

October 1967

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Howard J. Busbee, *Concurrent Practice of Accounting and Law: Public Interest or Private Gain?*, 9 Wm. & Mary L. Rev. 219 (1967), <https://scholarship.law.wm.edu/wmlr/vol9/iss1/12>

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CONCURRENT PRACTICE OF ACCOUNTING AND LAW: PUBLIC INTEREST OR PRIVATE GAIN?

INTRODUCTION AND THE PROBLEM STATED

The practice of law has been a time-honored profession among all countries for centuries, revered for the requisite skill and the men who have participated in its exercise. The practice of law includes

. . . doing or performing services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matters may or may not be depending in a court.¹

Accounting has only recently, perhaps within the last half-century, been credited with the attributes of a true "profession"; yet those practitioners who achieve the terminal distinction in accountancy, that of Certified Public Accountant, are publicly respected as a "professional man" to the same degree as the present day lawyer. Accounting has been defined by the Committee on Terminology of the American Institute of Certified Public Accountants as:

. . . the art of recording, classifying, and summarizing in a significant manner and in terms of money, transactions and events which are, in part at least, of a financial character, and interpreting the results thereof.²

It would logically appear that one man who has acquired the knowledge essential to the practice of both law and accounting and who is deemed so qualified by the respective bodies regulating admission to practice each profession would be a most welcome asset to the business community. Instead, the Attorney-CPA discovers that his practice in

1. *Eley v. Miller*, 2 Ind. App. 529, 34 N.E. 836 (1893). For various definitions of the practice of law, see Annot., 151 A.L.R. 781 (1944).

2. The voluntary professional society of Certified Public Accountants, [hereinafter referred to as the AICPA]. Reference in this paper to accountants and to the accounting profession is intended to refer only to those accountants who have qualified under their respective state laws as Certified Public Accountants and to the profession which they represent.

a dual capacity is specifically prohibited by the American Bar Association's Committee on Professional Ethics and receives only silent acceptance by the corresponding body within the AICPA.

This note will analyze the history of the relations between the attorney and the accountant, with the expectation that this may in part explain the present hesitation of some to recognize the Attorney-CPA as a qualified person to represent the interests of his client in both capacities. An analysis of the present grounds of objection to concurrent practice as well as arguments in support of concurrent practice will be useful in presenting the stand taken by the ABA and AICPA, and the reaction thereto, regarding this dual practice problem. Critical to this entire discussion is the ultimate question of whether the concurrent practice of law and accounting is self-motivated for private gain or primarily in the public interest.

In any such discussion, however, it would first be appropriate to summarize those situations in which an Attorney-CPA would be most accomplished and useful. Unless such a compilation can be made, the advocates of concurrent practice would be debating a moot controversy.

UTILITY OF THE ATTORNEY-CPA

The close interrelationship of law and accounting in almost every phase of personal and business activity makes these fields close working partners. One of the most vital situations in which their combination shows potential for better service to the client is estate planning. The regular and familiar knowledge acquired in the capacity of accountant allows for a useful analysis of such vital facts as insurance needs, valuation of liquid and fixed assets, and goodwill of the client's business attributed to his presence, which analysis is weighed in the light of state and federal law applicable to trusts, wills and taxation.

The usefulness of the Attorney-CPA in aiding a company to comply with various rules and procedures of governmental regulatory agencies is typified when the client is a company which is "going public". The registration statement required by the Federal Securities Act of 1933³ to be filed with the Securities and Exchange Commission includes a "narrative" section, normally completed by an attorney, and a "financial" section, usually the accountant's job to complete. The time and expense saved on such SEC engagements by employing the talents of but one

3. 74 Stat. 412, 15 U.S.C. § 77(b) (1933).

man to learn of the company's proposed structure, and thereby avoiding great duplication of effort, should be obvious.

Pension and profit-sharing plans can be successfully implemented by an Attorney-CPA because his day to day contact with his client permits a deliberate calculation of the company's ability to establish such a program with maximum business deductions under prevailing income tax law.

Other areas of assistance to clients which are best handled by a fiduciary with the skills of both professions include labor negotiations (representing the position of either union or management), mergers and reorganizations, establishment of creditors' agreements and other devices short of bankruptcy, claims for insurance losses (especially where prospective losses of business profits is involved) and any other litigation for which accounting knowledge is vital.

Perhaps no other field of work performed by both an accountant and an attorney better illustrates the natural affinity of the two professions than federal taxation. While both professions claim dominion over or at least equal right to the gray area of taxation between those parts which are clearly law or clearly accounting, it is nevertheless the obvious fact that the services of an Attorney-CPA would erase the jurisdictional dispute and ultimately provide better service to the public. It is within this federal taxation area that the legal profession has felt the most significant challenge to its source of clientele. The following relates the progression of that conflict between professions, which conflict is very possibly an underlying consideration in the pointed disapproval of concurrent practice by the ABA Committee on Professional Ethics. Despite all possible ethical considerations, the plain fear of "unfair competition" imposed by recognition of the Attorney-CPA could have been a very real motivation in the minds of committee members in issuing the prohibitive Opinions 272 and 297.⁴

THE HISTORY OF ATTORNEY VS. CPA

The kindling of the controversy between the practitioners of law and those in accounting was begun by the passage of the Sixteenth Amendment and the first federal income tax law in 1913. The friction between the two professions was felt early, especially respecting ap-

4. The essence of these opinions, discussed subsequently at length in section V, is that the attorney who is qualified also as a CPA is required to choose between the two professions and to hold himself out and practice only that chosen profession.

pearance before tax tribunals. In 1932 the first meeting was held between representatives of the American Institute of Accountants⁵ and the ABA regarding their conflicting roles in tax practice, but initially to discuss practice before the Board of Tax Appeals. This early cooperative effort was overshadowed by federal legislation in 1942 which permitted lawyers to practice for the Treasury Department without a qualifying examination, accountants not being accorded this same privilege. In 1944, a more formal organization of attorneys and accountants was founded; the National Conference of Lawyers and Certified Public Accountants (hereinafter referred to as the National Conference). Consisting of five appointees from both the AICPA and the ABA, with a co-chairmanship of one representative of each of the two societies, the National Conference has been the most successful attempt to delineate responsibilities between the two professions in the tax field.

