

It should be noted that such deference to state findings would not be required except in the event the trial court record has been introduced in evidence, for only with the bases for those findings available should comity demand that they be respected. And if the record has not been made available, the federal court in a habeas corpus proceeding should be free to redetermine the facts relating to the alleged violation of petitioner's constitutional rights.

It is no doubt true, as a general rule, that state appellate tribunals are competent to ensure the constitutional regularity of state criminal processes. However, states may be more alert to protect individual rights if federal surveillance can be invoked in the event of their violation. The certiorari jurisdiction of the Supreme Court does not assure this alertness. Moreover, it should be remembered that it is federal constitutional rights which are sought to be protected. Where necessary, lower federal courts should enforce these rights and prevent illegal detention of persons confined under state authority.

THE BAR AND THE UNAUTHORIZED PRACTICE OF LAW: A SURVEY

Traditionally, the legal profession has required of its members close adherence to a rigid code of ethical ideals. But while intent on maintaining their own high standards of professional demeanor, lawyers have failed to combat effectively the rendition of services legal in nature by persons and business groups not authorized to engage in the practice of law. Of course, the close relationship of legal concepts to modern business transactions makes difficult an absolute description of the lawyer's function. It may be impossible to perceive, for example, the point at which a tax accountant ceases to advise in the preparation of a tax return, and begins to give legal advice. Hence, there exists a twilight zone between those obligations manifestly within the responsibility of lawyers to perform, and those clearly within the prerogative of some other profession or business group. But the twilight zone does not comprise the entire unauthorized practice of law problem; services unquestionably legal in their nature are performed by persons without warrant to do so.¹

The Bar has unwittingly aided this development of unauthorized practice by taking a lethargic attitude toward public relations. It has failed to instill public understanding of the tremendous range of services which lawyers are obligated to render and the necessity of consultation on every problem in a legal context. Indeed, it is of paramount importance that a campaign against unauthorized practice be founded on the premise that the public interest de-

1. See *Report of the Standing Committee on Unauthorized Practice of the Law*, 70 A.B.A. REP. 257, 261 (1945).

mands rendition of legal services only by those subject to the high educational and ethical standards of the lawyer's discipline.²

In the past little has been accomplished by organized action to eliminate unauthorized practice. Sporadic policing measures, aimed at the problem through the legislatures and courts, generally have failed in their objective.³ Moreover, prosecution not followed by negotiation with offending groups leads to further ill-feeling and misunderstanding. Cognizant of the need for a more realistic solution, the American Bar Association has outlined a three point program:⁴

- (1) A modification of the curricula of the country's law schools to include required courses in the law of taxation, labor law, and administrative tribunal practice, and the extension of their facilities to practicing attorneys.
- (2) A national publicity campaign to make the public aware of the advantages of consulting a lawyer on every legal problem.
- (3) The formation by state and local bar associations of conference groups composed of lawyers and laymen for the purpose of discussing their mutual problems and coordinating their services in the public interest.

This plan is designed to better acquaint lawyers with certain recently developed areas of the law in which lay specialists have been especially active; to promote, through institutional advertising, public appreciation of the latitude of the lawyer's function and the social service which he performs; and to effectuate cooperation with lay groups through a joint conference system by which particular grievances can be settled, mutual problems in the twilight zone solved, and the evils of unauthorized practice explained.⁵

On the premise that the success of the A.B.A. plan depends on the unreserved application of its principles by the legal profession generally, the *Indiana Law Journal* recently conducted a survey among the bar associations of the forty-eight states and the District of Columbia to obtain data on the progress of the movement against unauthorized practice pursuant to points two and three of the A.B.A. program. Replies to the inquiry, chiefly from association unauthorized practice committee chairmen or from association secretaries, were received from the District and forty-four states, and are

2. See Tinkham, *Report of the Public Relations Committee*, PROCEEDINGS OF THE ANNUAL MEETING OF THE INDIANA STATE BAR ASSOCIATION 32 (1949).

