UNAUTHORIZED PRACTICE OF LAW IN TEXAS—A PRIMER

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CHAPTER 7
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Meloney C. Perry is a founding partner of the Dallas office of the law firm of Meckler Bulger Tilson Marick & Pearson, LLP. Her practice focuses on insurance class-action and bad-faith litigation. Ms. Perry is currently involved in defending a major auto insurance company in complex, insurance regulatory and/or class-action litigation in multiple jurisdictions. The case topics include, but are not limited to, a challenge to the use of medical audit vendors and privacy of medical records, an attack on the method in which uninsured motorist coverage is rejected, and the practice of deducting “betterment” in adjusting automobile property damage claims. Additionally, she has been involved in extensive policy forms drafting, and negotiations with various governmental agencies. Ms. Perry also frequently does appellate work in multiple jurisdictions. One of Ms. Perry’s representative cases is Safeco Ins. Co. of Am. v. Burr/GEICO Gen. Ins. Co. v. Edo, 127 S. Ct. 2201 (2007), which involves issues of first impression under the Fair Credit Reporting Act and the use of credit scores in the underwriting process.

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Ms. Perry’s Professional Affiliations include Federation of Defense & Corporate Counsel, Chair Reinsurance, Excess and Surplus Lines Section, Vice Chair Extra-Contractual Liability Section, Vice Chair Appellate Law Section, Vice Chair Ethics and Professionalism Committee; Defense Research Institute; Patrick E. Higginbotham American Inns of Court, Pupil (1995-96); State of Texas Bar Association, The Insurance Law Section, The Insurance Law Council (2008-2012); American Bar Association, Litigation Section and Tort Trial & Insurance Practice Group Section.

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UNAUTHORIZED PRACTICE OF LAW IN TEXAS—A Primer

I. INTRODUCTION

In the age of the Internet, everything is available at the push of a button, including legal forms. Companies advertise “claim” services which may or may not be the unauthorized practice of law (“UPL”). In Texas, from 2004 to 2008, the legal community was abuzz with discussions on the subject and whether a liability carrier’s use of staff counsel to defend its insured was, in fact, the unauthorized practice of law. After the Texas Supreme Court’s decision in Unauthorized Practice of Law Committee v. American Home Assur. Co., Inc., 261 S.W.3d 24 (Tex. 2008), the issue of unauthorized practice of law quieted down. Now a search indicates that only a hand full of cases since 2008 reference actions regarding the unauthorized practice of law. So, does the unauthorized practice of law still exist in Texas? What is it? And why should we as attorneys be concerned about it? Have we had it happen in our cases and not even know it? This article examines the reasons and history behind the regulation of the unauthorized practice of law and what remedies exist.

II. WHAT IS THE REASON FOR REGULATION OF THE UNAUTHORIZED PRACTICE OF LAW?

The primary objective of any regulation of the unauthorized practice of law is to protect the public. “The controlling purpose of all laws, rules, and decisions forbidding unlicensed persons to practice law is to protect the public against persons inexperienced and unlearned in legal matters from attempting to perform legal services.” Grievance Committee State Bar of Texas, Twenty—First Congressional District v. Coryell, 190 S.W.2d 130, 131 (Tex.Civ.App.—Austin 1945, writ ref’d w.o.m.). Who has the power and/or duty to regulate such activities? Do we as licensed attorneys have that duty and/or legal authority to enforce the authorized practice of law?

III. WHO HAS POWER TO REGULATE THE PRACTICE OF LAW?

Both the legislature and the courts have power to regulate the practice of law in Texas. UPLC v. American Home Assur. Co., Inc., 261 S.W.3d 24, 29-30 (Tex. 2008). The Supreme Court of Texas has held that independent of any statutory authority it has the inherent power to regulate the practice of law in Texas “for the benefit and protection of the justice system and the people of Texas as a whole.” UPLC v. American Home Assur. Co., Inc., 261 S.W.3d at 29-30; In re Nolo Press/Folk Law, Inc., 991 S.W.2d 768, 769–770 (Tex.1999); State Bar of Texas v. Gomez, 891 S.W.2d 243, 245 (Tex.1994); Unauthorized Practice Comm. v. Cortez, 692 S.W.2d 47, 51 (Tex.1985); Hexter Title & Abstract Co. v. Grievance Comm., 179 S.W.2d 946, 948 (1944) ( “The State has a vital interest in the regulation of the practice of law for the benefit and protection of the people as a whole”).