Following the institution of the National Conference, the Secretary of the Treasury, under his delegated authority to prescribe rules and regulations governing the attorneys or other representatives of claimants before his department,⁶ issued Treasury Circular 230.⁷ By authority of that regulation, the CPA was given equal status with the attorney, in that both were allowed to practice before the Internal Revenue Service without a qualifying examination upon proof of good standing in their respective professions. Treasury Circular 230 did, however, contain the proviso that “. . . nothing in the regulations in this part shall be construed as authorizing persons not members of the bar to practice law.”⁸

Although most courts⁹ and the ABA¹⁰ recognize that the mere preparation of tax returns does not constitute the “practice of law,” the nature of questions raised and their answers given by accountants incidental to the preparation of the return has given rise to substantial litigation between factions representing local bar committees and the AICPA on the question of an accountant’s possible unauthorized practice of law. The most famous of these cases was *Matter of New York County Law-*

5. The AICPA was formerly known as the American Institute of Accountants until 1957 when the present name was officially adopted.

6. 23 Stat. 258, 31 U.S.C. § 1026 (1884).

7. 31 C.F.R. § 10.3 a (i), (ii) (1949), now renumbered as § 10.3 (a), (b) (1967).

8. *Ibid.*, § 10.2 (f) (1949), now renumbered as § 1031 (1967).

9. See Annot., 9 A.L.R.2d 797 (1950) and cases reported therein.

10. *Report of the Standing Committee on the Unauthorized Practice of Law*, 76 A.B.A. REP. 280, 283-4 (1951).

yers' Ass'n v. Bercu,¹¹ wherein the court applied the "incidental" test to the activities of a CPA. Bercu, found guilty on appeal of the unauthorized practice of law, had given an opinion as to the year in which city retail and use taxes were deductible on a federal income tax return, basing his opinion on court decisions and Treasury Department rulings that he had personally examined. In affirming the conviction, the court stated:

We must either admit frankly that taxation is a hybrid of law and accounting and, as a matter of practical administration, permit accountants to practice law, or, also as a matter of practical administration, while allowing the accountant jurisdiction of incidental questions of law which may arise in connection with auditing books or preparing tax returns, deny him the right as a consultant to give legal advice. We are of the opinion that the latter alternative accords to the accountant all necessary and desirable latitude and that nothing less would accord to the public the protection that is necessary when it seeks legal advice.¹²

A significant criticism of the *Bercu* case was that in its simplicity the test ignored the public interest as controlling, although alluding to the protection of the public in the opinion. Irrespective of being incidental to the preparation of a tax return, the layman was being permitted to resolve a legal question with no warranty of competence.

The Minnesota court, in *Gardner v. Conway*,¹³ rejected the "incidental" test of *Bercu* and formulated the "difficult or doubtful question of law" test. The defendant, although not a CPA, advertised himself as an "income tax expert", and gave advice on numerous complex legal situations posed by the preparation of an income tax return. Holding such activity to constitute the unauthorized practice of law, the court said:

When an accountant or other layman who is employed to prepare an income tax return is faced with difficult or doubtful questions of the interpretation or application of statutes, administrative regulations, and rulings, court decisions or general law, it is his duty to leave the determination of such questions to the lawyer.¹⁴

11. 273 App. Div. 524, 78 N.Y.S.2d 209, aff'd 299 N.Y. 728, 87 N.E.2d 451 (1948), 2 A.L.R.2d 787 (1948).

12. *Id.* at 526.

13. 234 Minn. 468, 48 N.W.2d 788 (1951).

14. *Id.* at 476. For further interpretation of the prohibition against the unauthorized

Although deterred in its initial efforts by the *Bercu* and *Gardner* decisions, the National Conference in 1951 promulgated the *Joint Statement of Principles Relating to Practice in the Field of Federal Income Taxation*¹⁵ for the consideration and guidance of the members of the legal and accounting professions. The basic premise of the *Joint Statement* is that the responsibility remains with the individual lawyer or accountant to determine when he has encroached upon the professional jurisdiction of the other practitioner, and to so advise his client in order that the client may obtain advice from the more competent authority.¹⁶ The main criticism aimed at the general rule involved is that practice before the Internal Revenue Service will inevitably involve the practitioner with the application of legal principles, irrespective of the initial nature of his engagement.¹⁷

GROUND OF OBJECTION TO CONCURRENT PRACTICE

The attack upon dual practice of law and accounting has been suggested above to be the outgrowth of the past conflict of the two professions, most notably in the field of federal income taxation. Of greater import, at least in the open arguments of those who oppose concurrent practice, are the ethical considerations involved in the dual "holding out" problem. Most often mentioned are the professional prohibitions against advertising, indirect solicitation, practice and advertisement of a specialty, and the formation of improper partnerships and contingent fees.

