Collection Agencies and the Unauthorized Practice of Law

In State ex rel. Norrell v. Credit Bureau of Albuquerque, Inc.,\(^1\) the New Mexico court analyzed the activities of a collection agency to determine if the agency was engaged in the unauthorized practice of law. The defendant Credit Bureau solicited claims for collection, taking them pursuant to an agreement with the creditor, the agreement stating that the Bureau's fees were contingent upon collection and requiring the creditor to assign his claim to the Credit Bureau when requested to do so. In the course of its collection efforts, the Bureau sent collection letters to the debtor, but if such efforts short of litigation failed, the Bureau advised the creditor that legal action was necessary, and then required creditor to assign the claim to the Bureau, so that it could bring suit against the debtor in its own name. In magistrate courts, the Bureau sometimes controlled the subsequent litigation itself, without help from its lawyers; in some instances, the Bureau referred the cases to its own lawyers. In cases where a judgment was collected, the creditor received an agreed percentage, and the Bureau kept the remainder. Maintaining that the activities of the Credit Bureau constituted the unauthorized practice of law, the state brought action against the Bureau for declaratory and injunctive relief, and New Mexico's Supreme Court held that the activities of the Credit Bureau did constitute the unauthorized practice of law.

The problem of unauthorized practice of law by collection agencies has been with us for a long time.\(^2\) While "the practice of law" is difficult to define, one workable definition is that the practice of law is undertaken by one who appears before courts, drafts legal instruments, or gives advice on the law.\(^3\) Representatives of collec-

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2. For an excellent analysis of some leading decisions in this area, see Annot., 27 A.L.R.3d 1152 (1969).

When a person not legally authorized to do so carries on such activity, it is the "unauthorized practice of law." See Clark, The Effect of Unauthorized Practice
of Law Upon the Ethics of the Legal Profession, 5 Law and Contemp. Prob. 97, 99 (1938).

This "monopoly" given lawyers as to the practice of law is generally justified on the part of the organized bar by the desire to protect the public from the ignorant and unscrupulous through the bar requirements of high educational standards and ability. Comment, 24 U. Chi. L. Rev. 572, 573 (1957). Although the American Bar Association was founded in 1878, it did not become concerned with the unauthorized practice of law on a national basis until the Depression of the 1930's, over half a century later. See Grant, The Need for State Bar Counsel in Effectively Combating the Unauthorized Practice of Law, 31 Unauthorized Practice News 23 (1965); Johnstone, The Unauthorized Practice Controversy, A Struggle Among Power Groups, 4 U. Kan. L. Rev. 1, 2 (1955). However, the unauthorized practice problem was not new or novel at this time. Grant, supra at 23. The Standing Committee on the Unauthorized Practice of Law was created in 1930, and although individual lawyers and some state bar groups had shown earlier concern with the problem, only then did the ABA begin to serve in some co-ordinating nationwide capacity to combat the problem. See Johnstone, supra, at 2 & note 3.

The unauthorized practice of law can be said to have had its foundation in the nineteenth century when even trained lawyers had no monopoly in some states—anyone could practice law. Id. at 7. This nineteenth century period was "the Jacksonian era of equalitarianism, marked by its concomitant attitudes of anti-professionalism and anti-intellectualism. It was then felt that the innate genius of the self-made man made him equal to any employment no matter what his training or education." Editorial Note, An Analysis of the Unauthorized Practice of Law in Ohio, 33 U. Cin. L. Rev. 401 (1964). A typical American statute of the time might have read, "Every person of good moral character, being a voter, shall be entitled to practice law in all courts of justice." Id. at 401. See Pound, The Lawyer from Antiquity to Modern Times 5 (1953). The logical result by the middle half of the century was a significant deprofessionalization of legal practice throughout the United States. Johnstone, supra, at 7. With the stimulus of economic growth and the resulting increased complexity of our society, the problem increased in volume and tempo, finally resulting in efforts by the organized bar to combat the lay practice of law.