The Court's inherent power is derived in part from Article II, Section 1 of the Texas Constitution. UPLC v. American Home Assur. Co., Inc., 261 S.W.3d at 29-30 (citing, Nolo Press/Folk, 991 S.W.2d at 769–770. See also Gomez, 891 S.W.2d at 245; Eichelberger v. Eichelberger, 582 S.W.2d 395, 398–399 (Tex.1979) (holding that “[t]he inherent judicial power of a court is not derived from legislative grant or specific constitutional provision, but from the very fact that the court has been created and charged by the constitution with certain duties and responsibilities”, and “also springs from the doctrine of separation of powers between the three governmental branches”, “to enable our courts to effectively perform their judicial functions and to protect their dignity, independence and integrity.”). This constitutional provision conveys to the Texas Supreme Court the regulation of judicial affairs and the power to govern the practice of law. Nolo Press/Folk, 991 S.W.2d at 769–770; Gomez, 891 S.W.2d at 245.

The Texas Legislature has acknowledged that the Texas Supreme Court has exclusive authority to adopt rules governing admission to the practice of law in Texas. UPLC v. American Home Assur. Co., Inc., 261 S.W.3d at 29-30, n.40. See Tex. Gov’t Code §81.061—“Rules governing the admission to the practice of law are within the exclusive jurisdiction of the supreme court.”; see also Tex. Gov’t Code §82.021—“Only the supreme court may issue licenses to practice law in this state as provided by this chapter. The power may not be delegated.”

The Legislature supplemented the Supreme Court’s inherent powers by statute, primarily the State Bar Act [Texas Government Code chapter 81]. Nolo Press/Folk, 991 S.W.2d at 769–770; Tex. Gov’t Code §§ 81.001–.114 (formerly Tex. Rev. Civ. Stat. Ann. art. 320a–1 Sec. 3(enacted in 1939 and repealed in 1987—§81.001 et seq. is the codification of former art. 320a-1)); See §81.011(b)—“This chapter [the State Bar Act] is in aid of the judicial department’s powers under the constitution to regulate the practice of law, and not to the exclusion of those powers.” Note References to Chapters of the Texas Government Code below are references to the State Bar Act, Chapter 81 unless otherwise noted.

IV. WHO HAS DUTY OF ENFORCEMENT?

Chapter 81 of the State Bar Act authorizes the Supreme Court to establish and appoint the nine-member Unauthorized Practice of Law Committee to be responsible for investigating and prosecuting the
unauthorized practice of law. 1 §81.103(a)—“The unauthorized practice of law committee is composed of nine persons appointed by the supreme court.” See Order Approving amendments to the Rules Governing The Unauthorized Practice of Law Committee, Misc. Docket No. 07–9197, (Tex. Nov. 27, 2007) (available from the Supreme Court of Texas website at www.supreme.courts.state.tx.us/miscdocket/07/079197 00.pdf (“The S.Ct. Order”)). See Fadia v. Unauthorized Practice of Law Committee, 830 S.W.2d 162, 163 (Tex.App.—Dallas, 1992); Drew v. Unauthorized Practice of Law Comm., 970 S.W.2d 152, 153 (Tex.App.—Austin 1998, pet. denied); Crain v. Unauthorized Practice of Law Committee of Supreme Court of Texas, 11 S.W.3d 328, 331 (Tex.App.—Houston [1 Dist.],1999). See also Nolo Press/Folk, 991 S.W.2d at 771–772. To fulfill these duties the UPL Committee website states that the UPL Committee meets at least twice a year to conduct business and receive reports from its regional and district chairpersons and votes whether to authorize civil court lawsuits to enjoin the unauthorized practice of law. See www.txupls.org/. §81.103 and the S.Ct. Order both provide that the UPL Committee is comprised of nine members, at least three of whom must not be lawyers, appointed by this Court for staggered three-year terms. Members receive no monetary compensation for their service, but §81.103(f) and the S.Ct. Order require the State Bar to pay the Committee’s necessary and actual expenses. Section 81.106 gives the UPL Committee and persons to whom it delegates authority immunity from liability “for any damages for an act or omission in the course of the official duties of the committee”, and gives complainants and witnesses before the Committee the same immunity they would have in a judicial proceeding. The S.Ct. Order provides a similar grant of immunity. Section 81.105 provides that the UPL Committee is not prohibited from using local subcommittees, and the S.Ct. Order expressly authorizes the appointment of subcommittees of one or more persons. The UPL Committee has divided the state of Texas into five regions, Northern, Central, Southern, Eastern and Western. See UPL Committee website. The UPL Committee has created 37 district subcommittees within such regions. The UPL Committee appoints chairpersons for the regions and district subcommittees. The district subcommittees are comprised of lawyers and lay persons. The