3. See, e.g., an excellent review of the troubled history of the problem in New Jersey in Lasher, *The Unauthorized Practice of the Law*, 72 N.J.L.J. 341 (1949).

4. 70 A.B.A. REP. 257, 262 (1945).

5. Related activities in which the A.B.A. has taken a vigorous interest are Legal Aid and Lawyer Reference Plans. For a general discussion see REDDEN, *CAREER PLANNING IN THE LAW* (1951). For complete information see Porter, *Lawyer Reference Plans, A Manual for Local Bar Associations* (A.B.A., SURVEY OF THE LEGAL PROFESSION, 1949).

filed in the *Journal* office. The results are tabulated in the chart, pages 567-569.⁶

The survey reveals marked differences in attitude and approach regarding unauthorized practice. Alabama,⁷ for example, reports that the principal activity has been the handling of local problems by the local bar associations; the most flagrant abuses have been dealt with through litigation; discussions have been undertaken with various business groups, but only with the bankers. Has any formal joint resolution been formed; advertising by the State Bar was considered, but this plan failed for lack of funds. In Arkansas⁸ there is genuine interest in the problem, but a financial handicap has been insuperable. Its report discouragingly states that, ". . . the question has had a long history here with not much accomplished." Continued litigation is expected. Kansas⁹ has recorded little activity so far, but lawyers there are said to be interested and a campaign against unauthorized practice is expected to develop; plans have been laid for institutional advertising. In Maryland¹⁰ neither negotiation nor institutional advertising has been considered necessary; there is a committee on grievances empowered to handle reported breaches. Illinois reports¹¹ that, "The Committee on the Unauthorized Practice of the Law . . . will not compromise or enter into agreements . . . but . . . will vigorously prosecute any . . . who may be guilty. . . ."

It is not the intention of the *Journal*, in presenting this report, to depreciate the efforts of particular bar groups. But the information compiled in the chart reflects few significant accomplishments in the movement to eliminate unauthorized practice. The A.B.A., in promulgating its three point program, has provided the framework for effective resistance. Enthusiastic application of its principles by state and local bar associations is necessary to achieve the plan's broad objectives; in certain areas this is being done. It is

6. Other leading sources of information regarding the movement against unauthorized practice of law: THE UNAUTHORIZED PRACTICE NEWS, published quarterly by the Committee on the Unauthorized Practice of the Law of the A.B.A., 1140 N. Dearborn St., Chicago, Warren H. Resh, Editor; also the various state bar association journals. One pamphlet in particular is of great value: ONION, UNAUTHORIZED PRACTICE OF LAW (San Antonio Bar Association, 1950). Also, the address of Edwin M. Otterbourg of the New York County Lawyers Association (former chairman of the A.B.A.'s Committee on Unauthorized Practice) to the Maryland State Bar Association, Hotel Traymore, Atlantic City, N. J., June 29, 1950; and a thoughtful article, Hallett, *Life Underwriters and Lawyers:—The Application of the Cooperative Technique*, GOLD BOOK OF THE EASTERN UNDERWRITER (1950).

7. Letter of John B. Scott, Secretary of the Alabama State Bar Board of Commissioners, to the INDIANA LAW JOURNAL, Dec. 11, 1950.

8. Letter of Terrell Marshall, Vice President of the Bar Association of Arkansas, to the INDIANA LAW JOURNAL, Dec. 8, 1950.

9. Letter of Judge Clark A. Wallace, Chairman of the Public Relations Committee of the Kansas Bar Association, to the INDIANA LAW JOURNAL, May 16, 1951.

10. Letter of S. Vannort Chapman, Secretary of the Maryland State Bar Association, to the INDIANA LAW JOURNAL, December 6, 1950.

11. Letter of John P. Loughnane, Chairman of the Committee on the Unauthorized Practice of the Law of the Illinois State Bar Association, to the INDIANA LAW JOURNAL, February 14, 1951.

believed, however, that desired results could be attained generally, if the endeavors of the local groups were coordinated. This uniformity of effort may be implemented, yet with local responsibility retained, by extensive exchange of information and technique among the bar associations. This report is designed to aid in stimulating that exchange.

