The Birth of the Movement to Prohibit the Unauthorized Practice of Law

Laurel A. Rigertas
THE BIRTH OF THE MOVEMENT TO PROHIBIT THE UNAUTHORIZED PRACTICE OF LAW

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I. INTRODUCTION

Despite its omnipresence in the field, there is no comprehensive history of the legal profession’s effort to prohibit the unauthorized practice of law (“UPL”), by persons or entities who do not have a license to engage in such work. Drawing on original historical research, this article provides the most comprehensive view, to date, of the birth of the modern movement to prohibit the unauthorized practice of law. While bar associations’ efforts to prohibit the unauthorized practice of law...
exploded nationwide in the 1930s, they sowed the seeds for the movement during the several decades preceding the Great Depression.\footnote{George E. Brand's 1937 book, *Unauthorized Practice Decisions*, demonstrates the explosion of interest in the unauthorized practice of law in the 1930s. See *Brand*, supra note 1 at v–vi (1937). While Brand did not claim to summarize every UPL decision in his book, the book summarized over 150 decisions from around the country. See *id.* at xix ("This book is not intended as a substitute for the complete decisions, nor is it claimed that all the decisions are contained in it."); *id.* at 721–45 (reporting the cases cited and summarized within the book). For the approximately ninety years between 1840 and 1929, Brand's book summarized forty-seven unauthorized practice decisions. *Id.* at 721–45. For the mere eight years spanning 1930-37, however, the book summarized 109 decisions. *Id.; see also* Rhode, *Policing the Professional Monopoly*, supra note 1, at 8-9 (noting that Brand’s book devoted 619 pages to cases decided between 1930 and 1937). As one writer stated, “Finally, in 1930, the Bar woke up.” F. Trowbridge vom Baur, *An Historical Sketch of the Unauthorized Practice of Law*, 24 *Unauthorized Prac. News* 1, 7 (1958). However, as this article will discuss, the bar was stirring long before the 1930s. Some scholars have noted the movement’s earlier roots. See, e.g., Christensen, *supra* note 1, at 161–189 (analyzing the unauthorized practice of law beginning in the seventeenth century throughout the nineteenth century and the early twentieth century). For example, a 1937 dissertation in political science provided an early challenge to the idea that the movement to prohibit the unauthorized practice of law was a product of the Great Depression. M. LOUISE RUTHERFORD, *INFLUENCE OF THE AMERICAN BAR ASSOCIATION ON PUBLIC OPINION AND LEGISLATION* 93–94 (1937). In her doctoral thesis about the influence of the ABA on public opinion and legislation, Mary Louise Rutherford wrote:}

\begin{quote}
It is thought by the public generally that this movement of the organized Bar to repress unauthorized practice of the law is of quite recent development, dating from the depression in 1929. The truth of the matter is that the organized movement against unauthorized practice, excluding local developments in New York, was first agitated as many other matters were, in the Conference of Bar Association Delegates in 1919 [during the annual meeting of the American Bar Association].
\end{quote}

*Id.*

There is no question that the movement exploded during the Depression, and Rutherford was correct that bar associations began to focus on the issue earlier. Barlow Christensen’s article also notes that even as early as the colonial times there was an interest in prohibiting the unauthorized practice of law. Christensen, *supra* note 1, at 162 ("describing how in Colonial America, “[t]here arose very early, especially as courts began to develop, what might be called an ‘informal bar,’” which imposed what can be viewed as the first unauthorized practice restrictions). This interest continued after Independence and case law in the 1800’s laid the foundation for later organized efforts to prohibit UPL; as Christensen wrote:

\begin{quote}
[t]he importance of the period from 1870 to 1920 in the development of the legal profession’s campaign to prevent the practice of law by nonlawyers can hardly be overstated. This was in a real sense the seminal period. While the campaign in the years following may have been better organized, more intensive, more diverse, more sophisticated, and more effective, it surely had its roots in this era.
\end{quote}

*Id.* at 186. This article provides a more in-depth exploration of this era than other historical treatments of the topic have provided.
unauthorized practice of law. Their efforts eventually led to a well-established separation of powers principle that state courts—not state legislatures—have the inherent power to regulate the practice of law, which came to include the power to define the practice of law.  

This inherent power limits options to increase access to justice by reassessing who can deliver legal services. When legislatures attempt to enact laws that touch on the definition of the scope of lawyers’ monopoly over justice, it is common for courts to invalidate the legislation and reason that “[w]hen the Legislature passes a statute which attempts to define the practice of law, it directly impinges upon the constitutional grant of power bestowed upon the courts respecting the regulation of the conduct of the members of the legal profession.” Thus, unlike other areas, such as healthcare, state legislatures cannot create new categories of licensed professionals in order to increase access to legal services.

When bar associations began to address the unauthorized practice of law, however, the power of state courts to do so was not well-established. In fact, as the research in this article demonstrates, early bar associations initially saw state legislatures as appropriate partners to define the practice of law and help them curb the unauthorized practice of law. The curtailment of legislative power came later. Examining this history raises the question of whether the limits on legislatures’ ability to regulate the practice of law are mandated by the separation of powers doctrine, or whether they were excluded because, pragmatically,

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4 See infra Part VI.


7 See infra Parts III and IV.

8 Id.

9 Rigertas, Stratification of the Legal Profession, supra note 6, at 112.
courts were a better partner for promoting lawyers’ self-interests.\textsuperscript{10} If the latter, the power of the state courts could be challenged, and potentially limited or even eliminated. This could impact how we explore ways to expand access to legal services.

Part II of this article gives an overview of the law in the nineteenth century with respect to both the unauthorized practice of law and the separation of powers doctrine. During this time, concerns about the unauthorized practice of law arose primarily when nonlawyers appeared on behalf of another in court proceedings.\textsuperscript{11} This period largely predated the existence of bar associations, so there were no organized efforts to address these concerns;\textsuperscript{12} instead, courts used their inherent powers on a case-by-case basis to prohibit nonlawyers from appearing in a representative capacity.\textsuperscript{13} The court’s authority to do this appeared unquestioned.\textsuperscript{14} Indeed, the judicial branches’ control over who can appear in the courthouse in a representative capacity has raised few objections, then, or now.

Next, Part III of this article discusses the creation of modern bar associations in the late 1800s and the efforts of newly formed bar associations in New York and Illinois to identify unlicensed practitioners at the turn of the century. This Part also examines early enforcement efforts that relied on the legislatures to enact statutes that criminalized the unauthorized practice of law as well as on the courts’ inherent equity and contempt powers. New bar associations viewed both the judiciary and the legislature as allies.\textsuperscript{15} At this time, bar associations were still largely focused on the issue of nonlawyers functioning in a representative capacity in the courthouse.\textsuperscript{16}

Part IV examines the rise of corporations in the early 1900s and the contemporaneous expansion of legal work outside of the courtroom. This created opportunities for unlicensed competitors—such as banks,

\textsuperscript{10} See Rigertas, \textit{Lobbying and Litigating}, supra note 3, at 125 (arguing that the bar associations were motivated to partner with the judicial branch because their influence over the state legislatures was weak).

\textsuperscript{11} Christensen, supra note 1, at 174.

\textsuperscript{12} \textit{Id.}; see also, infra note 63 and accompanying text.

\textsuperscript{13} See, e.g., \textit{In re Morse}, 126 A. 550, 553 (Vt. 1924) (holding that the court had the implied power to punish persons partaking in UPL, and that the individual in question was guilty of contempt for posing as a lawyer in the practice of law).

\textsuperscript{14} \textit{Id.} (“The express legislative grant to this court of exclusive and full authority to determine who shall practice as attorneys before the courts of this state carries with it the implied power to do whatever may be reasonably necessary to make such grant effective. . . ”).

\textsuperscript{15} See infra Part IV.

\textsuperscript{16} Christensen, supra note 1, at 172–74.
trusts, and realtors—to engage in work outside the courtroom that lawyers believed was within their scope of practice. A variety of themes marked this time period—themes that still animate modern debates, including the challenge of defining the practice of law as well as the challenge that new market entrants posed to the legal profession's independence and self-regulation. As corporations encroached on lawyers' perceived territory, bar associations continued, at least initially, to look to both courts and legislatures to assist them in their enforcement efforts. Legal professionals often viewed legislatures as the appropriate branch to define the practice of law, and legislatures were willing to prohibit or criminalize the corporate practice of law. Bar associations, however, were beginning to see how other interest groups—which were doing a variety of transactional work outside the courthouse—could lobby legislatures in an attempt to carve out exemptions from the definition of "legal practice" for their business practices.

The efforts of state bar associations soon moved to a national stage. Part V will describe the efforts of the American Bar Association's Conference of Delegates in 1919—inform by the work of state and local bar associations—to respond to concerns about the unauthorized practice of law on a national level. The Conference of Delegates' concerns were predominantly focused on legal work taking place outside the courtroom. A key objective of the Conference of Delegates was to draft a model definition of the practice of law that representatives of state bar associations would bring to their state legislatures for enactment and enforcement. Those efforts had little success. By the time the UPL movement exploded during the Great Depression, bar associations changed course, arguing that, under the separation of powers doctrine, the state legislatures did not have the constitutional power to define the practice of law. This has become a generally

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17 Id. at 177–78.
18 RICHARD L. ABEL, AMERICAN LAWYERS 113 (1989).
19 Id. (explaining that bar associations “sought legislation that would define their monopoly as expansively as possible”).
20 Id. (noting that as a result of the bar associations' efforts, "17 laws were enacted between 1870 and 1920 and another 12 between 1920 and 1960").
21 See infra Part III.
22 See, e.g., Rigertas, Lobbying and Litigating, supra note 3, at 95 (describing delegates' concerns that trust companies were taking over business formerly transacted by lawyers).
23 Id. at 97.
24 Id. at 101.
25 Rigertas, Stratification of the Legal Profession, supra note 6, at 112.
accepted principle.  

Part VI concludes by briefly examining the impact of this modern principle, particularly as it relates to modern efforts to expand access to legal services. With legislatures excluded from defining the practice of law and, relatedly, creating new categories of legal services providers, exploration of this topic is left to the state supreme courts. If, however, this principle is a product of history as opposed to well-founded state constitutional law, then it opens the door to question the status quo.

II. AN OVERVIEW OF THE EARLY EMERGENCE OF UPL LEGISLATION AND CASE LAW IN THE NINETEENTH CENTURY

The contemporary use of the term “unauthorized practice of law” describes several different scenarios. It describes lay persons doing the work of lawyers in or outside the courtroom. It also describes a lawyer licensed in one jurisdiction but practicing law in another jurisdiction where the lawyer is not licensed or otherwise authorized to practice. Additionally, the term describes a disbarred lawyer who continues to practice law. It also describes entities using agents who may or may not be lawyers to provide legal services to third parties, also called the corporate practice of law.

The first statute limiting the practice of law to authorized persons traces back to a 1292 statute enacted under Edward I, so some understanding of the concept likely accompanied colonists across the Atlantic. The 1292 statute authorized the Lord Chief Justice “to appoint a certain number of ‘attorneys and lawyers of the best and most apt for their learning and skill, who might do service to his court and people;
and that those chosen only and no other, should practice.\textsuperscript{33} The colonists initially brought sparse law with them, but the 1765 publication of William Blackstone's \textit{Commentaries on the Laws of England} became the first major book of laws in the American colonies.\textsuperscript{34} During later colonial times, as the body of law began to grow, there were varying legislative and judicial efforts to control admission to practice before the courts which operated to prohibit unauthorized practice in the courts.\textsuperscript{35} There is no evidence that colonists concerned themselves with the activities of lay persons outside the courthouse.\textsuperscript{36}

In early American law following the Revolution, the prohibition on the unauthorized practice of law predominantly came from statutory law and case law, both of which are discussed in the following sections. Much like Edward I's 1292 statute, the statutory law of some states restricted the practice of law to attorneys.\textsuperscript{37} Those early statutes, however, often did not provide a mechanism to enforce those restrictions or provide consequences for those who practiced without a license.\textsuperscript{38} Early case law also recognized that only lawyers could appear in court in a representative capacity on behalf of another.\textsuperscript{39} Instead of imposing penalties on the party engaging in unauthorized practice, in early cases it was often the litigant who paid the price—such as the dismissal of his or her lawsuit—for having a representative who was not a lawyer.\textsuperscript{40}

This section provides a brief overview of some of the statutes and case law in the nineteenth century that began to lay the foundation for subsequent efforts to prohibit the unauthorized practice of law.