Advertising

The Canons of Professional Ethics of the ABA and the Code of Professional Ethics of the AICPA closely parallel each other in their prohibition of advertisement by the members of their respective services.¹⁸

practice of law contained in Treasury Department Circular 230, see *Agran v. Shapiro*, 127 Cal. App. 807, 273 P.2d 619 (1954). See also *Sperry v. Florida ex rel. Florida State Bar*, 373 U.S. 379 (1963).

15. The *Joint Statement* was published almost simultaneously in 37 A.B.A.J. 517 (1951) and 91 J. ACCOUNTANCY 869 (1951). The entire text is also reprinted in Note, *The Tax Practice Controversy in Historical Perspective*, 1 WM. & MARY L. REV. 18 (1957).

16. Levy & Sprague, *Accounting and Law: Is Dual Practice in the Public Interest?*, 52 A.B.A.J. 1110, 1115 (1966).

17. 25 J. TAXATION 184, 187 (1966).

18. Canon 27 states in part: "It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photo-

The implications of advertising legal services are clear. By self-laudation the lawyer may tend to increase litigation through the power of suggestion as to the availability of legal advice, and thus frustrate public policy. The advertising prohibitions appear more closely directed, however, to self-preservation of the integrity of the professions themselves. By allowing the practitioner to openly advertize for business, the criterion for selection of an attorney or accountant would shift from his professional skills to the most effective display of commercialism. But to apply the provisions of the Canons and the Code to the concurrent practice of law and accounting extends the prohibitions well beyond their clear meaning. The attainment of the CPA certificate is not lowering, but is in fact a raising, of the professional standards of the lawyer. The tenor of a dual holding out is far from the unseemly advertising at which Canon 27 is directed. That Canon was meant to preserve the lawyer's skills, never to withhold them from the public.¹⁹

While other "touting" practices of attorneys, such as a complete listing in the Martindale-Hubbell Law Directory and reference in stationery letterheads to out of state associates and deceased or former partners, are fully approved by Canons 27 and 33, the concurrent practitioner is condemned for "self-laudation" by merely engaging in both professions for which he is qualified. The result in interpretation of the Canons appears incongruous.

*Indirect Solicitation*²⁰

Opponents of concurrent practice maintain that such activity would also violate the respective prohibitions against solicitation of employment

graph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper." Consonant with the theme of Canon 27 are the prohibitions of Canons 20, 40 and 46.

Rule 3.01 of the Code simply states: "A member or associate shall not advertise his professional attainments or services." See also the opinions of the AICPA Committee on Professional Ethics, numbers 1, 2, 4, 9, and 11. The Code and AICPA opinions are reprinted in CAREY AND DOHERTY, *ETHICAL STANDARDS OF THE ACCOUNTING PROFESSION* (1966).

19. Goldberg, *Dual Practice of Law and Accounting: A Lawyer's Paradox*, 1966 DUKE L.J. 117, 125.

20. For an extended discussion of the aspects of indirect solicitation in the concurrent practice of law and accounting, see 19 LA. L. REV. 830, 833-4 (1959).

by lawyers and accountants.²¹ Since, the critics allege, the practice of accounting would serve as a natural "feeder" for the Attorney-CPA's law practice, the dual holding out of both professions is a *per se* solicitation of clients. There is substantial support for this position among textbook writers. In discussing the attorney's right to engage in an independent business, Drinker states:

There is, of course, nothing in the Canons to prevent [carrying on another business] as to an occupation entirely distinct from and unrelated to his law practice. Thus, no one would dispute the right of a lawyer to be a teacher, or a violinist or doctor or a farmer, or to sell rare postage stamps, provided he in no way used such occupation to advertise, or as a feeder to his law practice. . . .

Where, however, the second occupation, although theoretically and professedly distinct, is one closely related to the practice of law, and one which normally involves the solution of what are essentially legal problems, it is inevitable that, in conducting it, the lawyer will be confronted with situations where, if not technically, at least in substance he will violate the spirit of the Canons, particularly that precluding advertising and solicitation.²²

Authors on accounting ethics also maintain that in some situations the practice of a second profession may indirectly infringe the standards proscribing advertising and solicitation, and thus further violate the prohibition against activities incompatible with the occupation of public accounting.²³

When one considers the potential harm inflicted by concurrent practice due to indirect solicitation, however, the Canons and Code appear only vaguely applicable. The feeding aspect is merely a reward for a satisfactory engagement, and not the product of even indirect request for employment. Where the client has received competent professional advice, he should not be denied the service of the Attorney-CPA in either of the other professions in which the latter is qualified to practice. The extent to which one phase of law or accounting work can feed another phase in the same profession is evidence for the argument that a natural feeder is not a *per se* solicitation of business. The Canons and Code surely cannot be understood to prohibit an attorney or accountant from participation in local civic or religious organizations. Their applica-

21. Canon 27; Rule 3.02 and AICP Opinions 1, 9 and 11.

22. DRINKER, *LEGAL ETHICS* 221-2 (1953).

23. CAREY, *PROFESSIONAL ETHICS OF CERTIFIED PUBLIC ACCOUNTANTS* 150-151 (1956). See Rule 4.04 of the AICPA Code.

tion to the concurrent practice problem is overly harsh and arbitrary, and denies the client his right to know the full professional capacities of the Attorney-CPA. The proper approach should be the prohibition of only those unseemly feeder practices of the joint practitioner and absolve him of the condemnation of a *per se* unethical activity.²⁴

Practice and Advertisement of a Specialty

The legal and accounting associations encourage and assist their members to acquire the highest degree of professional ability in their chosen field, but simultaneously prohibit them from the advertisement of their services as a specialty.²⁵ Canon 27 allows the attorney to designate himself as a patent or trademark attorney or a proctor in admiralty, but no other differentiation from the rest of the body of lawyers is permitted to any other specialist in the law. The reason for this proviso to Canon 27 is that the patent or trademark attorney has received official recognition from some regulatory agency outside the ABA as having skills not within the competence of the average lawyer. The designation "Certified Public Accountant" is analogous to the recognition given the patent attorney or proctor in admiralty. All such practitioners are required to take a qualifying examination and all are subject to definite, ascertainable standards apart from the ethical Canons of the ABA. The requirements of admission for the CPA so closely parallel those of a patent attorney or proctor in admiralty that the inclusion of the CPA in the excepted specialties of Canon 27 merits serious consideration.