The major opponents of the bar have been powerful business groups that seek to compete with lawyers. Among these business groups are accountants, abstract and title companies, automobile clubs, claims adjusters, estate planners, and collection agencies. Unauthorized practice is certainly not limited to these institutional groups, but they are much more likely to oppose any challenge by the bar than are individuals or poorly organized groups who might be accused of practicing law illegally. Id. at 1-2.

The lawyer's interest in the controversy is usually represented by the organized bar—the bar associations. In most states and large cities, and even in some small towns and counties, the respective bar associations have created internal committees which do much of what is done to prevent unauthorized practice in that particular locale. Id. at 2.

The ABA, perhaps influenced by earlier similar activities at the state level has, among other things, entered into a series of agreements, or "Statements of Principles" as they are called, with a number of trade associations representing competing business interests. The purpose of the agreements is to solve the unauthorized
tion agencies admit openly that some agencies do commonly engage in activities that in fact amount to the unauthorized practice of law. For many years there have been those members of the organized bar who have continued to maintain that the operation of any collection agency is per se the practice of law. However, these lawyers have failed to recognize that there are a great number of reputable collection agencies which are honest, well-financed, and which provide outstanding legitimate service to the public which is not always reasonably available elsewhere.

One argument often advanced by the collection agencies is that the lawyers do not really want the collection work for themselves. Many lawyers are simply too busy to handle such routine matters, and more importantly, they often consider it beneath their dignity to handle collection matters on a large scale, in that there is a general desire among lawyers to "graduate" from the collection business as early in their professional careers as possible. Accentuating this professional reluctance, the agencies argue, is the fact that even many of the lawyers who do handle collections delegate the mundane duties of such practice to secretaries, law clerks, or junior associates, who, for the most part, are untrained and virtually uneducated even in this relatively simple area of the law. Quite to

practice problem by cooperation with the offenders. Id. at 4. See generally Resh, Implementation of National Statements of Principles at the State and Local Levels, 36 UNAUTH. PRAC. NEWS 14 (1971). Usually the agreements set out, in degrees of detail varying with the respective groups, the activities that can and cannot be legally carried on by the group. In some cases, the agreements have proved "to be only a truce in the use of aggressive power tactics." Johnstone, supra, at 4. The Statement of Principles with representative groups of the collections industry was the first of the agreements, and was entered into in 1937. See 6 MARTINDALE AND HUBBELL LAW DIRECTORY 71C, 75C (1975). It is important to understand that while the agreement has supplied both sides in the controversy with a workable point of reference, it has not necessarily been adhered to by many of the collection agencies in this country.

4. See Lothian, Collection Agency Activities: The Problem from the Standpoint of the Agencies, 5 LAW AND CONTEMP. PROB. 29, 31 (1938); cases cited notes 35-36 infra.


7. Id. at 34. See Schiff, Should a Commercial Attorney Accept Retail Collections—A Critical Analysis, 78 COM. L.J. 50 (1973).

the contrary, the agencies point out, the standard collection agency employs persons whose level of competence in the area of collections has become very high through continued exclusive practice in this one area.\(^9\)

Perhaps the most persuasive argument that the agencies put forth is that of economics. That is, the agency contends that it provides for the small businessman a service which might otherwise be beyond his reach if he were to rely solely on the services of the attorney, in that the fees charged by collection agencies generally are considerably smaller than those charged by the average collections attorney for doing comparable work.\(^10\)

In addition to this ability to offer more efficient and less expensive service than a lawyer generally can, the collections industry suggests that the reputable agency can be of invaluable help to the lawyer in handling a claim through the court after its initial collection efforts have failed,\(^11\) and to the creditor by being in such a position in such a case to suggest the names of competent lawyers to the creditors.\(^12\)