\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{Id.} at 5; see also 2 \textsc{Perry Miller}, \textsc{The Life and Mind in America: From the Revolution to the Civil War} 115 (1965) (discussing the popularity of Blackstone's \textit{Commentaries} in America in the late 1700s).
\textsuperscript{35} See Christensen, supra note 1, at 162–63 ("The earliest legislation ‘for the better regulation of attorneys and the great fees exacted by them’ was enacted in 1642–43. It severely limited fees [and] prohibited pleading without a license from the court. . . .")
\textsuperscript{36} \textit{Id.} at 214; \textsc{Abel}, supra note 18, at 112.
\textsuperscript{37} See infra notes 49–51 and accompanying text.
\textsuperscript{38} See infra note 59 and accompanying text.
\textsuperscript{39} See, e.g., Weir v. Slocum, 3 How. Pr. 397, 398–99 (N.Y. Sup. Ct. 1849) (requiring that the Plaintiff bear the costs of amending the complaint when the Court discovered that the Plaintiff's listed agent was not authorized to practice law); Cobb v. Judge of Super. Ct. of Grand Rapids, 5 N.W. 309, 310–11 (Mich. 1880) (disbarred attorney could not appear as an "agent" for defendants in pending case, requiring Plaintiff to seek new counsel); Knope v. Reeves, 28 So. 666, 667 (Ala. 1900) (holding that a woman's husband, who was not a licensed attorney, was not authorized to appear on her behalf).
\textsuperscript{40} Knope, 28 So. at 667 (dismissing the Plaintiff's case because her husband was not authorized to, and in any case did not, request a continuance on her behalf).
A. Early Statutes and Constitutions that Addressed Limits on the Right to Practice

Prior to the American Revolution, courts in many of the colonies authorized attorneys to appear before them using procedures that varied in their requirements and formality. Following the American Revolution, there was a decline in respect for the bar and a decline in restrictions on law practice and bar admissions. Scholars have referred to this period of "Jacksonian democracy" as a time of de-professionalization. A product of frontier conditions, this egalitarian spirit, which held any man capable of doing anything, gave real impetus to the movement to open up the practice of law to any who might wish to pursue it, without regard to educational or other qualifications. "Fourteen out of nineteen jurisdictions required all lawyers to complete an apprenticeship" in 1800, but sixty years later, only nine out of thirty-nine jurisdictions had this requirement. Barlow Christensen wrote in his article about the unauthorized practice of law:

Legislation in New Hampshire in 1842 provided that every citizen over 21 years of age might practice law, without any other qualifications. In 1843 legislation opened up the practice of law in Maine to every citizen, and a similar Wisconsin law of 1848 gave the privilege of law practice to every resident. A provision of the 1851 Indiana constitution extended to every voter the privilege of practicing law. As a practical matter, then, by the time of the Civil War there were no significant restrictions on admission to law practice.

While Indiana extended the privilege to practice through its state constitution, the references to New Hampshire, Maine, and Wisconsin cite legislative acts that opened the practice of law to all citizens. Even

41 Rigertas, Lobbying and Litigating, supra note 3, at 74–76 (describing the various restrictions on attorneys in Colonial times).
42 Christensen, supra note 1, at 169.
43 See Terence C. Halliday, Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment 61 (1987); Christensen, supra note 1, at 172; Abel, supra note 18, at 40. But see Miller, supra note 34, at 103 (arguing that “[t]here can be no worse falsification of American history than to suppose that this antilegalism of the early nineteenth century was merely ‘Jacksonian,’ merely the expression of a party”).
44 Christensen, supra note 1, at 172.
45 Abel, supra note 18, at 40.
46 Christensen, supra note 1, at 173. “Among the few challenges that were made to the practice of law by laymen during this period, most dealt with appearances in court and the signing of pleadings and were raised by opposing counsel as a strategy of litigation.” Id. at 174.
47 Id. at 173.
in these states, however, men still had to be "admitted"; the right to practice was not self-executing. Not all states in the early 1800s were so egalitarian in providing access to the legal profession. States like Maryland and Massachusetts had legislative acts that limited the courts' ability to license men to practice law only upon meeting certain qualifications, such as education and character.

Illinois is another example of a state with a long history of legislatively limiting the practice of law to licensed attorneys. In 1807, prior to becoming the twenty-first state in 1818, the territory of Illinois passed an act entitled "Regulating the admission and practice of Attornies [sic] and Counsellors [sic] at Law." That Act prohibited persons from practicing "as an Attorney or Counsellor at Law or to commence, conduct, or defend any action, suit or plaint [sic], in which he is not a party concerned...without having previously obtained a license." It further specified that a license authorized one:

to appear in all the Courts of Record within this territory and there to practise [sic] as an Attorney and Counsellor [sic] at Law according to the laws and customs thereof, for, and during his good behaviour [sic] in the said practice, and to demand and receive all such fees...for any service which he shall, or may [render] as an attorney, and counsellor [sic] at law in [this] Territory.

The Act also provided for restitution and costs of suit against anyone who practiced law without a license.

After becoming a state, the Illinois legislature enacted a substantially similar attorney act in 1818; while the Act had been amended from time to time, it maintained comparable language. In

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48 HURST, supra note 1, at 250.
49 2 GENERAL PUBLIC STATUTORY LAW AND PUBLIC LOCAL LAW OF THE STATE OF MARYLAND 1032 (Clement Dorsey ed., 1840) (requiring applicants to have at least two years legal study and to present evidence of his character to the court, whereupon the court shall admit the applicant); 1 ASAHEL STEARNS & LEMUEL SHAW, THE GENERAL LAWS OF MASSACHUSETTS, FROM THE ADOPTION OF THE CONSTITUTION TO FEBRUARY, 1822 199 (Theron Metcalf, ed., 1823) (providing that only those of good moral character and "well affected to the Constitution and Government of this Commonwealth" shall be admitted as attorneys to the court upon the taking of an oath).
51 1 NATHANIEL POPE, LAWS OF THE TERRITORY OF ILLINOIS 72 (1815).
52 Id.
53 Id. at 72-73.
54 Id. at 78.
55 THE STATUTES OF ILLINOIS: AN ANALYTICAL DIGEST OF ALL THE GENERAL LAWS
1841, Illinois adopted a rule regarding admissions that required an oral examination in open court. The early Illinois statutes did not, however, contain strong enforcement mechanisms to prevent the unauthorized practice of law; they only provided for a refund of fees earned and costs of suit or, in the case of forging the signature of an attorney or justice with the intent to deceive, the statutes authorized a prosecution for forgery. A lack of strong enforcement mechanisms was not unusual among attorneys' acts in the states.

In the absence of statutory authorization to enforce prohibitions on unlicensed practitioners during most of the 1800s, remedies were often rooted in the courts' inherent authority to prevent unlicensed practitioners from appearing in their courtrooms. The issue, however, was not a common one in the 1800s. George Brand's 1937 handbook on the unauthorized practice of law may not have been a complete collection of all unauthorized practice of law cases at the time of its publication.

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Id.


See THE STATUTES OF ILLINOIS, supra note 55, at 68. The statute provided:

If any person not licensed as aforesaid, shall receive any money or any species of property, as a fee or compensation for services rendered, or to be rendered by him, as an attorney, or counsellor [sic] at law within this state, all money so received by him shall be considered as money received to the use of the person paying the same, and may be recovered back, with costs of suit, by an action for money had and received... and if any person shall sign or cause to be signed the name of an attorney, or either of the justices of the supreme court, to any certificate or license provided for in this section, with an intent to deceive, such person shall be deemed guilty of forgery, and shall be prosecuted and punished accordingly.

Id.

See, e.g., Edward W. Sheldon, The Early History of the Association of the Bar of the City of New York—A Professional Story of National Importance, 5 MASS. L. Q. 360, 368 (Discussing the corruption in the New York Bar and noting that the bar association attempted to incorporate in an attempt to change the character of the bar because "[t]he Association itself needed strengthening and the authority and permanence which incorporation would give").

See, e.g., In re Morse, 126 A. 550, 553 (Vt. 1924) (holding that the court had the power to hold persons in contempt for the unlawful practice of law pursuant to its power to determine who shall practice before the court).
publication, but it only referenced seven cases from the 1800s that addressed unauthorized practice of law issues. By comparison, the handbook summarized over one hundred cases from the first three decades of the twentieth century that addressed unauthorized practice issues.

**B. Nineteenth Century Case Law**

During the nineteenth century, limited efforts to prevent the unauthorized practice of law were focused on lay persons acting in a representative capacity in court. There is, however, no evidence of proactive enforcement efforts for most of the nineteenth century. Instead, when it became an issue in the 1800s, parties raised UPL as a defensive tactic in lawsuits relating to other subjects. In these cases, the consequence of UPL was an adverse outcome in the lawsuit, such as a dismissal of the lawsuit, as opposed to a legal consequence for the person engaged in UPL.

For example, courts dismissed lawsuits when the party sued raised a defense that the person preparing or signing the complaint was neither the party in interest (the pro se exception) nor a licensed attorney. In an 1841 Illinois case, a petition filed against Samuel Robb was signed "John Smith, Sen., by Thomas Morgan, agent." Robb argued that the

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60 BRAND, supra note 1, at 1–9.
61 Id. at 743–56.
62 Christensen, supra note 1, at 174.
63 See id. at 174–75 ("For the most part, then, the effort to combat unauthorized practice... lay dormant, along with the organized bar itself, through the first two-thirds of the nineteenth century."). I was unable to locate any cases from the 1800s where a cause of action was brought to enjoin the practice of law. In other words, there were no prosecutors charging people who appeared in court without a license and no bar association committees pursuing legal action against people who appeared in court without a license.
64 Id. at 174; see, e.g., Robb v. Smith, 4 Ill. (3 Scam.) 46, 47 (Ill. 1841) (deciding whether to grant a motion to dismiss the lawsuit when the petition in question "was not signed by the plaintiff himself, or any attorney of the Court").
65 Id. at 47–48 (dismissing the lawsuit in order to preserve the sanctity of the law regarding UPL by unlicensed "agents").
66 See, e.g., Weir v. Slocum, 3 How. Pr. 397, 398 (N.Y. 1849) (setting aside service of summons and complaint signed by non-attorney agent, but allowing the timely filing of an amended complaint); Cobb v. Judge of Super. Ct. of Grand Rapids, 5 N.W. 309, 310–11 (Mich. 1880) (holding that a disbarred attorney could not appear as an "agent" for defendants in pending case). But see Rader v. Snyder, 3 W. Va. 413, 414 (W. Va. 1869) (denying motion to dismiss suit commenced by person not licensed to practice in West Virginia on the basis that the unlicensed person should suffer the consequence, not the plaintiff).
67 Robb, 4 Ill. (3 Scam.) at 47.
court should dismiss the suit because Morgan was neither the plaintiff nor an attorney. The appellate court agreed and relied largely on the Illinois Attorney Act. The court viewed the Act as one conceived for the protection of the public that existed “not as a restriction upon the citizen or suitor, but for his protection against the mistakes, the ignorance and unskillfulness of pretenders.”

Similarly, adverse case outcomes resulted when named parties sent family members on their behalf to court. In one case, a party sued a woman who, due to illness, sent her husband to court on her behalf to seek a continuance. He perched himself on the courthouse steps while another case was being tried, then missed hearing his wife’s case being called. The court entered a judgment against the wife; she sought to enjoin the enforcement of the judgment on the ground that no one called her husband in from the courthouse steps. The court denied her relief and held that because her husband was not a licensed attorney, he had no authority to appear for her, even if the court had called for him. The case does not indicate that the husband, however, personally suffered any legal consequence for trying to appear in court on his wife’s behalf without authority to do so.

Case law in the 1800s also foreshadowed later state legislation that prohibited corporations from appearing in court by a non-lawyer officer or representative. In the late 1800s in Illinois, for instance, defendants successfully had cases dismissed when corporate officers signed pleadings instead of licensed attorneys.

