

Volume 12 | Issue 3

1961

Attorneys at Law

Seymour J. Schafer

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Seymour J. Schafer, *Attorneys at Law*, 12 W. Res. L. Rev. 451 (1961)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol12/iss3/6>

This Article is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

tions of the agency. The case of *In re Topper*⁶¹ involved an appeal by the Ohio State Racing Commission from a judgment of the common pleas court. One of the questions decided by the court was a proper construction of Rule 261 of the racing commission. This was a matter of law which involved only the rule, but, another issue involved a portion of the Act concerning the admission of additional evidence in common pleas court; these issues protected the appeal from dismissal. A properly perfected appeal by the agency will be disposed of by the appellate court in accordance with the provisions of section 119.12 of the Revised Code. Under this section, when an appeal is properly perfected, the court of appeals reviews and determines the correctness of the judgment. It will follow the same procedure in arriving at its decision as that enjoined by section 119.12 upon the common pleas court. Of course, the decision of the court of appeals is based on the same evidence as that which was before the common pleas court. In the principal case the court of appeals did not concern itself with the validity of the agency rule. It affirmed on the basis of the lower court's conclusion that there was no reliable, probative, and substantial evidence to support the Commission's order.

MAURICE S. CULP

AGENCY

Because of the lack of significant opinions rendered on Agency during the period covered by this survey, Mr. Hugh Ross has not submitted an article this year.

THE EDITORS

ATTORNEYS AT LAW

A more accurate title for this section this year might be "non-attorneys at law." The three cases which will be discussed concern the activities of a disbarred attorney and the unauthorized practice of law by a workmen's compensation consultant and by a non-profit corporation.

ATTEMPTED CIRCUMVENTION OF THE EFFECTS OF DISBARMENT

*Goings v. Black*¹ will, perhaps, write the first lines of the final chapter in the strange odyssey of one J. Harvey Crow through the courts of Ohio

61. 109 Ohio App. 289, 165 N.E.2d 19 (1959).

and the nation. Mr. Crow was first disbarred in Ohio in 1935, reinstated in 1950, and disbarred for a second time in 1957.² Correspondingly, he was disbarred by the federal district court in 1937, reinstated in 1950 and disbarred again in 1959. The United States Supreme Court refused to review the second of the Ohio disbarment proceedings upon a writ of certiorari³ and entered its own order disbaring Mr. Crow in 1959.⁴

It would have appeared that a final determination of Mr. Crow's fitness to practice law had been made and that he was now effectively barred from appearing before the courts as an attorney. However, in *State ex rel. Crow v. Weygandt*,⁵ Mr. Crow sought to be made a party to a case for malicious prosecution on the ground that he had acquired a financial interest in such cause by an assignment of a part of the claim from the original party plaintiff. The Ohio Supreme Court decided the case on the basis of the non-assignability of this type of cause of action. The court was not unaware of what appeared to be the true purpose of Mr. Crow's actions. Judge Taft commented:

However, we would be less than human if we were not curious as to whether relator can circumvent his disbarment by acquisition of "a financial interest" in a pending case.⁶

Unfortunately the court did not attempt to answer the riddle it posed.

In *Goings v. Black*,⁷ the issue was squarely presented. Mr. Crow had been assigned, in a pending personal injury case, the type of claim that could be assigned. There was a motion by Mr. Crow that he be made a party to the pending case because of his financial interest in the case. Judge Leach of the Court of Common Pleas for Franklin County, in denying the motion, held that Mr. Crow could not circumvent his disbarment by such a ruse. Doubting the validity of such an assignment if made to a practicing attorney, the court felt that considerations of public policy (which were not enumerated) clearly made the assignment improper where a disbarred attorney was concerned. Furthermore, the court said:

It should be apparent that if a contingent fee contract of a licensed attorney at law is enforceable only as an "equitable assignment," a contingent fee assignment to a disbarred attorney surely could not be upheld as giving him the right to intervene as a party to the tort action (with