On the whole, the position of the lay collections industry is that the legal profession has failed to clearly express any relevant and sufficient reasons to justify any efforts aimed at abolition or strict curtailment of collection agency activities on unauthorized practice grounds. In many instances where such activities are curtailed, the agencies insist that, unfortunately, the courts have focused too heavily on weighing the relative interests of the agencies and the bar associations involved, ignoring the public need for competent, efficient, low cost debt collection services, which the lay agencies are best able to supply, and which the legal profession has not adequately provided.\(^13\)

The organized bar, in urging a slow-down or halt of collection

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9. See Lothian, supra note 4, at 31. However, while the offenders are often well-trained specialists, they are too often over-specialized, and do not clearly see the various relationships between the different branches that make up the complete body of law. See Cohen, Ambivalence Affecting Modern American Law Practice, 18 ALA. L. REV. 31, 42 (1965).


11. See Lothian, supra note 4, at 32.


agency operations, can also present persuasive arguments supporting its position. The *Code of Professional Responsibility* of the American Bar Association states that a lawyer should assist in preventing the unauthorized practice of law.\(^{14}\) Such conduct by the attorney helps ensure that the client will be assured in the attorney-client relationship that he is dealing with one who is subject to the requirements and the restrictions of the legal profession. In keeping with the *Code of Professional Responsibility*, the bar emphasizes that when lay persons practice law, they are not governed by such requirements and restrictions in terms of legal competence,\(^{15}\) integrity, and ethics, as are attorneys, and there are no disciplinary sanctions for offenders as are set up by the bar for protection of the public from offending lawyers.\(^{16}\)

This protection of the public is the reason most commonly given by lawyers for their attempts at harassing unauthorized practice of law by collection agencies and similar lay groups. However, attempts at regulation for this reason have often been misunderstood by the public to have been motivated solely by a desire to return legal business to the lawyers. While few lawyers would deny that such a result is economically desirable for the legal profession, it is said not to be the primary motivating factor, since, in any collection system, lawyers will continue to attract a great deal of business.\(^{17}\)

One problem that especially seems to bother the bar is the way in which the collection business is often conducted and the lawyer-

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15. Representatives of the agencies have argued that the absence of a general legal education is relatively unimportant compared to the low cost and efficiency, especially since lawyers, too, often use non-legally trained persons to handle collection matters. *The Unauthorized Practice of Law*, supra note 13, at 1335. See pp. 157-158 and note 9 supra.

16. "Although some groups, such as the CPA's, have rules of conduct which are adopted by their associations, the consequence of violation is only loss of association membership, which does not bar the violator from continuing 'to serve the public' and charge for his services. Although a lawyer is subject to economic and professional ruin by the disciplinary action of his bar association, the principal risk to which his lay competitor is exposed for improper performance is the risk of legal liability for damages, as for negligence or in a suit by an injured customer." Cohen, *Ambivalence Affecting Modern American Law Practice*, 18 Ala. L. Rev. 31, 42-43 (1965).

lay person relationships therein. 18 Many of the evils caused by the unauthorized practice of law by collection agencies would not occur without the cooperation of lawyers willing to accept unethical relationships with the offending agencies, allowing themselves to be used and advertised by the agencies. 19 Obviously, many lawyers affiliated with collection agencies think that by becoming "collectors," they might divest themselves of their ethical obligations. 20 It has been held that such attorneys are unprofessional and are in violation of the Code of Professional Responsibility. 21

The bar associations also argue that lay compensation for legal business can have a debilitating effect on the total professional environment of the lawyer. 22 Strict compliance with the standards of professional conduct imposed by the bar prohibit interested lawyers from seeking to compete with the unrestricted agencies in the commercial law field, 23 and thus he is under pressure to violate his professional standards of ethical conduct if he does intend to successfully compete. 24

When called upon to settle disputes arising from collection agency activities, the courts 25 generally have reached compromises in terms of which activities they will allow and those which will be barred on unauthorized practice grounds. 26 Generally speaking, the agency may, among other things, solicit claims for collection, send out dun notices through the mails, and agree with their clients to be compensated for their efforts on a contingent fee basis. 27 Under

