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Statutes and Cases Concerning Unauthorized Practice of Law in Colorado

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Calendar

December 1—Denver Bar Association regular monthly luncheon meeting, 12:15 P.M., Chamber of Commerce dining room.

December 13—Denver Bar Association institute on taxation, University of Denver Law Library.

January 5—Denver Bar Association regular monthly luncheon meeting, 12:15 P.M., Chamber of Commerce dining room.

Statutes and Cases Concerning Unauthorized Practice of Law in Colorado

By WILLIAM RANN NEWCOMB

Of the Denver bar, member of the Denver Bar Association Committee on Unauthorized Practice of Law. In April, 1947, the committee held a meeting and received reports of instances of unauthorized practice. It then requested all members of the bar to report to it any further instances of unauthorized practice coming to their attention. There having been some confusion in the past as to what such a committee might be able to accomplish in stopping unauthorized practice, a member of the committee prepared this memorandum so that the committee would know what might be accomplished and in which fields of activity it might meet the greatest success.

The author of this memorandum has been asked by the chairman of our committee to study and submit a memorandum on the Colorado statutes and cases concerning the unauthorized practice of law in Colorado to the end that this committee may proceed with its work in an enlightened manner.

It appears that activities by laymen which attorneys consider to be the unauthorized practice of law break down into four general classifications with, of course, some persons engaging, in particular cases, in one or more activities. They are as follows:

1. The misrepresentation by a layman that he is an attorney at law.
2. The performance by a layman of legal services as a practice or business.
3. The holding out by a layman that he performs legal services.
4. The performance of legal services by a layman, not as a practice.

It is my intention to take up each of the aforementioned classes and analyze the Colorado law in relation thereto.

1. The Misrepresentation by a Layman That He Is an Attorney at Law

> "Any person who shall, without having a license from the supreme court of this state so to do, advertise, represent or hold himself out in any manner as an attorney, attorney at law, or counsellor at law, or who shall appear in any court of record in this state to conduct a suit action, proceeding, or cause for another person, shall be deemed guilty of contempt of the supreme court of this state and of the court in which said person shall so appear, and shall be punished therefor according to law; provided, that nothing herein contained shall prevent the special admission of counsellors, residing in other states, as provided in the next succeeding section of this chapter."

The cases under this particular section, which was adopted in 1905 and appears in the Session Laws for that year at page 157, are very clear to the effect that the Colorado Supreme Court will, when such a case is presented for its consideration, punish the wrong-doer for contempt.

People ex rel. Colorado Bar Association vs. Erbaugh, 42 Colo. 480, (1908). In this case, the defendant had printed and distributed cards bearing the information, "Charles O. Erbaugh, Attorney," and had also at one time maintained an office, the door of which bore his name, and under the name the words "Attorney at Law." The Colorado Supreme Court held, with respect to the cards, that the commonly accepted meaning of the word "attorney" is "attorney at law" within the meaning of the statute. The court said that since this was the first case arising under the statute, it would impose no penalty, but required the defendant to state fully and under oath within thirty days the extent to which he intended to obey the statute.

People ex rel. Colorado Bar Association vs. Ellis, 44 Colo. 176, (1908). In this case, the defendant had been admitted to practice in Kentucky and New Mexico, and took up residence in Colorado where he filed an application for admission to the Bar. Upon the advice of a district judge in the county where he was residing that he was authorized to do so even though not formally admitted, he undertook to commence an action in a court of record on behalf of a client and performed other legal services. The court found him guilty of violating the statute, but imposed no penalty on the ground that his violation was unintentional and that the court felt that he had acted in good faith.

People ex rel. vs. Norton, 44 Colo. 253, (1908). In this case, the defendant had been admitted in another state and came to Colorado and formed a partnership for the practice of law while his admission was pending. The partnership distributed card announcements in which they represented that they were attorneys at law, and the door of his office bore the same legend.

His application for admission to the bar was rejected, and in his answer to the information, filed in this case, he stated that he had ceased the practices complained of although it was pointed out that he did not state when he had ceased. The court found him guilty of violating the statute and imposed a $100.00 fine or committment to jail.