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68 Id.
69 Id.
70 Id.
71 Knope v. Reeves, 28 So. 666, 667 (Ala. 1900).
72 Id.
73 Id.
74 Id. The court opinion stated:
No appearance as a fact is averred. The presence of her husband in the court room cannot be so construed [even if he had been called in]. He, not being a licensed attorney, was wholly without authority to appear for her . . . . This she and her husband knew or were bound to know.
Knope, 28 So. at 667. But see Hughes v. Mulvey, 3 N.Y. Super. (1 Sand.) 92, 95 (N.Y.C. Super. Ct. 1847) (holding that under the circumstances, the judge did not err in concluding that the defendant’s wife was authorized to appear on his behalf).
75 Knope, 28 So. at 667.
76 See Trowbridge vom Baur, supra note 2, at 6–7 (discussing a 1909 statute that prohibited corporations from practicing law).
77 Nixon, Ellison & Co. v. S.W. Ins. Co., 47 Ill. 444, 446 (Ill. 1868) (dismissing a case when the plea was purported to be not by an attorney, but by a corporation’s secretary and president); Nispel v. W.U.R.R. Co., 64 Ill. 311, 314 (Ill. 1872) (similarly dismissing a case
While the majority of cases in the 1800s that touched upon the subject of unauthorized practice focused on activities in court, there were occasional cases in which parties would raise the issue of unauthorized practice outside the courthouse. Again, parties used this issue as a defensive litigation tactic as opposed to filing lawsuits specifically to prohibit, deter, or punish the unauthorized practice of law. For example, in an Illinois case involving the administration of a minor’s personal injury settlement, the court held that the guardian could not pay any portion of the funds designated for attorney’s fees to an adjustment company. The adjustment company, which had learned of the minor’s accident from a newspaper article, obtained a power of attorney from the parents to settle and collect a claim against the railroad that caused their son’s injuries. The adjustment company then hired two attorneys to prosecute the claim and they obtained a verdict for the minor.

The Probate Court later issued an order authorizing the minor’s guardian to expend one-third of the recovery on attorney’s fees. The appellate court held that it would be improper for the minor’s guardian to pay the adjustment company any of these fees because it “[was] not an attorney, and [had] no right to receive fees, or collect money for legal services.”

While case law decided in the 1800s established some precedent for defining and enforcing restrictions on who could practice law, no organizational structure existed to focus on prohibiting the unauthorized practice of law until the creation of state and local bar associations in the late 1800s. Simultaneously, the growth of cities, societal changes, and

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when the plea was purported to be not by an attorney, but by the president and secretary of a corporation). While legislation in the early 1900s routinely prohibited the corporate practice of law, support for this idea was found to date back to the Lord Coke’s time. Nixon, 47 Ill. at 446 (“We find that as early as Lord Coke’s time it was the recognized doctrine that a corporation aggregate could not appear in person to an action.”).

78 See, e.g., Robb v. Smith, 4 Ill. (3 Scam.) 46, 47 (Ill. 1841) (wherein appellant moved to have the case dismissed because a petition filed against him was “not signed by the plaintiff himself, or any attorney of the court”).


80 Id. at 468.

81 Id.

82 Id. at 469.

83 Hughes, 62 Ill. App. at 469; see also Alpers v. Hunt, 24 P. 846, 847, 850 (Cal. 1890) (holding contract that split legal fees between attorneys and person who procured client for attorneys to be void).

84 LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 495–97 (3d ed. 2005) (“In most of the nineteenth century, no organization even pretended . . . to govern the conduct of
the emergence of new corporations and businesses combined to create circumstances conducive to the growth of unauthorized practice that the newly formed bar associations would confront.85

III. THE RISE OF BAR ASSOCIATIONS AND THEIR INITIAL EFFORTS TO CURB UNAUTHORIZED PRACTITIONERS

In 1850, there were just over 20,000 lawyers in the United States.86 That number increased to about 60,000 by 1880 and about 114,000 by 1900 as the growth of the American economy increased the need for lawyers.87 The demographics of lawyers also changed during this time with white European Catholic and Jewish immigrants making the bar somewhat more diverse;88 however, the bar remained “basically a white male preserve.”89 As the number of lawyers grew, professional organization followed.90 Lawyers began forming our modern bar associations in the late 1800s, with forty state or territorial bar associations created in the United States by 1900.91 Roscoe Pound marked “the beginning of the resurgence of the bar, leading to its reprofessionalization [sic], at the organization of the Association of the Bar of the City of New York in 1870.”92 Cities that were major commercial centers followed suit and established their own regional bar associations, including: Cleveland (1873), Chicago (1874), St. Louis (1874), and Boston (1877).93 Accordingly, the American Bar Association, the national bar organization, was formed before the end of
Bar associations around the country started as mostly social organizations, but after the turn of the century, lawyers increasingly used bar associations as a vehicle to advocate for the profession. Terence Halliday, in his book, Beyond Monopoly, calls the early period of bar organization "an era of formative professionalism." Establishing respect for the profession required cleaning house in a variety of ways. Legal education, exams for admission to the bar, discipline of attorneys, and adoption of codes of ethics were some of the areas on which bar associations focused. Their initiatives were steeped in rhetoric about increasing the professional status of the bar, but those initiatives focused more on erecting barriers of entry to protect the professional elite. Consistent with the theme of elevating the legal profession’s reputation and limiting it to those who possessed the privilege to practice, some young bar associations began to turn their attention to the unauthorized practice of law at the turn of the century.

This Part will discuss the earliest efforts of bar associations in New York City and Chicago to address unauthorized practitioners in the late 1800s. Bar associations in both of these cities started with a basic issue that will be discussed in this Part: they needed lists of licensed attorneys in order to determine who was not licensed to practice law. Once they identified unlicensed practitioners, bar associations in New York and Illinois would necessarily have to grapple with how to enforce prohibitions on UPL. The potential sources were the courts’ equity powers to enter injunctions, the courts’ inherent contempt powers, and legislation that criminalized UPL. This Part will also examine early

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94 HURST, supra note 1, at 287; ABEL, supra note 18, at 45. A rival national bar, the National Bar Association, only survived from 1888 to 1893. Id.
95 See HURST, supra note 1, at 288–91 (describing the progression of bar activities over the course of time).
96 HALLIDAY, supra note 43, at 60.
97 See, e.g., id. at 62 (focusing on legal education); JOHN H. LANGBEIN, HISTORY OF THE COMMON LAW 1066 (2009) (focusing on higher standards for bar admission and the discipline of unethical conduct); Christensen, supra note 1, at 175 (focusing on educational requirements for bar admission).
98 ABEL, supra note 18, at 71–72, 109.
99 LANGBEIN, supra note 97, at 1071–72.
100 As early as 1882, the New York City Bar Association tried to persuade the New York legislature to pass a bill requiring the keeping of a roll of bar members. CLIFFORD A. HAND, ET AL., ANNUAL REPORT OF THE COMMITTEE ON THE AMENDMENT TO THE LAW FOR 1881 79 (1882) [hereinafter HAND, ANNUAL REPORT FOR 1881].
questions about the appropriate party to bring enforcement actions: bar associations or prosecutors.

A. Bar Associations in New York and Their Initial Efforts to Identify and Stop Unlicensed Practitioners

After the Civil War, corruption permeated New York City, the nation’s financial capital. The city was under the corrupt influence of the Tweed Ring, a group that had obtained the power to appoint judges who would then protect it. “As the collaboration between unprincipled entrepreneurs and corrupt lawyers and judges became more conspicuous, the legal profession was once more in disgrace.” In 1869, The New York Times called on lawyers to break their “guilty silence,” reawaken their “public spirit,” and “help us back to a better state of things.” From this call came the organization of the New York City Bar Association on February 1, 1870—the first modern bar association. Two hundred thirty-five of the four thousand lawyers in New York formed the organization to “sustain the [legal] profession in its proper position in the community, and thereby enable it in many ways to promote the interests of the public.” In addition to investigating corruption, the New York City Bar Association began to investigate professional misconduct, contemplate a code of ethics, and call for tougher licensing standards. Leading lawyers subsequently incorporated the New York State Bar Association in 1877, which provided another voluntary association of lawyers in New York. These two bar associations soon began to undertake the task of

PROCEEDINGS OF THE NEW YORK STATE BAR ASSOCIATION 60, 69 (1898) [hereinafter Danaher, Report of the Committee on Bill for Registration of Attorneys] (noting that other states’ courts punish the unauthorized practice as civil contempt).

103 Id.
104 Id.
105 Id.


107 POUND, supra note 91, at 255 (emphasis omitted).
108 HENKE, supra note 102, at 26.

B. Identifying Unlicensed Practitioners

The first step in fighting the unauthorized practice of law was to determine whether someone was licensed to practice law in the first place. When towns were small and the number of lawyers in each town was few, it was not difficult for the residents and the courts to know the licensed lawyers in town.\(^{111}\) As populations grew and people became more transient, particularly in the larger cities, however, that became more difficult, and the legal system was in need of methods to identify who had the proper authorization to practice.\(^{112}\)

In 1882, the New York City Bar Association lamented the legislature's failure to pass a bill that would have created an official roll of attorneys in the state.\(^{113}\) The Association reported:

There appears to be no little reluctance on the part of the Legislature to authorize more efficient discipline by the courts of the persons having or claiming the right to practice before them. Doubtless this reluctance is in some degree attributable to the fact that the evils sought to be remedied are not so apparent in the county districts as in our city.\(^{114}\)

Despite these concerns, the annual reports of the Grievance Committee of the New York City Bar Association mentioned very few accounts of the unauthorized practice of law during the last decade of the 1880s. The Grievance Committee noted one instance in the report for 1885, which described a complaint against a resident of New York City who appeared in court without a license and falsely represented that he was an attorney.\(^{115}\) After investigating the complaint and finding the

\(^{110}\) For example, the New York City Bar Association's various committees "got to business" in raising professional standards soon after its incorporation by implementing a grievance committee to oversee complaints of misconduct by lawyers, taking on the responsibility of investigating judicial abuses of city judges, and more. Henke, supra note 102, at 25-26.

\(^{111}\) Danaher, Report of the Committee on Bill for Registration of Attorneys, supra note 101, at 69.

\(^{112}\) Id.

\(^{113}\) Hand, Annual Report for 1881, supra note 100, at 79.

\(^{114}\) Id.

allegations true, the Grievance Committee reported its conclusion to the Executive Committee of the Association and recommended prosecution. The Executive Committee then retained an attorney as counsel on its behalf in the matter. The following year, the Grievance Committee reported that "[p]ending proceedings before the Grand Jury, [the unlicensed practitioner] escaped from the State and thus avoided punishment."

Towards the end of the nineteenth century, the New York State Bar Association encouraged the legislature to revisit enacting a bill that would create an official register of attorneys in the state. The express purpose of the bill was to deal with unlicensed practitioners. The 1898 report of Committee on the Bill for Registration of Attorneys of the New York State Bar Association stated that, "[w]e have not the time nor the space to properly set forth the facts concerning the practice of law by non-qualified individuals within this State. The evil is greater than is known." Evidence in support of this concern included applications for admission to the bar which seemed to indicate unauthorized practice; some applications even being printed on letterhead titled "Law Office of . . ." As one letter seeking admission to the New York bar stated:

I am exceedingly anxious to become admitted as I have a large practice – so large in fact that I have been compelled to open an office. I believe I am fully prepared for admission. I have been engaged in the practice of both criminal and civil law during all of the time above mentioned. Had two criminal cases, both of which I won, before filing my certificate of clerkship. . . . Have tried

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116 Id. It is presumed that the prosecution was made under a local law that made it a crime to practice law without a license in New York City, though the Report does not specify what law the charge was brought under, nor does it identify the specific case. Id.
117 Id.
118 Henry E. Howland, et al., Annual Report of the Committee on Grievances for 1886, in ASS’N OF THE BAR OF THE CITY OF N.Y., THE REPORT OF PROCEEDINGS OF THE ASSOCIATION’ OF THE BAR OF THE CITY OF NEW YORK 64, 64 (1887) [hereinafter Howland, Annual Report of the Committee on Grievances for 1886]. The 1885 report did not identify the unlicensed practitioner by name, but the 1886 report identifies an individual in a similar circumstance as Charles W. Irving. Id. It is possible that these two reports are referring to different matters, but the descriptions of the matter are close enough that it seems fair to infer that they are both discussing the same unlicensed practitioner.
119 Danaher, Report of the Committee on Bill for Registration of Attorneys, supra note 101, at 60, 66.
120 Id. at 61. The report also spoke of driving "from cover the many individuals who, under the name and title and prestige and privileges of our profession, are preying upon the people to the discredit of the Bar and to its harm and damage." Id.
121 Id. at 62.
122 Id.
more cases than any two attorneys here since I began the study of the law.123

The New York State Bar’s reports reflected changes caused by the growth of New York City and the influx of newcomers, which made it harder to identify unlicensed practitioners; as one member of the bar explained:

The evil to which the bill seeks to address itself I think is perhaps more noticeable in the city of New York than in any other portion of the State. I presume that this evil does not exists [sic] in courts of justice of the peace, nor does it exist in localities where people are more generally known, are better acquainted with each other and where there is less likelihood of a man practicing as a member of the Bar when he is not entitled to do so. Furthermore, anyone can practice, of course, before a justice of the peace without a license. In the city of New York, however, and especially upon the east side of that city, the evil is a great and crying one.124

Without an official register of attorneys, there was no easy way to ascertain whether a new arrival was entitled to practice law when he hung out a shingle or appeared in court.125 This concern applied to those individuals who had never been licensed, as well as to individuals who were licensed in other states but had never been licensed in New York.126

The New York State Bar Association also noted some enforcement problems:

It is a curious fact, not generally known, that it is not a crime to practice law in this State without a license, except in the city of New York and the county of Kings. It is only punishable in the other parts of the State as and for a civil contempt.127

The proposed bill would remedy this by making it a misdemeanor statewide to practice law without a license.128

124 Id. at 69–70. The report also opined that the number of unlicensed practitioners was growing because of “stringent pre-educational and examination qualifications required of students.” Id. at 63.
125 Id.
126 Danaher, Report of the Committee on Bill for Registration of Attorneys, supra note 101, at 64.
127 Id.
128 Id. at 68.
The bill finally became a law on March 29, 1898. In addition to creating an official register of attorneys in the State of New York, the bill also made it a misdemeanor to practice or appear as an attorney-at-law or as attorney and counselor-at-law . . . or to hold himself out to the public as being entitled to practice law . . . without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state.

