

October 1957

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Joseph V. Anderson, *The Tax Practice Controversy in Historical Perspective*, 1 Wm. & Mary L. Rev. 18 (1957), <https://scholarship.law.wm.edu/wmlr/vol1/iss1/3>

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# THE TAX PRACTICE CONTROVERSY IN HISTORICAL PERSPECTIVE

JOSEPH V. ANDERSON

Much has been written and said about the controversy between lawyers and accountants, but it has been the writer's observation that everything written or spoken in the last few years has dealt with only one small segment of the overall dispute. Few in either profession are aware of the circumstances surrounding the problem, nor are they aware of the history behind the present state of affairs. It is doubtful if many persons are fully cognizant of the full scope of the problem. For this reason, the writer has tried to give a documentary history, coupled with the more significant court decisions, and some explanation as to what the objects of the two professions are. This article is intended solely to explore what the problem is, how it came about, and what is being done about it.

"The unauthorized practice of law movement was formally organized by the legal profession about thirty years ago."<sup>1</sup> The necessity of such a movement was due to three factors: first, the individual invasion of the field of law by laymen; second, the institutionalization of certain phases of the field of law; and third, the employment of lawyers on a salary by laymen, or by corporations, with the laymen or corporations in one way or another trafficking in the employed lawyer's opinion or services.

This is the situation which confronted the organized bar at a time when it was attempting

. . . to raise the standards of admission to the profession and to strengthen and enforce a code of professional ethics. In its efforts to do so, it was greatly handicapped in the competition that young lawyers faced from various types of laymen or corporate institutions which were doing the kind of work that lawyers had customarily done.<sup>2</sup>

It was becoming harder and harder for young lawyers to get started in the profession and at the same time there were more

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<sup>1</sup> Maurice H. Stors, "The Accountant's Place in Tax Practice", p. 3, Papers presented at a Special Technical Session of the 76th Annual Meeting of the American Institute of Accountants, held in New York City, October 17-21, 1954.

<sup>2</sup> *Ibid.*

young persons being attracted to the law.<sup>3</sup> This situation gave birth to the unauthorized practice movement which in turn resulted in the prosecution of a great number of "laymen" for the illegal practice of law.<sup>4</sup> The courts were sympathetic with the movement and most of the prosecutions were successful, but in some of the cases, the courts felt the bar was seeking to go too far and they refused to punish the defendant.

Out of the flood of cases prosecuted, certain general principles have been established which have come to be known as the "law of the unauthorized practice of law." The following are some of the more important principles:

1. The practice of law is not limited to the actual participation in the conduct of litigation.
2. A laymen employing a lawyer to render legal services to others would be likely to be held engaged in the unlawful practice of law.
3. The drafting of legal documents such as contracts, wills, conveyances, mortgages, or giving advice with respect to the validity of such documents would be likely to be considered the practice of law.
4. The interpretation and application, or giving advice as to the effect of general statutes or court decisions, would likely be regarded as the practice of law.
5. Representation before judicial or quasi-judicial bodies involving formal pleadings and judgment of the competency of evidence would be likely to be regarded as the practice of law.<sup>5</sup>

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<sup>3</sup> The organized bar rightly felt that a strong and independent legal profession was essential to the preservation of the American system of justice, and a government of laws instead of a government of men. It was difficult, however, to build a strong and independent legal profession, when the rising of standards was impeded, and economic pressures were applied, by competition from non-lawyers in the lawyer's traditional field.

<sup>4</sup> This movement consisted primarily of the appointment by the various bar associations of committees whose function was to seek legislative enactments or court action to prevent non-lawyers from doing work which lawyers had customarily done.

<sup>5</sup> Note 1, *supra*, at 4. This list is not all inclusive, but is indicative of the nature of the problem.

Needless to say, the unauthorized practice of law movement was enthusiastically supported, particularly by the younger members of the bar.<sup>6</sup>

Accountants were affected first by the unauthorized practice movement. The accounting profession was invited to meet with the unauthorized practice of law committee of the American Bar Association in the middle of the 1930's. At that time, the complaint dealt with the preparation by accountants of legal documents such as contracts, trust agreements, corporate charters, by-laws, and indentures. It was admitted by the Bar Association at the meeting that the complaints dealt mostly with persons who were not certified public accountants nor members of the national or state professional organizations. Nevertheless, the American Institute Committee agreed with the American Bar Committee that it was improper for accountants to attempt to draft such legal documents and that members of the American Institute were to refrain from so doing.