Section 81.104 and the S.Ct.’s Order outlines the duties of the UPL Committee to include the following: (1) keep the supreme court and the state bar informed with respect to: (A) the unauthorized practice of law by lay persons and lay agencies and the participation of attorneys in that unauthorized practice of law, and (B) methods for the prevention of the unauthorized practice of law; and (2) seek the elimination of the unauthorized practice of law by appropriate actions and methods, including the filing of suits in the name of the committee. See UPLC v. American Home Assur. Co., Inc., 261 S.W.3d at 29–30.; Nolo Press/Folk, 991 S.W.2d at 771–772. To fulfill these duties the UPL Committee website states that the UPL Committee meets at least twice a year to conduct business and receive reports from its regional and district chairpersons and votes whether to authorize civil court lawsuits to enjoin the unauthorized practice of law. See www.txupls.org/. §81.103 and the S.Ct. Order both provide that the UPL Committee is comprised of nine members, at least three of whom must not be lawyers, appointed by this Court for staggered three-year terms. Members receive no monetary compensation for their service, but §81.103(f) and the S.Ct. Order require the State Bar to pay the Committee’s necessary and actual expenses. Section 81.106 gives the UPL Committee and persons to whom it delegates authority immunity from liability “for any damages for an act or omission in the course of the official duties of the committee”, and gives complainants and witnesses before the Committee the same immunity they would have in a judicial proceeding. The S.Ct. Order provides a similar grant of immunity. Section 81.105 provides that the UPL Committee is not prohibited from using local subcommittees, and the S.Ct. Order expressly authorizes the appointment of subcommittees of one or more persons. The UPL Committee has divided the state of Texas into five regions, Northern, Central, Southern, Eastern and Western. See UPL Committee website. The UPL Committee has created 37 district subcommittees within such regions. The UPL Committee appoints chairpersons for the regions and district subcommittees. The district subcommittees are comprised of lawyers and lay persons. The

2 In addition, the Texas Supreme Court requires continuing education and imposes disciplinary rules, enforced through the grievance process. UPLC v. American Home Assur. Co. Inc., 261 S.W.3d at 30. TEX. STATE BAR R. art. XII, §§ 1–13; see §81.072 concerning General Disciplinary and Disability Procedures and §81.113 regarding continuing legal education. See also TEX. DISCIPLINARY R. PROF’L CONDUCT; TEX. STATE BAR R. art. X. and TEX.R. DISCIPLINARY P. all available on the Supreme Court of Texas website.

2 “The first such entity (predecessor to the UPL Committee), the Committee on the Lay and Corporate Encroachment of the Practice of Law, was created in 1932 by the voluntary Texas Bar Association and its members appointed by the Association’s president. The Committee’s sole purpose was to draft and urge enactment of a statute defining the practice of law and prohibiting the unauthorized practice. That goal having been accomplished in the 1933 legislative session, the Committee was made a standing committee of the Bar Association with the name, the Committee on Unlawful Practice of the Law. The Committee’s purposes were enlarged to include informing local bar associations about the problems of the unauthorized practice of law, investigating possible violations of the new statute, and enforcing the statute by injunctions and criminal prosecutions. Shortly after the integrated State Bar of Texas was formed in 1939, this (Texas Supreme) Court promulgated rules governing its operations, which called for local grievance committees to investigate and prosecute the unauthorized practice of law. The State Bar also created a state committee on unauthorized practice to assist the local grievance committees, stimulate interest, and disseminate information. The state committee was not a standing committee, however, and its role was largely advisory; investigation and prosecution of the unauthorized practice of law was left to local grievance committees. Rules amendments adopted by the bar and approved by this Court in 1952 established the Unauthorized Practice of Law Committee as a permanent entity in the State Bar administration and gave the Committee investigative and
subcommittee members investigate UPL complaints and make recommendations to the subcommittee. The subcommittee either resolves the complaint or makes a recommendation to the UPL Committee regarding whether to file suit to enjoin the unauthorized practice of law. See www.txupls.org.

The UPL Committee’s authority to institute legal proceedings to prohibit the unauthorized practice of law is not exclusive. While the Supreme Court established the UPL Committee to investigate and prosecute the unauthorized practice of law, any violation of the statutes covering unauthorized practice of law constitutes the unauthorized practice of law and may be enjoined by a court of competent jurisdiction. See §83.006. Therefore, any interested attorney, group of attorneys, or any local bar association may file suit in the district court, of this right to injunction to enjoin the unauthorized practice of law. Touchy v. Houston Legal Foundation, 432 S.W.2d 690, 694 (Tex. 1968) (“the interest of the legal profession, as well as the interest of the public, would be better served by recognizing the right of private attorneys to institute an action, upon proper and sufficient allegations, to enjoin the unauthorized practice of law or conduct of non-lawyers which is demeaning to the legal profession and harmful to the plaintiffs”); Stewart Abstract Co. v. Judicial Commission of Jefferson County, 131 S.W.2d 686 (Tex. Civ. App. —Beaumont 1939, no writ).3

