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Attorney-Client - Unauthorized Practice of Law - Independent Negotiation of Claims by Public Casualty Adjuster

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ATTORNEY-CLIENT—UNAUTHORIZED PRACTICE OF LAW—INDEPENDENT NEGOTIATION OF CLAIMS BY PUBLIC CASUALTY ADJUSTER—The Supreme Court of Pennsylvania has held that a licensed public casualty adjuster who independently negotiates claims on behalf of third parties is an unauthorized practitioner of law whose practice can be enjoined.

Dauphin County Bar Association v. Mazzacaro, 351 A.2d 229 (Pa. 1976).

In 1974, Augustus Mazzacaro, a public casualty adjuster licensed under Pennsylvania's Public Adjuster Act,¹ was employed by several insurance companies to settle claims on their behalf. Mazzacaro also independently negotiated personal injury and property damage settlements² on behalf of third parties³ against tort-feasors or their insurers. He undertook representation⁴ of these third parties only upon the assumption that the insurer was liable and that the exclusive issue to be negotiated was the amount of the damages.⁵ If either the insurance company or the insured contested liability, Mazzacaro would withdraw his services and recommend that an attorney be consulted. When liability was not at issue, Mazzacaro conducted the entire settlement without the assistance of an attorney. In the event the parties agreed upon a settlement, he would collect a contingent fee.

The Dauphin County Bar Association filed an equity action seeking to enjoin Mazzacaro from representing third parties in pursuance of damage claims against either tort-feasors or their insurers.⁶

1. PA. STAT. ANN. tit. 40, §§ 301-308 (1971). In Pennsylvania, one may not act as a public adjuster without first having procured a public adjuster's license from the Insurance Commissioner. *Id.* § 302.

2. At the trial, Mazzacaro testified that between fifty and seventy-five percent of his business dealt with independent representation. Record at 107a, *Dauphin County Bar Ass'n v. Mazzacaro*, 351 A.2d 229 (Pa. 1976).

3. A third party, as the term is used in *Mazzacaro*, is a person who has been injured by a party who is insured and therefore has a claim for the loss against the insured or his insurer. *Dauphin County Bar Ass'n v. Mazzacaro*, 351 A.2d 229, 230 n.2 (Pa. 1976).

4. Mazzacaro's services included interviewing witnesses, gathering evidence, calculating the amount of the damage, and writing a demand letter to the insurer. Brief for Appellee at 12, *Dauphin County Bar Ass'n v. Mazzacaro*, 351A.2d 229 (Pa. 1976) [hereinafter cited as Brief for Appellee].

5. Mazzacaro contended that he would agree to represent an injured party only if the insurer or the insured admitted liability. 351 A.2d at 230.

6. In Pennsylvania, an injunction is a proper remedy for unauthorized practice of a regu-

It contended that Mazzacaro's public adjuster's license did not authorize him to represent third parties,⁷ and such representation constituted the unauthorized practice of law in violation of Pennsylvania's statute prohibiting lay practice.⁸ At trial, the chancellor issued a decree nisi enjoining Mazzacaro's representation of third parties.⁹ Mazzacaro's exceptions¹⁰ were overruled and a final decree entered.¹¹ He appealed to the Supreme Court of Pennsylvania.¹²

There were three grounds for Mazzacaro's appeal. First, he contended that his public adjuster's license authorized him to represent third-party claimants.¹³ Second, since his services were predicated

lated profession. See *Ginsburg v. Kovrak*, 392 Pa. 143, 139 A.2d 889 (1958) (defendant not licensed to practice law in Philadelphia enjoined from practicing law there despite fact he was licensed to practice before Supreme Court of the United States); *McCarthy v. Panaccio*, 49 Pa. D. & C.2d 501 (C.P. Phila. Co. 1969) (action by Philadelphia Bar Association to enjoin defendant from preparing applications for Immigration and Naturalization Service); *Felix v. Wax*, 13 Pa. D. & C.2d 600 (C.P. Phila. Co. 1958) (equity action instituted by individual physicians and their professional association to restrain defendant from practicing medicine without a license).

7. The authority of a public adjuster is delineated in the Public Adjuster Act, PA. STAT. ANN. tit. 40, §§ 301-308 (1971). The Dauphin County Bar Association contended that the use of the term "assured" by the General Assembly restricts a public adjuster to the representation of parties against whom a claim is made. Thus Mazzacaro's license only permitted him to adjust claims on behalf of the insurance company who issued the policy to the person defending against the claim. The Association contended that if the General Assembly had contemplated adjusters representing third-party claimants, it would have used a more general term such as "claimant" or "injured party" in the Act. Brief for Appellee, *supra* note 4, at 5.