A violation of the statute was a misdemeanor, and it was the duty of the district attorneys to enforce the act and prosecute all violations. Thus, by the turn of the century, the two New York bar associations had the first steps they needed to address the unauthorized practice of law: a way to identify individuals engaged in UPL, a legislative means for enforcement, and district attorneys charged with executing that enforcement.

C. Enforcement

There are limited records of efforts to enforce the new prohibitions on the unauthorized practice of law immediately following New York’s enactment of the legislation in 1898. The Grievance Committee for the New York State Bar Association did not report any activity to curb the unauthorized practice of law in the decade following the enactment of the legislation. The Bar Association of the City of New York’s reports contain some discussion of enforcement action, which is consistent with the organization’s prior observation that the unauthorized practice of law was more prevalent in the city.

In 1898, the same year that legislation made it a misdemeanor to practice law without a license, the Bar Association of the City of New York

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130 Id. at 325.

131 Id. at 326.

132 A review of the New York State Bar Association Grievance Committee reports for the years 1898-1908 revealed no reported enforcement efforts.

York dedicated an attorney to assist the Grievance Committee, which was made known to the public. The number of complaints that the committee received doubled that year and continued to increase in subsequent years. Most of the complaints were against licensed attorneys who allegedly engaged in some misconduct, but some of the complaints were also against unlicensed practitioners. For example, the 1901 annual report of the Committee on Grievances disclosed that it had received complaints against three unlicensed persons in the County of New York. The Committee referred these cases to the District Attorney who assured that the “cases would be expedited.”

Over the next decade, the number of complaints the Bar Association of the City of New York’s Committee on Grievances received increased dramatically, and they contained some references to unlicensed practitioners. In 1903, for instance, the committee reported receiving forty-five complaints against attorneys and “persons claiming to be attorneys” throughout the past year, but the report did not specify how many of those forty-five complaints were against non-lawyers. Again, the bar association referred complaints against unlicensed persons to the district attorney. This resulted in those persons discontinuing their unauthorized conduct, with the exception of two individuals that were still under investigation at the time of the report.

By 1911, the number of complaints made to the Grievance Committee increased more than ten-fold to 551 “complaints against attorneys and persons pretending to be attorneys.” Again, the 1911 report did not specify how many of those complaints were against non-lawyers nor the disposition of those complaints.

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135 Id.
136 William E. Stiger, Annual Report of the Committee on Grievances for 1900, in ASS'N OF THE BAR OF THE CITY OF N.Y., THE REPORT OF PROCEEDINGS OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 84, 84–85 (1901) [hereinafter Stiger, Annual Report of the Committee on Grievances for 1900] (“The attention of the Committee having been called to three cases of persons not admitted to the Bar attempting to practice law in the County of New York, these cases were brought by your Committee to the attention of the District Attorney.”).
137 Id. at 85.
138 Merrill, Annual Report of the Committee on Grievances for 1902, supra note 133.
139 Id.
140 Id.
142 Id. at 142-44. Reports from the next decade continued to include sporadic reports of
Unlike Illinois, which will be discussed in the next section, New York bar associations did not appear to rely heavily on the inherent powers of the court to enjoin or punish the practice of law. There is merely one reference in the bar association records of the unauthorized practice of law being a civil contempt prior to the enactment of the criminal misdemeanor statute; but aside from that one reference, the New York bar associations' records in the late 1800s and early 1900s do not reflect that they were filing their own actions to enjoin or punish unauthorized practitioners pursuant to the court's inherent contempt or equity powers. Instead, the enforcement was confined to the district attorneys prosecuting persons under the misdemeanor statute.

The New York bar associations' reliance on the criminal statute as the main enforcement mechanism was consistent with the state’s early views on separation of powers, which is traceable to an 1860 case. In 1860, the New York Court of Appeals decided In re Henry W. Cooper, holding that the courts did not have the power to deny an application for admission by Mr. Cooper, who applied for admission pursuant to a legislative act. At that time, the state constitution provided that “[a]ny male citizen of the age of twenty-one years, of good moral character, and who possesses the requisite qualifications of learning and ability, shall be entitled to admission to practice in all the courts of this State.”

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143 Cadwalader, Annual Report of the Committee on Grievances for 1885, supra note 115, at 63.

144 See, e.g., Stiger, Annual Report of the Committee on Grievances for 1900, supra note 136, at 84–85.

145 In re Cooper, 22 N.Y. 67, 94–95 (N.Y. 1860).

146 Id. at 92.
legislature passed a statute that provided for the admission of graduates of the Law School of Columbia College without examination by the court.\textsuperscript{147} Mr. Cooper, a Columbia graduate, applied for admission pursuant to the statute.\textsuperscript{148}

The intermediate court of appeals denied the application for admission and found the statute unconstitutional.\textsuperscript{149} The main constitutional objection to the law was that the courts held the exclusive power to admit attorneys under the state constitution and that the legislative act prescribing qualifications for admission was in conflict with that power.\textsuperscript{150} It was a separation of powers argument about which branch of government had the authority to regulate the licensing of attorneys.\textsuperscript{151}

In rejecting the reasoning of the intermediate court of appeals, the New York Court of Appeals reasoned that the courts could not possess such an exclusive power without a specific provision in the state constitution.\textsuperscript{152} The court asserted that such exclusive power "cannot be claimed as a part of the inherent power of the courts, or as resulting necessarily from their organizations as courts."\textsuperscript{153} Reviewing the history of attorney admission, particularly in New York, the court concluded that "although the appointment of attorneys has usually been entrusted in this State to the courts, it has been nevertheless . . . treated not as a necessary or inherent part of their judicial power, but as wholly subject to legislative action."\textsuperscript{154} The court reasoned that the legislation did not divest the courts of their jurisdiction over admissions; rather, it only "prescribed what shall be competent evidence in certain cases," regarding the applicant's qualifications.\textsuperscript{155}

In light of this precedent in New York—that the courts did not possess constitutionally mandated inherent powers over the admission to the practice of law—it made sense that the bar associations primarily relied on legislation to make the unauthorized practice of law a misdemeanor. In Illinois, however, the State Supreme Court took a different approach, claiming broad inherent powers over the practice of law.
law.\textsuperscript{156} This approach may explain the evolution of unauthorized practice of law enforcement in Illinois, which relied more on the court’s inherent powers.

\textit{D. Bar Associations in Illinois and Their Initial Efforts to Identify and Stop Unlicensed Practitioners}

Inspired by the founding of the Association of the Bar of the City of New York in 1870, forty-two lawyers formed the Chicago Bar Association ("CBA") in 1874.\textsuperscript{157} The CBA’s bylaws created four standing committees, including the Grievance Committee.\textsuperscript{158} The bylaws charged the Grievance Committee “with the hearing of all complaints against members of the Association, \textit{and also all complaints which may be made in matters affecting the interests of the legal profession and the practice of law, and the administration of justice. . .}.”\textsuperscript{159} The Grievance Committee focused predominantly on identifying attorney misconduct and filing disbarment proceedings before the Illinois Supreme Court.\textsuperscript{160} CBA records from the late 1800s, however, contain evidence that the committee also used this broad mandate in the bylaws to discuss concerns regarding the unauthorized practice of law.\textsuperscript{161}

The CBA’s effort to prevent unlicensed persons from practicing law was a natural corollary to its goal of raising the state’s standards for admission to the bar.\textsuperscript{162} Around the turn of the century, law schools proliferated and part-time law schools emerged, much to the concern of elite lawyers who worried about the quality of lawyers that new schools produced, particularly part-time schools.\textsuperscript{163} One way to combat these

\textsuperscript{156} See infra Part III(d).
\textsuperscript{157} KOGAN, supra note 56, at 35, 37.
\textsuperscript{158} Id. at 37.
\textsuperscript{159} Chicago Bar Association By-Laws, CHI. LEGAL NEWS, Apr. 18, 1874, at 243 (emphasis added).
\textsuperscript{160} HALLIDAY, supra note 43, at 68; KOGAN, supra note 56, at 42.
\textsuperscript{161} See Joseph M. Larimer, Unauthorized Practice Pioneers, 6 UNAUTHORIZED PRACT. NEWS 21, 21 (1940).
\textsuperscript{162} KOGAN, supra note 56, at 82. This trend was not limited to Chicago. Standards were also raised in other states by, for example, the displacement of apprenticeships with the requirement of formal legal education. See ABEL, supra note 18, at 41–42 (discussing the shift from apprenticeships to formal legal education throughout the country).
\textsuperscript{163} FRIEDMAN, supra note 84, at 36–37; see also JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 99 (1976) ("Successful practitioners, fearful of thrusts from below within the profession, wielded higher standards as a weapon in defense of the elitism that enhanced their own stature. . . . Night schools were a tempting scapegoat.").
concerns was to increase the standards for admission to the bar. For the first twenty years of its existence, the CBA worked on a campaign to increase standards for admission, which finally saw some success in 1897 when the Illinois Supreme Court adopted Rule 39. This rule created a centralized State Board of Law Examiners to generate written exams and test all applicants who had completed three years as apprentices or in law school. This was an early example of what would become a national trend. By 1917, thirty-seven jurisdictions had central boards of bar examiners. With the CBA’s campaign to raise admissions standards reaching success in the last years of the nineteenth century, turning its focus to prohibiting unlicensed practitioners was logical.

E. Identifying Unlicensed Practitioners

Similarly to the New York bar associations, the CBA’s interest in preventing the unauthorized practice of law necessitated the creation of a method to identify unlicensed practitioners. The CBA’s concerns about UPL encompassed persons who never held a law license, lawyers who were licensed in a jurisdiction outside of Illinois, and disbarred lawyers who continued practicing law. Unlike New York, which did not have an official roll of attorneys until 1898, Illinois had an official roll of attorneys before the 1874 founding of the CBA. Additionally, Sullivan’s Law Directory—a privately published directory of attorneys—began publication in 1876, two years after the CBA was formed. Thus, when the CBA began to focus on curbing the unauthorized practice of law, it had some resources in place to determine who was engaging in UPL – unlike New York.

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164 See FRIEDMAN, supra note 84, at 37–39 (explaining the various ways in which elite lawyers attempted to impose more stringent requirements on law school and bar admissions).
165 Id.
166 HALLIDAY, supra note 43, at 76.
167 FRIEDMAN, supra note 81, at 39.
169 Chapter 165, Laws of 1898, Relating to Registration of Attorneys, supra note 129 and accompanying text.
170 The STATUTES OF ILLINOIS, supra note 55, at 67 (“It shall be the duty of the clerk of the supreme court to make and keep a roll or record, stating ... that the persons whose names are therein written, have been regularly licensed and admitted to practice as attorneys and counsellors [sic] at law within this state. ... “).
In 1898, the Grievance Committee of the CBA undertook a large project to compare the names in Sullivan’s Chicago Law Directory with those on the Illinois Supreme Court’s roll of licensed lawyers. The Grievance Committee spent two years assessing over 4,000 names and determined that 193 of the people listed in Sullivan’s did not have an Illinois license to practice law. The purpose of creating the list was “to enable the members of the association to inform the committee of such persons, so that proceedings by bill for injunction or attachment for contempt might be instituted against them.” The CBA implored its members to memorize the 193 names and to give the committee any information necessary to initiate proceedings against the interlopers. A 1900 report from the Grievance Committee stated its position emphatically:

[W]e entertain a profound contempt for any member of this association, or of the bar of this city, who, through motives of policy, fear of antagonism, or any other considerations whatever, hesitates a moment to openly and actively lend his aid to the purification of the bar, and of the administration of justice.