At the first meeting, everything was handled on a very friendly basis and the American Institute appointed a committee to cooperate with and to continue conversations with the bar association.

As a result of the above meeting, the Virginia Society of Public Accountants at its meeting on May 20, 1938, adopted the following resolution:

Resolved, that the Virginia Society of Public Accountants, Inc., regards the writing and obtaining of corporate charters and the writing of contracts, partnership agreements, wills, trust agreements, deeds, and corporate by-laws and minutes by public accountants and auditors as outside the field and competence of such accountants and auditors and contrary to the best interests of the public, and hereby admonishes its members that they should decline any and all requests to render such services.

The American Institute distributed “. . . copies of this resolution to all state societies of certified public accountants.”<sup>7</sup>

Shortly after the first meeting, the Institute's committee was called to meet with the Bar's committee again. The meeting dealt

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<sup>6</sup> “*The Unauthorized Practice News*” is a bulletin published by the American Bar's Unauthorized Practice Committee to relate the news in the field of unauthorized practice.

<sup>7</sup> *Journal of Accounting*, September 1938, p. 154.

with complaints that accountants were doing legal work in the tax field. Discussion continued for sometime, after which the Institute's committee was presented with a statement of the Bar's position. This statement was unacceptable to the Institute which attempted to draft an alternative statement. While negotiations were continuing, the Bar committee issued a separate statement as to its conclusion in its annual report in 1938. This statement appears in full as follows:

### REPORT OF BAR COMMITTEE<sup>8</sup>

There is an obvious similarity between certain classes of business problems as to which lawyers are commonly consulted by clients and problems in which are required the advice and assistance of accountants. The identical question may be referred on one occasion to an accountant, and on another occasion to a lawyer, and on another to the lawyer and accountant jointly. Questions of accounting and questions of law are frequently intertwined in the same state of facts. Experience has shown that, in business problems involving questions of accountancy and questions of law, it is advantageous to engage both an accountant and a lawyer and to let them adjust the division of effort and responsibility. This procedure assures the benefit of each practitioner's skill and judgment as regards matters within his grasp.

It is not proper for accountants to prepare contracts, conveyances, wills, trust agreements, corporate charters, articles of incorporation, by-laws, stock subscriptions, minutes of meetings, or resolutions relative to the power, functions, securities, or business transactions of corporations.

These activities, and advising or counseling as to the legal effect or sufficiency of any such instrument or proceeding, constitute the practice of law.

It is not proper for an accountant and a lawyer to divide fees for services rendered by either of them. In any case in which they are associated for the same person, the compensation of each should be fixed by a separate contract with the employer.

The practice of law is based on a personal relationship between client and lawyer. The professional services of

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<sup>8</sup> Report by American Bar Association Committee on Unauthorized Practice of Law, submitted to American Bar Association at its Annual Meeting in July, 1938, at Cleveland, Ohio.

the latter must not be controlled or exploited by any intermediary lay agency, personal or corporate. It is therefore improper for an accountant to employ a lawyer to perform legal services for another.

Inasmuch as tax problems involve constantly both legal and accounting questions, the taxpayer's interests are generally adequately protected only when he engages the services of an accountant as well as a lawyer and arranges for their cooperation.

The regulations of the United States Treasury Department now in force, which permit lay agents to represent taxpayers in that department, forbid on the part of lay agents the solicitation of employment and also the drafting of conveyances for the purpose of affecting federal taxes, and prohibit the giving of advice to a client regarding the legal sufficiency of any such instrument or its legal effect upon a client's federal taxes, and declare further that the regulations shall not be construed as authorizing persons not members of the bar to practice law.

Attention is called to the basic principles that the giving of advice regarding legal rights and remedies which involve the application of rules of law to factual problems constitutes the practice of law, and that the representation of other persons before court or administration officer or agency of government in the assertion of legal rights and remedies likewise constitutes the practice of law.

Adherence to the principles stated above requires that whenever, in connection with the defense or assertion of a taxpayer's rights, there arise questions whether of substantive law or procedure, the solution of which requires the knowledge and skill of a lawyer, the decision upon the issue may not properly be made by an accountant.