V. WHO CAN PRACTICE LAW IN TEXAS?

The Texas Supreme Court has made it clear that the right to practice law in Texas is a privilege, not a right. State Bar of Texas v. Heard, 603 S.W.2d 829, 834 (Tex. 1980). The rules adopted by the Court permit only individuals meeting specified criteria to practice law—one must either be licensed by the Court or have special permission. UPLC v. American Home Assur. Co., Inc., 261 S.W.3d at 29-30 n.41 (TEX.R. GOVERN. BAR ADM’NN I–XXI available online from

3 Note that the Austin Court of Appeals in Drew v. UPL, 970 S.W.2d 152 (Tex. App. — Austin 1998, pet. denied), allowed the award of sanctions and attorney’s fees. It distinguished Fadia v. UPLC, 830 S.W.2d at 166, in which the Dallas Court of Appeals found that the Committee could not recover attorney’s fees and that §81.104(2) did not authorize the award of attorney’s fees. Id. Fadia did not address regular monetary sanctions and did not address whether the court could award attorney’s fees under the declaratory judgment act at Texas Civil Practice and Remedies Code section 37.009. The Austin Court of Appeals found no prohibition against monetary sanctions and held “they are part of the court’s inherent power to control the procedure of the cause. .. The Committee sought and received a declaration that Drew participated in the unauthorized practice of law. As a prevailing party in a declaratory judgment action, the Committee could be awarded attorney’s fees”.

the Texas Board of Law Examiners.); see §81.051(a)— “The state bar is composed of those persons licensed to practice law in this state”. Other exceptions include law students, foreign legal consultants and out-of-state attorneys. See §81.102; e.g. TEX.R. GOVERN. BAR ADM’NN XIV (foreign legal consultants), XIX (pro hac vice); RULES AND REGULATIONS GOVERNING THE PARTICIPATION OF QUALIFIED LAW STUDENTS AND QUALIFIED UNLICENSED LAW SCHOOL GRADUATES IN THE TRIAL OF CASES IN TEXAS (law students and unlicensed graduates). See also §81.102—“(a) Except as provided by Subsection (b), a person may not practice law in this state unless the person is a member of the state bar. (b) The supreme court may promulgate rules prescribing the procedure for limited practice of law by: (1) attorneys licensed in another jurisdiction; (2) bona fide law students; and (3) unlicensed graduate students who are attending or have attended a law school approved by the supreme court.” Entities, including insurance companies, are generally excluded. UPLC v. American Home Assur. Co., Inc., 261 S.W.3d at 33. However, there are some limited exceptions for small claims and justice courts. See Tex. Govt. Code §28.003(d) (re: small claims suits); Tex. Prop. Code §24.011 (re: non-lawyer representation in forcible entry and detainer cases). Finally, some governmental agencies have adopted rules allowing non-lawyers to assist in administrative proceedings. See, e.g., Tex. Labor Code §401.011(37) (re: cases under the Workers’ Compensation Act); 28 Tex. Admin. Code §1.8 (re: the Texas Dept. of Insurance “A person appearing at any proceeding may be represented by a licensed attorney or by any duly authorized representative”).

VI. WHAT IS THE PRACTICE OF LAW?

Section 81.101(a) defines the practice of law as: the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined. In addition, the legislature has broadly prohibited certain activities as the unauthorized practice of law. For example: a person...may not charge or receive, either directly or indirectly, any compensation for all or any part of the preparation of a legal instrument affecting title to real property, including a deed, deed of trust, note, mortgage, and transfer or release of lien. §83.001; Crain v. Unauthorized Practice of Law Committee of Supreme Court of Texas, 11 S.W.3d 328, 332-33 (Tex.App.—Houston [1 Dist.] 1999, pet. denied). The statutory
definition, however, is not exclusive. §81.101(b); Nolo Press/Folk, 991 S.W.2d at 770-77; Gomez, 891 S.W.2d at 245; Cortez, 692 S.W.2d at 51 (“independently of any statutory provisions as to what may constitute practice of law, the court has the duty and the inherent power to determine in each case what constitutes the practice of the law, and to inhibit persons from engaging in the practice of law without having obtained a license to do so” (quoting Grievance Comm. v. Coryell, 190 S.W.2d 130, 131 (Tex.Civ.App.—Austin 1945, writ ref’d w.o.m.), and citing Grievance Comm. v. Dean, 190 S.W.2d 126, 128—129 (Tex.Civ.App.—Austin 1945, no writ)) (concluding that in regulating the practice of law, the Legislature acts “not to the exclusion of, nor in denial of, the constitutional powers of the judicial branch of the government”)).