Thus, unlike the New York bar associations—which had to expend effort to get an official roll of licensed attorneys created in 1898—when the CBA turned its attention to the unauthorized practice of law, a roll of attorneys was already available to aid its efforts. When New York passed its act to create an official roll of attorneys in 1898, however, it simultaneously criminalized the unauthorized practice of law and gave the district attorney enforcement powers. No similar enforcement mechanism existed in Illinois at the time that the CBA became concerned with the unauthorized practice of law, so the means of

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172 Asbury Johnson, Chicago 1899 Report of the Grievance Committee, supra note 168, at 26; see also Larimer, supra note 161, at 21. This was perhaps a natural progression from the CBA’s successful campaign in 1897 to increase the profession’s stature by convincing the Illinois Supreme Court to establish the State Board of Law Examiners to hold regular examinations for those who had completed three years of apprenticeship or law school. Halliday, supra note 43, at 76. Prior to the establishment of the State Board of Law Examiners, admission to the bar was granted up after an oral examination by a judge. Id.


175 Id. at 29.

176 Id.

177 Danaher, Report of the Committee on Bill for Registration of Attorneys, supra note 101, at 68.
enforcement in Illinois has a more complex history.  

F. Enforcement

The CBA’s earliest efforts to stop the unauthorized practice of law raised two implicit issues that the CBA did not explicitly discuss in the records located for this project. One issue was the source of the legal authority to enjoin or punish the unauthorized practice of law. While the CBA initially relied on the courts’ inherent contempt powers and equity powers, the legislature eventually criminalized UPL in 1905. The courts’ inherent powers, however, always remained in play. The Illinois Supreme Court took a strong position regarding its jurisdiction over the practice of law as opposed to the legislature. This differed from New York’s early assessment of the power of the two branches over the regulation of the practice of law. Another implicit issue concerned who had standing to bring enforcement actions. Possible parties to enforce prohibitions on the unauthorized practice of law were the courts, bar associations, state prosecutors, and injured parties. The different sources of legal authority and varying parties to pursue enforcement created a complex landscape in Illinois.

Some of the CBA’s earliest efforts to address the unauthorized practice of law did not rely on assistance from the courts or the legislature; instead, the CBA used more informal methods. For instance, in 1895 the Chicago Bar Association appointed a two member committee to investigate allegations that Edward O’Brien Jr. had been holding himself out as a licensed lawyer since 1888 without a license to practice law. The committee held meetings where it invited both Mr. O’Brien Jr. and his accuser to offer evidence on the matter. During those meetings, the committee determined that Mr. O’Brien Jr. was unlicensed and falsely practicing under the license of his retired father,

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178 Recall that the Attorney Act in effect at this time did not have a provision to enforce the restriction on the practice of law to licensed attorneys. See The Statutes of Illinois, supra note 55, at 67–69.
179 Larimer, supra note 161, at 21.
180 Rigertas, Lobbying and Litigating, supra note 3, at 88–89.
181 Id. at 86 (discussing an Illinois Supreme Court case in which the Court held that “the admission of attorneys was a purely judicial function over which the legislature had no power”).
182 Id. at 86–87 (examining In re Cooper, 22 N.Y. 67, 90–91 (N.Y. 1860)).
184 Id.
Edward O’Brien Sr. Instead of obtaining his own license, the junior O’Brien took advantage of the Illinois Supreme Court’s omission of “Jr.” or “Sr.” on the license that it issued to his father. As a result of the investigation, Mr. O’Brien Jr. agreed not to practice law until he obtained his own law license. Based on this promise alone, the committee determined that no further action was warranted.

Gentlemen’s agreements—such as the one that appears to have been the result of the O’Brien investigation—were not likely to deter many of those engaged in the unauthorized practice of law. In the absence of any legislation prohibiting or criminalizing the unauthorized practice of law, the CBA’s Grievance Committee nonetheless found a way in the late 1800s to initiate many lawsuits to prohibit such practices. The CBA’s records refer to proceedings it brought and intended to bring for injunctive relief and for contempt. The available records do not address how the CBA had standing to initiate these proceedings or the legal authority for the relief sought, and there are no published decisions from this time period explaining the courts’ legal reasoning for their power to enjoin those engaged in the unauthorized practice of law or to hold them in contempt. Presumably, the Illinois courts were relying on their inherent powers, which, unlike New York, they viewed as an exclusive power over the practice of law.

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185 Id.
186 Id.
188 Id.
189 See, e.g., Charles L. Billings, Report of the Grievance Committee, Chi. Legal News, Nov. 3, 1900, at 88, 90 [hereinafter Billings, Report of the Grievance Committee] (describing the grievance committee’s efforts to curb unauthorized practice, including through contempt proceedings); see also Larimer, supra note 161, at 21 (discussing an injunction obtained in 1899 through the efforts of the Grievance Committee against an individual practicing law without a license).
191 The records relied on in this section are the CBA’s official published reports, which do not provide specific details about these actions. See, e.g., Asbury Johnson, Chicago 1899 Report of the Grievance Committee, supra note 168. Court decisions in later decades clearly articulate this power. See, e.g., People ex rel. Ill. State Bar Ass’n v. People’s Stock Yards State Bank, 344 Ill. 462, 471 (Ill. 1931).
192 People ex rel. Ill. State Bar Ass’n, 344 Ill. at 471. For a more detailed discussion of inherent powers, see generally, Rigertas, Litigating and Lobbying, supra note 3, at 86–91.
This section will discuss the inherent powers doctrine and, in particular, how that judicial doctrine played a role in establishing the Illinois courts' authority over the practice of law. The Illinois Supreme Court used this doctrine to reason that it had jurisdiction over the unauthorized practice of law. The inherent powers doctrine is a corollary of the separation of powers doctrine. The essence of the inherent powers doctrine is that some powers, while not expressly delineated in the state constitution, are necessary to enable the judicial branch to operate as an independent branch of government.

Separation of powers is a bedrock principle of modern constitutional law. James Madison called the doctrine the "first principle of free government." The precise meaning of the doctrine, however, has not always been clear. Indeed, the idea of a robustly independent judiciary took some time to develop in the colonies. By the late 1700s, however, the judicial branch strengthened and began to proclaim limits on legislative authority and declare some laws unconstitutional. This drew criticism: "[T]o many, desirous as they may have been to find some way of checking encroaching legislatures, the judiciary's pronounced of a law enacted by the legislature . . . as unconstitutional and invalid seemed inconsistent with a free popular government."

As states adopted constitutions, they articulated the idea of separation of powers, although often in a very general way. For example, Illinois adopted its first constitution in 1818, with subsequent
iterations adopted in 1848, 1870, and 1970.203 When the CBA was addressing the unauthorized practice of law around the turn of the century, Article III of the 1870 state constitution provided this broad statement about the separation of powers: “The powers of the Government of this State are divided into three distinct departments — the Legislative, Executive and Judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.”204

Article VI denoted powers in the judicial department, but it did not address the regulation of the legal profession.205 This left ambiguity as to whether the judicial branch or the legislative branch had the power to regulate the legal profession.

The landmark case in Illinois that addressed this ambiguity was In re Day, which the Illinois Supreme Court decided in 1899.206 Like the 1860 New York case of In re Cooper, the case of In re Day involved the question of the legislature’s authority to set standards and qualifications for admission to the practice of law.207 In juxtaposition to In re Cooper, however, the Illinois Supreme Court articulated a very different view of its powers over the admission of attorneys.208

As mentioned earlier, the CBA spent its first two decades trying to strengthen standards for admission to the bar, which culminated in the Illinois Supreme Court’s adoption of Rule 39.209 In addition to establishing a statewide board of bar examiners, Rule 39 also increased the period of time for study—in a law school or in an apprenticeship—from two years to three years.210 The new court rule applied to students who had already started a two year program at the time of the rule’s enactment.211

203 Frank Kopecky & Mary Sherman Harris, Understanding the Illinois Constitution 2 (2001 ed., 2000) (The fourth and most recent iteration of the Constitution was adopted in 1970 and has been amended from time to time).

204 Ill. Const. of 1870, art. III.

205 Id. art. VI. Some state constitutions explicitly give the judicial branch the power to regulate the legal profession, but none of them expressly give the judiciary the power to define the practice of law.

206 In re Day, 54 N.E. 646 (Ill. 1899).

207 Id. at 646.

208 Id. at 647, 651–52 (rejecting the reasoning of the holding in In re Cooper and noting its inconsistency with interpretations of Illinois state law).

209 Rigertas, Lobbying and Litigating, supra note 3, at 83–85.

210 Kogan, supra note 56, at 85–86.

211 In re Day, 54 N.E at 653–54.
Students in the midst of two year programs immediately objected to the requirement that they complete a third year of education. After unsuccessfully petitioning the Illinois Supreme Court to exempt those already enrolled in a two-year program, the students took their cause to the state legislature. In 1899, the general assembly passed an act that required the Supreme Court to exempt those students who had enrolled in a two-year program prior to the adoption of Rule 39.

Students in two-year programs then moved the Supreme Court for admission to the bar under the legislative act. The CBA opposed this motion, which sparked a significant separation of powers challenge in Illinois over the regulation of the practice of law as illustrated by the case of *In re Day*.

In the case of *In re Day*, the Illinois Supreme Court denied the students’ motion and held that the legislature’s enactment assumed the exercise of a power that properly belonged to the judicial branch. The court examined limited precedent existing at the time and concluded that the admission of attorneys was a purely judicial function over which the legislature had no power. The Illinois Supreme Court, therefore, held the act unconstitutional.

The *Day* court did not, however, completely exclude the legislature. It made a distinction between legislative acts that required admission to bar and legislative acts that assisted the court in protecting the public from those unfit to practice law. The court stated, “the power of the legislature to protect the public against persons unfit to practice law and to pass laws for that purpose has never been denied.” As an example,

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212 KOGAN, *supra* note 56, at 86.
213 *Id.* at 87.
214 *Id.*
215 *Id.* at 87.
217 *In re Day*, 54 N.E. at 653. The court also held that the act was special legislation that granted privileges to a special class of persons, which violated the state constitution. *Id.* at 647. *In re Day* has been an influential case regarding the power of the judicial branch. It has been cited by over half of the states’ courts as authority for the judicial branches’ powers over the regulation of the practice of law. Rigertas, *Lobbying and Litigating, supra* note 3, at 90 (based on author’s research of Westlaw in 2009).
218 *In re Day*, 54 N.E. at 653. The court rejected the reasoning of *In re Cooper* and explained that the New York decision had “been greatly deplored by eminent men, abundantly able to judge of the injustice to the public resulting from the rule then established, under which other special laws were passed.” *Id.* at 651.
219 *Id.* at 647.
220 *Id.* at 652.
221 *In re Day*, 54 N.E. at 652.
the court referred to a prior case where it had denied Myra Bradwell admission to the bar based on legislation that restricted admission to men.\textsuperscript{222} The court reasoned that Illinois courts maintained the power to "protect themselves against ignorance and want of skill [without which] they cannot properly administer justice,"\textsuperscript{223} and the legislation was permissible because it did not require the court to admit anyone.\textsuperscript{224} The court concluded that the legislature, in that case, properly exercised its police powers to prohibit admissions for reasons that it believed (incorrectly) were in the public’s interest.\textsuperscript{225} This reasoning left the door open for the legislature to later enact laws that would aid the judiciary in its efforts to prohibit the unauthorized practice of law, such as the criminalization of the unauthorized practice of law in 1905.\textsuperscript{226}

\textit{H. Inherent Powers as an Enforcement Mechanism: Unauthorized Practice of Law Enforcement in Illinois in the Late 1800s/Early 1900s—Injunctions and Contempt}

There are no published Illinois decisions from the turn of the century that address the courts’ powers to enjoin or punish the unauthorized practice of law, but the CBA’s records describe such activity.\textsuperscript{227} It may be fair to conclude that the court’s reasoning in \textit{In re Day} about the court’s inherent powers also supported its willingness to use its powers to enjoin or punish the unauthorized practice of law in the absence of legislation addressing the topic. If the court had the inherent power to regulate the legal profession, a corollary to that would be the power to prevent unauthorized people from practicing law. By the 1930s, Illinois cases made this point explicitly, but the courts did not

\textsuperscript{222} Id. (citing \textit{In re Bradwell}, 55 Ill. 535 (1869)). Mrs. Bradwell was later granted her law license after the legislature passed an amendment stating that no person should be denied a license on the basis of gender. \textit{Id.}

\textsuperscript{223} \textit{Id.}

\textsuperscript{224} \textit{See In re Day}, 54 N.E. at 652. The court explicitly stated that the legislature’s police powers over the qualifications of those admitted to other fields, such as doctors, plumbers and horseshoers, had no influence on the issue before it. \textit{Id.} at 653.