It is the view of the committee that it is the practice of law to engage in any of the following activities:

1. To give advice regarding the validity of tax statutes or regulations or the effect thereof in respect of matters outside of accounting procedure;
2. To determine legal questions preliminary or prerequisite to the making of a lawful return in a lawful manner;
3. To prepare protests against tax adjustments, deficiencies or assessments;
4. To represent a taxpayer at a conference with administrative authorities in relation to matters outside of accounting procedure;

5. To prepare claims for refund of taxes;
6. To prepare petitions, stipulations, or orders incidental to the review of assessments by the United States Board of Tax Appeals or any like administrative tribunal;
7. To conduct the trial of issues before the United States Board of Tax Appeals or any like administrative tribunal.

The American Institute's committee found that although they were in agreement with much of the preliminary matter, ". . . they were in complete disagreement with the implications of the seven items relating to tax practice at the conclusion of the section dealing with accountants." It was decided to accept the Bar Association committee's invitation to meet with it at Cleveland on Monday, July 25, [1938], to discuss the matter further.<sup>9</sup>

At the meeting, the accountants' committee stated that the American Institute of Accountants could not accept the conclusions set out in the above quoted report arrived at by the Bar Committee with respect to practice by certified public accountants in tax matters.<sup>10</sup>

The two committees agreed to cooperate in the investigation of complaints as to alleged improper practice by accountants and to re-examine and clarify the conclusions expressed in the Bar Committee's report.

The American Institute's Committee, submitted a brief statement of its position on the relationship of the practice of law and of accounting, to the board of governors of the Bar Association. The statement of the American Institute Committee's position follows:

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<sup>9</sup> See Note 7, *Supra*, at 156. On the day appointed, representatives of the Institute's Committee and representatives of the New York, Ohio, and Virginia state accounting societies met with the full committee on unauthorized practice of the law of the American Bar Association.

<sup>10</sup> The chairman of the Bar Association reiterated that the Committee had received country-wide complaints regarding improper practice by accountants, mostly ones who were not certified nor members of the American Institute of Accountants. He went on to say that the conclusions expressed by his committee were necessarily general and were tentative in nature.

## OUTLINE OF RELATION BETWEEN THE PRACTICE OF LAW AND ACCOUNTING<sup>11</sup>

Although the accounting profession is much younger than the legal profession, it has grown rapidly during the four or five decades of its active history in this country, and throughout the period the association of the two professions has become constantly closer. Accounting, having evolved from bookkeeping, is naturally intimate with business practices which historically and necessarily are the basis of business law, and due to the increasing number of state and federal statutes, business itself and the accounting profession are surrounded by even more legal problems.

It is thus apparent that the two professions are closely interrelated.

In practice, they often work together in the interest of mutual clients in the contesting or settling of claims, tax disputes, and matters arising under the jurisdiction of government regulatory commissions. Business men recognize the wisdom of obtaining professional advice in order to avoid costly claims and disputes, and for this purpose they consult with both attorneys and public accountants. In many instances the attorney is called in at the suggestion of the accountant and vice versa.

Close as the two professions necessarily are, they are nevertheless fundamentally dissimilar. But as the courts themselves have more than once pointed out, we are often confronted with mixed questions of law and fact. Obviously, then, it is impracticable to formulate mutually exclusive definitions of the practice of law and of the practice of accounting or to draw a hard and fast boundary between all the activities of the two professions. In important respects, their activities necessarily overlap.

Typical of activities exclusively within the field of law are the trial of cases in the courts, the drawing of such documents as deeds, conveyances, wills, trust agreements, contracts, charters, articles of incorporation, articles of association, by-laws, proxies, indentures, etc. Typical of activities exclusively within the field of professional accounting are the examination of books of account and other corporate or business records pertinent thereto, the forming and expressing of expert opinion on financial statements prepared therefrom, the installation of book-

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<sup>11</sup> *Ibid* at 157.

keeping, cost finding, and budgetary systems, etc. As to each of these types of activity where the responsibility rests exclusively with one profession or the other, the responsible profession will nevertheless often find it advisable or necessary to consult with the other. A lawyer, in drawing an indenture, may require an accountant's advice as to a workable definition of 'current assets' and 'current liabilities'; an accountant in reporting on the position of a company, may require the opinion of a lawyer as to the financial significance of litigation in which the company may be involved.

