

Dueling over the Dual Practice

Henry G. Burke

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Legal Profession Commons](#)

Recommended Citation

Henry G. Burke, *Dueling over the Dual Practice*, 27 Md. L. Rev. 142 (1967)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol27/iss2/5>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

DUELING OVER THE DUAL PRACTICE

By HENRY G. BURKE*

The dual practice of law and accountancy has developed an imposing body of comment. Each writer has tried to state the problem in simple terms, yet there seems to be a tendency for the issues to get out of hand and for every manifestation and facet to acquire a complexity of its own. Those who have taken the position that the dual practice is valid and viable proceed on the assumption that no insuperable ethical conflicts need confront the dual practitioner and that his practice serves a public need. Those who condemn the practice assume that, as soon as the lawyer has obtained the CPA certificate or the CPA has been admitted to the Bar, he must suppress the publication of one or the other of his dual qualifications in order to avoid conflict with the canons of ethics of the American, state and local Bar Associations. If the latter position were "a truth universally acknowledged,"¹ the American Institute of Certified Public Accountants and all state and local bar associations would have endorsed this conclusion. Instead, we find that most state and local bar associations have remained silent and, consequently, neutral.²

The American Institute of Certified Public Accountants in 1946 refused to condemn the dual practice and has not changed its opinion since.³ The dominant document, on the other side, is Opinion 297 of the American Bar Association Ethics Committee.⁴ The most significant part of Opinion 297 answers the question: "Under what circumstances, if any, is it ethical for a lawyer who is also a public accountant to render both legal and accounting services?"⁵ The Committee on Professional Ethics answered:

The person who is qualified as both a lawyer and an accountant must choose between holding himself out as a lawyer and holding himself out as an accountant. As stated in the answer to Question 3, dual holding out is self-touting and a violation of *Canon 27*.

If he elects to hold himself out as an accountant, he must not practice law or he will violate *Canon 27* in that he will be using his activity as an accountant to feed his law practice. In determining whether he is practicing law when he holds himself out only as an accountant, the controlling factor is whether the activity in question is one which would constitute the practice of law when engaged in by one holding himself out as a lawyer.

* LL.B., 1927, University of Maryland; Ph.D., 1933, Johns Hopkins University; President, Maryland Association of Certified Public Accountants, 1932-33.

1. AUSTEN, PRIDE AND PREJUDICE 1 (1813).

2. See Goldberg, *Dual Practice of Law and Accountancy: A Lawyer's Paradox*, 1966 DUKE L.J. 117, 136 n.87.

3. See 83 J. ACCOUNTANCY 172 (1947).

4. ABA COMMITTEE ON PROFESSIONAL ETHICS, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 8 (1963-1964 Supp.).

5. *Id.* at 9.

If he elects to hold himself out as a lawyer, he will not violate any Canon of Ethics merely because in rendition of legal services he utilizes and applies accounting principles. It is not, of course, within the jurisdiction of this Committee to determine whether in any instance he is acting contrary to the governing restraints applicable to him as an accountant.⁶

This Opinion has been *fons et origo* of most pronouncements condemning the dual practice. The joint report of the committees on Professional Ethics of the Maryland State Bar Association and the Bar Association of Baltimore City finds most of its inspiration and authority in Opinion 297.⁷ The clearest bar association statements which do not follow Opinion 297 are those of the Idaho and Ohio State Bars.⁸ Although Opinion 297, as well as the Opinion of the Maryland and Baltimore Bar Association Ethics Committees, deals with many related questions, which are also covered fully or in part by the Opinions of other bar associations on both sides of the issue, the fundamental question is whether an attorney, who is also qualified as a certified public accountant, may ethically publicize his qualification as a lawyer and accountant. If a conclusive "yes" or "no" were accepted to this question, most other issues would probably solve themselves. The situation of the lawyer employed as a "house attorney" by an accounting firm or the CPA employed as a "house accountant" by a firm of lawyers presents no real difficulty. Although much has been written on this subject, there is little real difference of opinion. Likewise, there is no real disagreement as to the formation of proper partnerships in firms holding themselves out as lawyers or CPA's.

