June 1968

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STUDENT NOTE

Practice of Law by Attorney-Accountant

The controversy surrounding the services and areas of work of the attorney-certified public accountant is not a new one, but lately it seems to be receiving increased attention. There have been numerous articles written on the subject, both in law reviews and other legal and accounting publications. There are naturally arguments for and against the dual practice. In the current literature the typical considerations have fallen primarily into the following categories: public interest, professional ethics, independence versus advocacy, and privileged communications. Also some writers have questioned the constitutionality of some of the limitations imposed upon the dual practitioner.¹

Most of these considerations do not really impose any limitations on the dual practitioner—they are merely justifications and denun-

ciations of a current situation which usually results from a rationalization of a previously decided position. The real problem arises when a small yet authoritative group such as the Ethics Committee of the American Bar Association unequivocally takes the position that in the public interest the dual practice of law and accountancy should be condemned as unethical. It is this ethical position that herein be considered.

In order to better understand the problems involved it is helpful to consider the history of the disputation existing between accountants and lawyers. A short survey of that history follows.

When the first federal tax statutes were enacted in 1913, taxpayers naturally turned to their accountants who were already preparing similar types of financial reports. The forms and procedures were relatively simple and the information needed to prepare the tax report was readily accessible to the accountant. For some twenty-five years thereafter, the accountants' monopoly in taxation was virtually unchallenged. Not only had the accountants proven their competence, but most lawyers generally regarded taxes to be mere bookkeeping and beneath their dignity. In addition many lawyers were unqualified to deal with the intricacies of taxation.²

As tax problems became more complex, an anomalous situation arose—non-lawyers were singularly interpreting and applying a complete system of statutory law. Statutes, even those dealing with taxation, do not exist in a vacuum, and courts in utilizing statutory interpretations from other legal areas were reaching decisions based on areas with which the accountant was totally unfamiliar. For example, if a business was prosecuted for violating anti-trust laws and convicted, it could not until 1965 deduct such expenses as ordinary and necessary. Then in Tellier v. Commissioner³ the court reversed this holding citing, of all things, the sixth amendment (providing for right to counsel in criminal cases). The court also cited the Criminal Justice Act and several court decisions that were not even indexed, let alone discussed, in the regular tax services.⁴ For this reason and perhaps others less savory, lawyers attempted to convince accountants that lawyers were better able to handle tax

³ 342 F.2d 690 (2d Cir. 1965).
problems. Naturally some accountants were skeptical and friction ensued.

Accordingly peace feelers were initiated and, in 1944, a National Conference of Lawyers and Certified Public Accountants was held. The purpose of the conference was to attempt to minimize the friction which was beginning to appear.6 The resultant reconciliation was short lived.

The renowned cases of Loeb,4 Bercu,7 Conway8 and Agran9 succeeded in placing certain restrictions upon accountants. Since the limits were virtually indefinable, it left the accountant subject to a certain amount of legal harassment. Another conference was held in 1957 which re-established the statements of cooperation previously iterated in 1951 by the National Conference of Lawyers and Accountants. Also a voluntary system was set up to handle any future disputes.10

However, that the controversy has still not ended becomes apparent when one reads the Bailey case decided in late 1966.11 The Court of Appeals of Kentucky found that an accountant, in filing petitions for review with the Kentucky Board of Tax Appeals was raising questions of statutory interpretation and constitutional law which pertained principally to legal issues rather than accounting problems. The court ordered a cease and desist instead of punishment and in addition made the following comment at 531:

Respondent is apparently so impressed with his legal ability that he not only has failed to employ his own counsel in the

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7 Lowell Bar Association v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943). Preparation of simple income tax reports, did not, by itself, constitute the practice of law. While the holding may seem pro-accountant, the implication was that anything more than the preparation of simple tax reports may be the practice of law.
8 In re Bercu, 273 App. Div. 524, 78 N.Y.S.2d 209 (1948). An accountant may not consider a legal question unless it was incidental to his employment as an accountant.
9 Gardner v. Conway, 224 Minn. 468, 48 N.W.2d 788 (1951). An accountant may not handle doubtful or difficult legal questions which, to safeguard the public, reasonably demand the application of a trained legal mind.
proceeding but declined to have counsel appointed for him. His brief in the Court constitutes an attack on the legal profession and purports to raise legal questions which properly should be presented by a person licensed to practice law.

This attack along with the admonition rendered by the court demonstrates the continuing vulnerability of the accountants' position.