The real weakness in the contention that dual practice is the advertisement of a specialty is, however, that accounting is not a specialty in the law, nor is law a specialty in accounting; but each is a separate, identifiable profession capable of being practiced independently of the other. This distinction between specialization and identification was inferentially made by the National Conference when it included the following in its 1951 *Joint Statement*:

An accountant should not describe himself as a "tax consultant" or "tax expert" or use any similar phrase. Lawyers, similarly, are prohibited by the Canons of Ethics of the American Bar Association and the opinions relating thereto, from advertising a special branch of law practice.²⁶

24. *Supra* note 19 at 127.

25. See Canons 27 and 45, and AICPA Rule 3.01 and Opinion 5.

26. References to the *Joint Statement* are found in note 15 *supra*.

Thus, a dual holding out of law and accounting is not the advertisement of a specialty, but mere identification as a practitioner of two distinct professions.

Formation of Improper Partnerships

ABA Canon 33 specifically condemns the partnership of an attorney with a member of the laity where the partnership's employment consists of the practice of law. Canon 34 prohibits the division of fees with persons other than lawyers or with whom there has been no division of responsibility. Both Canons seemingly allow the separate partnerships of an Attorney-CPA with a law firm and an accounting firm. Yet the ABA Committee on Professional Ethics in Opinion 272 disallows such an arrangement. While admitting that Canons 33 and 34 do not prohibit separate partnerships, the committee nevertheless reaches over into the advertising restrictions imposed by Canon 27 as authority for the opinion.

The AICPA Code prohibits the practice of incompatible or inconsistent occupations with that of public accounting,²⁷ but the Committee on Professional Ethics has not specifically applied this Rule to the separate partnership of the Attorney-CPA.

The dual practitioner is thus effectively prohibited by at least the ABA committee from practicing both professions within separate partnerships. Subsequent opinions by this same committee have blocked attempts by the Attorney-CPA to practice even as a sole proprietor of his services.

Contingent Fees

The difficulty allegedly involved in dual practice because contingent fees are a permissible method under Canon 13 of establishing a lawyer's compensation, while prohibited by the AICPA Code,²⁸ is easily resolved. The clear purpose of Canon 13 is to allow a client with a compensable claim who could not otherwise afford legal counsel to secure an attorney's services without an initially large retainer. The Code provision respecting CPAs is to insure the maintenance of the independence of the CPA, which might otherwise be lost were his ultimate determination of his client's profitability to affect the fee received for the engagement. The initial contradiction in ethics is resolved by the proviso in the Code

27. AICPA Code Rule 4.04.

28. AICPA Code Rule 1.04.

that the restriction on contingent fees does not apply to cases involving taxation, where the findings are those of the tax authorities and not the CPA. In practically all areas other than taxation in which the Attorney-CPA would become involved, the line of demarcation between law and accountancy is clear, so that the public interest can be maintained by his selection of the proper ethical standard to determine the propriety of contingent fees.

Other Considerations

While the above arguments are frequently advanced as grounds for prohibiting concurrent practice, other objections are raised which, although not based on pure ethical standards, merit consideration.

(1) Perhaps the most often voiced of these non-ethical arguments is the fear of the great inconsistency inherent in concurrent practice—the attorney's advocacy opposing the independence of the CPA. This independent quality of the CPA is most evident in the performance of his attest function, which is his certification that based on his audit the dated financial statements of his client accurately reflect the company's financial position in accordance with generally accepted accounting principles consistently applied to this particular company. The need for the CPA's independence in his attestation is to protect the public which has come to rely on such financial statements for lending and investment purposes. Also evident is the fact that, beyond this certification engagement, the CPA can also be a strong advocate of his client's position, most notably in the fields of management services and taxation. In interpreting the accountant's responsibility for independence, the AICPA's Committee on Professional Ethics issued Opinion No. 12 in 1963. The opinion, after ruling that CPA advice rendered in connection with management services and taxation problems was ethically appropriate, established the test that only those relationships which to a reasonable observer "... might impair the objectivity of a member in expressing an opinion on the financial statements of the enterprise"²⁹ were improper.

Neither is the lawyer's role one of steadfast advocacy for the client's cause. Despite his duty of loyalty to the client, the lawyer is an "officer of the Court" and a "minister of the law," and is bound to exercise candor and fairness before the Court (Canon 22), is entitled to withdraw

29. The full text of Opinion 12 appears in CAREY AND DOHERTY, *supra* note 18 at 206.

from employment as attorney for good cause (Canon 44) and is ethically limited in the advocacy of his client's case (Canons 15, 30, 31 and 32).

Thus, the roles of both the accountant and attorney are positions of objectivity in the representation of their respective clients. The claim that dual practice is objectionable because of the "schizophrenic position"³⁰ of the Attorney-CPA is more theoretical than real. Should the dual practitioner be faced with an actual conflict of interest, it is not the client who will suffer but the practitioner who must in good conscience withdraw from the assignment.