The proponents of both positions with regard to the dual practice have subsumed their arguments under the same headings. The favorite topics have centered around the public interest, the dual holding out which encompasses the announcement of a specialty in two professions, both of which are unprepared to permit the promulgation of specialties, the treatment of the dual practice as ipso facto advertising, the use of the two professions as a feeder for each other, the irreconcilability of the lawyer as advocate with the accountant as independent attestor or appraiser, and the impossibility of acquiring a high degree of proficiency in two professions. Of less significance, but, nevertheless, fully developed in the literature, are such questions as the economic advantages to the

6. *Id.* at 11.

7. See The Daily Record (Baltimore), April 11, 1966, p. 3.

8. Opinion No. 10 issued by the Committee on Professional Ethics of the Idaho State Bar; Opinion No. 22 issued by the Legal Ethics and Professional Conduct Committee of the Ohio State Bar Association (May 31, 1966).

The Idaho position is briefly summarized in the following statement: "An attorney who is also qualified as a certified public accountant may carry the designation 'Certified Public Accountant' on his office door, his professional card, and on his letterhead, and may practice both professions from the same office, providing that he adheres to the professional standards applicable to attorneys at law with respect to advertising and solicitation." The Advocate (Idaho State Bar Foundation), April, 1959, p. 4. The Ohio position is less forthright. It recognizes that the lawyer may properly engage in other activity, such as accounting, but warns that the dual practice may lead to conflicts or create an equivocal position which the practitioner must seek to avoid.

client in being able to consult a single practitioner rather than two and the implied claim of outstanding proficiency in the field of taxation.⁹

PUBLIC INTEREST

When considering the public interest there is a danger that one may make a psychological transfer and merge the interests of an individual or organization with the interest of the general public. One may easily slip into the fallacy of believing that what is good for the American Bar Association or what is good for the American Institute of Certified Public Accountants is good for the public. There are areas, however, in which the interest of the professional association and the interest of its members may run contrary to the interest of the public.

As an example of an association placing its interests above that of the public, perhaps no better illustration may be offered than the battle of the American Medical Association against a national health insurance program. For over fifty years, with an expenditure well in excess of fifty million dollars, the American Medical Association, through its lobbyists and by the use of every other means at its disposal, was able to block the enactment of a national health insurance program.¹⁰ It may be unfair to invoke ethical and moral concepts in the case of business associations, such as the National Association of Manufacturers, but one has a right to expect professional organizations to exercise ethical and moral restraint.

Frequently, the arguments concerning public interest represent a mixture of fact and law which require careful sorting before they may be reasonably judged.¹¹ The admission of the legal right of the individual to hold himself out as a member of both professions should dispose of the question, but Opinion 297 and the reports of various state bar associations condemning the dual practice give the impression that it is illegal and must be suppressed. These opinions endeavor to throw the prestige of the organization behind a principle which, at this moment, has no legal authority.

In order not to be diverted by the side issues which are interwoven in discussing the public interest, a concise statement by those favoring the dual practice and those opposing it will define the two

9. How heated the discussion of the dual practitioner problem has become is illustrated by an article written by W. D. Sprague and A. J. Levy entitled *Accounting and Law: Is Dual Practice in the Public Interest?*, J. ACCOUNTANCY 46 (December, 1966) and 52 A.B.A.J. 1110 (1966). This article was followed in the February, 1967, issue of the ABAJ by nine letters denouncing it under the scare headline "Messrs. Levy and Sprague are drawn and quartered," and by further denunciation which appeared in the March issue. 53 A.B.A.J. 100, 106, 108, 110-11, 116, 119, 210, 215-17 (1967).

10. HARRIS, A SACRED TRUST (1966).

11. In the "Sprague-Levy" article, the authors admit the legal right of the dual practitioner to practice either or both professions and then noticeably pass on to discussing the dilution of his experience because of diversification in two fields. "Admittedly he is permitted by law or regulation to practice either or both professions. His experience in each profession necessarily will be diluted to some extent because of the diversification into two fields instead of one. On the other hand, at some point in his career, his years of experience in each field may possibly exceed that of a relatively new practitioner in either field." J. ACCOUNTANCY 46 (December, 1966).

approaches to the problem. The favorable view is that taken by the accountants in the statement published in 1947 that "the compelling consideration, in our opinion, is the desirability of allowing the public complete freedom in the selection of lawyers or certified public accountants, who the public believes can render most effectively the professional services it desires."¹² The opposing view may be found in the joint report of the Professional Ethics Committees of the Maryland and Baltimore Bar Associations: "The lawyer should not be allowed to equip himself with two cloaks, each lined with different allegiances, restraints and responsibilities and possible penalties, especially if he is permitted to change his cloak as the occasion may require, to the confusion of the court, the client and the public."¹³ The picturesque language of the joint report leaves this author a little breathless. It might at least be admitted that when the joint practitioner appears before the court as a lawyer, it is hardly likely that the court will be confused or find it necessary to enter into a minute examination of the mantle he is wearing to determine what qualities and qualifications he may have other than that of being a lawyer.