\textsuperscript{225} \textit{See id.} at 652–53 (noting that in the Bradwell case, "[t]he legislature did not undertake by the amendment to deprive the court of passing upon her learning and fitness to practice law").

\textsuperscript{226} \textit{See e.g.}, 38 ILL. REV. STAT. 118a (1905) \textit{in THE REVISED STATUTES OF THE STATE OF ILLINOIS} 696 (Harvey B. Hurd, ed., 1906) (making the unauthorized practice of law a misdemeanor offense).

expressly articulate it at the turn of the century.\textsuperscript{228}

The courts' inherent powers can also include contempt powers.\textsuperscript{229} Contempt can be civil or criminal, and indirect or direct.\textsuperscript{230} Courts generally use civil contempt to force compliance with a court order, whereas criminal contempt serves a punitive purpose.\textsuperscript{231} Direct criminal contempt is an "affront[] to the dignity of the court that actually occur[s] in the courtroom," and, therefore, the judge has direct knowledge.\textsuperscript{232} For instance, it would be a direct criminal contempt for a person to fraudulently appear in court in the capacity of a lawyer without proper licensing.\textsuperscript{233} Unauthorized practice that has occurred outside the courtroom, however, is considered to be worthy of indirect criminal contempt, which would require the filing of a petition or complaint and an evidentiary hearing.\textsuperscript{234}

The courts' contempt power played an important role in the prohibition of the unauthorized practice of law in Illinois at the turn of the century, although there were no appellate cases in the early 1900s that clearly asserted that the courts' contempt power covered

\textsuperscript{228} See, e.g., People ex rel. Ill. State Bar Ass'n v. People's Stock Yards State Bank, 176 N.E. 901, 905–06 (Ill. 1931). Therein, the Illinois Supreme Court stated:

Although the Constitution does not expressly confer upon this court power and jurisdiction with respect to the admission of attorneys to practice law, such power and jurisdiction are necessarily implied and are inherent in this court. . . . Having power to determine who shall and who shall not practice law in this state, and to license those who may act as attorneys and forbid others who do not measure up to the standards or come within the provisions of its rules, it necessarily follows that this court has the power to enforce its rules and decisions against offenders, even though they have never been licensed by this court. Of what avail is the power to license in the absence of power to prevent one not licensed from practicing as an attorney? In the absence of power to control or punish unauthorized persons who presume to practice as attorneys and officers of this court the power to control admissions to the bar would be nugatory.

\textit{Id.}

\textsuperscript{229} See \textit{A Synopsis of a Lecture Delivered by John F. Geeting to the Senior Class of the Chicago-Kent College of Law on December 18, 1903}, CHI. LEGAL NEWS, Jan. 16, 1904, at 176 ("The organization of the court implies a power to maintain order and sustain authority at its sessions; to execute its process; and to prevent all unlawful interference with those [who] . . . take part in the proceedings had before it.") [hereinafter \textit{Synopsis of a Lecture Delivered by John F. Geeting}].

\textsuperscript{230} \textit{Remedies Available to Combat the Unauthorized Practice of Law}, 62 COLUM. L. REV. 501, 512–13 (1962) [hereinafter \textit{Remedies Available}].

\textsuperscript{231} \textit{Id.}

\textsuperscript{232} \textit{Id.} at 513.

\textsuperscript{233} \textit{Id.; see also} People v. Securities Discount Corp., 279 Ill. App. 70, 78 (Ill. App. Ct. 1935) (engaging in unlawful practice of law before the court was a direct contempt that the court could immediately punish).

\textsuperscript{234} \textit{Remedies Available}, supra note 230, at 513–14.
unauthorized practice of law occurring both inside and outside the courtroom.\textsuperscript{235} The CBA’s records from 1899 and the early 1900s, however, refer to its success in bringing “proceedings by bill for injunction or attachment for contempt” against people alleged to be engaged in UPL.\textsuperscript{236} For example, the CBA’s 1899 annual report noted that it created a list of unlicensed lawyers specifically so that the grievance committee could bring actions for injunctions or contempt.\textsuperscript{237} The 1899 report discussed some specific cases. For example, one case appeared to establish equity jurisdiction over unauthorized practice of law cases.\textsuperscript{238} In April of 1899, a bill against B.A.L. Thompson came before the court, which held a hearing before a jury.\textsuperscript{239} After the jury returned a verdict in favor of the people, the court entered a decree that enjoined Thompson from “practicing in a court of record,” or “holding himself out to the public as a lawyer.”\textsuperscript{240} The CBA report stated: “No appeal has been prosecuted from that decree, and the members of the [grievance] committee are now confident that the jurisdiction of a court of equity in such cases is securely established.”\textsuperscript{241} Another case in the 1899 report described the use of the courts’ contempt powers when a Mr. McCormick demurred to a bill filed against him.\textsuperscript{242} The court entered a rule to show cause, and he submitted to an examination where he disclosed that he had a law degree but no license.\textsuperscript{243} Because McCormick had been practicing for more than five years without a license, the court found him in contempt and “committed him to the county jail for thirty days and imposed a fine of $50.”\textsuperscript{244} References to these types of enforcement actions continued in the

\textsuperscript{235} As later articulated, the courts’ ability to punish persons who appeared before it without a license fell within the courts’ inherent powers to hold persons in contempt. See Synopsis of a Lecture Delivered by John F. Geeting, supra note 229, at 176 (“The power to punish persons guilty of criminal contempt, is an essential, inherent, self-sustaining function of every court.”); see also Jury Trials in Contempt Cases, 36 HARV. L. REV. 1012, 1013 (1923).
\textsuperscript{236} Asbury Johnson, 1899 Report of the Grievance Committee, CHI. LEGAL NEWS, supra note 227, at 87.
\textsuperscript{237} Id.
\textsuperscript{238} Id.
\textsuperscript{239} Id.
\textsuperscript{240} Id.
\textsuperscript{241} Asbury Johnson, 1899 Report of the Grievance Committee, CHI. LEGAL NEWS, supra note 227, at 87.
\textsuperscript{242} Id.
\textsuperscript{243} Id.
\textsuperscript{244} Asbury Johnson, 1899 Report of the Grievance Committee, CHI. LEGAL NEWS, supra note 227, at 87.
CBA's 1899 and 1900 reports. In some cases, the person accused of practicing without a license purportedly "silently stole away" from the state after the committee filed an action against him. In other cases, the court entered a rule to show cause and ultimately found the unlicensed attorney in contempt. Contempt orders included both fines and jail time against persons practicing law without a license. The CBA's work in this area became a point of pride; in 1900, it boasted:

The past year has been an exceedingly successful one with this institution. It exercises a healthy influence over shysters and persons attempting to practice law without a license; in fact, it has done its work so thoroughly, if a lawyer is guilty of unprofessional conduct and finds that the grievance committee of this association is after him he takes to the woods at once.

Thus, in its initial wave of curbing the unauthorized practice of law, the CBA was initiating lawsuits and seeking remedies pursuant to the courts' inherent powers in the absence of any statutory authority to enforce prohibitions on the unauthorized practice of law. There are, however, no published court decisions from this time period specifically addressing the courts' inherent powers over the unauthorized practice of law in Illinois. While there are a sparse number of cases from other jurisdictions throughout the 1910s that discuss the courts' contempt powers over the unauthorized practice of law, a body of case law clearly establishing that power and the reasons for it did not emerge in Illinois and other jurisdictions until the 1930s.

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245 See generally id. at 87–88; see also Grievance Comm., Charles L. Billings, Report of the Grievance Committee, CHI. LEGAL NEWS, Nov. 8, 1900, at 88–90 [hereinafter Billings, 1900 Report of the Grievance Committee].
247 Id.
248 Id. (detailing proceedings initiated). For example, the Grievance Committee's 1899 report described one such outcome:
On May 20, 1899, the committee procured from Judge Willis an order on Mr. Ewohn to show cause why he should not be attached as for a contempt, for practicing in said court without a license. Upon examination in court on June 3d, it appeared by Mr. Ewohn's testimony that he had been practicing for about two years without a license. On July 1st he was fined $200, and order entered that attachment issue, and for his commitment.
Id. at 87.
249 Billings, 1900 Report of the Grievance Committee, supra note 245.
250 Id.
251 See, e.g., People ex rel. Ill. State Bar Ass'n v. People's Stock Yards State Bank, 176 N.E. 901, 906–07 (Ill. 1931) (finding the respondent corporation guilty of contempt for engaging in the unauthorized practice of law).
I. Creation of a Special Committee and Passage of Legislation

The CBA's initial enthusiasm for ferreting out the unauthorized practice of law waned after a couple of years. In 1904 and 1905, for reasons that are not clear, the CBA appeared to cease pursuing cases against unauthorized practitioners, even when such cases were brought to its attention.252 The CBA still has the Grievance Committee's handwritten meeting minutes from 1904–1910. During 1904 and early 1905, those meeting minutes include entries that show it was not pursuing matters against persons who were not members of the bar.253 The reasons for not pursuing these cases may be lost to history. It is possible that the CBA did not have the resources to pursue these cases, particularly since it was increasingly focused on attorney discipline at this time.254 It is also possible that some question was raised about the CBA's standing to pursue actions alleging the unauthorized practice of law or perhaps about the courts' authority to enjoin and punish the unauthorized practice of law. But these possibilities are just speculation.

In 1904, the CBA reported that 1899 was the last time it had made an effort to compile a list of those feigning to be licensed Illinois attorneys and recommended the compilation of a new list.255 The Grievance Committee, which was increasingly focused on disbarment proceedings at this time, recommended the creation of a special committee.256 This special committee would investigate those presenting


253 See, e.g., Meeting Minutes from July 13, 1904 to Nov. 1, 1910, CHI. BAR ASS'N GRIEVANCE COMM., at 56, 64 (on file with author) (“In re J.J. Connell. Found not to be a member of the bar. Case dismissed... In re Henry Weil. Complaint of Harry Dare read and dismissed because Weil is not a member of the bar.”).

254 See generally Holland, 1905 Report of the Grievance Committee, supra note 252, at 126–28 (reporting on the Committee's actions, all of which involved disbarment proceedings).


256 Buckley, 1904 Report of Grievance Committee, supra note 252, at 128. The first committee on the unauthorized practice of law was formed in 1905. Larimer, supra note 161,
themselves as lawyers without a license and compile an updated list to provide to courts, CBA members, and the state's attorney. The committee’s rationale for a special committee focused on the need to combat the unauthorized practice of law:

The attention of the association is called to the fact that there are here in Chicago a considerable number of persons holding themselves out as lawyers, who either have never been admitted to the bar of this state or else have been disbarred for iniquitous practices, and your committee recommends the appointment of a special committee to make an investigation and prepare a list of such persons, and that when such list be prepared, it be printed and furnished to the several courts and the state’s attorney and distributed among members of the association. These pirates prey upon an unsuspecting public. Their acts are injurious, not only to their victims, but also to the legal profession, in that they are classed as lawyers and the legal profession debited with their acts. We believe a generous publication of their names would do much to remedy the evil.

Perhaps not too much can be read into the last statement, but it suggests that the Grievance Committee was interested in remedying the problem by making judges aware of unlicensed persons who appeared in their courtrooms, as opposed to initiating proceedings as it had previously done.

In addition to recommending the creation of a special committee to address UPL, the Grievance Committee in 1904 also advocated for an “enactment by the legislature to prevent designing persons who have been disbarred or never admitted to practice, from holding themselves out as attorneys.” This was not the first time the Grievance Committee raised this issue. Its 1903 report also raised a concern regarding “the absence of a statute making it an offense for an unlicensed person to hold himself out as a practicing attorney.”

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257 Buckley, 1904 Report of Grievance Committee, supra note 252, at 128; Asbury Johnson, supra note 255, at 125; Holland, 1905 Report of the Grievance Committee, supra note 252, at 128; KOGAN, supra note 56, at 109. It is not clear why matters would be referred to the state’s attorney because there was no criminal statute that prohibited the unauthorized practice of law until 1905. See infra, note 261 and accompanying text.

