

*Is it safe to represent
a client on all matters
related to accounting practice?*

THE UNLAWFUL PRACTICE OF LAW?

by Richard B. Malamud, J.D., LL.M.

Accountants who practice in the fields of pension, estate or financial planning, income or estate and gift taxation, or litigation support run a risk of practicing law without a license. They are constantly analyzing legal issues for clients, such as whether a couple is legally married, whether a contract is a lease or a purchase, and whether a company is legally registered to do business in a particular state as an incidental part of tax preparation or planning.

Those who specialize in pension or estate planning run a risk of practicing law if they draft "legal" documents that are not reviewed by an attorney. Although auditors make legal determinations whenever they review bonds, mortgages, leases, warranties and similar documents to determine the legal affects of business transactions on financial statements, they probably are not practicing law since they do not provide legal advice to the client.

Possible litigation

The potential risk to a CPA is evident in a 1988 Minnesota case, *Cardinal v. Merrill Lynch Realty*, in which a real estate office was charged with practicing law without a license because it charged \$250 for drafting, responding and closing fees. The court stated that

this was the first time that such a charge was made in modern times. The court then held that the actions of the real estate company were merely incidental to its normal practice and therefore not the practice of law. However, three justices dissented and the company was forced to defend itself all the way to the Florida Supreme Court.

What is to stop other states from asking whether accountants or other professions, such as bankers, insurance agents, real estate agents and stock brokers, are practicing law, especially if they draft documents for their clients? Worse yet, these allegations may be contained in criminal rather than civil charges. Thus, not only can the accountant be charged with a misdemeanor or felony, but he or she may not be able to collect on an account receivable because the contract to provide an illegal service, the practicing of law without a license, is generally not enforceable.

Legal guidance

Is there a line of cases that demonstrates when the work performed by an accountant is considered practicing law? Unfortunately, there are few cases on this subject, and these are at least 30 years old and do not define "practicing law." But there is an explanation for this situation.

Faced with the problem of determining when an accountant practices law without a license, the American Bar Association (ABA) and the predecessor to the American Institute of Certified Public Accountants (AICPA) met in 1932 to discuss a proposal to limit practice in front of the Board of Tax Appeals, the forerunner of the Tax Court, to lawyers. Nothing was resolved, and in 1942, a Massachusetts Bar Association brought suit to prevent a company from preparing individual income tax returns (*Lowell Bar Association v. Loeb*). The court noted that "[I]t was not easy to define the practice of law." It held that the preparation of (simple) tax returns is not the practice of law. The court divided tax practice into three areas: 1- That clearly within the sole

competence of a lawyer; 2- That clearly within the sole competence of an accountant; and 3- That middle area in which the tasks may have significant legal consequences and yet be commonly performed by non-lawyers.

The problem with this case is that it did not provide guidelines for when an activity falls within the first area. In 1944, the ABA and the AICPA responded by passing a resolution stating that either lawyers or accountants could prepare tax returns, but that CPAs should not prepare legal documents such as partnership or trust agreements or similar technical agreements.

In 1947, a New York CPA was charged with practicing law without a license when he prepared a memorandum for a corporate client

that discussed whether a specific expenditure was deductible (in the *Matter of New York County Lawyers Association*). This memorandum was not part of a tax return engagement. The appellate court held that the CPA had decided a legal question. However, this alone did not mean that he had illegally practiced law. It stated that where advice is given on a legal issue and no other accounting work is performed, the accountant has practiced law without a license.

The court went on to say that if the advice had been incidental to the accounting work, such as during the preparation of a tax return, that it would not have been the illegal practice of law. The defendant pointed out that the sole difference whether the legal analysis is incidental to the

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"Do you expect the jury to believe that? And, more importantly, do you expect the viewers of the eventual TV movie of this trial to believe it?"

accounting work, was illogical. The court recognized this objection but did not find it controlling, stating that even if the advice is incidental, if the question is so involved and difficult that it goes beyond the knowledge of the accountant, advice should be obtained from a lawyer. This began what is known as the "incidental" and "involved and difficult" tests.

A test case

In a similar 1951 case, a private detective hired by the Minnesota State Bar was sent to a tax preparer to set a trap by asking several "legal" questions, such as could he claim an exemption for his common law wife even though there was no wedding (*Gardner v. Conway*). After giving the advice, the tax preparer was charged with the unauthorized practice of law. The Minnesota court rejected the incidental test and said that the nature of the question should determine whether a legal question was involved. The court then stated that laymen practice law only "if difficult or doubtful questions of law" are present that require the comprehension of a trained legal mind. Unfortunately, the court did not indicate how one is to know when a question is "difficult or doubtful." Possibly, it is the same as

pornography: As Justice Potter Stewart said in deciding *Jacobelli v. Ohio*, "I may not be able to define pornography, but I know it when I see it."

California got into the act in 1954. In the case of *Agran v. Shapiro*, an accountant challenged the IRS on the tax treatment of a loss carryback claim and successfully persuaded the IRS that the taxpayer owed \$200 rather than \$6,000. When suing the taxpayer for his bill, the court held the contract unenforceable because it called for the performance of the unauthorized practice of law, since the sole work performed by the accountant was an interpretation of the IRS Code and Regulations. The court also noted that this was a difficult and doubtful question.

