Petition for rehearing denied. Petition for allowance of appeal currently pending with the Pennsylvania Supreme Court.
empower an individual to engage in the unauthorized practice of law . . . , any rules or regulations of an administrative agency likewise cannot confer the power to engage in conduct that is prohibited . . . as the unauthorized practice of law. Rodgers, ___ Pa. Commw. at ___, 693 A.2d at 999 n.10 (citations omitted).

The Commonwealth Court's language in Rodgers indicates that the practice of law also includes proceedings before county boards of assessment appeals. If a board of assessment's rule cannot grant a lay person the power to practice law, then a lay person appearing before the board on behalf of another must be engaging in the practice of law.

**OPINION 99-101**

**SUBJECT:** Unauthorized practice of law before zoning hearing boards and governing bodies of municipalities in connection with land use applications.

It is the **OPINION** of the Unauthorized Practice of Law Committee of the Pennsylvania Bar Association (the "Committee") that the representation of property owners/applicants before zoning hearing boards and governing bodies by persons including, but not limited to (i.e. by way of illustration, not limitation) land use and urban planners, architects, real estate salespersons and brokers, real estate appraisers, civil engineers, contractors, and surveyors not licensed to practice law in the Commonwealth of Pennsylvania ("Unlicensed Persons") in connection with land use applications is the unauthorized and unlicensed Practice of Law.

**BRIEF IN SUPPORT OF OPINION 99-101**

It has come to the attention of the Committee that persons not licensed to practice law, including by way of illustration and not limitation, land use and urban planners, architects, real estate salespersons and brokers, real estate appraisers, civil engineers, contractors, and surveyors represent or attempt to represent property owners/applicants in proceedings before the various zoning hearing boards and governing bodies of municipalities regarding land use, including zoning variance and special exceptions, conditional uses, land development and subdivision.

**ISSUES PRESENTED**

**DOES THE REPRESENTATION OF A PROPERTY OWNER/APPLICANT BEFORE A ZONING HEARING BOARD OR THE GOVERNING BODY OF A MUNICIPALITY, IN CONNECTION WITH LAND USE APPLICATIONS BY A PERSON NOT LICENSED TO PRACTICE LAW IN THE COMMONWEALTH OF PENNSYLVANIA, CONSTITUTE THE UNAUTHORIZED PRACTICE OF LAW?**

Suggested Answer: Yes.
BACKGROUND

I. REGULATION OF THE PRACTICE OF LAW IN THE COMMONWEALTH OF PENNSYLVANIA


Persons engaging in the unauthorized practice of law are subject to the penalties set forth in 42 Pa.C.S.A. § 2524:

(a) General rule. Except as provided in subsection (b), any person, including, but not limited to, a paralegal or legal assistant, who within this Commonwealth shall practice law, or who shall hold himself out to the public as being entitled to practice law, or use or advertise the title of lawyer, attorney at law, attorney and counselor at law, counselor, or the equivalent in any language, in such a manner as to convey the impression that he is a practitioner of the law of any jurisdiction, without being an attorney at law or a corporation complying with 15 Pa.C.S. Ch. 29 (relating to professional corporations), commits a misdemeanor of the third degree upon the first violation. A second or subsequent violation of this subsection constitutes a misdemeanor of the first degree.

(c) Injunction. In addition to criminal prosecution, unauthorized practice of law may be enjoined in any county court of common pleas having personal jurisdiction over the defendant. The party obtaining the injunction may be awarded costs and expenses incurred, including reasonable attorney fees, against the enjoined party. A violation of subsection (a) is also a violation of the act of December 17, 1968 (P.L. 1224, No. 387), known as the Unfair Trade Practices and Consumer Protection Law.

In order to protect the public, stringent requirements have been imposed to gain admission to and remain a member of the bar. See Kohlman, 438 Pa.Super. at 356, 357, 652 A.2d at 851. “A duly admitted attorney is an officer of the court and answerable to it for dereliction of duty Childs et al. v. Smeltzer, 315 Pa. 9, 14, 171 A. 883, 886 (1934). As stated by the Supreme Court in Shortz v. Farrell

the object of the legislation forbidding practice to laymen is not to secure to lawyers a monopoly, however deserved, but, by preventing the intrusion of
inexpert and unlearned persons in the practice of law, to assure to the public adequate protection in the pursuit of justice, than which society knows no loftier aim.


