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Legal Advice by Accountants

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should be noted that in the instant case the photographs established the crime and without them no conviction could have been had, indicating that the court was adopting an unusually liberal view as to their admittance. Liberal use of photographs as substantive evidence rather than mere illustrative evidence has been urged by textwriters[6] and law review authors.[7] Those in favor of liberal use of photographs in evidence point out that here is the perfect witness—"an eye-witness who cannot forget and whose memory cannot be distorted."[8] They also point out that protection against "trick" photography lies not in rigid exclusory rules but rather in careful qualification in preliminary examinations. According to these authors two questions are to be met: (1) competency and (2) materiality and relevancy. If the photograph is not an accurate, honest representation of the true facts it is not competent and should be excluded. If the photograph is competent then the question is whether it is a genuine aid to the jury in determining the facts; i. e., is it material or relevant? If these two tests are met it then becomes the most admissible type of evidence, entitled to the highest degree of credibility because it is free of the usual and very human causes of testimonial error.[9]

These arguments have a strong appeal, but there are pitfalls to consider. Looking at the instant case it is seen that no one vouched for the authenticity of the photographs and this fact in itself would cast doubt upon their worth. The venue and time of the crime was established by the photographs of the interior of the apartment; however, most metropolitan apartments are notoriously similar in appearances and furnishings. These photographs could easily have represented the interior of another apartment in another state at another time.

With the traditional safeguards and strong precedent in mind the majority of the courts have been more restrictive than the instant case in admitting photographs into evidence. It is submitted that this case offers an argument for both points of view as to the admission of photographs into evidence:—To those who advocate liberality it represents a healthy trend:—To those who faver the traditional safeguards it points up the dangers of being too liberal. As is generally true in such situations, the better view lies somewhere between the two extremes.

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LEGAL ADVICE BY ACCOUNTANTS

Defendant, an accountant, was consulted by the Croft Co. as to whether certain tax obligations to the state of New York attributable to business done in

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the credibility of defendant.); Scott, Photographic Evidence, pp. 208-211 (1942) (Points out the possibility of catching criminals in the act by use of photographs and refers to Commonwealth v. Brletic, supra note 5, as an illustration of this point. The author also mentions "planned pictures" which are made by setting up automatic cameras to operate in connection with burglar alarms to catch the criminal in the act. But no cases are cited to cover such a situation since the criminal who is confronted with such evidence would undoubtedly confess immediately).

6. 3 Wigmore, Evidence Sec. 792a (Pocket Supplement, Rucker Ed. 1947); Scott, Photographic Evidence, sec. 601 (1942).
7. Gardner, The Camera Goes to Court, 24 N. C. L. Rev. 233 (1946); 7 N. C. L. Rev. 443 (1929).
8. 24 N. C. L. Rev. 233, 235 (1946).
9. Gardner, The Camera Goes to Court, 24 N. C. L. Rev. 233, 235, 236 (1946).

the years 1935, 1936, and 1937, when the company had no taxable profits, could be charged off as expense in 1943, when the company had large profits. Defendant made a research on the subject and advised the company that there was a case similar to this problem in the company's favor. Defendant did not prepare the company's tax return and did no work of any kind on their books. A lower court dismissed the proceedings on the merits, but the Appellate Division of the New York Supreme Court here reverses and defendant was fined $50.00 and enjoined from further illegal practice of law, the court reasoning that the question which defendant undertook to answer was in the nature of a question of law, made evident by the nature of the research. *Held* that, if the question of law is such a problem that an outside consultant, besides the regular accountant preparing the tax return, must be called in to do legal research and to advise as to law none too clear, that consultant must be a lawyer. *Application of New York County Lawyer's Ass'n.* 78 N. Y. Supp. (2d) 209 (1st Dept. 1948).