The People ex rel. vs. Taylor, 56 Colo. 441, (1914). In this case, the defendant's name had appeared in the telephone books, on his business cards, and his office door as "George F. Taylor, Lawyer;" the court held that the word "lawyer" clearly came within the prohibition of the statute, and fined the defendant $100.00. This case, however, is interesting in that the court, for the first time, refers to the authority of the Supreme Court, under the rules for admission to the practice of law, and the authority of the Supreme Court to enforce its rules by contempt proceedings. The court refers to chapter 9 of the Revised Statutes of 1908, which are the same provisions presently contained in 1935 CSA, chapter 14, sections 1 through 4. The court stated as follows, in language pertinent to prosecuting other classes of laymen engaged in the unlawful practice of law:

> "By virtue of these provisions this court has adopted rules providing for a committee of law examiners, the period which applicants must have studied, either in the office of a practicing attorney or attendance at a law school approved by the committee, and other general educational qualifications of applicants for admission to the bar; that they must be of good moral character and that such applicants must pass an approved examination by the committee; and satisfy the committee that their moral character is good, before they will be admitted to practice law in this state.
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> "These rules are in effect an order of this court that no person shall practice law in this state except upon a compliance with such rules and the laws governing the admission of attorneys, the main purpose of which is to protect the public from being damaged through entrusting their legal business to incompetent and improper persons claiming to be licensed attorneys, who in fact, are not. *Any person engaging in the practice of the law in this state* is bound to take notice of this order and if he violates it by failure to comply with the prescribed requirements which must be complied with before he is entitled to hold himself out to the public as licensed to engage in the general practice of the law, he is guilty of contempt, the same as any other person violating an order of court, of which he is bound to take notice."

The People ex rel. Colorado Bar Association vs. Humbert, 86, Colo. 426, (1929). The defendant was a disbarred attorney, but continued to allow his name to appear in various directories under the heading of "attorney at law." The court found him guilty of violating the statute and he was sentenced to jail for thirty days. The court added, by way of dicta, the following interesting language:

"It is doubtful if this (statute) adds anything to prior law. In the absence of statute, it would seem clear that one falsely represented himself as an officer of this court thereby committed a contempt of the court."

The People ex rel. Attorney General vs. Thomas, 87 Colo. 547, (1930). In this case, the defendant who had been admitted to the bar in Missouri, but had not been admitted in Colorado, instituted an action on behalf of a client and also advertised in various ways that he was a "lawyer." He was found guilty of violating the statute and was given the option of paying a $50.00 fine, or being committed to jail.

It is submitted that the foregoing authorities indicate very clearly that where an unauthorized person holds himself out as being an attorney at law, or an attorney, or a lawyer, when he is not, the Colorado Supreme Court will find him guilty of contempt and will punish him unless there are extenuating circumstances. This class of cases should furnish no real difficulty to our committee.

2. The Performance by a Layman of Legal Services as a Practice or Business

This particular type of problem is probably the most serious with which this committee must deal. It directly concerns the activities of real estate men, collection agencies, notaries public, banks, accountants, "tax advisers," "estate planners," bookkeepers, and various and sundry other laymen who actually render services of a legal nature as part of their business or profession. It seems clear that the provisions of the statute referred to in the first classification above do not govern the activities of these persons who do not hold themselves out as being lawyers, but nevertheless usurp the business and professional prerogatives of the lawyer.

The first case in Colorado dealing specifically with this type of problem was *The People ex rel. Committee on Grievances of the Colorado Bar Association vs. Denver Clearing House Banks,* 99 Colo. 50, (1936). In this case, the Committee on Grievances commenced an original proceeding in contempt charging the Denver Clearing House Banks with practicing law. The banks answered fully and admitted facts which permitted the conclusion that the banks *as a practice* (1) drafted wills wherein they were named as executors or trustees and gave legal advice to the testators with respect thereto; (2) drew living trust indentures and life insurance trust agreements in which they were named as trustees and gave legal advice to the grantors of such documents. In both of these classes of cases, the testators or grantors did not have independent legal advice. The court found that these acts had been performed by the trust officers of the banks, who were generally members of the bar, but who acted in these matters on behalf of the banks.

The court held, with respect to these facts, that corporations cannot practice law, and, in addition, that,

" 'practice of the law' is not limited to practice before the courts; 2 RCL, page 938, sec. 4. But under all attempted definitions, it includes drafting of documents which of necessity must be presented to, and their legality passed on by, the courts. We think the drawing of wills, *as a practice*, is the practicing of law, and this for three reasons: First, because of the profound legal knowledge necessary for one who makes a practice of this work; second, because all these instruments, before they become effective, must be filed in and administered by a court; and third, because what we consider the weight of authority so hold. The People ex rel. vs. People Stockyard's State Bank, 344 Illinois 462, 176 NE, 902; and other citations." (Italics the authors).