258 Buckley, 1904 Report of Grievance Committee, supra note 252, at 128.

259 Id.


The attention of the Association has been called by former Committees to the necessity for the enactment of such legislation as will prevent designing persons
The appeals for this legislation finally succeeded after the Grievance Committee drafted an act making it a misdemeanor to hold oneself out as a lawyer without a license, which the Illinois legislature adopted as part of the fraud section of the criminal code in 1905.\footnote{261} While this act provided remedies, it did not define the practice of law.\footnote{262} It did, however, make clear that the practice of law was not confined to

who have been disbarred, or never admitted to practice, from holding themselves out as members of the legal profession. And your Committee desires again to call the attention of the Association to the urgent need of such legislation. In the absence of a statute making it an offense for an unlicensed person to hold himself out as a practicing attorney, the Committee has found many instances where unscrupulous persons have persistently, and with impunity, masqueraded as duly licensed attorneys, and as such have prayed upon the community.

\textit{Id.}\footnote{261} 38 ILL. REV. STAT. 118a (1905). The act read:

That any person residing in this State not being regularly licensed to practice law in the courts of this state, who shall in any manner hold himself out as an attorney at law or solicitor in chancery or represent himself either verbally or in writing, directly or indirectly, as authorized to practice law, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than twenty-five ($25.00) dollars, nor more than five hundred ($500.00) dollars, or imprisonment in the county jail not exceeding one year, or by both fine and imprisonment, at the discretion of the court, for each and every offense, said misdemeanor to be prosecuted and costs assessed as in other cases of misdemeanor under chapter 38 of the Revised Statutes of Illinois.

\textit{Id.; see also} Larimer, \textit{supra} note 161, at 21 (the law was titled "Act to Prevent and Punish Frauds in the Practice of Law"); Kogan, \textit{supra} note 56, at 109. The Illinois Supreme Court upheld the validity of the act in a 1911 case that challenged its constitutionality. People v. Schriber, 95 N.E. 189, 190 (1911). That case also clarified that the practice of law was not confined to trying cases in court; the definition of the practice of law also included advising parties of their legal rights outside the courthouse. \textit{Id.} at 191. The defendant in this case was in the business of "making collections, preparing conveyances, examining abstracts, negotiating loans, closing real estate deals, [and] advising parties as to their legal rights." \textit{Id.} The court held that the evidence was sufficient to establish that the defendant was holding himself out as an attorney at law. \textit{Id.}\footnote{262} See 38 ILL. REV. STAT. 118a (1905). Illinois was not the only state to criminalize the unauthorized practice of law at this time. In 1905 the Colorado legislature also passed an act criminalizing the unauthorized practice of law. The 1905 Report of the Colorado Bar Association’s Committee on Grievances contained the following report on new legislation:

The matter of Charles O. Erbaugh’s practicing without a license having been referred to the late Calvin Reed, and the matter of Frank B. Taylor’s continuing to practice law after having been disbarred having been referred to Charles Brock, each of these gentlemen reported the advisability of procuring the passage of a law to meet such cases. The committee suggested to the legislature the passage of such an act, and "An Act to provide for the punishment of one guilty of practicing law without a license," was passed and went into effect April 10, 1905. This act will be found in Session Laws of 1905, page 157.

\textit{Colo. Bar Ass’n, Report of Committee on Grievances} 210, 212 (1905).
appearances in court but instead—like New York’s broad criminal statute—applied to anyone who “in any manner [holds] himself out as an attorney at law.”

After the passage of the statute criminalizing the unauthorized practice of law, the CBA’s Grievance Committee minutes in 1905 contain entries that reflected this new enforcement mechanism. In Herman Kogan’s book about the first 100 years of the CBA, he wrote that “[f]ollowing up on this legislation, the Association obtained the conviction, between 1907 and 1910, of some 100 offenders, most of whom, as recipients of unfavorable publicity, took up other forms of livelihood.”

In 1905, the same year that the Illinois legislature criminalized the unauthorized practice of law, the CBA followed the recommendation of the Grievance Committee and created the first committee in the country that was dedicated to addressing the bar’s concerns about lay practice: the Committee on Persons Assuming to Practice Law without a License. The duties of the committee were “[t]o receive complaints against persons practicing law without having been duly licensed by the Supreme Court, and procure the prosecution of such persons under the law.”

Records for the time period following the creation of the Committee on Persons Assuming to Practice Law without a License are limited for many years and only provide a broad overview of the work done by the committee. In 1907, the efforts of the committee’s work included investigating eighteen complaints and obtaining two convictions. In 1908, the Committee only received two complaints.

263 38 ILL. REV. STAT. 118a (1905).
264 Meeting Minutes from July 13, 1904 to Nov. 1, 1910, supra note 253, at 78, 80 (“In re J. Embry Allen. Communication from C.B. Morrison District Attorney read and considered. Mr. Allen not being a member of the bar the matter is referred to the States Attorney.... In re S.B. Turner and Wm. Wright. Respondents not on the roll and matters referred to the States Attorney.”).
265 KOGAN, supra note 56, at 109.
266 Larimer, supra note 161, at 21; Chicago Bar Association, Standing Committees, CHI. LEGAL NEWS, Feb. 2, 1907, at 205; ABEL, supra note 18, at 113; DEBORAH L. RHODE, ACCESS TO JUSTICE 74-75 (2004).
267 Chicago Bar Association, Standing Committees, supra note 266, at 205. The Committee on Grievances retained jurisdiction over complaints against members of the bar of Cook County. Id.
268 Larimer, supra note 161, at 21.
269 ALBERT S. LOUER, REPORT OF THE COMMITTEE ON PERSONS ASSUMING TO PRACTICE LAW WITHOUT A LICENSE 85 (1908).
One was against an Indiana lawyer unlicensed to practice in Illinois.\textsuperscript{270} That lawyer “agreed to discontinue the use of the term ‘lawyer’ in connection with his practice.”\textsuperscript{271} The Committee referred the second complaint to the State’s Attorney, but the grand jury had already indicted the individual for criminal offenses, thus making him “not likely to practice law again in the near future.”\textsuperscript{272} The report suggested that future committees “extend their activities to those attorneys who have been disbarred heretofore and who continue to practice law in our courts despite such disbarment.”\textsuperscript{273}

The 1908 committee report stated that the committee had some meetings “for the purpose of considering measures that might be adopted looking toward your committee’s and future committees’ taking original action, without waiting for complaints to be filed against individuals charged with the violation of the Criminal Code.”\textsuperscript{274} This suggests that the committee found the process under the criminal code inadequate for some reason. Perhaps the number of criminal prosecutions was not satisfactory to the CBA.\textsuperscript{275} It is also somewhat of a curious statement that the committee needed measures to take original action in light of the 1899 report, which detailed original action taken by the CBA to enjoin or punish the unauthorized practice of law prior to the criminalization in 1905.\textsuperscript{276} This statement in the 1908 report perhaps suggests that the CBA no longer had confidence in its standing to prosecute the unauthorized practice of law as it had previously done, but this is speculation.

In the committee’s 1910 annual report, it noted that it “received

\textsuperscript{270} Id.
\textsuperscript{271} Id.
\textsuperscript{272} Id.
\textsuperscript{273} CHI. BAR ASS’N, REPORT OF THE COMMITTEE ON PERSONS ASSUMING TO PRACTICE LAW WITHOUT A LICENSE (June 4, 1908) (on file with author).
\textsuperscript{274} Id. The committee also complained about its lack of funding: “This Committee believes that much better results could be accomplished in the work of such Committee, if there were at its disposal a fund which could be utilized in obtaining evidence in matters which are referred to it.” Id.
\textsuperscript{275} “There were few prosecutions, probably because it was feared that the public reaction would be unfavorable.” HURST, supra note 1, at 324. Professor Rhode’s 1981 research confirms that in later years, even when prosecutors had authority to prosecute UPL, few exercised that authority. Rhode, Policing the Professional Monopoly, supra note 1, at 18–19 (“In the vast majority of states, bar committees are the only agencies actively involved in policing unauthorized practice.”).
\textsuperscript{276} See Asbury Johnson, 1899 Report of the Grievance Committee, supra note 168, at 26–30 (describing the bar association’s efforts to enjoin unauthorized practice prior to its criminalization).
complaints against twelve different persons whom it was alleged were practicing law without a license.277 The committee referred these complaints to the State’s Attorney for prosecution under the criminal code.278 The State’s Attorney investigated the complaints, and in some instances, he declined to prosecute “where it seemed that justice would be best served by not instituting prosecutions, upon the offender promising to cease the practices complained of . . . .279 In other cases, criminal prosecutions were commenced and at least one individual—S.B. Turner—was fined $100 and costs.280 As late as 1914, the CBA was still referring matters to the State’s Attorney for prosecution under the criminal code.281 Thus, in the first decade after the enactment of the criminal legislation, prosecution under that criminal act reigned as the primary enforcement tool in Illinois.

The Chicago Bar Association was a trailblazer in the area of organized unauthorized practice enforcement. While a search of every bar associations’ reports for this time period was not done in connection with this article, secondary sources do not mention any other bar committees in the first decade of the twentieth century that were dedicated to the unauthorized practice of law. In fact, some sources do not even mention the CBA’s committee but instead credit the New York County Lawyers’ Association—which was formed in 1908—with appointing the first standing committee on the unauthorized practice of law in 1913.282

When the New York County Lawyers’ Association formed its Committee on Unlawful Practice of the Law in 1913,283 other bar associations in both New York and Chicago were expanding their

277 Robert Redfield, Report of the Committee on Persons Assuming to Practice Law without a License, in CHI. BAR ASS’N, ANNUAL REPORTS 60, 60 (1910).
278 Id.
279 Id.
280 Id.
282 See, e.g., HURST, supra note 1, at 323 (asserting that the New York County Lawyers Association appointed the first standing committee on unlawful practice in 1914); N.Y. CTY. LAWYERS’ ASS’N, YEAR BOOK 1913 16 (1913) (noting that the Committee on Unlawful Practice of the Law was created by resolution during the annual meeting on May 8, 1913). But see ABEL, supra note 18, at 113 (mentioning the CBA’s 1905 committee and that the New York County Bar Association followed in 1914 with the establishment of the unauthorized practice committee).
283 N.Y. CTY. LAWYERS’ ASS’N, YEAR BOOK 1913, supra note 282, at 16.
unauthorized practice of law focus to include corporate entities. While the first period of unauthorized practice of law enforcement that has been discussed in this article can be characterized as establishing ways to identify unlicensed persons and developing methods for enforcement, by 1913, bar associations in New York and Illinois were starting to focus on new threats to the legal profession: namely, the proliferation of corporate entities that were beginning to engage in conduct outside the courthouse that competed with the work of lawyers.

IV. THE RISE OF CORPORATIONS AND BAR ASSOCIATIONS’ CONCERNS ABOUT THEIR ENCROACHMENT ON THE PRACTICE OF LAW

As bar organizations were forming and creating organizational structures geared towards advocacy for the profession leading up to the turn of the century, societal changes were occurring in ways that changed the legal profession. Specifically, the work of lawyers became less exclusive to the courthouse as the types of legal needs evolved. This created a turf battle over work outside the courtroom that nonlawyers had occupied without much resistance for some time. Two important changes spawned the growth of legal work outside the courthouse: the Industrial Revolution and the rise of the corporation.

A 1958 article, which gave one of the earliest historical sketches of the unauthorized practice of law, described the Industrial Revolution as a “spectacular development”:

With it came bigness; the industrialization of everything; an enormous increase in government regulation, paperwork and desk work; and the rise of the corporation. Theretofore the practice of law had been largely confined to the

284 RHODE, supra note 266, at 75.
285 Christensen, supra note 1, at 178-79.
286 See HALLIDAY, supra note 1, at 62 (discussing the impact of social, economic, and political changes, including the growth of corporations, on the practice of law).
287 FRIEDMAN, supra note 84, at 460 (describing lawyers as society’s “jacks-of-all-trades”).
288 See ABEL, supra note 18, at 113. Some of these early campaigns were lost. Id. “In California, with its strong populist tradition, an 1872 law limited the professional monopoly to the courts, explicitly allowing laypersons to perform any other legal function.” Id.
289 Trowbridge vom Baur, supra note 2, at 5–6; see also LANGBEIN, supra note 97, at 1021 (discussing the growth of Post-Revolution industry, such as the railroad, and how it contributed to the growth of transactional legal work and litigation throughout the nineteenth century).
290 Trowbridge vom Baur, supra note 2, at 5.
Corporations brought a concentration of wealth and more complex business models that began to blur the line between business and legal decisions, shifting the role of the lawyer. The role of the business lawyer soon overshadowed the role of the trial lawyer. This, in turn, shifted the organization of law firms, which began to hire more clerical staff and shift work locations and practices with the rise of typewriters, telephones, elevators, and improved passenger transport on trains. Also, as lawyers began to represent ever-growing corporate entities, the perception of their independence suffered as some lawyers viewed them as "the lackey of the corporations."