The privilege of practicing law is strongly restricted to members of the bar,[1] and the judicial department of government, and no other, has power to license persons to practice law.[2] The justification made by the courts for excluding from the practice of law persons not admitted to the bar is to be found, not in the protection of the bar from competition, but in the protection of the public from being advised and represented in legal matters by incompetent and unreliable persons over whom the judicial department could exercise little control.[3]

Having the proposition that practice of law is illegal if by one other than a member of the bar, what is "practice of law"? The courts have said repeatedly that the judicial department is the sole arbiter of what constitutes the practice of law.[4] It is not easy to define the practice of law. An architect must know the building laws to advise a client; an insurance agent must know the legal effect of policies; and similarly with brokers, salesmen, and realtors. It is even more difficult in the case of accountants to separate the tangled principles of accounting and law. An accountant must understand the legal effects of statutes and decisions to properly prepare statements and tax returns.

Some definitions have been assayed, such as, "'Practicing as an attorney or counselor at law, according to the customs of our courts, is the giving of advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree

1. Wyo. Comp. Stat. 1945 sec. 2-418. "No person resident in the State of Wyoming shall practice law in the state of Wyoming except an active member of the State Bar."
2. Wyo. Comp. Stat. 1945 sec. 2-102. "All applications for admission to the bar of the state shall be made by petition to the supreme court . . . "; Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N. E. (2d) 27 (1943); In Re Keenan, 313 Mass. 186, 47 N. E. (2d) 12 (1943).
3. In Re Shoe Mfrs. Protective Ass'n, Inc., 295 Mass. 369, 3 N. E. (2d) 746 (1936).
4. Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N. E. (2d) 27 (1943); State ex rel Hunter, Atty. Gen. v. Kirk, 133 Neb. 625, 276 N. W. 380 (1937); People ex rel Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 8 N. E. (2d) 941 (1937), cert. denied 302 U. S. 728 (1937).

of legal knowledge or skill'."[5] Another test often applied is whether the act performed requires legal technique, skill and training.[6] But when these tests are applied to facts, they do not stand up. They are far too simplified for the confusion that actually exists.

A sharp line cannot be drawn between accountant and lawyer, but the examination of statutes, judicial decisions, and departmental rulings for the purpose of advising upon a question of law relative to taxation, and the rendering of an opinion thereon, are a part of the practice of law in which only members of the bar may engage.[7] The courts are again agreed that it is not necessary for illegal practice of law that an appearance in court be made.[8] Further, it has been said that it is entirely the character of the act which determines, and not whether any compensation has been given.[9]

In the principal case, the court had no objection to the defendant's knowing and using law, particularly tax law, and preparing books without taking every question to a lawyer. They admit that a thorough and working knowledge of tax law is elemental to the practice of accounting. They further admit that there is an inevitable over-lapping of fields by both accountant and tax lawyer. The court evolved, not a strict definition, but a working rule of thumb which can be applied to fact situations with rational results. In short, they say that it is not the adequacy or the accuracy of the advice given, nor is it an issue, but that the decisions must rest on the nature of the services rendered and on whether they were inherently legal or accounting services. Applying this rule to the facts, they held that an accountant may serve in setting up or auditing books, or advising with respect to the keeping of books and records, the making of entries therein and the handling of transactions and the preparation of tax returns. Most naturally this work and advice must take cognizance of the law and conform with the law, particularly the tax law. The application of legal knowledge in such work, however, is only incidental to the accounting functions. It is not expected or permitted of the accountant, despite his knowledge or use of the law, to give legal advice which is unconnected with accounting work. That is exactly what this defendant did.