Courts inherently have the power to determine whether other services and acts not enumerated in the definition may constitute the practice of law on a case-by-case basis. §81.101(b); Cortez, 692 S.W.2d at 50; Brown v. Unauthorized Practice of Law Committee, 742 S.W.2d 34, 41 (Tex. App.—Dallas 1987, writ denied). The courts have found that the practice of law includes, in general, all advice to clients and all action taken for them in matters connected with the law. Brown, 742 S.W.2d at 41. In fact, a person may confer legal advice not only by word of mouth, but also by a course of conduct that encourages litigation and the prosecution of claims. Brown, 742 S.W.2d at 40; Green v. Unauthorized Practice of Law Committee, 883 S.W.2d 293, 297-98 (Tex.App.—Dallas 1994, no writ). In essence, it is the character of the service and its relation to the public interest that determines whether services performed by a layman constitute the practice of law. Brown, 742 S.W.2d at 41-42.

The Texas Supreme Court has also held that due to these inherent powers to determine what acts constitute the practice of law, the court is not bound by a jury’s decision when the undisputed facts demonstrate the unauthorized practice of law. Cortez, 692 S.W.2d at 51. And even though the courts have used the legislative definition of the practice of law to aid in cases, the courts are not bound by the jury’s determination of whether the undisputed acts fell within the statutory definition. Cortez, 692 S.W.2d at 51.4

As a result, the unauthorized practice of law is a proper subject for summary judgment. UPLC v. Cortez, 692 S.W.2d at 51, Fadia v. Unauthorized Practice of Law Comm., 830 S.W.2d 162, 164 (Tex.App.—Dallas 1992, writ denied). When the activities alleged to be the practice of law are undisputed, courts have the inherent power to determine on a case-by-case basis whether those activities constitute the unauthorized practice of law and render judgment. Cortez, 692 S.W.2d at 50—51; Fadia, 830 S.W.2d at 164; Crain, 11 S.W.3d at 332. The right to a jury trial still exists in cases when the alleged facts are disputed and factual determinations must be made. Cortez, 692 S.W.2d at 51. Ultimately, the courts may decide whether certain undisputed activities constitute the unauthorized practice of law. Id.

VII. DO THE ETHICS RULES MATTER IN THE UNAUTHORIZED PRACTICE OF LAW?

While obviously ethics rules matter in the overall practice of law, do they pertain to the regulation of the unauthorized practice of law? The Texas Supreme Court held that ethics opinions and rules do not determine what constitutes the practice of law, but they do reflect the state of the practice as it exists. UPLC v. American Home Assur. Co., Inc., 261 S.W.3d at 35.

VIII. ARE THERE CONSTITUTIONAL LIMITATIONS?

While the Texas Supreme Court in UPLC v. American Home, recognized that state regulation of the unauthorized practice of law may be limited by the undecided “whether or not this court would have the implied authority to determine what would constitute the practice of law, independent of the statute.” Cortez at 50-51 (citing Hexter at 954.). The Cortez court also discussed the companion cases of Grievance Committee, State Bar of Texas, Twenty-First Congressional Dist. v. Dean, 190 S.W.2d 126 (Tex.Civ.App.—Austin 1945, no writ) and Grievance Committee, State Bar of Texas, Twenty-First Congressional Dist. v. Coryell, 190 S.W.2d 130 (Tex.Civ.App.—Austin 1945, writ ref'd w.o.m.), in which the Austin court of appeals stated that the legislative definition was not exclusive and “does not deprive the judicial branch of the power and authority, both under the State Bar Act and the adjudicated cases, to determine whether other services and acts not therein enumerated, may constitute the practice of law.” Therefore, the Cortez court noted that the legislature lifted the language from Dean and placed it in section 19(a) of the State Bar Act with the apparent intent to recognize the inherent power of the courts to determine what is the practice of law on a case by case basis, unconfined by the statute. Moreover, the court noted Coryell and Dean have been cited by the Texas Supreme Court in recognizing the inherent power of the courts. See Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 & n.1 (Tex.1979).

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4 The Texas Supreme in Cortez examined the legislative history in determining whether the court was bound by a jury determination. It reviewed its decision in Hexter Title & Abstract Co. v. Grievance Committee, Fifth Congressional Dist., State Bar of Texas, 179 S.W.2d 946 (Tex. 1944), in which the court reviewed certain acts to determine if they constituted the unauthorized practice of law under article 430a of the 1925 Penal Code (repealed). After finding a violation under the statute, the court specifically left
First Amendment, such as when an organization furnishes legal services to advance the personal interests of its members through a staff attorney, the parties in the case did not make a constitutional argument. Therefore, the Supreme Court did not directly address the issue. 261 S.W.3d at 36.