8. The Bar Association contended that Mazzacaro's conduct violated PA. STAT. ANN. tit. 17, § 1610 (1962), which prohibits anyone who is not a member of the Pennsylvania Bar from practicing law within the Commonwealth.

9. *Dauphin County Bar Ass'n v. Mazzacaro*, Civil No. 3181 (C.P. Dauph. Co., Pa. Sept. 6, 1972). The chancellor ruled that Mazzacaro's independent representation was not authorized by his public adjuster's license and that his activities constituted the unauthorized practice of law.

10. Mazzacaro excepted to the court's conclusion that a public adjuster's license did not authorize him to represent third parties in claims against alleged tort-feasors. *Dauphin County Bar Ass'n v. Mazzacaro*, 96 Dauph. 372, 374 (C.P. Pa. 1974). Mazzacaro also excepted to the court's conclusion that the representation of third-party tort claimants constituted unauthorized practice of law. *Id.*

11. The court held that Mazzacaro's public adjuster's license only authorized him to represent insurance companies and the insured. *Id.* at 376. The court further held that he must be enjoined from representing third parties to protect the public from potential incompetence. *Id.* at 378.

12. Jurisdiction was conferred on the supreme court by the Appellate Court Jurisdiction Act of 1970, PA. STAT. ANN. tit. 17, §§ 211.101-.510 (Supp. 1976), which provides for direct appeal to the supreme court from a final order of the court of common pleas in actions in equity. *Id.* § 211.202(4) (suspended by PA. R. APP. P. 5105(a)).

13. 351 A.2d at 231. Mazzacaro claimed that the Public Adjuster Act authorized him to

on the assumption of the insurer's liability, they did not involve the exercise of legal judgment and consequently did not constitute the practice of law.¹⁴ Finally, he contended that the statute which proscribes the practice of law by one not a member of the Pennsylvania Bar Association¹⁵ was unconstitutionally vague.¹⁶

The Pennsylvania Supreme Court, in an opinion by Justice Pomeroy, affirmed the chancellor's decision. The court rejected Mazzacaro's first contention on the basis of its grammatical construction of the Public Adjuster Act.¹⁷ Mazzacaro contended that the Act defined two types of public adjusters: those who adjust claims arising out of insurance policies and those who assist the assured.¹⁸ Since he adjusted claims against insured tort-feasors, he believed that his negotiations arose out of insurance policies and consequently were authorized by the first definition in the Act. The court refused to interpret the statute as authorizing third-party representation by laymen. The Act defined only one type of adjuster—a person who adjusts claims arising out of an insurance policy and gives advice to the individual protected by *that policy*. Since Maz-

settle third-party claims since the claims arose out of policies of insurance. See text accompanying note 18 *infra*. In the alternative, he contended that the term "assured" should be interpreted as "a party making a claim for damages arising out of a policy of insurance." Mazzacaro argued he was authorized to give assistance to a third party who was an *assured* party. *Id.*

14. Mazzacaro emphasized that he did not negotiate a claim if his opponent contested liability and therefore his services were the same as those of an adjuster employed by an insurance company. His duties only involved expressing his opinion as to the monetary extent of the tort-feasor's liability which he believed did not constitute the practice of law. Brief for Appellant at 29-31, *Dauphin County Bar Ass'n v. Mazzacaro*, 351 A.2d 229 (Pa. 1976) [hereinafter cited as Brief for Appellant].

15. PA. STAT. ANN. tit. 17, § 1610 (1962) provides: "Any person who shall practice law, within this Commonwealth, without being a member of the Bar of a Court of Record, shall be guilty of a misdemeanor . . ."

16. Appellant contended that the term "practice of law" is impermissibly broad under the test enunciated by the United States Supreme Court in *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926): "[T]he terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties . . ." Brief for Appellant, *supra* note 14, at 42.

17. See note 19 and accompanying text *infra*. The Act provides in relevant part:

The term, "public adjuster" . . . shall include every person . . . soliciting business, or holding himself . . . out to the public, as an adjuster of claims for losses or damages arising out of policies of insurance . . . and receiving any compensation or reward for the giving of advice or assistance to the assured in the adjustment of claims for such losses . . ."

PA. STAT. ANN. tit. 40, § 301 (1971).