There are no Wyoming cases concerning accountants, but the court has denied the right to appear in court to non-resident attorneys,[10] and censured the drawing of wills by a law clerk as illegal practice of law, though they did dismiss

5. People ex rel Illinois State Bar Ass'n v. People's Stockyards State Bank, 344 Ill. 462, 176 N. E. 901, 907 (1931).
6. Shortz v. Farrell, 327 Pa. 81, 193 Atl. 20 (1937); People ex rel Chicago Bar Ass'n v. Goodman, 366 Ill. 346, 8 N. E. (2d) 941 (1937), cert. denied 302 U. S. 728 (1937).
7. Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N. E. (2d) 27 (1943); Crawford, County Treasurer v. McConnell, 173 Okla. 520, 49 P. (2d) 551 (1935).
8. Land Title Abstract & Trust Co. v. Dworken, 129 Ohio St. 23, 193 N. E. 650 (1934); State ex rel Johnson, Atty. Gen. v. Childe, 147 Neb. 527, 23 N. W. (2d) 720 (1946).
9. State ex rel Hunter, Atty. Gen. v. Kirk, 133 Neb. 625, 276 N. W. 380 (1937); Grievance Committee of Bar of Texas, Twenty-First Congressional Dist. v. Dean, 190 S. W. (2d) 126 (Tex. Civ. App. 1945). Contra: Paul v. Stanley, 168 Wash. 371, 12 P. (2d) 401 (1932); State v. Adair, 4 W. W. Harr. 585, 156 Atl. 358 (Del. Ct. Gen. Sess 1922).
10. North Laramie Land Co. v. Hoffman, 26 Wyo. 327, 184 Pac. 226 (1919).

the complaint and refuse to grant an injunction, feeling that there was good faith, and said that, because no one had warned the defendant before filing suit, his actions did not warrant punitive action, and they felt confident that he would refrain from future illegal practice.[11]

In determining whether a man is practicing law, his work for any particular client or customer should be considered as a whole.[12] An accountant may prepare tax returns and answer incidental legal questions that arise in connection with preparing tax returns, but may not be called in by a business or another accountant to do nothing other than answer a legal question. The possible added inconvenience and expense of calling in a lawyer do not warrant a lessening of this rule, for the considerations of public protection far outweigh these factors.[13]

ALLYN B. HENDERSON

MEANING OF ACCIDENT IN ACCIDENT INSURANCE POLICIES

Plaintiff carried an accident insurance policy which provided that "Injury" as used in the policy means bodily injury which is the sole cause of the loss and which is effected solely through accidental means. Suicide was expressly excluded from recovery under the policy. Plaintiff attempted to commit suicide by closing all the windows and turning on the gas of her stove. She went to sleep and awakened several hours later surprised to find herself still alive. She then turned off the gas and attempted to light the pilot light. An explosion resulted which injured her. She brought suit to recover under the insurance policy; Iowa District Court allowed recovery and defendant appealed to the Iowa Supreme Court. *Held,* affirmed, sufficient evidence that injury was the result of accidental means to go to the jury. Comfort v. Continental Casualty Co., 34 N. W. (2d) 588 (Iowa 1948).

There has long been a dispute as to the meaning of the phrase "by accidental means" as used in accident insurance policies. Two view have developed neither of which is a clearly defined majority.[1] One view takes the position that when the means that caused the death or injury are exactly as the insured intended, the means are not accidental, even though the result was unexpected and accidental.[2] The other view looks at the phrase from the layman's point of view and holds that

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11. The State of Wyoming, ex rel Wyoming State Bar v. Hardy, 61 Wyo. 172, 156 P. (2d) 309 (1944).
12. Auerbacher v. Wood, 139 N. J. Eq. 599, 53 A. (2d) 800 (Ch. 1947).
13. Application of New York County Lawyers Ass'n, 78 N. Y. Supp. (2d) 209 (1st Dept. 1948).

1. See Note, 166 A. L. R. 469 (1947).
2. Horton v. Travelers Insurance Co., 45 Cal. App. 462, 187 Pac. 1070 (1920); Travelers Insurance Co. v. Selden, 78 Fed. 285 (C. C. A. 4th 1897); Husbands v. Indiana Trav. Acc. Ass'n, 194 Ind. 586, 133 N. E. 130 (1921); Feder v. Iowa State Trav. Men's Ass'n, 107 Iowa 538, 78 N. W. 252 (1899); Kendall v. Trav. Protective Ass'n of America, 87 Ore. 179, 169 Pac. 751 1918).