In the earlier cases of Green and Fadia, the issues of whether section 81.101 violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Texas Constitution were urged late and were waived. Green v. Unauthorized Practice of Law Committee, 883 S.W.2d 293 at 300; Fadia v. Unauthorized Practice of Law Comm., 830 S.W.2d at 165. Still, it should be noted that in Drew v. UPL, 970 S.W.2d at 155, the Austin Court of Appeals addressed the constitutionality of the Statute and whether §81.101 was unconstitutionally vague and allows abuse and the deprivation of the First Amendment right to freedom of speech. The Court found that the statute is sufficiently specific as concerns the actions the court enjoined, including preparation of pleadings, giving legal advice preparing legal documents, and attempting to appear before a judge on behalf of another. The court held that though the statute prevents Drew from acting as the legal representative of another, it does not prohibit him from speaking out against perceived injustices and therefore does not impermissibly infringe on his First Amendment rights. Id.

IX. CASE EXAMPLES
A. Drafting of Forms
1. Real Estate

In Hexter Title & Abstract Co., v. Grievance Committee, 179 S.W.2d 946 (Tex. 1944), the court held that the title company was not justified in drafting real estate documents even where those documents would have some impact on the title insurance policy to be issued and even where the title company used licensed attorneys to draft the documents. In Rattikin Title Co. v. Grievance Committee, 272 S.W.2d 948 (Tex. Civ. App.—Ft Worth 1954, no writ), the court found the law firm could not convey the documents when the law firm personnel and the title company personnel were one and the same.

2. Estate Issues

In Davis v. Unauthorized Practice Committee of State Bar of Texas, 431 S.W.2d 590 (Tex.Civ.App.—Tyler 1968, writ ref’d n.r.e.), Harold Davies, worked for an elderly man to assist him in administering his estate. Davies was not licensed to practice law in Texas. Id. at 592. In the course of his employment, Davies drafted numerous building and construction contracts, prepared articles of incorporation for a corporation, prepared a plan to establish a trust fund and gave legal advice in connection with the trust, negotiated with Lubbock County officials regarding condemnation proceedings, and advised attorneys concerning the method of computing inheritance tax together with his opinion of tax law. Id. at 592-593. The Tyler Court of Appeals held that, while the practice of law is generally understood to embrace the preparation of pleadings and other papers incident to special proceedings and to manage such proceedings on behalf of clients, the practice of law is not confined to cases conducted in the courts. Id. at 593. The court found that Davies had indeed engaged in the unauthorized practice of law because he gave legal advice, prepared legal documents and “placed himself in the position of an advocate in the presentation of claims.” Id. at 594.

3. Wills

In Palmer v. Unauthorized Practice Committee, 438 S.W.2d 374, 376 (Tex.Civ.App.—Houston [14th Dist.] 1969, no writ), the court agreed that no phase of law requires a more profound learning on the subject of trusts, powers, taxation law, legal and equitable estates, and perpetuities than preparing a will. And an unlicensed person, untrained in such complex legal subjects, cannot perform these duties for someone else. In Fadia v. Unauthorized Practice of Law Committee, 830 S.W.2d 162, 165 (Tex. App.—Dallas 1992, writ denied), the UPL Committee filed suit to enjoin Fadia from distributing his will manuals in Texas. Each party filed cross-motions for summary judgment. Based on the summary judgment evidence presented, the trial court granted an injunction prohibiting the sale and/or distribution of Fadia's will manuals in Texas. The Court held that because a nonlawyer cannot and should not give advice to any other person on the drafting and executing of wills, Fadia's publication and distribution of his will manual constitutes the practice of law. Id. at 165.

4. Immigration Forms

In Unauthorized Practice Committee v. Cortez, 692 S.W.2d 47 (Tex. 1985) which was a case of first impression, the Court decided whether selecting and preparing immigration forms constitutes the practice of law. The Court found the selling of legal advice is the practice of law and that Fadia sold his advice for $24.95. The Committee held that although the act of recording a client's response "probably does not require legal skill or knowledge, the act of determining whether the I-130 should be filled out at all does require special legal skills." 692 S.W.2d at 50. The Court further held that due to the nature of the immigration forms and the information required and implications of such filings, advising a client as to whether to file a form requires a careful determination of legal consequences. Id. As a result, the court
reversed the jury’s decision and held that Cortez’s actions constituted the unauthorized practice of law.\(^5\)