18. 351 A.2d at 231.

zacaro was advising the injured party and not the insured, his independent practice was not authorized by the Act.¹⁹

The court next addressed the more troublesome question of whether Mazzacaro's activity constituted the unauthorized practice of law. It observed that an adjuster must probe the strengths and weaknesses of his opponent's case as well as evaluate the likelihood of his client's success in court. In the majority's view, one can only do so by examining the particular facts in light of principles of torts and rules of evidence.²⁰ Once an adjuster has assessed the claim according to the applicable law, he knows the approximate amount he can demand from the tort-feasor or his insurer. Since an experienced lay adjuster such as Mazzacaro is not competent to appreciate the legal problems and consequences involved, he is apt to settle for a lesser amount than could be exacted. In the public's interest the court sought to limit the negotiation of third-party settlements to persons who can competently apply the law to the particular facts through the use of sound legal judgment.²¹ Because it concluded that Mazzacaro lacked the necessary professional training, his representation of third-party claimants fell within the meaning of unauthorized practice of law.

The court summarily dismissed Mazzacaro's third contention. He asserted that the statute prohibiting the practice of law by one not a member of the Pennsylvania Bar was unconstitutionally vague because it did not provide the public with an adequate definition of the criminal conduct that was proscribed. However, Mazzacaro was not permitted to attack the statute on those grounds because he was *prospectively* restrained from engaging in specified conduct. The court held that the injunction provided him with a sufficiently definite standard for conforming his conduct; he was not permitted to disregard this notice.

19. *Id.* Although Mazzacaro also contended that the term "assured" defined "any party making a claim for damages arising out of a policy of insurance," the court determined that "assured" defines the person who is subject to the risk of loss which the insurance policy has been issued to guard against; the term did not encompass third parties as Mazzacaro contended. *Id.*

20. 351 A.2d at 234.

21. "Where . . . a judgment requires the abstract understanding of legal principles and a refined skill for their concrete application, the exercise of legal judgment is called for." *Id.* at 233, citing *Shortz v. Farrell*, 327 Pa. 81, 193 A. 20 (1937) (where the application of legal knowledge and technique is involved, the activity constitutes the practice of law). See note 29 *infra*.

Justice Roberts filed a dissent which discussed the possibility of having Mazzacaro's license revoked by the State Insurance Commissioner.²² According to Justice Roberts, it was within the Commissioner's power to regulate Mazzacaro's conduct. He believed that the court was without jurisdiction because of the availability of an administrative remedy.

It is well settled in Pennsylvania that legal advice given by a layman constitutes the unauthorized practice of law.²³ A major concern has been that an injured party may not be able to judge the competence of his representative. It is not enough to proscribe laymen from practicing in the courtroom. A counselor untrained in the law can jeopardize his client's opportunity for a favorable settlement more by way of unsound advice than through representation in court where there is a judge to supervise his conduct.²⁴ A casualty adjuster may persuade his client to believe that his expertise in insurance enables him to negotiate with the proficiency of an attorney.²⁵ Since a primary function of tort law is to compensate injured parties,²⁶ courts have sought to ensure that only qualified persons advise claimants in matters relating to the commission of compensable torts. For this reason the *Mazzacaro* court agreed with the legal profession's view that the handling of tort claims should be reserved to practicing attorneys.²⁷

Arguably, Mazzacaro's conduct did not constitute unauthorized law practice since he did not advise clients of their legal rights and liabilities. The court's emphasis on fully compensating injured par-

22. 351 A.2d at 235-36 (dissenting opinion). PA. STAT. ANN. tit. 40, §§ 301-308 (1971) empowers the Insurance Commissioner to revoke the license issued by the Commission if he determines that the holder is incompetent or untrustworthy. *Id.* § 306.

23. See, e.g., *Childs v. Smeltzer*, 315 Pa. 9, 171 A. 883 (1934) (notary public enjoined from furnishing legal services, including advice to clients, since it constituted unauthorized practice of law); *Blair v. Motor Carriers Serv. Bureau, Inc.*, 40 Pa. D. & C. 413 (C.P. Phila. Co. 1939) (individuals enjoined from advising others on legal matters because it constituted unauthorized practice of law). Other jurisdictions are in accord. See, e.g., *Spivak v. Sachs*, 16 N.Y.2d 163, 211 N.E.2d 329, 263 N.Y.S.2d 953 (1965) (New York statute forbidding unauthorized practice of law in New York includes giving legal advice).

24. See *Childs v. Smeltzer*, 315 Pa. 9, 171 A. 883 (1934). See also *People v. Alfani*, 227 N.Y. 334, 125 N.E. 671 (1919) (layman held himself out as being in the business of law and drew legal papers).

25. See *Meunier v. Bernich*, 170 So. 567 (La. App. 1936) (claim adjuster convinced parents of child killed as result of railroad's negligence that he could competently settle claim on their behalf).