NEGOTIATION WITH LAY GROUPS

The A.B.A. set the pattern for negotiation with laymen by publishing, jointly with the national organizations of various business groups, statements of principles. To date, agreements have been formed with The American Institute of Accountants; The National Association of Life Underwriters; The American Bankers Association; The National Association of Real Estate Boards; and representatives of several insurance and adjustor groups. Typical, and the most recent, is that prepared by the National Conference of Lawyers and Certified Public Accountants. Emphasizing the necessity of collaboration by lawyers and accountants and the importance of each group advising assistance by the other when proper, it states that: (1) Both groups may prepare federal income tax returns. (2) Only an accountant may advise in the preparation of financial statements. (3) Drafting of conveyances, corporate minutes, amendments to corporate charters, partnership agreements, and similar instruments must be done by lawyers. Establishment of local committees is urged.

On the state level, the survey reveals that the bar associations have not commenced negotiations to any significant extent. Aside from agreements entered into with banks and trust companies, only twenty-six such joint statements were reported completed with the remaining business groups. For example, consider the situation with realtors, with whom the bar has frequently had difficulties: only seven state bar associations have any sort of agreement with them, and none were reported in the process of negotiation! Only thirteen state permanent conference groups were stated to be in operation; and of those, most are formulating initial statements of principles. Cooperation with accountants on the state level has been minimal; however prospects are encouraging, considering the number of agreements reported in the negotiation stage. The list of agreements with bankers is the most satisfactory, with only Ohio and Arkansas reporting a lack of cooperation.¹² Negotiations with bankers has had a long history, and this experience clearly demonstrates that it is possible to implement successful arrangements with business groups.

The chart indicates that Texas is overwhelmingly the leader in this aspect

12. See note 8 *supra*; letter of K. V. Nicola, Chairman of the Committee on Unauthorized Practice of Law of the Ohio State Bar Association, to the INDIANA LAW JOURNAL, March 19, 1951.

of the A.B.A. program. Agreements successfully completed there are modeled after those formulated by the A.B.A., modified to meet local conditions. The statement published jointly with the Texas Society of Certified Public Accountants, for example, provides: (1) Lawyers shall draft legal instruments (*e.g.*, articles of incorporation). (2) Accountants shall not appear before the SEC except to give expert opinion on accounting matters. (3) Either group may prepare income tax returns, though estate and inheritance tax returns shall be prepared only by lawyers with an accountant's assistance. Local joint conference groups are encouraged to discuss coordinating the endeavors of the two professions and "to join in their efforts to enforce the laws designed to protect the public from improper practices."

Reports of agreements on the local level, *i.e.*, in cities and counties, are very few. However, the detailed agreement between the Hennepin County (Minnesota) Bar Association and Minneapolis Banks illustrates the type of arrangement possible with local lay groups. It provides in part that: (1) Advertisements which invite the creation of fiduciary relationships shall state the necessity of procuring legal advice. (2) Advertisements must state that a bank's probate services do not include attorney's fees. (3) A bank may not discuss a customer's will without notice to the attorney-draftsman. (4) No wills or trust instruments shall be drafted by a bank; lawyers must supervise the execution of wills and testamentary instruments.

There is, of course, no one particular method by which point three of the A.B.A. program must be effectuated. For example, leaders in the movement against unauthorized practice have found that state and local negotiation with adjusters is not practical. This sharp contrast from the usual conclusion reached regarding negotiation with business groups is explained by the chairman of the Conference Committee on Adjusters on the ground that adjusters are employees of national organizations which have direct representatives on the Committee.¹³

In some states it has apparently been found that even with highly informal arrangements with lay groups, not only will unauthorized practice be suppressed, but the groups themselves will cooperate just as fully in policing their own members as under a formal agreement. In Louisiana, although no statement of principles has been published nor a conference group established, an oral understanding with the Chartered Life Underwriters reportedly has proved effective, with both organizations pledged to keep their own members in line.¹⁴ The Wisconsin Bar has had much the same experience with collec-

13. Letter of Oscar J. Brown, Chairman of the Conference Committee on Adjusters, to the *INDIANA LAW JOURNAL*, October 31, 1950.