5. Mechanics Liens
In *Crain v. Unauthorized Practice of Law Committee*, 742 S.W.2d 34 (Tex. App.—Dallas 1987, writ denied) the Dallas Court of Appeals held that contracting to represent persons with regard to personal injury and property damage claims constitutes the practice of law. The undisputed facts demonstrate Brown, who had paralegal training, ran a business in which he entered into contracts with persons to represent them in resolving their personal injury and/or property damage claims on a contingent fee basis. *Id.* at 37. There was evidence at trial from two claims adjusters concerning Brown’s actions. *Id.* at 38. One adjuster testified she believed Brown was an attorney due to how he conducted himself. *Id.* at 38. For example, Brown was listed as a co-payee on the insurance check as “Ron Brown, Attorney at Law;” sent a letter of representation, and request for expenses. *Id.* Brown attempted to negotiate settlements for damages such as future medical expenses and actually instituted legal proceedings against three insurance companies because they refused to negotiate with him. *Id.* at 40. One of Brown’s clients also testified that she thought Brown was an attorney, he was to handle the claim and receive 1/3 of what she got from the carrier. *Id.* at 39.

Brown argued that there was no direct evidence that he advised his clients of their rights, or whether to accept settlement, or any duties under the law. *Id.* at 40. While the court agreed with Brown that there was no evidence that he ever verbally told his clients their rights, the Court held that a person may confer legal advice not only by word of mouth but also by a course of conduct that encourages litigation and the prosecution of claims. *Id.* at 40; (citing Quarles v. State Bar of Texas, 316 S.W.2d 797, 800, 802, & 804 (Tex.Civ.App.—Houston 1958)). The Court found Brown’s course of conduct nevertheless encouraged litigation and the prosecution of claims and, at least implicitly, advised his clients of what he perceived to be their legal rights. *Id.* at 40. Determining the legal liability, the extent of legally compensable damages, and the legal rights and privileges of personal injury and property damage claimants, by their very nature, require legal skill and knowledge. 742 S.W.2d at 40. The court decided that this is the same result even if the issue of liability is uncontested, since until the damage issue is resolved the claim is a disputed and contested claim. *Id.* at 42.\(^5\)

In *Green v. Unauthorized Practice of Law Committee*, 883 S.W.2d 293 (Tex.App.—Dallas 1994, no writ) the Dallas Court of Appeals held that preparing and sending demand letters on personal injury and property damage claims and negotiating and settling the claims with the insurance companies constitutes the practice of law. The undisputed facts demonstrated that Green who owned Eagle Consulting, which assists individuals in seeking their personal injury and property claims with insurance companies, composed and sent demand letters for settlement of his clients’ claims. *Id.* at 295, 298. The demand letters contained a section on liability and a section on legally compensable damages which involved the use of legal skill and knowledge. *Id.* at 298.

Green argued that he was acting as a mere “go-between”. *Id.* at 298. The court did not find that argument persuasive. The court held that even if Green were a “go-between”, he nevertheless impliedly advised his clients that the requested damages were the only damages to which they were entitled. *Id.* at 298. In addition, Green’s course of conduct showed that he negotiated his client’s claims with the insurance companies. *Id.* Green admitted he met with clients to come to an agreement for damages he would seek from the insurance companies. *Id.* He also transferred offers and counter-offers between his clients and the insurance carriers. Moreover, the insurance carrier would place Green on the settlement checks. *Id.* The court held that a party negotiates if that party conducts communications or conferences with a view toward reading a settlement or agreement. *Id.* (citing Black’s Law Dictionary at 1036). Green’s course of conduct demonstrated he impliedly advised his clients and approved the settlement amounts. *Id.* As a result, the court affirmed the summary judgment permanently enjoining Green from (1) contracting with persons to represent them with regard to their personal causes of

\(^5\) The jury had found at trial in response to the sole special issue, submitted without objection, asked: Do you find from a preponderance of the evidence that the Cortez Agency has given advice or rendered service requiring the use of legal skill and knowledge in interviewing persons and advising them as to whether or not to file a petition or application under the Immigration and Naturalization Act to secure a benefit for the client or relative of the client which require a careful determination of the facts, conclusions and legal consequences involved? The jury answered, “We do not.” *Cortez*, 692 S.W.2d at 48.

\(^6\) Brown had argued he only handled undisputed and uncontested claims per the Insurance Code. *Id.* at 42. Brown, however, was not a licensed adjuster. *Id.*
action for property damage or personal injury, (2) advising persons about their rights and the advisability of making claims for personal injuries or property damages, (3) advising persons whether to accept an offered sum of money in settlement of claims for personal injuries or property damages, (4) entering into contracts with persons to represent them in their personal injury or property damage matters on a contingent fee basis, and (5) advising clients of their rights, duties, and privileges under the law. 883 S.W.2d at 299.