With respect to the client and public, it is also presumptuous for the bar associations to assume that the dual practice must necessarily lead to confusion on the part of client and public and, consequently, should be proscribed. It is this sort of paternalistic arrogance which makes it difficult to reduce a relatively simple problem to its basic terms. Opinion 297 attempts to create the impression that, even in his most menial activities, the lawyer never discards the mantle of his profession; the intended effect has no basis in reality.

The second part of the public interest issue usually turns on the inability of the dual practitioner to acquire the sort of competence that the public has a right to expect. The question of proficiency or competence is discussed more fully below, but the manner in which it is introduced into the consideration of the public interest issue is really self-defeating. If the objection to the dual practice is that it is impossible to acquire proficiency in two professions and, therefore, the public is being deliberately deceived by a dual holding out, then this shortcoming would have become apparent long ago, and the individual practitioner, in self-defense, would have retired to a single field. On the other hand, the growth of the dual practice is, in itself, proof that a market demand is being met and that the individual with the dual qualifications is ready to stand on his ability to perform such tasks as he may conscientiously undertake. If the task he assumes lies beyond his competence, his position is no different from that of the single practitioner.

DUAL HOLDING OUT

When we move to the dual holding out argument and to the arguments which are usually described as ethical, we find that under the captions of self-laudation, announcement of a specialty, and advertising,

12. 83 J. ACCOUNTANCY 171, 172-73 (1947).

13. The Daily Record, *supra* note 7.

the issues are so closely knitted that the discussion of one necessarily involves the discussion of the others.¹⁴

Referring to dual holding out as "self-touting and self-laudation," the Ethics Committees of the Maryland and Baltimore Bar Associations stated that :

There can be no other true reason for or result but that one holding out would enhance, complement and be a feeder of employment for the other, and in effect be a direct or indirect solicitation one for the other. This is particularly apparent when one acknowledges that the skills of one or the other can be just as effectively applied when the attorney or the accountant elects to proclaim himself in a single capacity.¹⁵

The difficulty with the committee report is that again the factors have been so jumbled that the net result is self-contradiction. The only sin that the committee is fighting appears to be holding out. No objection is raised to the use of the skills of one profession by a practitioner in the other. It might be pointed out that this approach hardly establishes a very high moral standard for professional conduct. The practitioner is being told that he may utilize everything that his training or experience has provided but should refrain from holding himself out as a member of a profession to which he has been legally admitted. The other objection to the solution contained in the joint report is that, by implication, oral self-touting or self-laudation is considered unobjectionable, whereas a simple or honest statement on the door of one's office would constitute a serious grievance. Thus, there is the further implication in the position taken by the Professional Ethics Committees that devious or subtle self-laudation falls within the permitted rules. Those who believe that the joint practice should be permitted see no violation of existing ethical canons in the dual holding out. With regard to advertising and self-laudation, the answer is that the practitioner is merely identifying himself and claiming no superiority in comparison with other practitioners.¹⁶

If the contention is made that the difference between identification and the announcement of a specialty is merely juggling words, the proponents of the dual practice are also prepared with a full and complete answer. They reply that both the legal profession and the accounting profession have set up inviolable rules with regard to self-laudation, advertising, and the announcement of the specialty, which would prevent the practitioner in either field from engaging unpunished in such an unethical practice. The dual practitioner is subject to regulations by the published ethics of both professions which, therefore, should act as a double check on improper conduct.

14. See, e.g., Goldberg, *supra* note 2, at 124-25, 128; Brent, *Accounting and Law: Concurrent Practice Is in the Public Interest*, J. ACCOUNTANCY 38, 44 (March, 1967); Hughes, *Outlook for the Lawyer-CPA*, 39 TEXAS L. REV. 59, 71 (1960); Comment, 3 U.C.L.A.L. REV. 360-362 (1956).