26. See Seavey, *Principles of Torts*, 56 HARV. L. REV. 72 (1942).

27. See ABA CANONS OF PROFESSIONAL ETHICS, EC 3-1 to 3-4.

ties may not seem persuasive because Mazzacaro was an experienced adjuster with expertise in translating a particular injury into a dollar amount. Yet the court's decision is defensible in light of its added focus on sheltering the public²⁸ from incompetent laymen in general.²⁹ The relative ease with which a lay adjuster can obtain a license to settle claims³⁰ led the court to stress the need to prevent improficiency by proscribing lay adjusters from acting in the demanding capacity of a lawyer. The requirements one must satisfy to become an attorney³¹ are designed to guarantee a minimum level of competence in the profession, assuring a client that his representative can make a proper legal assessment of his claim.

The *Mazzacaro* court's concern with protecting potential clients goes beyond securing a proper assessment of the extent to which the damages should be compromised. By requiring that an attorney

28. Most jurisdictions have indicated that protection of the public is the primary reason for enjoining laymen from practicing law. See *Wilkey v. State ex rel. Smith*, 244 Ala. 568, 14 So. 2d 536 (1943) (insurance adjuster gave advice to the insurance company that employed him concerning subrogation rights); *Fitchette v. Taylor*, 191 Minn. 582, 254 N.W. 910 (1934) (insurance adjuster settled personal injury claims for a contingent fee); *Shortz v. Farrell*, 327 Pa. 81, 193 A. 20 (1937). (claim adjuster prepared and filed pleadings as well as conducted litigation in workmen's compensation cases). See also Kephart, *Unauthorized Practice of Law*, 40 DICK. L. REV. 225 (1936) [hereinafter cited as Kephart]; Note, *The Unauthorized Practice of Law by Laymen and Lay Associations*, 54 CALIF. L. REV. 1331 (1966) [hereinafter cited as *Unauthorized Practice*].

29. In its discussion of the need for protection of the public, the court relied primarily on *Shortz v. Farrell*, 327 Pa. 81, 193 A. 20 (1937). *Shortz* involved a claim adjuster who prepared and filed pleadings in workmen's compensation cases. He also represented clients before workmen's compensation boards, conducting all phases of the litigation. The Pennsylvania Supreme Court held that the adjuster could continue to prepare and file pleadings but it enjoined him from practicing before the board. In the court's view, such practice involved considering legal questions, applying legal rules, and judging facts in light of legal principles. It therefore concluded that the claim adjuster was not competent to manage a case before a workmen's compensation board. The court's rationale was that laymen must be prohibited from practicing law to protect the public from the intrusion of inexpert and unlearned persons. *Id.* at 86, 193 A. at 22.

30. Public Adjuster Act, PA. STAT. ANN. tit. 40, §§ 301-308 (1971). It is relatively simple to obtain a license under the Act. No legal training is required; a person need only pass a test and apply to the Insurance Commissioner for a license. The application contains the applicant's name, prior occupation and information concerning prior insurance licenses he might have held. On the basis of this application, the Commissioner decides if the applicant is trustworthy and competent to transact the business of a public adjuster. *Id.* § 304.

31. The Pennsylvania Supreme Court has the power to prescribe general rules concerning admission to the Pennsylvania Bar. PA. CONST. art. V, § 10(c); PA. SUP. CT. R. 7-9, 12, 14. See also *Childs v. Smeltzer*, 315 Pa. 9, 171 A. 883 (1934) (notary public advertised that she specialized in preparation of legal papers). See generally Kephart, *supra* note 28, at 226; *Unauthorized Practice*, *supra* note 28, at 1334.

oversee a prospective claim, a client is assured that his representative is bound by oath³² to negotiate in his best interests. Unlike a lay public adjuster, an attorney must affirmatively use his legal experience,³³ reveal all pertinent considerations to his client,³⁴ and formulate a professional opinion as to the outcome of the claim.³⁵ Every action within the attorney-client relationship is also reviewable by the bar association,³⁶ and misconduct can subject an attorney to disciplinary sanctions.³⁷ This sanction is particularly significant in view of the fact that Mazzacaro labored on a contingent fee basis. A demand for the greatest possible amount would jeopardize his fee because the insurer would be more inclined to litigate the claim. Mazzacaro might therefore tend to settle for an amount less than the injured party deserved for the sole purpose of insuring his fee. While such a practice might subject an attorney to disciplinary proceedings, a public adjuster has no such restriction since he is not bound by an enforceable code of ethics. Furthermore, a client has legal recourse against a negligent attorney who perfunctorily performs his job,³⁸ but no corresponding sanction exists against a lay adjuster. These considerations led the court to believe that Mazzacaro should only negotiate on behalf of insurance companies. The company would provide Mazzacaro with the legal knowledge necessary to handle the case and, by closely supervising him, the company could effectively eliminate his opportunity to conduct an unjust settlement.³⁹

32. PA. STAT. ANN. tit. 17, § 1603 (1962) provides that an attorney may not represent another person until he swears to support the Constitution of the United States, to support the constitution of the Commonwealth, and to faithfully use all his learning and ability on behalf of his client.