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20. Otterbourg, supra note 19, at 36.
22. See generally Cohen, supra note 16. "The primary evil in the lack of an attorney-client relationship is said to be the diverting of the duty and allegiance of the attorney from the person whose interests are at stake in the legal proceedings, thereby giving rise to a possible conflict of interests. Diverted allegiance must be found before the activities constitute the unauthorized practice of law by a lay intermediary." Note, 52 MINN. L. REV. 1300, 1301-02 (1968).
23. Otterbourg, supra note 19, at 40.
25. For insight into the problem of collection agencies from the viewpoint of the courts, see Butterfield, Collection Agencies and the Courts, 5 LAW AND CONTEMP. PROB. 47 (1938).
26. See note 1 supra.
27. Note, Unauthorized Practice of Law by Collection Agencies, 8 W. Res. L.
proper circumstances, they may also "forward" cases to attorneys for legal action, although the practice of forwarding has been a point of controversy often raised by the agency's opposition in the controversy. However, while these and other activities of collection agencies are generally held not to constitute the unauthorized practice of law, several common activities have very often been held by the courts to be illegal. In the court opinions barring these activities there is generally found a detailed analysis of the agency's standard operating procedure. Some examples of agency activities which are most often prohibited are the practice of advising or threatening legal proceedings, procuring or taking assignments of claims for collection, and the appearance by a collection agency in a court of law.

As previously indicated, throughout the history of the controversy between the collection agency industry and the organized bar, some lawyers have continued to maintain, despite court rulings to the contrary, that the mere operation of a collection agency is per se the practice of law, and thus, when done by laymen, is illegal. A recent United States District Court case has decided this issue in favor of the collections industry, and has created a precedent for the rest of the country.

The Unauthorized Practice of Law Committee of the Alabama State Bar Association charged Dun & Bradstreet, a large and repu-

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29. See pp. 163-164, infra.

30. Butterfield, supra note 25, at 47.


32. See, e.g., Bump v. District Court, 232 Iowa 623, 5 N.W.2d 914 (1942); Bay County Bar Ass'n v. Finance Sys., Inc., 345 Mich. 434, 76 N.W.2d 23 (1956); State v. James Sanford Agency, 167 Tenn. 339, 69 S.W.2d 895 (1934); State ex rel. State Bar of Wisconsin v. Bonded Collections, Inc., 36 Wis. 2d 643, 154 N.W.2d 250 (1967); p. 164 infra.


table national collection agency, with violation of Title 46, Section 42 of the Code of Alabama, which reads, in pertinent part:

Section 42. Who may practice as attorneys.—Only such persons as are regularly licensed have authority to practice law. For the purposes of this article, the practice of law is defined as follows: Whoever, . . . (d) as a vocation, enforces, secures, settles, adjusts, or compromises defaulted, controverted or disputed accounts, claims, or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense; is practicing law . . . .

The trial court rejected the plaintiff's contention that the agency's activities were per se the practice of law, and concluded that the case precedents relied on by the plaintiffs in their argument were decided on a "case-by-case" basis and relief in such cases had only been awarded where there was evidence of particular agency activities that should have been properly reserved for a licensed lawyer. The court pointed out that in such cases where relief was granted, the offending agencies had in some manner breached the Statement of Principles as adopted by the national collection agency organizations and the bar associations. In a per curiam opinion, the United States Court of Appeals for the Fifth Circuit adopted in toto the District Court's Opinion. The court concluded that the pragmatic "case-by-case" approach to controversies in this area "is in line with the weight of authority nationwide," and suggested that statutes such as Alabama's Title 46, Section 42, do not intend to eliminate entire businesses, but rather to ask if and at what point the agency does "enter into the field of the legal profession."