The court also held that the other types of documents referred to above constituted the practice of law for the same reasons. The court ordered the banks to pay the costs of the proceeding and said that since the Grievance Committee was apparently more interested in settling the law rather than punishing the banks, it made no other order with respect to damages or injunctions; however, the court said, in order to settle the law and avoid similar controversies in the future, it had adopted a rule effective September 1, 1936, which read as follows:

" 'Practicing law', forbidden to persons not thereto duly licensed, is not limited to practice before the courts. Corporations shall not practice law. The practice of drafting wills, living trust indentures and life insurance trust agreements is the practice of law and counsel for executors and trustees named therein may not act as counsel for their testators or creators."

This case is extremely important to the members of the committee, and, indeed to all attorneys in Colorado, since it demonstrates that the Colorado Supreme Court has authority to define what constitutes the practice of law in various areas of action, and to establish rules with respect thereto, the violation of which would constitute contempt. This seems to be true even in the absence of statutory authority. It would appear, therefore, that a practical method of approach by this committee could be to submit to the court from time to time cases which would require rulings on various types of activities by laymen. This is the only Colorado case where this particular problem was specifically and clearly presented. The other cases which I shall refer to below and which have been said to be disastrous to the cause of the attorney can, I believe, be distinguished on many grounds. This brings us to the third classification.

3. The Holding Out by a Layman That He Performs Legal Services

There are three classes under this heading that must be considered together. They are *People ex rel. Attorney General vs. Kinsey*, 101 Colo. 392, (1937); *People ex rel. vs. Wicks*, 101 Colo. 397, (1937); *People ex rel. vs. Bennett*, 101 Colo. 403, (1937).

In each of these cases the defendant was a notary public and advertised or allowed his name to appear in juxtaposition with the phrase "legal documents," or, as in the Wicks case, "Legal Papers Made. Deeds, trust deeds, mortgages, chattel mortgages, releases, extensions, affidavits, contracts, and wills." The court pointed out in connection with such advertising by a notary that the language could be equally consistent with the lawful authority of a notary in making declarations and protestations, taking affidavits and depositions and witnessing signatures, etc. The court pointed out in all three cases that it had not been favored with a brief on the questions of law involved by the attorney general and that there was no evidence that the defendants, *as a practice,* drew, on behalf of clients, legal documents which ordinarily would constitute the practice of law. Such an accusation was made in the Bennett case, but the court held that there was no evidence but that the notary filled in certain blank forms simply at the direction of the purchasers of the forms much as a secretary would do, and that there was no evidence that the notary determined the language that should go into the form.

In the Kinsey case, it was charged, in addition to the above, that the defendant had prepared and filed an inheritance tax application which he signed as "attorney." The court found from the defendant's answer, which was not denied by the attorney general, that he had acted in his own behalf in order to clear the title to certain real estate before making a loan thereon, and that he was therefore authorized to do it. The court further said that simply signing his name as attorney in an isolated case was not practicing law, nor a representation that he was authorized to practice law.

The court, however, despite the seemingly negative results in these cases, showed itself willing to punish the defendant in a proper case where it would fall within the area governed by the Denver Clearing House Banks case. For instance, in the Wicks case, the attorney general submitted the following proposition:

> Does the drawing of deeds, trust deeds, mortgages, chattel mortgages, releases, extensions, contracts, and wills, as a business, constitute the practice of law?

The court said:

> "The first proposition, if involved in the case at all, is not such as to form a basis upon which it may be adjudged that respondent is guilty of contempt, for it is not charged and does not appear, that respondent ever drew a single one of the enumerated instruments the drawing of which as a business it is contended constitutes the practice of law. We may assume, but need not decide, since it is no involved in the case, *that in the abstract an affirmative answer is correct.*"

On the question as to whether the court would punish a person engaged in such a practice, even though not pretending to be a lawyer, it was said:

> "The Supreme Court has power to license attorneys, and its action in so doing gives to those licensed a certain status and confers upon them

certain prerogatives as officers of the court which all must recognize. For one to assert the possession of a status which only the court can grant, and which has not been granted him, clearly is a trespass upon the court's jurisdiction and an affront to its dignity and authority. It is equally clear that it is such a trespass for one not licensed or lawfully authorized to assume to direct proceedings in the Supreme Court, or in any court the proceedings of which the Supreme Court may be called upon directly to review. As to such matters, the court is directly interested in a person's competency to deal with them. As a matter of public policy, the legislature has recognized the right of the court to protect its authority and dignity to this extent. Without determining whether the court in all cases is limited to taking cognizance of acts as contempt only if they fall within the statute, we think this is not a case of such character as indicates any necessity for our doing so. We shall consider it in the light of the statute alone."

On the same point, the court said in conclusion that there is a difference between a layman offering to do that which the law says he may not do and yet not doing it, and quite a different thing in holding oneself out as authorized by the court to do certain things, i.e., holding out as being an attorney. With respect to the first type, the court said,

"In such a case, the court may well await the overt act contemplated by the statute before taking cognizance of the situation."

This statement, it seems to me, must be read in light of the particular facts before the court where the advertising was of an ambiguous nature, and could have been consistent with the lawful authority of the defendant as a notary. Certainly, however, in light of the statements in these decisions, the court probably would be willing to punish if the "overt act" could be proved.

4. The Performance of Legal Services by a Layman, Not as a Practice

Under this heading, there falls the latest Colorado decision.

The People ex rel. Attorney General, vs. Jersin, 101 Colo. 406, (1937). In this case, it was alleged and admitted that the defendant drew three warranty deeds and a will for one George Tauckers. The petition alleged that he received compensation for these services, and the answer of the defendant alleged that Mr. Tauckers was ill, that he (the defendant) was an intimate friend of the said Tauckers, that he drew the instruments as a favor, and that at a later date he received the sum of $13.00 as a gift. The court said:

"There is no testimony in the record, and the case is before us on the charges admitted and the allegations of the respondent in his answer concerning the circumstances and conditions under which the acts charged as contempt of court were done. Such allegations as to circumstances and conditions are not controverted *and we assume their truth.*" (Italics the authors).

The court discussed at great length the difference between an occasional rendering of legal services and doing the same thing continually as a practice. The decision, which was written by Justice Young, stated in effect that the conduct of the defendant does "not show the doing as a practice or business, of acts which, when performed by a lawyer, constitute practicing his profession." The decision points out that the practice of law is the outgrowth of business and that a businessman, or other person, from time to time will require the drafting of a document which would ordinarily require the skill of an attorney, but the situation could be an emergency and a lawyer might not be immediately available. The court used this language:

> "What constitutes the emergencies and the exigencies of business in large measure always have depended, and always will depend, on the customs and practice of those who carry on the country's business, and within respectable limits such customs and practices should, indeed must, be recognized."

The court stated indirectly that actions which showed a constant doing of legal services as a business might well constitute a contempt of court, but that it would not construe the acts in this particular case as constituting a contempt.

It has been said by some attorneys that this case strips the bar association of the power to deal with laymen engaged in the unlawful practice of law. In my opinion, it does no such thing in the area where the lawyer needs *most* to be concerned. In other words, where laymen are engaged in activities coming within the ruling of the Denver Clearing House Banks case, the court will act and will use its power to punish for contempt.

Remedies Other Than Contempt

It should not be concluded from the foregoing discussion that attorneys are limited in their remedies to bringing a contempt action. As a matter of fact, authorities in other states are fairly uniform in holding that either individual attorneys or state or local bar associations may seek injunctive relief in the trial courts of the state. A very recent Kentucky Court of Appeals decision, which was handed down on September 27, 1946, known as *Robert P. Hobson, et al, vs. Kentucky Trust Company of Louisville, Kentucky,* held that an individual attorney was a proper party plaintiff to bring an unjunction action. The court said:

> "However, we entertain no doubt, in view of the numerous cases and texts dealing with the question, that a duly licensed attorney who has, at the cost of much time and finances, qualified himself and obtained license to practice law became thereby vested with a franchise or a property right which he may protect by employing any available remedy by which such protection may be obtained. The right thus obtained by an attorney is designated indiscriminately in opinions of courts and text writers as a 'privilege' or as a 'franchise', but those expressions are used

synonymously and as creating a property right. Moreover, attorneys are universally recognized and referred to as 'officers of the court', qualified to aid and assist it in its functioning in the administering of justice, and to that extent they are or should be as much interested in the correct and proper administration of the laws of the country as is the court itself, and there is respectable authority holding that even when no direct pecuniary injury is sustanied by an attorney, he may in such capacity as an arm of the court, maintain an action to prevent the unlawful practice of law by an unlicensed person."