(2) The matter of communications with the client is also a subject of concern for the Attorney-CPA. Ethically, members of both professions are bound to respect the confidences of the client and to preserve such communications even beyond the termination of employment.³¹

The problem for the dual practitioner arises, however, when the *legal* right of the CPA to withhold information received by the client is in question. Some fourteen states accord the accountant a legal privilege.³² Even in those jurisdictions where communications to an accountant have no legal protection, the privilege accorded the lawyer is not endangered by the mere fact that he is also an accountant. The usual privilege of attorney-client is applicable to the joint practitioner as long as he is consulted in his capacity as an attorney.³³ It is only where the Attorney-CPA is consulted as an accountant that the privilege is lost. It is therefore fallacious to argue that one who holds himself out to practice the two professions does a disservice to his client with respect to confidential communications; for if the privilege would have existed were the practitioner not an accountant, then it will continue to have legal sanction.

(3) The final objection often raised by opponents of concurrent practice is that by undertaking the task of engaging in the two professions, the Attorney-CPA will be proficient in neither because of the vast amount of knowledge required even to stay current in either profession. No lawyer or accountant is expected to maintain a daily working knowledge of all aspects of his respective profession. For this reason, most lawyers gravitate to one particular area in the law such as criminal law, personal injury cases or domestic relations, and remain prepared to acquire an *ad hoc* knowledge in other areas should the situation present

30. LEVY AND SPRAGUE, *supra* note 16 at 1113.

31. Canon 37, AICPA Rule 1.03 and Opinion 3.

32. WIGMORE, EVIDENCE § 2286 at 533, n.22 (1961) and Supp. 35 (1964).

33. 24 OHIO STATE L.J. 1, 20 (1963). See Annot., 38 A.L.R.2d 670 (1954).

itself. Similarly, the accountant may tend to limit himself to certain aspects such as cost accounting, auditing, or taxation. In the joint practice of law and accounting, where the high degree of interrelationship is conceded even by critics of dual practice, and where he tends to practice in a narrow field such as taxation or estate planning, the Attorney-CPA has the capacity to function with all requisite skills of both the accountant and the lawyer.

Dual qualification does not blunt the judgment of the practitioner, nor does it restrict his capacity for research and analysis required for any particular situation;³⁴ rather the individual becomes aware of many more facets of the problem through his diverse training. The answers to a client's inquiries can readily be found only when the issues are known. The Attorney-CPA's unique ability to discover these issues is made clear by the following statement:

But isn't it virtually impossible for any one person to continue to be well qualified in all the ramifications of law and accounting? Yes! Moreover, we assert that no one person can continue to be well qualified in all the ramifications of either one of the two professions. But we assert with equal confidence that the CPA-attorney is uniquely qualified to perform a distinctive service in the special areas of his choice. He does not profess to range over the total domain of two professions; he does profess special competence in a small sector of each, fortified by a broad view of both.³⁵

The public must be the ultimate determinant of the dual practitioner's ability to perform satisfactorily in both professions. The Attorney-CPA should be allowed to prosper or fail on his own accomplishments.

THE CASE FOR CONCURRENT PRACTICE

The grounds of objection which should allegedly bar the Attorney-CPA from concurrent practice are many and varied, ranging from ethical to practical bases. The arguments in support of concurrent practice are fewer in number and defensive in nature. The defensive quality of these arguments is attributable to the character of both professions represented by the Attorney-CPA. He will not take the offen-

34. Mintz, *Accounting and Law: Should Dual Practice Be Proscribed?*, 53 A.B.A.J. 225, 228 (1967).

35. Brent, *Accounting and Law: Concurrent Practice Is in the Public Interest*, 123 J. ACCOUNTANCY 38, 40 (1967).

sive to tout or claim superiority over his fellow members of the bar or public accounting; rather, the dual practitioner speaks out only to defend his choice to sharpen his professional skills. Many of these supporting arguments have been reflected in the preceding discussion. Other general contentions which can be made include the constitutionality of concurrent practice, the desirability of such a professional combination and the duplication of professional ethics imposed on the dual practitioner.

Constitutionality

Although no state can arbitrarily prohibit the practice of law, significant restrictions on that practice may be imposed where a reasonable relationship exists between the restriction and the undesirable activity sought to be enjoined.³⁶ The interest of the public in overshadowing the ethical standards of local bar associations was clearly reflected in two famous cases, *NAACP v. Button*³⁷ and *Brotherhood of Railroad Trainmen v. Virginia*.³⁸ Even though these cases were decided on first amendment grounds, they nevertheless indicate that the Court will not refuse to strike down limitations on the attorney's practice which violate the due process and equal protection clauses of the fourteenth amendment.³⁹

A denial of due process is alleged on at least three grounds:

- (1) An adequate alternative of continuing the control of a lawyer's conduct is available, without the severe limitations imposed by the prohibition of joint practice—that of prohibition only when actual and not merely potential ethical transgressions occur;
- (2) Attorney-CPAs are denied the opportunity to be heard on an issue which is clearly directed solely at them;

36. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957). *Konigsberg v. State Bar*, 353 U.S. 252 (1957). Goldberg, *supra* note 19, referring to *Sperry v. Florida ex rel. Florida State Bar*, *supra* note 14, suggests that the Attorney-CPA will be possibly insulated completely from state interference in certain areas such as federal tax practice.

37. 371 U.S. 415 (1963). The effort by Virginia to suppress the NAACP's encouragement of and provision for legal counsel for litigation to secure the constitutional rights of Negroes was held unconstitutional as a restriction of the first amendment right of free association.

38. 377 U.S. 1 (1964). Citing the *Button* case as authority, the Court held that the union's practice of encouraging litigation by railroad employees against the railroad for injuries received and recommending specific lawyers therefor could not be prohibited by Virginia.