The Courts have not precisely delineated “the boundaries . . . which limit the practice of law” since such “[a]n attempt to formulate a precise definition would be more likely to invite criticism than achieve clarity.” Shortz, 327 Pa. at 84, 193 A. at 21. Although such an exact description does not exist, one can identify those areas which are reserved for licensed attorneys at law:

Where . . . a judgment requires the abstract understanding of legal principles and a refined skill for their concrete application, the exercise of legal judgment is called for. Shortz v. Farrell, 327 Pa. 81, 85, 193 A. 20, 21 (1973). While at times the line between lay and legal judgments may be a fine one, it is nevertheless discernible. Each given case must turn on a careful analysis of the particular judgment involved and the expertise that must be brought to bear on its exercise.


II. JURISDICTION OF THE ZONING HEARING BOARD AND MUNICIPALITY GOVERNING BODY

The Pennsylvania Municipalities Planning Code sets forth the exclusive means by which an applicant may obtain relief. An applicant/property owner must appear before either the zoning hearing board or the governing body of the municipality depending upon the nature of the application.19 The zoning hearing board or governing body must conduct a public hearing within 60 days of the applicant’s request. 53 P.S. § 10908(1.2). Pursuant to the Pennsylvania Municipalities Planning Code, any “municipality which has enacted or enacts a zoning ordinance . . . shall create a zoning hearing board.”20 53 P.S. § 10909.1

1 It is recognized that, depending upon the nature of the application, the governing body or planning agency, if so designated by the governing body pursuant to 53 P.S. § 10909.1(b), may have exclusive jurisdiction to hear and render final adjudications. For purposes of this discussion, the term “governing body” collectively refers to the governing body and the planning agency.

20 Two or more municipalities may create a joint zoning hearing board rather than establishing separate agencies. 53 P.S. § 10904.

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10901. The zoning hearing board has exclusive jurisdiction “to hear and render final adjudications” in:

(1) Substantive challenges to the validity of any land use ordinance, except those brought before the governing body pursuant to sections 609.1 [relating to landowner curative amendments] and 916.1(a)(2) [relating to substantive challenges brought before the governing body].

(2) Challenges to the validity of a land use ordinance raising procedural questions or alleged defects in the process of enactment or adoption which challenges shall be raised by an appeal taken within 30 days after the effective date of said ordinance.

(3) Appeals from the determination of the zoning officer, including, but not limited to, the granting or denial of any permit, failure to act on the application therefor, the issuance of any cease and desist order or the registration or refusal to register any nonconforming use, structure or lot.

(4) Appeals from the determination by a municipal engineer or the zoning officer with reference to the administration of any flood plain or flood hazard ordinance or such provisions with a land use ordinance.

(5) Applications for variances from the terms of the zoning ordinance and flood hazard ordinance or such provisions within a land use ordinance pursuant to section 910.2.

(6) Applications for special exception under the zoning ordinance or flood plain or flood hazard ordinance or such provisions within a land use ordinance, pursuant to section 912.1.

(7) Appeals from the determination of any officer or agency charged with the administration of any transfers of development rights or performance density provisions of the zoning ordinance.

(8) Appeals from the zoning officer’s determination under section 916.2 [relating to preliminary opinions of zoning officers].

(9) Appeals from the determination of the zoning officer or municipal engineer in the administration of any land use ordinance or provision thereof with reference to sedimentation and erosion control and storm water management insofar as the same relate to development not involving Article V [relating to subdivision and land development] or VII [relating to planned residential development] applications.
53 P.S. § 10909.1(a).

The governing body of a municipality “shall have exclusive jurisdiction to hear and render final adjudications” in:

(1) All applications for approvals of planned residential developments under Article VII pursuant to the provisions of section 702.

(2) All applications pursuant to section 508 for approval of subdivisions or land development under Article V.

(3) Applications for conditional use under the express provisions of the zoning ordinance pursuant to section 603(c)(2).