36. All the state statutes relating to the unauthorized practice of law are compiled in the Unauthorized Practice Statute Book of the American Bar Foundation Project on the Unauthorized Practice of Law (1961).
39. For example, see Berk v. State, 225 Ala. 324, 142 So. 832 (1932) (court condemned the practice of a collection agency of threatening debtors with legal action). The Statement of Principles adopted in 1937 specifically prohibits such activities by collection agencies. See 6 Martindale and Hubbell Law Directory 71C, 75C (1975).
41. Id. at 1230. See Annot., 27 A.L.R.3d 1152, 1156 (1969).
Further analysis of the *Dun & Bradstreet* case is helpful in examining another common collection agency activity which has been frequently attacked by the organized bar. The practice of forwarding, the transfer of a delinquent account to a lawyer chosen either by the creditor or by the collection agency, has generally been held to be permissible so long as the agency is to thereafter perform only ministerial duties. If the agency does not overstep its proper role, and the other requisites of proper forwarding are met, there presently seems to be little doubt that a collection agency may act as agent for a creditor to select an attorney and arrange compensation, which is often done in forwarding.

In *Dun & Bradstreet*, the court reviewed in detail the agency's method of doing business, a method which is very similar to that of many collection agencies throughout the country. The court found that it was not a violation of the Alabama law for Dun & Bradstreet to forward the claim to an attorney it selected upon request of the creditor, since the evidence established that once the agency forwarded the claim, it gave no advice to the lawyer and exercised no further control over the settlement of the account. Further, the agency received no share of the attorney's fees and had no control over the lawyer. Hence, there was no harmful disruption of the very

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44. The forwarding must comply with the *Code of Professional Responsibility*. In general, to comply with the *Code*, there must be no division of fees for legal services except with another lawyer, based upon a division of service or responsibility; there must be no control of a lawyer's services by any intermediary lay agency; the attorneys involved must not aid the unauthorized practice of law by a lay agency. *See ABA, Code of Professional Responsibility, Canons 3, 5 and Disciplinary Rules 3-101, 3-102 (A), 5-107 (B). See also ABA Canons of Professional Ethics Nos. 34, 35, 47; ABA Committee on Professional Ethics, Opinions, Nos. 48 (1931), 180 (1938), 294 (1958), 316 (1967).*

45. Comment, 52 MINN. L. REV. 1300 n.14 (1968). In many instances the agency selects an attorney, under authorization from the creditor, based upon its experience and by using commercial law lists which contain names of commercial law attorneys in various geographic areas. *See Herron, supra* note 10, at 172; Ottebour, *supra* note 17, at 38-39.

46. For a description of the normal activities of a *Dun & Bradstreet* collection agency, see Herron, *supra* note 10.


48. *See* note 44 *supra*.
personal attorney-client relationship,49 since the lawyer involved acted solely as the creditor's attorney once hired, and in no way acted as attorney for the agency.

The weight of authority in the area, however, suggests that when control and the duty and allegiance of the lawyer are diverted from the creditor to the agency, then the collection agency is engaged in the unauthorized practice of law.50

The reasoning of the bar and the majority of courts in this area is further illustrated by the Credit Bureau of Albuquerque case. There the court held illegal the practice by an agency of taking an assignment of a claim for the purpose of bringing suit in its own name.51 It is suggested that if this practice were allowed, the agencies would use the assignment so frequently as to indicate an intent to represent another's interest as a business, and arguably in these circumstances, such activity is the unauthorized practice of law. In such a situation, lay employees would in effect be acting as attorneys, but without any of the sanctions imposed upon the attorney and without any of the requirements of expertise and training.52 Further, the agency's business would depend upon the solicitation of claims, for which an attorney could be disciplined,53 and the agency would be falsely holding itself out as ready, willing, and able to practice law and perform legal services.54