39. Goldberg, *supra* note 19 at 138.

(3) The dual practitioners must either abide by the prohibitions against concurrent practice or risk serious disciplinary action by their local bar associations.⁴⁰

The denial of equal protection of the laws also appears in the sweeping prohibition by the ABA committee on professional ethics. The interpretations of the Canons by the committee have thus far only specifically excluded the joint practice of law and accounting. This in effect is the kind of invidious discrimination which *Morey v. Dowd*⁴¹ held to be an equal protection violation.

Desirability

The purpose of section I was to enumerate those situations in which an Attorney-CPA would be highly useful. The following discussion centers upon the reasons behind the joint practitioner's unique ability in those situations.

Because of the extensive training required for the practice of both law and accounting, the Attorney-CPA is prepared to analyze a problem in greater depth and with a dual viewpoint; that is, he is familiar with the routine operation of his client and his business on a non-crisis basis, while at the same time he has the capacity to assist the client in any unexpected legal adversity. The professions are mutually complementary. By virtue of his legal knowledge, the Attorney-CPA is aware of the pitfalls unknown to the laity, and as a result of the problem discovery-function of the CPA, he is able to effectively prevent his client from suffering because of his ignorance of the law. It would be extremely unfortunate, for example, that accounting procedures be established to provide for a pension plan that failed to qualify under the Internal Revenue Code at the end of the taxable year.

The time and financial saving incurred by the use of a joint practitioner should be apparent. Joint discussions between attorney and accountant would no longer be required to discuss their overlapping involvement in the client's affairs. The attorney would not have to acquaint himself on his initial engagement or refresh his memory on subsequent engagements, with the client's background, with which the accountant is always familiar.

40. *Id.* at 139-140.

41. 354 U.S. 457. See also Goldberg, *supra* note 19 at 140.

Professional Ethics

The ethical Canons of the ABA and the AICPA Code, as noted above, are strikingly similar in their prohibitions against advertising, solicitation, revelation of a client's confidences, inconsistent occupations, conflicting interests and self-designated specialties. These professional ethics are adopted by practically all state bar associations and boards of accountancy. Provisions for enforcement of the ethical standards and penalties for their violation are found in the by-laws of both the ABA and AICPA. Thus, the argument that the dual practice of law and accounting constitutes an ethical breach *per se* is paradoxical in its reasoning for the Canons of law are applicable to the joint practitioner in his capacity as a lawyer, and a separate code of ethics is applicable in his capacity as an accountant. That the ethical standards of either are automatically violated by concurrent practice is a *non sequitur*.

THE STAND ON CONCURRENT PRACTICE

Bar Associations

The position of the ABA Committee on Professional Ethics regarding the concurrent practice of law and accounting has been crystalized in a series of opinions from 1942 to 1961. In Opinion 239⁴² (February 21, 1942), the committee interpreted Canon 33⁴³ as prohibiting a partnership between a lawyer and a CPA to act as consultants in federal tax matters and to represent taxpayers before the Internal Revenue Service, and the Board of Tax Appeals. Opinion 269⁴⁴ (June 21, 1945), involving Canons 33, 34, 35, and 47, stated that a partnership between a lawyer and a layman accountant to specialize in income tax work and related accounting was permissible only if the lawyer ceased entirely to hold himself out as such and confined his activities strictly to such as were open to lay accountants. Opinion 272⁴⁵ (October 25, 1946), extended the prohibition of Opinion 269 to the practice of law and accounting by the same individual. The committee held in the former opinion that Canon 27 precluded a lawyer ". . . from holding himself out, even passively, as employable in another independent professional capacity."⁴⁶

42. ABA, CANONS OF PROFESSIONAL AND JUDICIAL ETHICS 475 (1956).

43. "Partnerships between lawyers and members of other professions or non-professional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law."

44. ABA, *supra* note 42 at 559.

45. *Id.* at 565.

46. *Id.* at 569.

A minority of the committee, however, found nothing in the Canons proscribing a lawyer from practicing both professions from separate offices and using different stationery. Any such dissent among the committee was absent when Opinion 297⁴⁷ (February 24, 1961), was issued. Dual practice was held an absolute violation of Canon 27⁴⁸.

The Virginia State Bar adopts a more lenient approach toward the dual practice problem. The Legal Ethics Committee held in 1943⁴⁹, consistent with ABA Opinion 269 issued the prior year, that the association of a lawyer with a firm of accountants to handle tax matters before the Treasury Department was unethical as a violation of Canon 33. Also deemed improper was the partnership of an Attorney-CPA in an accounting firm conjointly with the practice of law from the same office. The ethical basis for this latter prohibition was the fear of control of the attorney's services by the intermediary accounting firm⁵⁰. The state committee failed to concur in ABA Opinion 272, however, and ruled in 1950 that an attorney who is also a CPA, may practice both professions separately at the same time ". . . provided, of course he uses extreme care that there be no confusion as to the capacity in which he is acting at any particular time and that he conforms strictly to the ethics of both professions."⁵¹ The committee, in giving credence to the practice of both professions, failed to expressly prohibit the Attorney-CPA from holding out in his dual capacity as accountant and lawyer.

The latest Virginia pronouncement on the simultaneous practice question appeared in Virginia Opinion 62⁵². In the instant opinion the propriety of functioning as a CPA while in association with a law partnership was questioned. The committee admitted to the conflict of authority on the point, citing the permissive Opinion 22 in contrast to the recommendations of the Committee for Cooperation with the Virginia

47. *Id.* (Supp. 1964) at 8.