During the same period a movement developed to stop the unauthorized practice of law. Organized bar groups initiated actions against those who they felt were practicing law without a license. Some of these groups were naturally over-zealous and, even where a legal foundation was lacking, the mere threat of a lawsuit by the organized bar was enough to prohibit future actions. Not to be overlooked was the factor of the court itself. Judges are lawyers (not accountants) and they are naturally apt to retain the loyalties and prejudices of their own profession and to give high value to the claims and qualities of their group. It is a difficult matter for the members of one group to resolve with complete fairness the conflict between their own group and the other group.

In order to avoid the consequences of a decision that a portion of their tax practice constituted the unlawful practice of law, it was expected that an increasing number of accountants would seek to become lawyers, especially when one considers the background of the judge hearing the case and the impetus of the organized bar behind an unauthorized practice movement. Then, too, the inextricable coalescence of law and accounting in tax practice required that not only must the accountant be thoroughly conversant with the tax law and a voluminous mass of judicial and administrative interpretations of the law, but also the tax lawyer must possess more than a rudimentary familiarity with the intricacies of accounting.

To summarize, the situation as created by the lawyers attempting to supervise their own profession, plus the natural overlapping of the fields of law and accounting, induced many persons to become qualified in both professions.

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There are currently more than 3000 persons who possess both a law degree and have passed the examination for certification in public accountancy. Seemingly for them the problem is solved. They cannot be accused of the unauthorized practice of law because they are licensed. However, this dual practice did not solve any controversies; it simply added a new one. Instead of being acclaimed by both professions as an answer to a difficult situation, the dual practitioner found himself attacked by members of both professions—especially the bar.

Formal Opinion 272 was issued by the Ethics Committee of the American Bar Association in 1946. The essence of the opinion was as follows. A majority of the committee was of the opinion that a lawyer, holding himself out as such, may not also hold himself out as a certified public accountant at any office without violating Canon 27, because his activities would inevitably serve as feeder of his law practice. A minority of the Committee, while agreeing that, as a practical matter, a lawyer could not properly carry on a considerable accounting practice and keep it independent of his law practice, nevertheless, found nothing in the canons which precluded a lawyer from attempting to carry on both professions, wholly independent of one another, at the same time but from a different office with different stationery and where in practicing accounting the lawyers would follow all the canons pertaining to lawyers.

It seems as if this opinion would be sufficient to deter any dual practice activities, but perhaps the minority opinion detracted from its weight. For some reason the Ethics Committee in 1961 reissued its previous statements in Formal Opinion 297. The opinion stated that, if a lawyer holds himself out as an accountant, he must not practice law or he will violate Canon 27 in that he will be using his activity as an accountant to feed his law practice. However, the opinion added that, if the lawyer elects to hold himself out as a lawyer, he will not violate any canon of ethics merely because in rendition of legal services he utilizes and applies accounting principles.

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16 Brent, Accounting and Law: Concurrent Practice is in the Public Interest, 123 J. OF ACCOUNTANCY 38, 41 (March, 1967).
17 It would seem that though the Committee urged lawyers to encroach upon the discipline of the accounting profession, they were quite unwilling to concede any encroachment on their own profession. Donnell, More Light Than Heat, 18 MERCER L.R. 309, 316 1987).
Informal Opinion 506, rendered May 31, 1962, declared it to be unethical for a lawyer-accountant to practice both professions at the same time in the same community even though conducted in different locations. Informal Opinion 565, rendered November 12, 1962, adds the statement that the use of separate letterheads will not justify practice as an attorney and an accountant.

It should be understood that the opinions are not necessarily correct interpretations of Canon 27. The failure to follow such directives is not grounds for disciplinary action; but it is true that the opinions do often carry great weight in state disciplinary proceedings.18

The position taken by the American Bar Association does not have unanimous approval. It is significant that Formal Opinion 297 has not been approved by the House of Delegates of the American Bar Association.19 The American Institute of Certified Public Accountants in 1946 refused to condemn the dual practice of law and accounting and has adhered to that position to the present time.20

Also, a recent study by the American Association of Attorney-Certified Public Accountants, Inc., (an organization which is committed to advancing the concept of dual practice) indicated that in 29 states concurrent practice is either affirmatively approved by the Bar Committee or is not regarded as an appropriate area of challenge in the public interest. Significantly two of these states acted in 1966 to reverse prior opinions opposing dual practice. In seven states the committees are undecided and in the fourteen remaining states, where Opinion 297 is favored, few have attempted to implement the opinion.21

More specifically, the New York County and City Bar Associations concluded that the dual practice and dual designation are entirely proper.22