Tax work is a field where the two professions overlap. As a specialist in accounts and accounting practice, the accountant is naturally called upon to prepare tax returns. When a tax dispute is carried to court the case must of course be handled by an attorney. Between these two extremes are such steps as discussions and conferences with field agents, review of agent's reports, preparation of protests, review of letters from the bureau in Washington, attending hearings before the bureau preparation of petitions to the Board of Tax Appeals, drafting and agreeing upon stipulations of facts with bureau, representatives, negotiations and compromises with members of the technical staff, and conducting trials before the Board of Tax Appeals. Long established rules of the Bureau of Internal Revenue permit qualified accountants to act as agents for taxpayers through all the steps within the bureau, and the rules of the Board of Tax Appeals have from the inception permitted certified public accountants, as well as members of the bar, to try cases before it.

There is such diversity in the nature of the facts and issues involved in different cases that it is impossible to lay down any rigid rule in these matters, but generally speaking the further the conduct of a case progresses along the above route, the more advisable it becomes for the taxpayer to have the services of a lawyer. Some taxpayers have lawyers associated with their tax matters from the inception; others may choose to have cases in the hands of accountants for settlement until and unless it is deemed necessary to have recourse to the court. The choice between these extremes of policy may depend not only on the amount involved in the case but also upon the nature of the facts and issues. From the point of view of either profession, the criterion is elementary. Whatever arrangements are in the best interest of the clients will in the long run prove to be to the best interests of both professions.

From the fact and considerations outlined above, it will

be apparent that while there are numerous important activities that pull property within the province of only one of the respective professions and should not be undertaken by the other, there are also many important activities in which the practice of the two professions necessarily overlap and where they must be ready and willing to consult and cooperate with each other in the best interests of their clients.

The Committees worked together in an attempt to formulate a joint statement of the Bar and the Institute until 1944 without success. In 1944, the National Conference of Lawyers and Certified Public Accountants was created. Its membership consisted of five members of the American Bar Association and five members of the American Institute of Accountants.<sup>12</sup>

After its creation, a number of meetings were held and a few resolutions adopted by the Conference, but progress was interrupted by initiation of the *Bercu*<sup>13</sup> case, by a New York Association of lawyers, without the issues involved in that case having been brought to the Conference table for discussion.

The *Bercu* case involved a certified public accountant who was called in by a taxpayer to advise him whether or not he could pay post-due sales taxes and compensatory use taxes for prior years in one year when it had a large income and then deduct them in its federal income tax return for that year. The accountant was not doing and had not done any accounting work for the taxpayer in the ordinary acceptance of accountant's work. He had nothing to do with the taxpayer's books or its tax returns. The only service he was to perform was to advise the taxpayer as to the view the tax authorities and ultimately the courts would take on the question involved.

In deciding the case, the court recognized the difficulty of drawing the line between law and accounting, but said that "An objective line must be drawn, and the point at which it must be drawn, at very least, is where the accountant or non-lawyer undertakes to pass upon a legal question apart from the regular pursuit of his calling."<sup>14</sup>

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<sup>12</sup> See Note 1, *supra*, at 5.

<sup>13</sup> In the Matter of New York County Lawyers Assn., 273 App. Div. 524, 78 N.Y.S.2d 209, Aff'd. without opinion, 299 N.Y. 728, 87 N.E.2d 451 (1948).

<sup>14</sup> *Ibid* at 219.

The court went on to say:

This does not mean, of course that many or most questions which may arise in preparing a tax return may not be answered by an accountant handling such work. But if the question is such a problem that an outside consultant, beside the regular accountant preparing the tax return, must be called in to do legal research of the kind which was necessary in this case, and to advise as to the none too clear if not obscure law, that consultant must be a lawyer.<sup>15</sup>

This is, in effect, a decision that the accountant may decide a question of tax law which is only incidental to preparing a tax return but he may not address himself to a question of law alone.

Following the *Bercu* case the next significant decision involving the accountant's practice of tax law was *Gardner v. Conway*,<sup>16</sup> a Minnesota case. It was an action for perpetual injunction from further engaging in the unauthorized practice of law and to have the defendant adjudged in contempt.

The facts were that a private investigator went to defendant's office to have his income tax return prepared; he informed the defendant that he operated a truck farm, that he had come to have his income tax return prepared, and that he needed help with certain questions. For a cash consideration, the defendant prepared the income tax return and gave germain professional advice for the determination of the following questions:

- (a) Whether the taxpayer, who himself had exclusive control of the operation of the truck farm was in partnership with his wife, who had contributed one-half of the purchase price, who helped with the work, and who received one-half the profits.
- (b) Whether the taxpayer was entitled to claim his wife as an exemption, since he had never been ceremonially married, though maintaining a common law marriage status.
- (c) Whether the taxpayer should file his separate return and advise his so-called common law wife to file a separate return.