In Unauthorized Practice of Law Committee v. Jansen, 816 S.W.2d 813 (Tex. App. — Houston [14th Dist.] 1991, writ denied), the court held that public insurance adjusters as defined in Texas Insurance Code §410.004 (former article 21.07-5) do not engage in the unauthorized practice of law by advising clients whether valuations placed on their claims by their insurers were accurate, despite effort to characterize such advice as analogous to counseling client to accept stated sum in settlement of claim. This includes such activities in measuring and documenting first-party claims under property policies, presenting those claims to carriers, and discussing claims with carriers’ representatives. Id. at 816. Jansen and his firm were public insurance adjusters who represented clients on a contingent fee basis. Id. at 814. They documented and presented first-party claims for property damage to insurance carriers on behalf of clients. Id. The undisputed evidence demonstrated Jansen had worked for over a decade as a licensed insurance adjuster. Id.

The UPL Committee argued that the trial court erred in finding the following:

1. the measure and documentation of first-party claims under property insurance policies is not the unauthorized practice of law;
2. the presentation of the claims of the insurance companies is not the practice of law; and
3. any discussion of the claims with insurance company representatives constitutes the unauthorized practice of law. Id. at 815.

The court of appeals disagreed. The court held that providing an estimate of property damage and completing forms to present a claim is the same procedure an insured follows to collect under a policy. Id. at 816. And just because the insured paid Jansen for his services to complete the paperwork did not convert the actions into the practice of law. Id.

The court distinguished negotiations with an insurance company regarding coverage and negotiations of a settlement from a public insurance adjuster presenting a claim. The court held that mere presentation of paperwork and data is not the practice of law. Id.

C. Litigation

1. Use of staff counsel by liability insurers

Over the years, liability insurance companies have turned increasingly to the use of in-house counsel or “captive” law firms to defend their policyholders. During the last decade, this practice engendered considerable controversy within the Texas bar and whether the insurance carrier companies were engaged in the unauthorized practice of law.

In its 2008 decision the Texas Supreme Court stated, “We start from a point of agreement among the parties, that a corporation is not authorized to engage in the practice of law.” Unauthorized Practice of Law Committee v. American Home Assur. Co., Inc., 261 S.W.3d 24, 33 (Tex. 2008). The Court examined the legislative history of Article 430a which specifically excluded insurance defense from its prohibition of the corporate practice of law. Id. at 34-35. The Court noted that thirty years after repealing Article 430a, the Legislature again undertook to define the practice of law in amendments to the State Bar Act which were recodified as Section 81.101(a) of the Texas Government Code. Id. at 35. The Court noted nothing in the legislative history of the amendments that indicated that the Legislature intended any change in the general understanding of the practice of law. Id.

The Court held that implicit in the statutory definition is that the practice of law requires the rendering of legal services for someone else. Id. The Court held that §81.101(a) does not outlaw house counsel in Texas and does not mean that a corporation engages in the practice of law when its attorney-employees provide legal advice regarding the corporation’s own affairs or represent others with identical interests in court. Id. at 35. Only when a corporation employs attorneys to represent the unrelated interests of others does it engage in the practice of law. Id.

Ultimately, the Texas Supreme Court held that “an insurer may use staff attorneys to defend a claim against an insured if the insurer’s interest and the insured’s interest are congruent, but not otherwise. Their interests are congruent when they are aligned in defeating the claim and there is no conflict of interest between the insurer and the insured.” Id. at 42-43. In cases where the interests between the insurer and the insured are congruent, the Court held that a staff attorney’s representation of the insured and insurer is indistinguishable. Id. at 42-43.

2. Out-of-state counsel and Pro Hac Vice requirements

§82.0361 provides in part that “a nonresident attorney requesting permission to participate in proceedings in a court in this state shall pay a fee of $250 for each case in which the attorney is requesting to participate. The attorney shall pay the fee to the Board of Law Examiners before filing with the
applicable court a motion requesting permission to participate in proceedings in that court as provided by rules adopted by the supreme court.” Subsection (f) provides that a nonresident attorney who files a motion requesting permission to participate in proceedings in a court in this state shall provide to that court proof of payment of the fee required by this section. The Supreme Court by rule shall prescribe the method of proof. Id. See also TEX. R. GOVERN. BAR ADM’NN XIX. Moreover, the attorney must be granted permission to participate in the proceedings—filing of a motion for pro hac vice is not sufficient. Id. If an attorney does not abide by these rules, he will be engaged in the unauthorized practice of law in Texas.

X. RESOURCES

See the website of the Unauthorized Practice of Law Committee (UPLC) of the State of Texas. http://www.txuplc.org/.

See the Supreme Court of Texas website at www.supreme.courts.state.tx.us/.

See various articles regarding the staff counsel issue at www.ticerlaw.com.