48. *Id.* at 11. A clarification of Opinion 297 is made in Opinion 305 (March 22, 1962) at page 28 of the 1964 Supplement.

49. VIRGINIA STATE BAR, OPINIONS, No. 2 (1965).

50. Canon 35 states in part:

"Intermediaries.

The professional services of a lawyer should not be controlled or exploited by any law agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client."

51. VIRGINIA STATE BAR, *supra* note 49, No. 23.

52. *Id.* at 65.

Society of Public Accountants favoring the rule that “. . . an individual should not simultaneously engage in the practice of law and accounting, . . .”⁵³ While forewarning the dual practitioner that he is “treading upon dangerous ground”, the ethics committee was not willing to rule the simultaneous practice as unethical *per se*, and held that the fact situation presented no improper relationships by the attorney.

The Virginia position on the problem of dual practice appears to be a “wait and see” attitude. The committee is hesitant to render a sweeping condemnation of the simultaneous practice, but hastens to note that this delicate situation will be scrutinized for possible actual unethical conduct. The committee, thus far, however, has not been squarely confronted with the propriety of a dual *holding out* although separate practice of the two professions is approved. By inference from the qualifications noted in Opinions 22 and 62 it seems clear that the committee will condemn such an identification already prohibited by ABA Opinion 297 should the issue ever arise in Virginia.

Accounting Societies

The official position of the AICPA respecting the problem of concurrent practice has remained unchanged for two decades. Upon simultaneous presentation of the problem to the ABA and AICPA in 1946 by the National Conference of Lawyers and CPAs, the ABA Committee on Professional Ethics issued its Opinion 272, discussed previously in this section. The decision of the AICPA expressed a contrary view:

In response to specific inquiry this committee has, in the past, expressed the opinion that the practice of law by a member of the Institute who was a member of the bar as well as a certified public accountant, would not be incompatible or inconsistent with the practice of public accounting. We are not passing upon the desirability of an individual carrying on the general practice of two professions simultaneously, but we do not consider such practice unethical. It must be recognized that in certain specialized branches of professional work, such as tax practice, in which questions of law and of accounting are frequently intermingled, an individual may combine the knowledge and skill of a lawyer and a certified public accountant with advantage to his client.⁵⁴

53. VIRGINIA STATE BAR, SIXTEENTH ANNUAL REPORT, 52.

54. *Official Decisions and Releases—Accountants and Lawyers*, 83 J. ACCOUNTANCY 172 (1947).

Professional accounting societies have not formulated any regulations regarding the problem of concurrent practice following the AICPA's negative response to the urgings by the National Conference that such practice be proscribed. Neither the American Institute's Code of Professional Ethics nor the numbered opinions of its committee on professional ethics prohibit an Attorney-CPA from holding himself out in his dual capacity or association in partnership with a legal firm. The only ethical restriction upon his activities would occur when his legal associates perform legal services outside the public accounting practice. In such a situation the CPA could not participate in the fees received for such an engagement without violating Rule 3.04 of the AICPA Code.⁵⁵

Authority of and Reaction to ABA Opinion 297

As the last in the series of ABA opinions on concurrent practice represents the most precise and sweeping condemnation by a professional organization of such activity, it is perhaps best at this time to survey the force of authority accorded and the critical reaction towards that opinion.

In view of the constitutional right of an attorney not to be prohibited from the practice of law without adequate justification⁵⁶, it is doubtful that an act of the legislature or a court's decision could constitutionally bar a CPA from the practice of law. As a statute or decision cannot make an illegal prohibition compulsory, *a fortiori* the interpretations of the Canon of Ethics of a voluntary professional organization, which lack the authority of law⁵⁷, are equally ineffective to prevent the concurrent practice of accountant and lawyer. Moreover, Opinion 297 does not represent the official policy of the ABA since the opinion has never been adopted as a resolution by its Board of Governors, House of Delegates, or membership at large. In fact, the Committee on Professional Relations reported to the ABA Board of Governors in 1965 that ". . . there is some question whether the language of the Canon of Ethics is as

55. ". . . Commissions, brokerage, or other participation in the fees, charges or profits of work recommended or turned over to any individual or firm not regularly engaged or employed in the practice of public accounting as a principal occupation, as incident to services for clients, shall be accepted directly or indirectly by a member or associate".

56. See section IV *supra* and the discussion of constitutionality as an aspect of the case for concurrent practice. See also Mintz, *supra* note 34 at 226.

57. Matter of Connelly, 240 N.Y.S.2d 126 (N.Y. 1963). See *Estes v. Texas*, 381 U.S. 532, 535 (1965). (A canon ". . . has of itself no binding effect on the courts but merely expresses the view of the [American Bar] Association.")

clear as it might be in dealing with [the dual practice problem]. For that reason, this committee has brought the matter to the attention of the Special Committee on Evaluation of Ethical Standards.”⁵⁸ Such a disclosure indicates that even the ABA feels a reconsideration of the policy behind Opinion 297 is warranted.

Reaction to the dual practice prohibition outside of the ABA has been more than cautious. Although support for the committee’s position may be found in periodical articles⁵⁹, the stand represented by Opinion 297 has been rejected by the great majority of state bar associations. In 1950, the New York City and County Bar Association⁶⁰ issued a joint opinion which supported the concurrent practice and holding out by an Attorney-CPA as ethically proper, provided that the joint practitioners “. . . adhere to the professional standards applicable to attorneys at law with respect to advertising and solicitation.”⁶¹ This opinion followed the issuance of ABA Opinion 272 and remains the rule in New York despite the later promulgation of ABA Opinion 297. The Nassau County (New York) Bar Association has also adopted the joint New York opinion. The Hennepin County (Minnesota) Ethics Committee subsequent to Opinion 297 refused to declare the dual practice and listings as ethically improper *per se*,⁶² despite the binding effect of the ABA Canons in Minnesota due to their adoption by the Minnesota Supreme Court. Similarly, the Idaho State Bar’s Committee on Professional Ethics maintains that:

An attorney who is also qualified as a certified public accountant may carry the designation “Certified Public Accountant” on his office door, his professional card, and on his letterhead; and may practice both professions from the same office, providing that he

58. 90 ABA REPORTS, 233 (1965).