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<sup>15</sup> *Ibid.*

<sup>16</sup> 234 Minn. 468, 48 N.W.2d 788 (1951).

- (d) Whether certain money expended on improvements of buildings on the truck farm was deductible from his earnings.
- (e) Whether a certain produce loss sustained by frost and subsequent flood was a deductible item.<sup>17</sup>

In holding the defendant, who was not a certified public accountant, in contempt, the court said:

Any rule which holds that a layman who prepares legal papers or furnishes other services of a legal nature is not practicing law when such services are incidental to another business or profession completely ignores the public welfare. A service performed by an individual for another, even though it be incidental to some other occupation, may entail a difficult question of law which requires a determination by a trained legal mind . . . In other words, a layman's legal service activities are the practice of law unless they are incidental to his regular calling; but the mere fact that they are incidental is by no means decisive. In a positive sense, the incidental test ignores the interest of the public as the controlling determinant.<sup>18</sup>

The court went on to say:

What is a difficult or doubtful question of law is not to be measured by the comprehension of a trained legal mind, but by the understanding thereof which is possessed by a reasonably intelligent layman who is reasonably familiar with similar transactions.<sup>19</sup>

The court qualified its remarks as to tax practice by saying that:

. . . in so holding that the determination of difficult or doubtful questions is the practice of law, it does not follow that the entire income tax field has been preempted by lawyers to the exclusion of accountants. The work of an accountant disassociated from the resolving of difficult or doubtful questions of law is not law practice.<sup>20</sup>

As to the particular case it held that:

. . . although the preparation of the income tax return was not of itself the practice of law, defendant, incidental to such preparation, resolved certain difficult legal ques-

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<sup>17</sup> *Id.* at 791.

<sup>18</sup> *Id.* at 795.

<sup>19</sup> *Id.* at 796.

<sup>20</sup> *Id.* at 797.

tions which, taken as a whole, constituted the practice of law.<sup>21</sup>

The *Bercu* case had held that a certified public accountant at least could deal with tax problems which arose in a tax return which he had been retained to prepare. In *Gardner v. Conway*, the *Bercu* holding was set aside and it held that a non-lawyer may not resolve "difficult questions of law" arising in connection with the preparation of a return.

Following the decision in *Gardner v. Conway*, the American Bar Association and American Institute of Accountants in 1952, adopted a Joint Statement of Principles Relating to Practice in the Field of Federal Income Taxation,<sup>22</sup> for the guidance of members of each profession. This Statement is presented below:

STATEMENT OF PRINCIPLES RELATING TO  
PRACTICE IN THE FIELD OF FEDERAL  
INCOME TAXATION<sup>23</sup>

*Promulgated by the National Conference of  
Lawyers and Certified Public Accountants*

*Preamble.* In our present complex society, the average citizen conducting a business is confronted with a myriad of governmental laws and regulations which cover every phase of human endeavor and raise intricate and perplexing problems. These are further complicated by the tax incidents attendant upon all business transactions. As a result, citizens in increasing numbers have sought the professional services of lawyers and certified public accountants. Each of these groups is well qualified to serve the public in its respective field. The primary function of the lawyer is to advise the public with respect to the legal implications involved in such problems, whereas the certified public accountant has to do with the accounting aspects thereof. Frequently the legal and accounting phases are so interrelated and interdependent and overlapping that they are difficult to distinguish. Particularly is this true in the field of income taxation where questions of

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<sup>21</sup> *Id.* at 798.

<sup>22</sup> See Note 1, *supra*, at 6.

<sup>23</sup> The Professional Relations of Lawyers and Certified Public Accountants, Bulletin issued in 1957 as a Joint Report by Committees of the American Bar Assn. and the American Institute of Accountants.

law and accounting have sometimes been inextricably intermingled. As a result, there has been some doubt as to where the functions of one profession ends and those of the other begin.