The above decision cites many authorities from other jurisdictions and discusses the underlying principles rather thoroughly. It concluded by enjoining the defendant banks from engaging in or performing regularly and as a business or advertising or soliciting or holding themselves out to the public as qualified to so act (with or without compensation, directly or indirectly) in any of the following acts from the circumstances indicated to-wit:

"Writing deeds, wills, conveyances, and other legal documents requiring expert knowledge and equipment in their phraseology so as to comport with the law as to such matters; or engaging in preparing any instruments wherein it is designated as fiduciary to enforce and administer the provisions in same, or to hold itself out as possessing the requisite knowledge so to do."

The court then excepted from the operations of this injunction such actions in isolated instances where the defendant might act without compensation as the maker's amanuensis and where the defendants might be preparing such instrument as a party thereto.

There are no Colorado cases, which have reached the Supreme Court, at least, where such a remedy has been sought. But, it is submitted by the author that no reason can be found in the reported cases why such remedy would not be available in Colorado.

Before leaving the authorities and discussion of remedies, reference should be made to rule 248 of the Rules of Civil Procedure which reads:

"Rule 248. Duty of Grievance Committee. The committee on grievances of the Colorado Bar Association shall investigate, on its own motion or upon complaint of any person, the improper conduct of any licensed attorney which affects his profession *and the conduct of any other person purporting to act as an attorney*. The files and transactions of the committees shall not be public records unless released by vote of the committee with the approval of the court."

The section of said rule which bears upon unauthorized practice is underlined. There have been no decisions interpreting the meaning of this expression, and it is probably ambiguous as to whether it refers to a person who holds himself out to be a lawyer, or whether it also refers to a person who does not hold himself out to be a lawyer, but who nevertheless holds himself out as being able to render services which constitute the practice of law. In any

event, it seems to add little to the existing Colorado authorities. It does, of course, have a direct bearing on the question as to whether the Grievance Committee or the Unauthorized Practice Committee is the proper prosecuting agency of the Colorado Bar Association for preventing the practice of law by laymen. I understand that another member of this committee is investigating this phase of the question.

Conclusion

A Colorado lawyer has the legal means to protect himself from the type of activity which is the most apt to harm himself and the public. That is, the performance of legal services by a layman as a practice or a business. Certainly it is in this area that one hears the most complaints from lawyers and it is in this area where the public most needs protection. It is the opinion of the author that the Denver Clearing House Banks case, and the various statements referred to above in the other decisions provide ample legal authority for the lawyer, through his bar association, to clarify the meaning of "practicing law" in the various fields of endeavor and to bring about an eradication of the objectionable practices of many persons and classes of persons. The Colorado cases do not go very far in clarifying and defining the practice of law in many fields. In any case, authority would have to be procured from another jurisdiction as to whether a particular activity is or is not the practice of law. This paucity of authority would seem to be due to the lack of prosecution in the past along these lines, and not to a lack of willingness of the court to do what should be done in many cases for the protection of the lawyer's franchise and the public who must depend upon skilled and competent service.

Lawyers in the Public Service

JOHN W. SHIREMAN, Denver, has been named president of the board of trustees of Westminster Law School, CHARLES A. BAER vice-president, and MISS NORMA COMSTOCK secretary. District Judge ROBERT W. STEELE and FRITZ A. NAGEL have been elected to the board.

RAYMOND B. DANKS, deputy district attorney in Denver since 1941, except for three years in the army, has been appointed chief deputy distrcit attorney.

H. LAWRENCE HINKLEY, attorney general of Colorado, has been named to the executive committee at large of the Association of Attorneys General.

MISS MAURINE MCINTOSH has been appointed assistant city attorney by Denver city attorney J. Glenn Donaldson, to fill the vacancy created by the resignation of Ruth Hunt. She will handle claims against the city and will do legal work for the Bureau of Public Welfare. She was graduated from Washburn University at Topeka, Kansas, in 1943, and attended summer school at Colorado University.