14. Letter of Philip Gensler, General Chairman of the Unauthorized Practice of Law Committee of the Louisiana State Bar Association, to the *INDIANA LAW JOURNAL*, Dec. 20, 1950.

tion agencies. There, the conference committee has assumed the form of an occasional meeting between the chairman of the bar committee and the president of the collectors association. The latter has vigorously enforced the agreement, and the collectors have received his suggestions graciously.¹⁵ Real estate boards and local bar associations regularly hold joint meetings in some communities.¹⁶ In other areas the bar has been represented by speakers before local groups such as life underwriters and realtors.¹⁷ While such activities are not substitutes for permanent conference groups, they are conducive of their eventual establishment.

As a general rule, however, informal arrangements will not be enough. Furthermore, statements of principles alone cannot solve the unauthorized practice problem. They must be implemented, as called for in the A.B.A. plan, by conference groups where *specific* grievances may be considered in the same atmosphere in which the statements were produced, and *particular* twilight zone problems worked out.

It should be noted that in certain states agreements have been entered into with groups other than those with whom the A.B.A. has published statements. Four state bars have negotiated with title companies, one with auto clubs,¹⁸ four with collection agencies, and one with social workers.¹⁹ In addition, certain measures not contemplated by the A.B.A. plan have been undertaken. In Missouri a pamphlet entitled *Unauthorized Practice of Law in Missouri* and containing information on the statutes and penalties involved is available for mailing to one suspected of engaging in unauthorized practice. In West Virginia a copy of the *Definition of the Practice of Law*, as promulgated by the state supreme court, is sent with a warning letter to suspected violators.²⁰ A copy of the *Definition* is included by the Secretary of State with each notary public commission issued. A similar practice is employed in California, where the Secretary of State also informs the Bar of corporate papers drafted by laymen.²¹ The survey has also revealed that a bar association's organizational structure may be a significant element in the effectiveness of the movement against unauthorized practice. In Missouri the official body for the prevention of unauthorized practice is the Missouri Bar Administration, which is independent of the integrated Bar. An agency of the supreme court, it has

15. Letter of Warren H. Resh, Chairman of the Wisconsin Bar Association Committee on Unauthorized Practice of Law, to the INDIANA LAW JOURNAL, Dec. 15, 1950.

16. Letter of Milton E. Bachman, Executive Secretary of the State Bar of Michigan, to the INDIANA LAW JOURNAL, Dec. 11, 1950.

17. 27 N. DAK. L. REV. 139 (1951).

18. Letter of G. H. Elmore, Secretary of the Committee on Unlawful Practice of Law of the State Bar of California, to the INDIANA LAW JOURNAL, Dec. 13, 1950.

19. Letter of James H. Higgins, Jr., Secretary of Rhode Island Bar Association, to the INDIANA LAW JOURNAL, February 9, 1951.

20. Letter of Oshel C. Parsons, Secretary-Treasurer of the West Virginia State Bar, to the INDIANA LAW JOURNAL, Dec. 8, 1950.

21. 25 JOURNAL STATE BAR CALIFORNIA 21 (1950).

entered into no agreements with lay groups because it has been granted no authority by the court to do so. Its only proper function is policing.²² The integrated California Bar, on the other hand, has been active in the movement for many years.²³ And in West Virginia, a state-wide central committee on unauthorized practice was recently established, after it was found that congressional district committees were unworkable.²⁴

NATIONWIDE ADVERTISING

The reported publicity campaigns universally have been educative in their nature. Some have been instituted with relatively little expense. For example, in Utah and several other states free public service radio time has been utilized for speaker panels and round table discussions by lawyers. News and editorial columns of newspapers are also available without cost. Other techniques include a series of lectures to high school groups,²⁵ and an essay contest on the law to be conducted among students.²⁶ One county bar association in Pennsylvania has conducted student tours of the courts with lectures by judges on the functions of law.²⁷