Another practice of collection agencies which goes a short step beyond forwarding was also struck down by the court in Credit Bureau of Albuquerque. That practice is the use of agency-employed attorneys to maintain suits for collection after initial efforts by the agency have failed. It has been held repeatedly, as it was in this case, that the agency would be, for all practical purposes, selling legal services for a profit, and thus doing indirectly what it

49. See Note, 52 Minn. L. Rev. 1300, 1301-02, supra note 22.
52. Comment, 41 Minn. L. Rev. 475 (1957).
53. Id. at 475; see ABA, CODE OF PROFESSIONAL RESPONSIBILITY, Canon 2.
54. Note, Unauthorized Practice of Law by Collection Agencies, 8 W. Res. L. Rev. 492, 499 (1957) and authorities cited therein at n.33.
could not do directly.\textsuperscript{55}

It is also clear in such cases, the bar associations point out, that the confidential and fiduciary attorney-client relationship is strained, if not altogether destroyed,\textsuperscript{56} since the attorney is responsible not to the creditor, but rather to the collection agency which hired him. Of perhaps greater importance in these situations is the fact that attorneys are in effect parties to the solicitation of business. That is, the agency can solicit business which the lawyer cannot do, and the lawyer can enforce the claims in court which the agency could not do.\textsuperscript{57} Thus, if one, on the strength of a mere assignment, purports to act as the real party in interest, advises the true creditor of the necessity for suit, and also directs an attorney in the initiation, conduct, and termination of the lawsuit, he is practicing law, and when done in the usual and habitual course of business, it constitutes the unauthorized practice of law.\textsuperscript{58}

The collections industry, on the other hand, has presented good arguments in opposition to decisions such as the court's in \textit{Credit Bureau of Albuquerque}. Among other things, they maintain that the control of an attorney by someone other than the real party in interest is not necessarily objectionable. That is, if one wishes to select another person to deal with his attorney, he should have the freedom to do so, assuming the third person-agent has no interests which are in conflict with his principal. So if the creditor feels that a collection agency can better handle his collection needs, even to the extent of using legal proceedings, there should be no objection to his hiring that agency.\textsuperscript{59} Small creditors should not be denied such expert services which the large institutions can provide for themselves internally.\textsuperscript{60}

Further, there is not necessarily a danger of diverting the attorney's allegiance or creating a conflict of interests. That is, if in examining the relative interests of the creditor and the collection

\textsuperscript{55} See Comment, 41 Minn. L. Rev. 475, 476 (1957); Note, \textit{Unauthorized Practice of Law by Collection Agencies}, 8 W. Res. L. Rev. 492, 500 (1957).

\textsuperscript{56} See note 24 supra.

\textsuperscript{57} Note, \textit{Unauthorized Practice of Law by Collection Agencies}, 8 W. Res. L. Rev. 492, 500 (1957).


\textsuperscript{59} Comment, 52 Minn. L. Rev. 1300, 1306 (1968).

\textsuperscript{60} See Maxwell & Zug, \textit{supra} note 28, at 159.
agency, it appears that both are the same, it really should not matter that the attorney's "allegiance" is to one or the other, for what is good for one will necessarily benefit the other.\footnote{Comment, 52 Minn. L. Rev. 1300, 1306 (1968).}

The argument that the agency should not be able to do indirectly what it could not do directly is not applicable in cases such as \textit{Credit Bureau of Albuquerque}, where the claim is referred to the agency-employed lawyer, the agencies argue. When the lay intermediary hires an attorney, the objections underlying the direct practice of law disappear. When an attorney is used, he is still subject to the same professional and ethical restrictions, regardless of who hires him, and, of course, he has attained the educational level needed to enter the legal profession.\footnote{\textit{Id.} at 1307.}

In sum, the agencies argue that the objections to the hiring of attorneys by lay intermediaries are insignificant and superficial when compared to the needs of the small creditor for efficient, low cost, and speedy collection of debts, and to the obvious demand for such services.\footnote{\textit{Id.}}

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