In a very similar 1961 California case, the non-lawyer was permitted to collect for his service where he argued that he read the cases solely to determine the issue of fact, rather than law, to determine the proper accounting method rather than to render a legal conclusion (*Zelkin v. Caruso Discount Corp.*).

Finally, in 1963, the U.S. Supreme Court spoke. In *Sperry v. Florida* it held that the state could not enjoin a non-lawyer properly registered to practice before the U.S. Patent Office, even though such conduct constituted the practice of law without a license, since the federal agency was controlled by that agency's rules

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rather than the state bar's. Following *Sperry*, no state has attempted to prevent accountants from representing clients in front of the IRS. Even if such conduct is the unauthorized practice of law, the IRS in Circular 230 stated that CPAs may represent

clients in administrative proceedings. It is also interesting to note that the IRS has also stated that, "Nothing in (Circular 230) shall be construed as authorizing persons not members of the bar to practice law."

A joint statement

Although few, if any, cases have been brought against accountants since *Sperry*, the AICPA and the ABA released a statement on practice in the field of federal income taxation, published in the August 1982 *Journal of Accountancy*. In it they stated that the preparation of federal income tax returns is a proper function of a lawyer or a CPA. However, they assert, "When a certified public accountant prepares a return in which questions of law arise, (s)he should advise the taxpayer to enlist the assistance of a lawyer."

The statement goes on to say that whenever criminal investigation is present, a lawyer's advice should be obtained. It is interesting that a separate statement for estate planning is presented. Unfortunately, neither statement defines when an accountant is practicing law. It simply sets forth: "There are some legal situations in which a lawyer is usually not needed, such as the simple cash purchase of merchandise or the routine disposition of a ticket for over-time parking."

Present status

Under present law, the IRS permits an attorney, certified public accountant, enrolled agent, officer or full-time employee of the taxpayer, immediate family member (spouse, parent, child, brother or sister) or enrolled actuary to represent clients under a power of attorney. In addition, the United States Tax Court permits not only lawyers, but also accountants and others who have passed a qualifying exam given in Washington, D.C., to represent clients in judicial proceedings. More-

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friendship ties, and of a deep sense of bourgeois privacy and secrecy. They do not readily interact with "strangers," even if it is to their business advantage. Americans are accustomed to telephoning or writing to present themselves to unknown people, but this will not suffice in Europe where personal introductions are essential.

Such introductions can be provided by well-connected European colleagues, the company's banker, a trade association executive and even the American embassy, or mission, for introductions to government officials. Meanwhile, American executives are well advised to forget about "hitting the deck running" in Europe—and their bosses at U.S. headquarters should realize it too.

Class differences

There is something repugnant about stressing social class differences. Most Americans prefer to believe in the myth of classlessness and to emphasize the democratic and fluid nature of their society, notwithstanding obvious status distinctions in the United States. European bourgeois either deny their privileged social position or have learned to use it in subtler ways.

Socially ambitious people everywhere hope that good academic credentials, professional performance or higher incomes will open all doors to them; and they assume that "class" means "style." However, social standing still matters in Europe; and one has to understand social distinctions, before condemning them, in order to operate effectively within their context. □

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over, virtually no reported cases have been brought in recent years against accountants for the unauthorized practice of law.

Does this make it safe to represent your client on all matters that may be related to your accounting practice? Maybe not. As recently as 1990, the Florida Supreme Court rejected an advisory opinion concerning the preparation of pension plans by non-lawyers. The proposal stated that non-lawyers may promote, market and sell pension plans so long as they do not hold themselves out as attorneys. The non-lawyer may also discuss the various types of plans available to the employer under ERISA, but it went on to assert that the drafting of the plan documents clearly constitutes the practice of law. Tax return filings required by ERISA may be prepared by an accountant, the opinion said.

In 1992, the Supreme Court of South Carolina rejected a similar proposal that would have prohibited CPAs from the practice of estate planning and income tax services other than preparation.

No precise definition

Prevailing law can be summarized by a statement made by the New Jersey Supreme Court in 1986: "The practice of law is not subject to precise definition...Therefore, the line between permissible business and professional activities and the unauthorized practice of law is often blurred. In cases involving an overlap of professional disciplines we must try to avoid arbitrary classifications and focus instead on the public's realistic need for protection and regulation."

Holding out to the public

Looking at all these opinions, there may be a limit to what services an accountant can provide to a client. What should accountants do to protect themselves from being charged

with the unauthorized practice of law? Don't ever hold yourself out or imply that you are a lawyer or that you practice law. Rather, if you have the proper credentials, hold yourself out as an accountant, a tax preparer or as an estate or financial planner. If you draft legal documents for clients, even simple ones, advise your clients that you are not practicing as an attorney and that they should review the documents with their attorney. This holds even if you are admitted to the state bar but are practicing as a CPA.

If a court is required to decide a

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practicing without a license case, it should take into consideration that laws which prohibit the unauthorized practice of law were passed in order to protect the public from the unscrupulous and the incompetent. So long as an accountant practices only in the areas of taxation, estate planning, pensions and other areas within his or her field of expertise, a good case can be made that the state has authorized the accountant to perform legal work incidental to the work for which the CPA's license was issued.

Clearly, the AICPA and the ABA should define the unlawful practice of law. It is not enough to say that lawyers should be consulted whenever difficult legal questions are present. What is needed are some specific examples, so that accountants will know in advance if they are practicing law rather than accounting. □

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