The Bars of Utah²⁸ and Kansas²⁹ have engaged professional public relations consultants and inaugurated elaborate programs. Utah's two main objectives are: (1) To create understanding and appreciation in the public mind of the lawyer as an officer of the court and a craftsman of the law. (2) To impress the public with the wide range of services rendered by lawyers, especially those designed to avoid legal difficulties. Its panel discussion radio series featured the appearance of various judges, professors, and attorneys. Topics used in the series covered a wide range of subjects, including: (1) The parent's responsibility for his child's operation of the family car, (2) Property and tax aspects of a divorce, (3) A debtor's rights and exemptions, (4) A creditor's rights—the enforcement of a judgment, (5) Property rights of the emancipated woman, (6) Jury duty, (7) How a lawyer can assist in the purchase of a home, (8) The use of the trust device in estate planning, (9) Certain aspects of criminal law, (10) The state court system, (11) State adoption laws, (12) Relative advantages of corporation and partnership organization, (13) A lawyer's view of the legal profession.³⁰

22. Letter of Fred B. Hulse, General Chairman of the Advisory Committee of the Missouri Bar Administration, to the *INDIANA LAW JOURNAL*, Dec. 8, 1950.

23. See note 18 *supra*.

24. See note 20 *supra*.

25. 19 S. DAK. B. J. 55 (1950).

26. Michigan's Bar has done extensive work in the schools. See 29 MICH. ST. B. J. 48 (1950).

27. 21 PENN. B. A. Q. 331 (1950).

28. Letter of Ross Journey, of Ross Journey and Associates, Public Relations Counsel of the Utah State Bar, to the *INDIANA LAW JOURNAL*, Jan. 25, 1951.

29. See note 9 *supra*.

30. See note 28 *supra*.

The Minnesota State Bar Association also has an extensive public relations program in operation.³¹ This includes the use of television. And a weekly newspaper column entitled "It's the Law" is published without charge as a public service. Typical subjects are "If There's No Will There's No Way," explaining testate and intestate distribution, the requisites of a will, and the legal impotency of an unwitnessed "strongbox will"; and "Watch Legal Angles When Buying a Home," explaining earnest money contracts, the importance of a wife's signature, and the non-prepayment clause in a mortgage. In addition, over a million attractive pamphlets on similar topics have been distributed; some are of the question-answer type. One such pamphlet distributed by the Kansas Bar aims at clarifying common misunderstandings of the law, and is entitled: *16 Questions: A Quiz Game Based on the Law*. Several state associations have placed distinguished looking newspaper advertisements which advise consultation with a lawyer first. For example, one from the District of Columbia reads: "Are you . . . making a contract? adopting a child? making a will? starting a business? making a tax return? It's good business and common sense to consult a lawyer. . . ."³²

The Wisconsin Bar has available for broadcast thirty-four radio scripts, which are furnished to other associations on request.³³ In Oklahoma professional actors have been hired to transcribe several programs; examples of titles are "Duty of a Lawyer" and "The Case of the Young Widow."³⁴ One round-table discussion program by the Milwaukee Association is entitled, "John Doe Meets the Law."³⁵ And in Michigan, a motion picture film entitled "What the State Bar Is and What It Means to You" was produced as a supplement to public speaking presentations by lawyers.³⁶

Banks and trust companies, as the chart indicates, have been cooperative in advising the public of the importance of consulting a lawyer. This is done through statements made in their regular newspaper advertising copy, in pamphlets distributed to their customers, and in notices placed in bank buildings. One such notice posted in Wisconsin banks and in justice of the peace and notary public offices reads: "We do not practice law. . . . The practice of law has been limited by state law to duly licensed attorneys who are specially trained in their profession and who are subject to discipline of the courts. . . . We do not prepare . . . contracts, deeds, mortgages, notes, liens, wills. . . ."³⁷ In Utah, under the joint sponsorship of the Bar and the Banker's Association,

31. Letter of Bert A. McKasy, Executive Secretary of the Minnesota State Bar Association to the *INDIANA LAW JOURNAL*, Mar. 13, 1951.