For the guidance of members of each profession the National Conference of Lawyers and Certified Public Accountants recommends the following statement of principles relating to practice in the field of federal income taxation:

1. *Collaboration of Lawyers and Certified Public Accountants Desirable.* It is in the best public interest that services and assistance in federal tax matters be rendered by lawyers and certified public accountants, who are trained in their fields by education and experience, and for whose admission to professional standing there are requirements as to education, citizenship, and high moral character. They are required to pass written examinations and are subject to rules of professional ethics, such as those of the American Bar Association and American Institute of Accountants, which set a high standard of professional practice and conduct, including prohibition of advertisement and solicitation. Many problems connected with business need the skills of both lawyers and certified public accountants and there is every reason for a close and friendly cooperation between the two professions. Lawyers should encourage their clients to seek the advice of certified public accountants whenever accounting problems arise and certified public accountants should encourage clients to seek the advice of lawyers whenever legal questions are presented.

2. *Preparation of Federal Income Tax Returns.* It is a proper function of a lawyer or a certified public accountant to prepare federal income tax returns.

When a lawyer prepares a return in which questions of accounting arise, he should advise the taxpayer to enlist the assistance of a certified public accountant.

When a certified public accountant prepares a return in which questions of law arise, he should advise the taxpayer to enlist the assistance of a lawyer.

3. *Ascertainment of Probable Tax Effects of Transactions.* In the course of the practice of law and in the course of the practice of accounting, lawyers and certified public accountants are often asked about the probable tax effects of transactions.

The ascertainment of probable tax effects of transactions frequently is within the function of either a certified public

accountant or a lawyer. However, in many instances, problems arise which require the attention of a member of one or the other profession, or members of both. When such ascertainment raises uncertainties as to the interpretation of law (both tax law and general law), or uncertainties as to the application of law to the transaction involved, the certified public accountant should advise the taxpayer to enlist the services of a lawyer. When such ascertainment involves difficult questions of classifying and summarizing the transaction in a significant manner and in terms of money, or interpreting the financial results thereof, the lawyer should advise the taxpayer to enlist the services of a certified public accountant.

In many cases, therefore, the public will be best served by utilizing the joint skills of both professions.

4. *Preparation of Legal and Accounting Documents.* Only a lawyer may prepare legal documents such as agreements, conveyances, trust instruments, wills, or corporate minutes, or give advice as to the legal sufficiency or effect thereof, or take the necessary steps to create, amend, or dissolve a partnership, corporation, trust, or other legal entity.

Only an accountant may properly advise as to the preparation of financial statements included in reports or submitted with tax returns, or as to accounting methods and procedures.

5. *Prohibited Self-Designations.* 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.

6. *Representation of Taxpayers Before Treasury Department.* Under Treasury Department regulations lawyers and certified public accounts are authorized, upon a showing of their professional status, and subject to certain limitations as defined in the Treasury rules, to represent taxpayers in proceedings before that Department. If, in the course of such Proceedings, questions arise involving the application of legal principles, a lawyer should be retained, and if, in the course of such proceedings accounting questions arise, a certified public accountant should be retained.

7. *Practice Before the Tax Court of the United States.* Under the Tax Court rules nonlawyers may be admitted to practice. However, since upon issuance of a formal

notice of deficiency by the Commissioner of Internal Revenue a choice of legal remedies is afforded the taxpayer under existing law (either before the Tax Court of the United States, a United States District Court, or the Court of Claims), it is in the best interests of the taxpayer that the advice of a lawyer be sought if further proceedings are contemplated. It is not intended hereby to foreclose the right of nonlawyers to practice before the Tax Court of the United States pursuant to its rules.

Here, also, as in proceedings before the Treasury Department, the taxpayer, in many cases, is best served by the combined skills of both lawyers and certified public accountants, and the taxpayer, in such cases, should be advised accordingly.

8. *Claims for Refund.* Claims for refund may be prepared by lawyers or certified public accountants, provided, however, that where a controversial legal issue is involved or where the claim is to be made the basis of litigation, the services of a lawyer should be obtained.

9. *Criminal Tax Investigations.* When a certified public accountant learns that his client is being specially investigated for possible criminal violation of the Income Tax Law, he should advise his client to seek the advice of a lawyer as to his legal and constitutional rights.

*Conclusion.* This statement of principles should be regarded as tentative and subject to revision and amplification in the light of future experience. The principal purpose is to indicate the importance of voluntary cooperation between our professions, whose members should use their knowledge and skills to the best advantage of the public. It is recommended that joint committees representing the local societies of both professions be established. Such committees might well take permanent form as local conferences of lawyers and certified public accountants patterned after this conference, or could take the form of special committees to handle a specific situation.