15. The Daily Record, *supra* note 7, at col. 4-5.

16. Brent, *supra* note 14, at 44. See Canon 27.

The attempt to attack the dual practice on the ground that dual holding out is the announcement of a specialty¹⁷ seems to hark back to the time when accounting may have been regarded as "a handmaiden to the legal profession."¹⁸ It is possible that both the accounting profession and legal profession are late in recognizing the growth of specialization.¹⁹ Perhaps, in the fields of corporation law, probate law, domestic relations, real estate law, labor law, and tax law, both the public and the profession would gain by the recognition of specialties. At present, however, little light is thrown on the controversy with regard to the dual issue, as neither profession is ready to recognize specialties in the manner permitted in the medical profession. In part, this failure is due to the absence of any existing machinery for qualifying those who are known as specialists and, in part, it is due to the difficulty presented by the large firms in both professions where the announcement of the specialty might create serious problems in existing partnerships.

The argument with regard to self-laudation starts out with the assumption that, by the dual holding out, the dual practitioner is claiming a superiority in an unethical manner. It is unreasonable to attribute a claim of superiority where no such claim is made and then proceed with the condemnation of the practice because the claim has been made. Some of this confusion arises from the failure to recognize realistically that members of both professions acquire reputations as experts, which may not, however, be reduced to formal announcement. In this situation, we face another instance of practice running ahead of rules. It is not within the scope of the present discussion to deal with the question of how this gap may be closed.

THE FEEDER ARGUMENT

The feeder argument leaps out of Opinion 297 in the assertion that Canon 27 of the professional ethics of the American Bar Association is being violated "because the lawyer-accountant firm would almost inevitably serve as a feeder to the legal firm."²⁰ In direct response to this assertion "the honest practitioner, I am sure, will after a moment's reflection on his own career, agree that every activity he engages in in his daily life, in effect, feeds his practice. It is his associations and the impressions he gives to the public that brings his clients to his door."²¹

17. Canon 46 states:

A lawyer available to act as an associate of other lawyers in a particular branch of the law or legal service, may send to local lawyers only and publish in his local legal journal a brief and dignified announcement of his availability to serve other lawyers in connection therewith. The announcement should be in a form which does not constitute a statement or representation of special experience or expertness.

18. See J. ACCOUNTANCY 64 (March, 1967).

19. See Resh and Habermann, *A Practical Answer to Specialization*, 6 Case & Com. 35 (Nov.-Dec., 1966).

20. See note 4 *supra*.

21. Wilson, *The Attorney-C.P.A. and the Dual Practice Problem*, 36 U. DET. L.J. 457, 459 (1959).

The objections to the position taken in Opinion 297 are that the concurrent practice is condemned no matter how ethically it may be conducted,²² and further, that the so-called feeder would arise from the practice of accounting, a profession which prohibits advertising and which is governed by a code of ethics comparable to the standards established for the practice of law.²³ The argument about the feeder issue thus degenerates into a sort of *tu quoque*. The feeder argument has moral or ethical validity only if it is a true expression of prevailing standards of conduct. Insofar as it is an attempt to lay down a rule of conduct which is intended to restrain some but is evaded by others in either a subtle or flagrant manner, it lacks any moral force.

ADVOCACY V. INDEPENDENCE

The various issues which the dual practice has raised have a tendency to advance and recede. At one moment, it appears that the principal thrust of the argument concerns the feeder question. At another moment, the dominant issue is the question of achieving competence. At other times, the irreconcilability of the lawyer as advocate and the accountant as independent valuer or attestor are treated as the most decisive fact. The joint report of the Ethics Committees of the Maryland and Baltimore Bar Associations sets forth this conflict in the following language:

The lawyer is an advocate whose duty it is sincerely to present his client's cause and the facts thereof, in the best and most convincing manner, in accord with his client's interests. On the other hand, the Certified Public Accountant is pledged to give the public an uncolored, impartial, and full statement and analysis of his clients' financial situation. He does not advocate, but certifies to the exactitude of his findings upon which the public has a right to depend. One who acts in the dual capacity here being considered, may therefore be continually confronted with a conflict of duty to his client and to the public and faced with a temptation which the nature of man finds increasingly difficult to resist. The client is entitled to honest, energetic advocacy from his lawyer and on the other hand to impartial exactitude in accounting from his CPA.²⁴

The objection to the foregoing statement is that the joint report sets up a stereotype advocate and stereotype accountant and then proceeds to draw conclusions from these fictions. The assumption that every lawyer is acting as advocate during his entire life is fallacious. When the estate planner consults with his client and is called upon to take into account an improvident wife or retarded child in formulating programs for planning the client's estate, it would indeed be stretching