32. Letter of James D. Mann, Executive Secretary of the Bar Association of the District of Columbia, to the *INDIANA LAW JOURNAL*, Dec. 15, 1950.

33. 22 *WISC. BAR BULL.* 115 (1949).

34. 20 *OKLA. ST. B. J.* 1228 (1949).

35. 22 *WISC. BAR BULL.* 8 (1949).

36. 29 *MICH. ST. B. J.* 48 (1950).

37. See note 15 *supra*.

a radio series of professionally dramatized programs was produced. Released under the copyrighted title "It Happens Every Day," each deals with typical legal situations. A booklet has been released in connection with the series.³⁸

CONCLUSION

The survey indicates that new enthusiasm is required immediately before the program instituted by the A.B.A. loses momentum. Perhaps if information were exchanged with increased velocity, enthusiasm would be spontaneous. The *Unauthorized Practice News*, which quarterly reports activities of bar associations over the country, provides a primary source of information.³⁹ It is believed that, in addition, correspondence among chairmen of state and local committees is essential to coordinate and make more effective the movement against unauthorized practice.

38. See note 28 *supra*.

39. See note 6 *supra*.

INDIANA LAW JOURNAL SURVEY OF BAR ASSOCIATION ACTIVITIES PURSUANT TO POINTS TWO AND THREE OF THE A.B.A.
PROGRAM AGAINST UNAUTHORIZED PRACTICE OF LAW

Alabama	Banks	Title Cos.	Organizations with whom the Bar has Agreements				Advertising Program			
			Accountants	Adjusters	Realtors	Underwriters	Others	State Bar	Local Bar	Business Groups
Arizona	S *	L						F	P	Banks & Trust Cos.
Arkansas									/	Banks
California	S *	S *	S *					F	F	Banks
Colorado	L							P	P	Banks-Title Co.
Connecticut	S ⁿ , L *	S ⁿ *						F		Banks
Delaware	S							P, R		Banks
Dist. of Columbia								P, R		Banks
Florida		*						P		Banks
Georgia	S	S ⁿ	S **	S	S ⁿ			P, R	P	Banks
Idaho								R		Banks
Illinois										
Indiana	L, S			S				P	P, R	Banks
Iowa	S ⁿ				S ⁿ				U	
Kansas										
Kentucky	No Answer	L							P	Banks
Louisiana	S ⁿ , L ⁿ								No Answer	Banks
Maine					S, L					Banks
Maryland									L	Banks
Massachusetts	No Answer								No Answer	Banks
Michigan		*		*	L					No Answer
Minnesota	L	S ⁿ						P, R		Banks
Mississippi								P, R, T		Banks
Missouri	L							R		

INDIANA LAW JOURNAL SURVEY OF BAR ASSOCIATION ACTIVITIES PURSUANT TO POINTS TWO AND THREE OF THE A.B.A.
PROGRAM AGAINST UNAUTHORIZED PRACTICE OF LAW—(Continued)

	Organizations with whom Bar has Agreements					Advertising Program				
	Banks	Title Cos.	Accountants	Adjusters	Realtors	Life Underwriters	Others	State Bar	Local Bar	Business Groups
Virginia								A		
Washington	S			S				P		Banks
West Virginia								R	P	
Wisconsin	S				S*	S	Collection Agencies	P	R	Banks
Wyoming	L ⁿ							R		

KEY

Agreements
S—Agreements on State Level
L—Agreements on Local Level
St—Negotiating agreements, State Level
Lst—Negotiating agreements, Local Level
*—Permanent Conference Group
**—Agreements of Questionable Success

Advertising

P—Printed (pamphlets, newspapers, etc.)
R—Radio
T—Television
F—None, for Lack of Funds
A—Program in Preparation
U—Type Unknown

Data presented in this chart was compiled from letters received from representatives of bar associations. These letters are filed in the office of the Indiana Law Journal, Indiana University School of Law, Bloomington, Indiana.