(4) Applications for curative amendment to a zoning ordinance pursuant to sections 609.1 and 916.1(a)(2).

53 P.S. § 10909.1(b).

ARGUMENT

THE REPRESENTATION OF A PROPERTY OWNER/APPLICANT BEFORE A ZONING HEARING BOARD OR THE GOVERNING BODY OF A MUNICIPALITY IN CONNECTION WITH LAND USE PLANNING APPLICATIONS BY NON-ATTORNEYS, INCLUDING BUT NOT LIMITED TO LAND USE AND URBAN PLANNERS, ARCHITECTS, REAL ESTATE SALESPERSONS AND BROKERS, REAL ESTATE APPRAISERS, CIVIL ENGINEERS, CONTRACTORS, SURVEYORS, OR ANY OTHER PERSON NOT LICENSED TO PRACTICE LAW IN PENNSYLVANIA, CONSTITUTES THE UNAUTHORIZED PRACTICE OF LAW.

The Supreme Court’s ability to regulate the practice of law is not restricted to courts of record. “Where the application of legal knowledge and technique is required, the activity constitutes such practice even if conducted before a so-called administrative board or commission. It is the character of the act, and not the place where it is performed, which is the decisive factor.” Shortz, 327 Pa. at 85, 193 A. at 21 (emphasis added).

Shortz focused solely on the issue of whether proceedings before the Workman’s Compensation Board required the “application of legal knowledge and technique”, and therefore whether laymen can appear on another’s behalf. 327 Pa. at 90, 193 A. at 24. According to the Court, the Workman’s Compensation Board “considers legal questions, applies legal rules, and weighs facts in light of legal principles. It has the power to issue
subpoenas, administer oaths, and require the attendance of witnesses and the production of books and documents.” 327 Pa. at 86, 193 A. at 22 (citations omitted). Furthermore, “the findings of fact made by the board are final . . .; the court cannot reverse such findings if there is any competent evidence to support them.” 327 Pa. at 86, 193 A. at 22 (citations omitted). Based upon such factors, our Supreme Court considered the proceedings before this administrative agency to be “essentially of a judicial character” and therefore constituted the practice of law. 21

The Supreme Court’s reasoning in Shortz equally applies to the issue of whether the non-attorney representation of applicants before the zoning hearing board constitutes the unauthorized practice of law. Proceedings before the board are under oath. 53 P.S. § 10908(4). The board may subpoena witnesses and documents. 327 Pa. at 86, 193 A. at 22. Although the rules of evidence do not apply, parties have the right to be represented by legal counsel and “shall be afforded the opportunity to respond and present evidence and argument and cross-examine adverse witnesses on all relevant issues.” 53 P.S. § 10908(5)-(6). As recognized by the Shortz Court, “examination and cross-examination of witnesses require a knowledge of relevancy and materiality.” 327 Pa. at 86, 193 A. at 22. Such concepts require one to recognize and apply many abstract principles of law. Therefore, since the examination and cross-examination of witnesses before the zoning hearing board implicates legal knowledge and technique, one must conclude that the representation of applicants is the practice of law. Shortz, supra.

Representation of property owners/applicants before the zoning hearing board also requires familiarity with ordinances, statutes, including the Municipalities Planning Code, and appellate court decisions. In Blair, Jr. v. Service Bureau, Inc., the court determined that non-attorney tax consultants who held themselves out to the public as capable of reducing or eliminating tax liability committed the unauthorized practice of law because this service “required thorough familiarity with complicated statutes and with multitudinous court decisions.” Blair, Jr. v. Service Bureau, Inc., 87 Pgh. Legal Journal 155, 165 (1939). The representation of property owners/applicants before the zoning hearing board requires a similarly extensive knowledge. Based upon statutes and case law, the property owner/applicant must sustain a legal burden that varies depending upon whether the applicant seeks a conditional use, special exception or variance.

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21 “These proceedings, though less technical, are conducted much as in court . . . Were they transferred to a courtroom and carried on before a judge, it would be readily perceived that they involve the same fundamental characteristics of the determination of property rights and obligations of parties as do other judicial proceedings.” Shortz, 327 Pa. at 86, 87, 193 A. at 22.