After the Statement of Principles, the most significant case in the field was decided, *Agran v. Shapiro*.<sup>24</sup> In this case, Agran, a certified public accountant, licensed to practice before the Treasury Department, was retained by one Shapiro in 1948. In connection with this employment, Agran prepared individual income tax returns for Shapiro and his wife for the years 1947 to 1950, inclusive.

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<sup>24</sup> 127 Cal. App. 2d Supp. 807 (1954).

In the 1948 return a deduction was claimed for a loss in the amount of \$43,206.56.

The loss had been incurred in this way: Taxpayers owned a building which they leased on July 19, 1946, to one Pritchard, a dealer in used cars, for a fixed rental of \$1,500 per month, plus 5 percent of Pritchard's net profits from operations in the building. On November 5, 1947, a new agreement was made under which the rental was restated at \$1,500 per month, plus 5 percent of Pritchard's net profits from four used-car lots operated by him at other locations. The Shapiros guaranteed the Bank of America against loss on all cars financed by and contracts discounted with the bank by Pritchard. Shapiro deposited \$115,000 with the bank in connection with this guaranty. Pritchard became insolvent, with the result that by December 31, 1948, the bank had charged the lessors' deposit with losses totaling \$43,260.56. With this loss deducted, the 1948 return showed a net loss, and Agran apparently filed applications for tentative carry-back adjustments to 1946 and 1947, and absorbed the balance of the net loss in the return for 1949.

The first revenue agent to examine the returns denied that the loss was a "net operating loss" and proposed a \$15,000 deficiency. After conferences with Agran, the revenue agent submitted his report which asserted a deficiency of \$6,280. At a later date another revenue agent entered the case and, after conferences with Agran, reduced the deficiency to \$200, which amount was based on points unrelated to the loss in question.

Agran submitted a bill for his services in the amount of \$2,000, saying on the face of the invoice that the services had saved the taxpayer in excess of \$6,000. (Actually it was a saving of slightly less than \$15,000 which was the first proposed deficiency.) Agran sued for his fee and it was awarded to him by the Municipal Court of the Los Angeles Judicial District. On appeal the Supreme Court of Los Angeles found that part of the services performed by Agran were the practice of law and remanded the case for retrial.

In its opinion the court recognized that it was within the accountant's function to prepare federal income tax returns except where substantial questions of law arise. In these instances, only a lawyer may determine such questions. The court treated the question of whether the loss was a "net operating loss" within the intent

of the revenue law as a substantial question of law. Also, the court stated that the returns were of such a simple character that an ordinary layman could have prepared them.

It is interesting to note that the court is applying the *Conway* rule and holding that the certified public accountant cannot decide a difficult or doubtful question of law even if it is incidental to the preparation of the return. It should be pointed out, however, that the questions considered difficult or doubtful in the *Conway* case were questions of general law whereas the questions considered difficult or doubtful in *Agran* were questions of tax law.

The *Agran* case probably received more attention and publicity than any of the other lawyer-accountant cases. Both the state and national organizations of the lawyers and accountants submitted *amici curiae* briefs and all were determined to carry the case as far as it may have proved necessary. It was argued by many observers that the accountants could not hope to benefit from such litigation, but the accountants countered, and logically, so it would seem, that they could not sit by and allow such a series of legal precedents to build up without a fight.

Fortunately, the two professions have reached at least a temporary settlement and have withdrawn from any further participation in the *Agran* case. In conjunction with their withdrawal from the *Agran* case, the following joint report was issued:

A JOINT REPORT BY COMMITTEES OF THE  
AMERICAN BAR ASSOCIATION AND THE  
AMERICAN INSTITUTE OF ACCOUNTANTS  
on  
THE PROFESSIONAL RELATIONS OF LAWYERS  
AND CERTIFIED ACCOUNTANTS<sup>25</sup>

Because of the inter-relationship of financial and legal aspects of the modern economy there sometimes is a basis for dispute as to whether a particular matter properly falls within the field of law or within the field of competence of certified public accountants. The Committee on Professional Relations of the American Bar Association and the Committee on Relations with the Bar of the

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<sup>25</sup> See note 23, *Supra*, pp. 3-6.

American Institute of Accountants believe than any such question that may arise between the two professions should be resolved by conference and cooperation. One of the principal fields in which such questions have arisen is Treasury practice.