33. See ABA CANONS OF PROFESSIONAL ETHICS, EC 7-5.

34. *Id.* EC 7-8

35. *Id.*

36. See *Walker v. Kahn*, 86 Pitt. L.J. 173, 31 Pa. D. & C. 620 (C.P. Allegh. Co. 1938) (insurance agent interpreted and applied provisions of liquor license law on behalf of client).

37. Any breach of an attorney's oath can result in discipline ranging from private admonition by a disciplinary council to disbarment by the Supreme Court of Pennsylvania. See PA. STAT. ANN. tit. 17, § 1661 (1962) (suspended by PA. SUP. CT. R. 1724(a)(3)), which provides that an attorney is subject to suspension or removal from office for misbehavior; *cf. In re Alexander*, 321 Pa. 125, 184 A. 77 (1936) (unfaithful or fraudulent conduct by an attorney on behalf of his client is ground for disciplinary action). See also PA. SUP. CT. R. 17-4 (grounds for discipline). Lack of an ethical code which a layman must adhere to makes comparable disciplinary sanctions impossible.

38. An attorney is civilly liable to his client if he negligently performs his professional duty. See *Walker v. Kahn*, 86 Pitt. L.J. 173, 31 Pa. D. & C. 620 (C.P. Allegh. Co. 1938).

39. See 351 A.2d at 234 n.7. The distinction between an independent adjuster and a

Since *Mazzacaro* never determined liability or advised a client of his legal rights, the court's decision may represent an extension of the existing law relating to unauthorized practice of law. Because the Pennsylvania Supreme Court justified its holding on broad grounds of public protection, the decision provides a basis for enjoining acts of other laymen whose occupations require them to deal with legal or quasi-legal matters. Real estate management and tax counseling, for example, are two fields where laymen tangentially deal with legal concepts to the same extent as public casualty adjusters.⁴⁰ In recent years the Pennsylvania Bar Association has not challenged these practitioners as illegally practicing law. *Mazzacaro*, however, may encourage inroads into areas the legal profession has yet to challenge. It reaffirms the judiciary's belief that laymen who are not professionally trained nor subject to discipline should not be permitted to render legal services. The broad definition of legal services used in *Mazzacaro* may allow the court to implement this belief by permitting challenges to lay practice even remotely related to the law. If a court is not willing to balance the protection of the public with the public's interest in low cost services rendered by laymen, it may grant attorneys a monopoly in many fields traditionally handled by non-lawyers. To insure a proper balance, *Mazzacaro* should be restricted to those areas where lay assistance carries the greatest potential of injury.

Thomas J. Santone

company adjuster is highlighted in *Liberty Mut. Ins. Co. v. Jones*, 344 Mo. 932, 130 S.W.2d 945 (1939). The Missouri Supreme Court decided that an adjuster who independently settles claims is practicing law, but an adjuster who settles claims on behalf of an insurance company is authorized to do so. The distinction is that a company adjuster is primarily involved in advising the company's claim counsel, whereas the public adjuster's conclusions and recommendations are made directly to the client without the safeguard of an intervening opinion. *Id.* at 965, 130 S.W.2d at 960.

40. In the area of real estate transactions, local and state bar associations throughout the country have been concerned with the competency of laymen to handle aspects of conveyancing, particularly the title assurance process. They have sought injunctions against real estate brokers and salesmen for the unauthorized practice of law in the use of printed forms of legal instruments prepared by lawyers, the selection of such forms to be used, and the insertion of words within the printed forms in connection with property transactions in which brokers and salesmen are involved. The majority of jurisdictions confronted with these suits have permitted real estate agents and brokers to use forms such as contracts of sale, options for purchase, deeds, and mortgages that have been prepared by attorneys. In the interest of public convenience and reduced costs, the courts have recognized the ability of these laymen to perform acts within their expertise as established by standardized examinations, concluding that merely filling in blanks on forms prepared by attorneys does not constitute the giving of legal advice or practice of law. See, e.g., *State ex rel. Indiana State Bar Ass'n v. Indiana Real Estate Ass'n, Inc.*, 244 Ind. 214, 191 N.E.2d 711 (1963).