22 Pursuant to 53 P.S. § 10913.2, the applicant may receive approval for a conditional use based upon the standards set forth in the varying zoning ordinances:

Where the governing body, in the zoning ordinances, has stated conditional uses to be granted or denied by the governing body pursuant to express standards and criteria, the governing body shall hold hearings on and decide
Despite the argument that the zoning hearing board is largely a “fact-finder”, legal representation is vital in these proceedings, which are quite often adversarial in nature. The municipality, persons affected by the application who timely enter their appearance and other civic groups or interested persons may be parties to the proceedings. 53 P.S. § 10908(3).

requests for such conditional uses in accordance with such standards and criteria. In granting a conditional use, the governing body may attach such reasonable conditions and safeguards, in addition to those expressed in the ordinance, as it may deem necessary to implement the purposes of this act in the zoning ordinance.

23 In order to receive a special exception, “the applicant bears the burden of establishing that the proposal complies with the specific requirements placed on the use by the ordinance, while the objectors have the burden of proving that the proposal is detrimental to the public health, safety and welfare.” Appeal of Booz, 111 Pa. Commw. 330, 334 n.3, 533 A.2d 1096, 1098 n.3 (1987) (citing Bray v. Zoning Board of Adjustment, 48 Pa. Commw. 523, 410 A.2d 909 (1980)) (emphasis added)).

24 The Municipalities Planning Code, 53 P.S. § 10910.2(a), sets forth the following standard for the grant of a variance:

The board may grant a variance provided the following findings are made where relevant in a given case:

(1) That there are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that the unnecessary hardship, required by law, is due to such conditions, and not the circumstances or conditions generally created by the provisions of this Ordinance in the neighborhood or district in which property is located;

(2) That because of such physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of this Ordinance and that the authorization of a variance is therefore necessary to enable the reasonable use of the property;

(3) That such unnecessary hardship has not been created by the applicant;

(4) That the variance, if authorized, will not alter the essential character of the neighborhood or district in which the property is located, nor substantially or permanently impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare; and

(5) That the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least modification possible of the regulation at issue.
Persons opposed to the application have the opportunity to “present evidence and argument and cross-examine adverse witnesses on all relevant issues.” 53 P.S. § 10908(5). A non-lawyer is not sufficiently trained to evaluate the legal sufficiency of the opposition’s arguments.

Of ultimate importance, is the preservation of issues for appeal in the record of the zoning hearing board proceedings. The Municipalities Planning Code requires the board to keep a stenographic record of the proceedings. 53 P.S. § 10908(7). If dissatisfied with the decision of the zoning hearing board, the applicant may appeal the decision to the court of common pleas of the judicial district in which the property is located. 53 P.S. § 11002-A. The court, however, traditionally does not take additional testimony. “If, upon motion, it is shown that proper consideration of the land use appeal requires the presentation of additional evidence, a judge of the court may hold a hearing to receive additional evidence . . . .” 53 P.S. § 11005-A. Therefore, the record of the proceedings before the board is vital since the presentation of additional evidence before the court is not a matter of right.

The stenographic record of the zoning hearing board hearing represents the only opportunity in the vast majority of cases to develop an evidentiary record in support of an application. If the court does not permit additional evidence, the standard of review of the board’s decision is whether the board committed an abuse of discretion or error of law and whether there is substantial evidence to support the ruling in question. Valley View Civic Association v. Zoning Board of Adjustment, 501 Pa. 550, 462 A.2d 637 (1983). Thus, any judicial review focuses solely on the record created before the board or governing body. If one does not preserve procedural, as well as substantive, issues in the board’s record, such matters are waived.

Clearly, non-attorney representation of applicants before the board or governing body endangers the public. The multiplicity of statutes and appellate court opinions governing land use applications require legal knowledge to effectively present the applicant’s case. Applicants must provide sufficient evidence to overcome significant legal burdens. Although not bound by the technical rules of evidence, proceedings before the board and governing body present the only opportunity to create an evidentiary record in support of the applicant’s legal position, and this should not be entrusted to a non-attorney. Only an attorney, licensed to practice law in Pennsylvania, can properly represent an applicant before the zoning hearing board or governing body.