18 H. DRINKER, LEGAL ETHICS 32 (1953).
20 Brent, Accounting and Law: Concurrent Practice is in the Public Interest, 123 J. OF ACCOUNTANCY 38, 39 (March, 1967).
22 Opinions of the Committees on Professional Ethics of the Association of the Bar of the City of New York and the New York County Lawyers Association, City Opinion 743, p. 447, County Opinion 388, p. 775, as cited by 9 WM. & MARY L.REV. 219, 238 (1967). This is the same bar which instituted the Bercu case supra note 6.
Other Bar Associations which have specifically rejected the contention of Opinion 297 are the Ohio State Bar Association,23 the Nassau (New York) Bar Association, The Hennepin County (Minnesota) Ethics Committee, and the Committee on Professional Ethics of the Idaho State Bar.24

Although it is difficult to surmise what the West Virginia court will hold, since no decisions on the question appears to have been rendered, the West Virginia Bar has made its position clear through Opinions of the Committee on Legal Ethics of the West Virginia State Bar.25 The Committee was asked to inquire through a complaint of the Grievance Committee of a local bar association that charged an attorney at the Bar with violations of the Canons of Legal Ethics. The Committee found from the facts that "the attorney was both an attorney and a certified public accountant and that he did use from his office stationery bearing both qualifications; that he did use the same office for his law practice and the accounting services . . . ." There was no question of whether this violated any Canon—it was assumed to do so.

In another opinion of the West Virginia Ethics Committee it was observed that, after the name of one law partner, C.P.A. was inserted on the letterhead of the law firm. The Committee felt the letterhead was improper and the firm discontinued its use.26

Given these two examples, it does not take much foresight to see that the Ethics Committee of the West Virginia State Bar will be in total agreement with Opinion 297 as promulgated by the American Bar Association Ethics Committee.

The ethical arguments against dual practice basically fall in to the following categories: the accounting business will inevitably "feed" the law business, it is the announcement of a speciality, and it is advertising. These will be discussed in order.

Feeding one's law practice seems to be a matter of degree. A lawyer can hold public office or conduct an insurance business or

an independent real estate business. But the concurrent practice of law and accounting is per se a violation even though the attainment of the accounting certification requires a much higher degree of competency than either that of the insurance or real estate agent.

All outside activities feed to some degree. If taken to its logical conclusion, the feeder argument would ban any activities of the lawyer even to the extent of participation in local civic or religious organizations. It has been submitted that the proper approach is the one used in all other areas—to require the lawyer to refrain from only uneasily feeder practices and discipline him if he does engage in such activities.

Both the accounting and legal professions encourage their members to reach the highest degree of efficiency and both prohibit them from admitting that, to reach this efficiency, it is usually necessary to specialize. The legal profession has hedged somewhat, allowing the patent attorney to hold himself out as such since 1951. The analogy has been made between the requirements for admission for the patent attorney and those of the CPA. It would appear as the same reasons for the exception of the patent attorney may also be applicable for the CPA.

The question of speciality itself is under some current criticism. A seminar held under the auspices of the American Bar Association came to the conclusion that, because of the growing complexity of the law, some method of certifying specialists should be developed as a means of aiding the public to secure competent legal services for particularized needs. Even now, specialization is de facto if not de jure. Every practitioner—either by choice or by consequence—narrows his practice and maintains his competence only in such fields as the practice he accepts requires.

Canon 27 specifically prohibits advertising and self-laudation. The question still must be asked, does one by identifying himself

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27 H. Drinker, Legal Ethics 227 (1953).
29 H. Drinker, Legal Ethics 216 (1953).
30 9 Wm. & Mary L.Rev. 219, 227 (1967).
33 Canon 27, ABA, Canons of Professional Ethics.
for what he is violate a code of ethics? If it be laudation, it is, as one author states, laudable laudation.\textsuperscript{34} It would appear that the attainment of the CPA certificate is actually raising the professional standards of the lawyer instead of lowering it. One can leave the name of a deceased partner on his door\textsuperscript{35} but one cannot identify the lawyer that still remains. It seems incongruous that the latter is advertising and the former is not.

There appear to be strong arguments in favor of the concurrent practice of law and accounting—maybe not in the view of the American Bar Association but at least in the public view. The speciality of taxation demands a full time performance and is ideally suited for one grounded in the theories of accounting and law. The dual practitioner can add the best of the two professions to arrive at highly efficient answers to difficult questions of tax law. A better approach to prohibit unethical conduct may be a case by case method rather than by blanket suppression. The machinery of state bar associations is set up to handle unethical situations on this basis and should be capable of hearing ethics cases in the area of concurrent practice as well as any other area. In this way the dual practitioner would survive on his own merit and it would be the public that would eventually determine his rise or fall.

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\textsuperscript{35} H. Drinker, \textit{Legal Ethics} 208 (1953).