22. Goldberg, *supra* note 2, at 125-26, points out that Canon 27 does not mention feeding.

23. See Comment, 3 U.C.L.A.L. REV. 360, 367 (1956); 19 LA. L. REV. 831, 833-34 (1959).

24. The Daily Record, *supra* note 7, at col. 4.

the word "advocate" to say that the lawyer falls into this category. The term "advocate" implies a conflict with an identifiable adversary. Neither the wife, the child, nor even the Internal Revenue Service could fairly be described as such an adversary. When the lawyer burns the midnight oil to prepare a registration statement for filing with the Securities and Exchange Commission, he is not acting as an advocate. He is doing a job for his client which must also be "uncolored, impartial" and a "full statement and analysis." The thousands of lawyers who spend their days in the Record Offices scattered over our country do not carry out this function in the mantle of advocacy.

On the other hand, a certified public accountant may be living a useful, busy, and productive life without engaging in the certification of his client's financial situation. He may, in fact, be called upon to act as advocate and may legitimately do so in ways quite similar to that of a lawyer. The most obvious example of this practice is representation of clients before Internal Revenue Service or the Tax Court. It is difficult to draw a valid line between the manner in which a lawyer will handle a tax case and the way in which a CPA would handle the same tax case.²⁵

Outside of the tax field, the certified public accountant may also find himself legitimately employed in all sorts of business negotiations where his position is clearly that of advocate. Aside from the question of the dual practice, the client may feel that on personal grounds he is more comfortable in entering into negotiations for the sale of his business, or the acquisition of another business, or complicated contractual disputes, with his CPA rather than his lawyer at his side.

The fact that an individual is qualified in two lines of endeavor does not mean that he has a split personality.²⁶ On the contrary, it may well be that in those two lines of professional activity the individual practitioner has found a oneness, an identity which he would not achieve in either profession alone.

Another objection to the use of the "advocacy and loyalty" argument as an inseparable quality of the lawyer is that it reduces the concept of advocacy to the lowest form of partiality in which every value is subordinated to the end of winning the client's case. The ethical rules of the legal profession strive for a higher level than this type of blind allegiance.

As a bait to the dual practitioner, it is pointed out that there is no objection to having him use all the skills which he may possess as a CPA; the condemnation extends only to the holding out.²⁷ The objection to this makeshift solution is that holding out is essential to

25. See Blake, *Tax Practice, Responsibilities and Interrelationships*, J. ACCOUNTANCY 31, 34-35 (March, 1967), which considers whether the representation of the client in a tax case will diminish the independence of the CPA.

26. A note published in the HARVARD LAW REVIEW in 1950 referred to the "schizophrenic position as a lawyer with a duty of loyalty to his client and as a CPA with a duty of impartiality." 63 HARV. L. REV. 1457, 1458 (1950). The schizophrenic phrase has persisted in the literature on the dual practice but it may very well be that the schizophrenia was in the mind of the author of the note rather than in the mind of the dual practitioner.

27. Comment, 3 U.C.L.A.L. REV. 360, 368-69 (1956).

the broadening of the practitioner's experience. The dual qualification cannot be effectively used as a badge to be concealed under the table. We are not dealing with ivory-tower research; we are dealing with active business discipline which must be tested and developed in the business world.

In a recent Reith lecture, John Kenneth Galbraith pointed out, "that to a far greater extent than we imagine our beliefs and cultural attitude are accommodated to the needs and goals of the industrial mechanism by which we are served."²⁸ The dual practitioner contends that he is serving the needs and goals of the society on which he is dependent and in which he is living. The opponents of dual practice contend that the public, which includes the courts as well as clients, is confused and that the functions of the accountant and of the lawyer must be kept so separate that where both services are required they should be furnished by two practitioners. To this the dual practitioner responds that the medium which he represents is unique and valuable, admittedly novel, and one that should be permitted and encouraged to develop.

It has also been urged that the concept of privileged communication extends to lawyers but not to accountants, and, therefore, further conflicts must occur in the dual practice. This general conclusion overstates the case. The question of privileged communication is one of local law.²⁹ Furthermore, the privilege is the privilege of the client and not the privilege of the practitioner. The statutory privilege granted in Maryland with respect to accountants' communications is not based on common law and is not recognized by the federal courts. The question of privileged communication may arise in many circumstances, but the difficulties presented are, by no means, insuperable and hardly provide a sound argument for condemning the dual practice in general.