In 1951 the American Bar Association and American Institute of Accountants adopted a Joint Statement of Principles Relating to Practice in the Field of Federal Income Taxation, for guidance of members of each profession.

On January 30, 1956, the Secretary of the Treasury issued a statement interpreting Treasury Department Circular 230 relating to practice before the Department. In this statement the Secretary mentioned the need for uniformity in interpretation and administration of the regulations governing practice before the Department and stated that the Department has properly placed on lawyers and accountants, under the Department's ethical requirements, responsibility for determining when the assistance of a member of the other profession is required. He cited with gratification, "the extent to which the two professions over the years have made progress toward mutual understanding of the proper sphere of each, as for example in the Joint Statement of Principles Relating to Practice in the Field of Federal Income Taxation."

In concluding his statement, the Secretary said that relationships of lawyers and accountants in Treasury practice would be kept under surveillance, so that, if necessary, the matter can be reviewed later to determine whether amendment of the regulations governing practice before the Department or other appropriate action is necessary.

Consideration of the public interest and the best interests of both professions seems, therefore, to require expansion of voluntary machinery for self-discipline by both professions and cooperation between them to enable differences between lawyers and certified public accountants as they may arise—whether in tax practice or elsewhere—to be resolved by conference and negotiations, and not by litigation.

To this end, the Special Committee on Professional Relations of the American Bar Association and the Committee on Relations with the Bar of the American Institute of Accountants have agreed that the National Conference of Lawyers and Certified Public Accountants, composed of members of the two committees, should serve as a joint

committee to consider differences arising between the two professions and disputes involving questions of what constitutes the practice of law or accounting.

The Joint Committee recommends the following procedures:

1. That with respect to the field of Federal Income Taxation, the two professions continue to adhere to the Statement of Principles, approved by the governing bodies of the American Bar Association and the American Institute of Accountants in 1951. It is recognized that the statement is a guide to cooperation and does not presume to be a definition of the practice of law or the practice of accounting.
2. That state organizations of the two professions consider the establishment in each state of a joint committee similar to the National Conference for consideration of differences arising between members of the two professions.
3. That before any state organization of either profession shall institute or participate in litigation or disputes involving differences between members of the two professions, or involving questions of what constitutes the practice of law or accounting, such differences and questions be referred to joint committees of state organizations of the two professions, where such committees exist, or to the National Conference.
4. That, in the interest of uniformity, state committees maintain close coordination with the National Conference; and if resolution of differences seems impossible at the local and state level, they be referred to the National Conference. Particularly in the early years, it would seem to be in the best interest of all concerned for the National Conference to participate actively in the consideration and settlement of disputes which might serve as guides and precedents for other cases.
5. That—again in the interest of uniformity—where joint committees at the state level are appointed to deal with any differences which may arise, they be limited, where possible, to one to a state, and their structure and procedure follow the pattern of the National Conference.

It is hoped and believed that resolution of specific cases as suggested above will in time provide a body of precedent which will come to serve as a guide to members of the

two professions. Such a body of precedent will, we think, prove of more practical value than attempts to find acceptable definitions of the fields of the two professions.

The efforts of the National Conference are not, of course, intended to be punitive in nature. Their objective will be to avoid conflict and to encourage and enable continuing cooperation between lawyers and certified public accountants in accordance with the ethical standards of the two professions.

It is hoped that this will prove to be a workable solution to this perplexing problem. Few, other than those who have worked so hard in committees, can appreciate the magnitude of the problem and the obstacles encountered. Therefore, it is with a great deal of interest that we wait and watch to see if the machinery which has been so meticulously organized to handle the lawyer-accountant dispute is adequate to settle the latest eruption between the lawyers and accountants. The writer refers to the recent move by the Kentucky Bar to have it declared to be the unauthorized practice of law to do any act toward the preparation of federal income tax returns.

If the test proves to be too great, and the machinery breaks down, one can only speculate as to what alternative will be pursued. Some of these alternatives are to again seek revision of the Treasury Department's Circular 230 relating to practice before the Department; special state or federal legislative enactments may be sought; or it may resort to the old method of case by case court litigation.

It is the opinion of the writer that the National Conference is more than adequate to deal with any dispute which may arise. But the mere formulation of procedure and machinery is insufficient in and of itself. It is going to require the cooperation and understanding of the membership of both the lawyers and accountants, and a sincere desire on the part of all in order to reach a peaceful solution to our differences. Then and only then will the client be properly served.