1. 164 N.E.2d 925 (Ohio C.P. 1960).
2. A complete history of Mr. Crow's difficulties in relation to his disbarments can be found in *In re Crow*, 181 F. Supp. 718 (N.D. Ohio 1959).
3. *Crow v. Faulkner*, 357 U.S. 927 (1958).
4. *In re Disbarment of Crow*, 359 U.S. 1007 (1959).
5. 170 Ohio St. 81, 162 N.E.2d 845 (1959).
6. *Id.* at 83, 162 N.E.2d at 847.
7. 164 N.E.2d 925 (Ohio C.P. 1960).

the incidental right of representing himself and thus necessarily in actual effect, representing his "client").⁸

There can be little doubt that the ultimate result reached by the court is the only sensible one if the disbarment proceeding is to be an effective tool for policing the legal profession. One might wish for a more definitive statement by the court of the policy considerations behind the decision. It is clear that the court must look at the substance of the matter and not just at the form if the effects of disbarment are not to be evaded. It is equally clear that the court must be able to give practical effect to the disbarment order.

One further comment that is suggested by Mr. Crow's adventures is that it might be appropriate for a study to be made to evaluate the procedures authorized and the standards utilized in disbarment and reinstatement proceedings.

UNAUTHORIZED PRACTICE OF LAW

Two cases arose during the past year which presented differing aspects of the problem of what acts constitute the unauthorized practice of law.⁹

In *Special Master Commissioners v. McCahan*,¹⁰ the court had to determine whether a layman, who holds himself out as being qualified to advise on claims and represent claimants before the Industrial Commission of Ohio and the Bureau of Workmen's Compensation, is engaged in the unauthorized practice of law. The respondent, McCahan, was a former member of the Canton Regional Board of Claims of the Industrial Commission of Ohio and had engaged in his workmen's compensation service for approximately eighteen years. The court looked at the character of the acts being performed by McCahan, and not the place of performance. The court concluded that: in appearing on behalf of claimants before the various agencies, in preparing notices of appeal from rulings, in preparing other forms and papers, and in giving advice to claimants in relation to their rights, McCahan had engaged in the practice of law which should be prevented by the issuance of an injunction.

Of the various acts which lawyers characteristically perform,¹¹ the

8. *Id.* at 927.

9. For statutory provisions regulating the authorized and unauthorized practice of law, see OHIO REV. CODE ch. 4705.

10. 83 Ohio L. Abs. 1 (C.P. 1960). See also discussion in *Administrative Law and Procedure* section, p. 445 *supra*, and in *Workmen's Compensation* section, p. 594 *infra*.

11. Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N.E. 650 (1934) syllabus 1 sets forth the following acts as acts constituting the practice of law: (1) conduct of cases in court; (2) the preparation of pleadings and other papers incidental to proceedings before judicial bodies; (3) conveyancing; (4) the preparation of legal instruments of all kinds; and (5) generally, advising clients in relation to matters connected with the law.

court seemed most impressed by the advice-giving function of attorneys in relation to legal matters.

The court is clearly of the opinion that the giving of advice as to whether a claim is good or not is the giving of advice as to legal rights. This is essentially the character of the service that is performed by an attorney in the practice of law.¹²

The second case concerning the unauthorized practice of law was *In re Battelle Memorial Institute*.¹³ Battelle is a non-profit corporation engaged in scientific research for itself and for others. Because it is likely that a patentable invention may be created during the course of research on any given project, Battelle requires its employees to agree to assign all such inventions made by the employee to Battelle. In turn, Battelle's agreements with its clients provide that Battelle will notify the client of any patentable invention made during the course of research on the client's project, and further provide that Battelle will assign all rights to the client if the client so elects. In the meantime, Battelle's legal department begins to process the patents for the inventions they deem worthwhile.