PROFICIENCY OR COMPETENCE

No one is likely to deny that, in general, both law and accounting are broad fields with many ramifications, or that specifically the field of income taxation, as well as almost every other field of administrative law in which the dual practitioner is likely to be interested, has grown increasingly complex. The mere naming of administrative agencies, such as Internal Revenue Service, Securities and Exchange Commission, Federal Trade Commission, etc., sets up a series of warning lights which any lawyer or accountant would disregard at his peril. In all these fields, the client demands and has a right to expect the highest degree of proficiency. The techniques involved are specialized and extend beyond the knowledge of law to a thorough understanding of the organizational structure of the agency. The dual practitioner, however, by holding himself out as qualified in two professions, makes no claim of outstanding competence in either. He has merely expanded the field from which he has chosen his areas of major interest and is ready to submit to the standards of qualification applied to other prac-

28. *The Listener* (London), Nov. 17, 1966, p. 712.

29. *MD. CODE ANN.* art. 75A, § 20 (1957).

tioners. The argument against the dual practice insists that he confine his choices to one field or the other.

The degree of competence which the dual practitioner is likely to attain could almost be stated as a mathematical formula. It may be represented as his response, in terms of his native and acquired abilities, to the problems confronting him. These factors are highly personal and cannot be prejudged without attempting to determine in advance the capacity of an individual to grow and develop. One has only to examine the courses offered in the name of continuing legal education to realize that we are dealing with an evolving society in which a large measure of experiment and novelty should be encouraged. In the scientific disciplines, the combination of skills has become too common to require much comment.³⁰ As a matter of experience, we find that most work of any complexity is performed in a team or joint effort. One individual may offer leadership, direction, or criticism but the end product is a composite where the separate contributions are not always distinguishable.³¹

The difficulties of professional practice are, by no means, confined to the dual practitioner. Firms of certified public accountants have during the last few years been subjected to a series of suits instituted by investors and creditors of the companies they audit. In all these cases, the CPA firms profess to be independent and objective, but the quality of their performance is being subjected to legal determination. A further degree of discomfort has been introduced by the attack of the Securities and Exchange Commission on the independence of the accountant where management services are performed by the accounting firm for its clients as a lucrative sideline.³² Thus, the problem of ramifications confronts not only the dual practitioner but the lawyer-CPA seeking to pursue a so-called single road. We do not simplify these problems by insisting on the maintenance of ancient barriers. Higher achievement is possible only in meeting new and greater challenges.

THE ECONOMICS OF THE DUAL PRACTICE

The argument that the dual practitioner is able to offer the public a more complete and less expensive service than the single practitioner is hardly susceptible to proof.³³ Although the statement is made that the dual practice serves to provide a substantial saving to the small business man, it is not necessarily true. In all cases, the bill that is rendered the client will be based on the time spent, the results achieved,

30. The applicability of the techniques of one discipline to another is well stated by ERICKSON, *INSIGHT AND RESPONSIBILITY* 77. "A transfer of concepts from one field to another has in other fields led to a revolutionary clarification and yet eventually to a necessary transcendence of the borrowed concept by newer and more adequate ones." In the *JOHNS HOPKINS JOURNAL* for November-December 1966, a leading article was entitled *Engineers Reshaping Medicine* and the first sentence reads: "Engineering is revolutionizing medicine and producing a new breed of scientist."

31. For additional discussion of the proficiency or competence issue, see Goldberg, *supra* note 2, at 132-33; Brent, *supra* note 14, at 40-41.

32. *N.Y. Times*, Nov. 20, 1966 (Financial section).

33. Comment, 3 *U.C.L.A.L. REV.* 360, 369 (1956).

and the rate which the practitioner applies to his services. We may grant that the dual practitioner might be able to do the work in less time than two single practitioners, but this is hardly proof that the bill rendered will likewise be less. The other difficulty with this argument is that too much importance is attached to the bill, whereas the client is generally more concerned with results. Here the position of the dual practitioner is no different from that of the single practitioner. If the bill is reasonable in terms of the outcome achieved, the client has no justifiable ground for complaint.