59. One of the most recent articles supporting the position of Opinion 297 is that by Levy and Sprague, *supra* note 16. The authors are the co-chairmen of the National Conference of Lawyers and Certified Public Accountants, the organization which originally proposed that the ABA and AICPA adopt proposals forbidding the concurrent practice of law and accounting.

60. The New York County Bar Association was responsible for the initiation of proceedings against a CPA for the unauthorized practice of law in *Bercu*, *supra* note 11, which brought the controversy between professions into open conflict.

61. 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.

62. Hennepin County (Minnesota) Ethics Committee, *Opinion on Dual Practice by Attorneys and Certified Public Accountants* (May 28, 1964), as cited in Goldberg, *supra* note 19 at 136.

adheres to the professional standards applicable to attorneys at law with respect to advertising and solicitation.⁶³

A recent study conducted by the American Association of Attorney-CPAs, Inc., an organization dedicated to encouraging the concept of dual practice, reveals that dual practice is either approved or not regarded as an appropriate area of concern for the public interest by the bar associations of 29 states and the District of Columbia. Of significance is the fact that two of these states in 1966 reversed prior opinions opposing dual practice. In seven states the committees are undecided and the 14 or 15 states where Opinion 297 has been adopted, few have attempted enforcement of its provisions.⁶⁴

The distaste for Opinion 297 is widespread, and its unpopularity increases as the state bar associations and the public become more aware of the ability of the Attorney-CPA. As noted above, the opinion lacks support even in ABA quarters. Its approach is nearsighted and illogical and, consequently, it is submitted that the opinion be rejected in theory as well as in practice.

CONCERN FOR THE PUBLIC INTEREST

Opinion 297 in effect holds that the concurrent practice of law and accounting is a touting and advertising technique which serves to increase the financial success of the lawyer by the natural feeding of clients from his accounting services into his legal practice. For whose benefit are the ethical Canons of the American Bar Association? Clearly, these standards are meant for the protection of the public interest and not to serve as proctor over the financial devices of lawyers. This paramount concern in the Canons for the public is initially revealed in the Preamble, which states:

In America, where the stability of Courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration.

63. Idaho State Bar, Committee on Professional Ethics, Opinion No. 10 (February 11, 1959), published in *THE ADVOCATE* (Idaho State Bar Foundation), April, 1959, p. 4.

64. For a discussion of dual practice by Philip Brent, past president of the American Association of Attorney-CPAs, see reference *supra* note 35.

The Preamble to the AICPA Code reflects a similarly protective theme when it states that "(T)he reliance of the public and the business community on sound financial reporting and advice on business affairs imposes on the accounting profession an obligation to maintain high standards of technical competence, morality and integrity."⁶⁵

Such high regard for the public by both professions would be best fulfilled by the practical union of accountancy and law in the role of the dual practitioner.

This union would allow for the duplication, not the dilution of professional ethical standards. Should even the combined internal enforcement and penalty provisions of the ABA and AICPA fail to insulate a member of the public from the improper conduct of the Attorney-CPA, adequate legal remedies exist to recompense the client for the negligent handling of his personal and financial affairs.⁶⁶

There remain for the Attorney-CPA broad, untapped fields of public service. The investigation and solution of complex problems in taxation and financial crimes are indicative. The ideal of concurrent practice should, of course, be measured by the demands for performance consistent with the public interest, but incidental financial gains accruing to the joint practitioner should not be involved in that measurement.

CONCLUSION

Owing in part to a history of conflict between the professions of accountancy and law, the Attorney-CPA has been singled out as an inherently inconsistent practitioner, qualified to practice only one of two licensed professions. The anomalous argument supporting this situation belittle or ignore the usefulness of the joint practitioner. The ethical contentions made in support of the prohibitive American Bar Association opinions are strained in theory and rejected in practice.

Among approximately 280,000 lawyers and 90,000 CPAs, some 3,000 professional men and women offer service to the public in both capacities. A realistic attitude should be taken towards the joint practitioner. Concurrent practice is in the public interest, notwithstanding the interpretation of the Canons to the contrary. The proper approach is to prohibit improper or unethical conduct of the Attorney-CPA on a case

65. As found in CAREY AND DOHERTY, *supra* note 18 at 183.

66. For remedies against an accountant in the federal tax field, see Groh, 25 J. TAXATION 296 (1966). As to the attorney's liability, see Annot., 96 A.L.R.2d 823 at 883 (1964).

by case basis and not by an all-inclusive edict. While a blanket prohibition is not the answer to the dual practice problem, neither is an unregulated approval the proper substitute. Open opportunity for unethical activity is admittedly present, as in the practice of any individual lawyer or accountant, and continued supervision is not unwarranted. The machinery of state bar associations has proven capable of handling unethical situations *as they arise* and can continue to do so in the case of the concurrent practice of law and accounting.

In the final analysis the desirability and propriety of integrating the interdependent fields of law and accounting remains for public determination. As maintained herein, the Attorney-CPA should be allowed to prosper or fail on his own merits.

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