The court stated that until the client indicates that it intends to acquire the invention, the Battelle lawyers are rendering services solely to Battelle and that this is permissible. The court had to further determine if Battelle could use its salaried legal staff to process patent claims for the benefit of its clients after they notified Battelle of their intention to claim the inventions. The court issued an injunction against Battelle, holding that Battelle was engaging in the unauthorized practice of law when it had its law staff render opinions as to the patentability of inventions, possible infringement and interference, and process the patent claims through the United States Patent Office, after the client had notified Battelle of its intention to claim the invention.

The court was very concerned with the adverse effect that action of the type carried on by Battelle would have on the attorney-client relationship, that is, the split loyalty of Battelle's legal staff to Battelle and to the client when the legal staff attempts to give advice about the inventions.

Neither the *McCahan* nor the *Battelle* case is startling on its facts or the impact of its decision. They appear to be simple examples of the policing functions which the bar and the courts are authorized to perform to insure the highest quality of professional competence in the law.¹⁴

12. *Special Master Comm'rs v. McCahan*, 83 Ohio L. Abs. 1, 12 (C.P. 1960).

13. 170 N.E.2d 774 (Ohio C.P. 1960).

14. See *Land Title Abstract & Trust Co. v. Dworken*, 129 Ohio St. 23, 193 N.E. 650 (1934) concerning the power of the court to act in unauthorized practice of law cases. See also *Battelle Memorial Institute v. Green*, 84 Ohio L. Abs. 353 (C.P. 1960) which was heard with the principal case discussed and in which the court issued a separate opinion discussing its

There are, however, deeper implications. If the giving of advice in regard to the law is the chief characteristic of the lawyer, one would be hard put to distinguish the services rendered by McCahan and Battelle from those rendered by other non-lawyer experts in areas which have a strong legal content. For example, "tax consultants," accountants (certified and otherwise) and accounting firms not only fill out income tax forms for their clients, but advise their clients as to deductions permitted under the law, exemptions permitted under law, etc., and the course of action which will lead to greater tax savings next year.¹⁵ Certainly, if the fact that McCahan appeared before the various agencies was removed from the record, the court's decision would be unchanged. Likewise, if Battelle's clients delivered all the patent papers to the patent office, the result would be the same. It would appear that those who prepare tax forms and advise others on tax problems would not escape a charge of unauthorized practice of law merely because they did not appear before the tax tribunals nor deliver the completed tax forms to the proper receptacle. The whole mass of persons who fill out and give advice regarding income taxes could be subjected to the sanction of the courts if the court or the bar should ever be so inclined.

Certainly, the public should be protected from the non-lawyer who like a gypsy gives his advice, packs his tent, and steals away into the night — leaving his client holding a bagful of legal problems, tax and others included. On the other hand it may well be time for the lawyer to recognize that non-lawyers who are competently trained in their professions by education and experience (such as certified public accountants in the tax field) may be better able to advise on matters concerning rights and obligations under the law than the ordinary attorney who is not a specialist in the field.¹⁶ This is not a plea to open the ranks of the law to all shapes, sizes, and varieties of non-lawyer specialists. However, it may be time for the lawyer to recognize that the high degree of specialization in the law today will require either an increase in the number of qualified legal specialists in particular fields or the acceptance of the necessity of permitting non-lawyer specialists to give advice in their fields even if by so doing they are crossing into the lawyer's domain.

A major problem concerning acceptance of the non-lawyer specialist would be proper policing so that the public is protected from the incom-

power to hear, determine and enjoin Battelle from engaging in acts constituting the practice of law.

15. The problem of the proper relationship between the law and accounting professions was recently considered in *Accounting-Law Issue*, 36 U. DET. L.J. 397-489 (1959). In particular, see Comment, 36 U. DET. L.J. 464 (1959).

16. It is interesting to note that at least 75% of the single requests for the annual tax symposium issue of the WESTERN RESERVE LAW REVIEW come not from attorneys, but from accountants.