THE LEGISLATIVE TWIST

Something new has been added to the history of the controversy concerning the dual practice by the introduction, on February 9, 1967, in the House of Delegates of Maryland, of the Boyer Bill to treat dual practice as a misdemeanor.³⁴ It is startling to find that the misdemeanor provision has been attached to the section of the bill dealing with the CPA, who holds himself out as such and practices law, but is omitted from the prohibition concerning the lawyer who engages in the practice of or holds himself out as a certified public accountant. It is also interesting to note that the prohibition against the practice of law in a dual capacity is extended to include a person "whether he is duly admitted to the Bar or not." As there are already sufficient safeguards against the practice of law by persons who have not been duly admitted to the Bar, there was no need to include this gratuitous qualification in a bill.

The evolution of the police power of the State and how it has been limited by the courts has a direct bearing on the constitutionality of the Boyer Bill. The older Maryland rule appears to be that no infringement of vested rights would arise out of the regulation of a profession.³⁵ Thus, the Court of Appeals of Maryland in 1877 had no difficulty in approving a statute which restricted the practice of law to "white males" and, when the white descriptive was dropped, continued to approve the prohibition of the practice of law by women.³⁶ Such approval by the Court of Appeals rested on what was naively described as "nature, reason, and experience."

More recent statements with regard to the police power recognize that there must be a necessary and immediate relation to public health, morals, or welfare, and that private rights may not be arbitrarily overridden and disregarded under the guise of the exercise of police power.³⁷ The impact of the due process clause of the fourteenth amendment has been recognized in testing state action in excluding persons from a business, profession, or occupation in which they may be engaged.³⁸ In the

34. House of Delegates, Maryland H.B. No. 326 introduced by Delegate Boyer — Judiciary 1967.

35. *Aitchison v. State*, 204 Md. 538, 105 A.2d 495 (1954), *cert. denied*, 348 U.S. 880 (1954).

36. *In re Maddox*, 93 Md. 727, 50 Atl. 407 (1901); *In re Taylor*, 48 Md. 28 (1877).

37. See *Mugler v. Kansas*, 123 U.S. 623 (1887); *Davis v. State*, 183 Md. 385, 37 A.2d 880 (1944); *Dasch v. Jackson*, 170 Md. 251, 183 Atl. 534 (1936).

38. *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957).

field of taxation, the Massachusetts court has recognized that there is an overlapping of work performed by attorneys and certified public accountants and an arbitrary insistence on the separation of these functions would be neither reasonable nor realistic.³⁹ Thus, the Boyer Bill seems to suffer from inherent constitutional weaknesses, which are also present in Opinion 297 and the joint report of the Maryland and Baltimore Bar Association Ethics Committees.⁴⁰ The Boyer Bill does, however, call attention to the fact that in Maryland the determination of qualification for admission to the Bar is a legislative function and not a judicial prerogative which has been delegated to bar associations.⁴¹

The underlying intent of the Boyer Bill, as well as Opinion 297 and the joint report of the Maryland and Baltimore Bar Associations Ethics Committees, is to regulate admission to the Bar. If the position taken were legal, it would mean that no one could properly be admitted to the Bar if he planned to hold himself out thereafter as a CPA. Consequently, even before admission there should be a public and affirmative renunciation of any intent to hold one's self out as a certified public accountant. Perhaps, the whole issue may turn on whether the legislature or the Bar Association has the right to impose this test as a qualification. Only if this power is being properly asserted is there any legality in the position taken either in the Boyer Bill or the Opinion and report above referred to.

At this moment, we do not know whether the conflict raging around the dual practice will be resolved by legislation, court action, or disposition by professional associations. Both sides claim that behind them stands the ultimate sovereign power of the state. Perhaps the standard of judgment may be found outside formal legal precedents. In determining how this power may be invoked, the dual practitioner contends: "That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."⁴²

39. See *Lowell Bar Ass'n v. Loeb*, 315 Mass. 176, 52 N.E.2d 27 (1943). In *NAACP v. Button*, 371 U.S. 415 (1963), the Court said: "For a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."

40. See *United States v. Raines*, 362 U.S. 17 (1960); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *In re Ricciardi*, 182 Calif. 675, 189 Pac. 694 (1920). See also Goldberg, *supra* note 2, at 136-41.

41. In *Bastian v. Watkins*, 230 Md. 325, 329, 187 A.2d 304, 306 (1963), the Maryland Court of Appeals said: "It has long been recognized that the admission of a resident of Maryland to practice law is a legislative, not a judicial, function in that the right may constitutionally be regulated by statute."

42. JOHN STUART MILL, ON LIBERTY 17.