The growth of corporations and new businesses, however, did not just change the nature of lawyers' work—corporations also became competitors to lawyers. As Barlow Christensen described, "[T]he business corporation posed a threat to lawyers both because corporate business tended to develop legal needs that lawyers seemed not yet able to meet, and because corporations had, or could develop, the capacity to compete effectively with lawyers in providing traditional kinds of legal services."

The growth of corporations impacted the landscape of legal work in two significant ways. First, corporations—such as title companies and trust companies—began to employ lawyers to provide legal services to their customers, thus allowing the corporation to make a profit from lawyers' work. This growth of the corporate practice of law still had the legal work performed by lawyers, but the lawyers served two masters under this model: the client and the corporate employer. As legal

291 Id. at 5–6.
292 See MARTIN, supra note 109, at 187–88; Pearce & Jenoff, supra note 88, at 484 (discussing the growth in large law firms and elite lawyers who were “taking on work for corporations that more closely resembled business functions”).
293 MARTIN, supra note 109, at 188, 191; see also FRIEDMAN, supra note 84, at 463 (discussing the rise of Wall Street and the growth of the corporate lawyer).
294 MARTIN, supra note 109, at 191–93.
295 Id. at 195.
296 Christensen, supra note 1, at 177–78.
297 Id. at 178.
298 See Trowbridge vom Baur, supra note 2, at 6; see also JULIUS HENRY COHEN, THE LAW: BUSINESS OR PROFESSION? 260 (revised ed., 1924) (describing the practice of attorneys being retained by corporations).
299 COHEN, supra note 298, at 249 (discussing why corporations cannot hire lawyers to
professionals were developing and early codes of ethics were being written, this model clashed with the codification of the lawyer's duty of loyalty to the client and the lawyer's independent professional judgment. Second, corporations eventually began to omit lawyers altogether by having laypersons provide a variety of services to consumers, such as estate planning and collection work. These developments began to raise new questions about what acts comprise the practice of law. Herman Kogan, who wrote a history of the Chicago Bar Association, discussed some of the changes in Chicago around the turn of the century that impacted law practice:

Abstract and title-insurance companies were invading the field of real estate law, banks and trust companies were handling the settlement of estates, insurance firms were beginning to indemnify policyholders against risks that formerly needed the services of lawyers, and there was an increasing tendency of many litigants to make out-of-court settlements instead of engaging in prolonged and expensive lawsuits.

Some lawyers began to write in earnest about these issues. For instance, in 1913, an article in the *Yale Law Journal*, titled *The Passing of the Legal Profession*, warned about the rise of corporations in the legal services field. The article argued that corporations

have neither soul nor conscience, and owe allegiance to no code of ethics or morals, and which have no other cause for existence than the accumulation of wealth for directors and stockholders. The lawyer's former place in society as an economical factor has been superseded by this artificial creature of his own genius, for whom he is now simply a clerk on a salary.

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301 COHEN, supra note 298, at 252.

302 KOGAN, supra note 56, at 88; see also COHEN, supra note 298, at 252–53 (citing a 1913 resolution by the Commercial Law League of America that condemned "business men practicing law either in the form of trust companies, corporations, notaries public or agencies").

303 See George W. Bristol, The Passing of the Legal Profession, 22 Yale L. J. 590, 590 (1913) (arguing that "financial interests have looked upon the legal profession with longing eyes, and have gradually corralled it and brought it under their domination for the profits which can be acquired from it").

304 Id.
Similarly, in 1919, Julius Henry Cohen wrote a book, *The Law: Business or Profession?*, which raised concerns about new corporate players, such as title and trust companies.\(^{305}\) Cohen pointed out that trust companies were engaged in activities such as drafting wills, preparing incorporation papers, and examining titles.\(^{306}\) He concluded that the legal profession had “suffered much from the inroads of the new financial and business methods in this great land of ours.”\(^{307}\)

As a result of these corporate activities, bar associations began to expand their efforts to prohibit the unauthorized practice of law.\(^{308}\) Prior to the growth of transactional legal work and the rise of corporate competitors, nonlawyers often provided transactional legal services without regulation.\(^{309}\) While the first ten to fifteen years of unauthorized practice of law enforcement focused primarily on unlicensed persons appearing in court, this next period expanded to include activities by unlicensed persons and corporate entities outside of the courthouse.\(^{310}\) Drawing on their earlier success of criminalizing the unauthorized practice of law, bar associations again looked to legislatures to prohibit and criminalize the corporate practice of law.\(^{311}\)

As legal work expanded outside the courthouse, however, defining the practice of law became more important. While there was consensus that laypersons could not appear in court in a representative capacity, the expanding activities of corporate actors and laypersons outside of the courthouse included a variety of activities that did not have such clear boundaries.\(^{312}\) During this period, bar associations began to grapple with how to define the practice of law.\(^{313}\) They initially looked to legislatures

\(^{305}\) COHEN, *supra* note 298, at 265, 270.

\(^{306}\) *Id.* at 265; *see also* Pearce & Jenoff, *supra* note 88, at 491–92 (discussing Cohen’s views on nonlawyer transaction services).

\(^{307}\) COHEN, *supra* note 298, at 267.

\(^{308}\) *See, e.g.*, RHODE, *ACCESS TO JUSTICE*, *supra* note 266, at 75 (describing the ABA’s efforts to diminish lay competition by adopting a broad definition of legal practice that would restrict the activities of realtors, insurance agents, accountants, and financial advisors).

\(^{309}\) Pearce & Jenoff, *supra* note 88, at 491; *see also* COHEN, *supra* note 298, at 244 (arguing that lawyers “aided in violating the standards of their profession” by conducting business with nonlawyers engaging in legal activities).

\(^{310}\) ABEL, *supra* note 18, at 112.

\(^{311}\) *See, e.g., id.* at 112–14 (explaining the bar association’s attempts to secure legislation that would define their monopoly as broadly as possible); Christensen, *supra* note 1, at 187 (describing bar associations’ “campaigns” against the corporate practice of law).

\(^{312}\) *See ABEL, supra* note 18, at 112 (“Until 1870, the legal profession was concerned primarily with establishing its exclusive rights in the courts, against challenges by both lay representatives and court personnel (such as clerks).”) (emphasis in original).

\(^{313}\) *See id.* at 113.
to help define the practice of law, but separation of powers issues about the proper branch to define the practice of law—the legislative or the judicial—soon came to the forefront of the matter. This section will discuss the bar association’s initial efforts to address the corporate practice of law in New York and Illinois during the second decade of the twentieth century. Both states were early leaders in the efforts to address this issue.

A. New York

As discussed previously, there were initially two bar associations in New York in the early twentieth century: the New York State Bar Association and the Association of the Bar of the City of New York. In 1908, legal professionals formed a third bar association: the New York County Lawyers’ Association, which was not as elitist with its membership as the Association of the Bar of the City of New York. The New York County Lawyers’ Association took the lead in New York to address concerns about corporations’ intrusions into the practice of law. These concerns included corporations hiring lawyers to do work for others—such as trust companies hiring lawyers to prepare wills for their customers—as well as corporations performing legal work without the assistance of any lawyers—such as title companies having lay employees prepare mortgages and deeds for customers.

In 1909, the New York County Lawyers’ Association’s Committee on Admissions gave its first annual report, which included an overview of the condition of the bar and “fundamental evils” affecting the profession. One of the identified evils was “inroads of [c]ommercialism upon the profession of the law.” On this topic, the

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314 Id.; Rigertas, Lobbying and Litigating, supra note 3, at 92.
315 See Rigertas, Lobbying and Litigating, supra note 3, at 92, 118–19 (suggesting that when the organized bar was unsuccessful in lobbying the legislature for more restrictive legislation, it began to challenge the legislature’s constitutional power to define the practice of law).
316 HENKE, supra note 102, at 25–26.
317 See About NYCLA, N.Y. CTY. LAWYERS’ ASS’N, https://www.nycba.org/NYCLA/About/AboutNYCLA.aspx (last visited Sept. 14, 2018) (“Throughout its history, NYCLA’s bedrock principles have been the inclusion of all who wish to join and the active pursuit of legal system reform.”).
318 See COHEN, supra note 298, at 256–59.
320 Id. at 131.
Committee on Admissions reported how corporations were encroaching on the legal profession and the legislative response to it:

For thirty years most all conveyancing, an honorable and profitable branch of the profession, has been performed by title searching and guaranty companies. A few corporations have thus usurped and annihilated the business of many hundred lawyers. The attorneys employed to transact the business of these bodies lose all their official individuality and force and become nothing but trained clerks.

Other corporations, societies and agencies exist for collecting debts; for writing briefs and transacting a general law business. This practice became so glaring that a statute of the present legislature prohibits corporations from practicing law in certain cases therein specified.321

The New York legislature had enacted the statute prohibiting corporations from practicing law in 1909, making it one of the first of its kind in the country.322

Like other bar associations, the New York County Lawyers' Association had a Committee on Discipline to address professional misconduct by lawyers.323 The Committee on Discipline's early annual reports included references to persons and entities practicing law without a license.324 In 1911, the Committee was asked to investigate corporations practicing law.325 In particular, there was concern that corporations were "conducting for others litigation of various kinds in the names of attorneys, employees of said corporations, and not of the litigants."326

The Committee on Discipline reported on its investigation in 1913 during its annual meeting, wherein it reported that it had not received many specific complaints.327 The complaints that the Committee did receive during its investigations focused on trust company lawyers drafting wills for customers and title companies drawing legal

321 Id.
322 Trowbridge vom Baur, supra note 2, at 6. Trowbridge vom Baur's 1957 historical overview of the unauthorized practice of law opined that "[o]wing perhaps to its high degree of industrialization, one of the earliest statutes prohibiting corporations from practicing law was section 280 of the Penal Law, enacted in New York State in 1909." Id.
323 See, e.g., By-Laws, in N.Y. CTY. LAWYERS' ASS'N, YEAR BOOK 1910 55, 63 (1910).
324 See, e.g., John Brooks Leavitt, Report of the Committee on Discipline, in N.Y. CTY. LAWYERS' ASS'N, YEAR BOOK 1910 93, 94.
325 Thomas Thacher, Report of the Committee on Discipline, in N.Y. CTY. LAWYERS' ASS'N, YEAR BOOK 1913 88, 90 (1913) [hereinafter Thacher, 1913 Report of the Committee on Discipline].
326 Id. at 91.
327 Id. at 91.
THE BIRTH OF THE MOVEMENT

documents.\textsuperscript{328} The Committee noted that the corporate practice of law was a “difficult” subject.\textsuperscript{329} It opined: “The tendency of the age is towards corporations. In many ways they can serve the community better than individuals. The main objection to corporations practicing law is the difficulty of exercising the disciplinary power over them.”\textsuperscript{330} In conclusion, the Committee recommended that the bar association create a standing committee “which shall have in charge the special subject of corporations practicing law to bring to the attention of the Attorney General any specific instance of a corporation so doing.”\textsuperscript{331}

Following that recommendation during the 1913 meeting, the CBA adopted a resolution that created a Committee on Unlawful Practice of the Law.\textsuperscript{332} The new committee was directed “to examine into and investigate any practice or method of procuring or transacting law work by individuals or corporations, not lawyers, which may be regarded as prejudicial to the welfare of the community or of the profession . . .”\textsuperscript{333} Academics sometimes credit this committee as being the first committee to address UPL,\textsuperscript{334} but as discussed earlier, the CBA had formed the Committee on Persons Assuming to Practice Law without a License in 1905.\textsuperscript{335}

The Committee on Unlawful Practice of the Law presented its first annual report in 1914.\textsuperscript{336} The report broke the problem of unauthorized practice into four categories: notaries, people pretending to be lawyers, corporations, and collection agencies.\textsuperscript{337} With respect to corporations, the report particularly focused on trust companies and other corporations that were soliciting people who needed wills drafted or probated,
condemnation proceedings initiated, or legal advice in tax matters.\textsuperscript{338} The Committee also reported that collection agencies were soliciting bankruptcy matters.\textsuperscript{339}

The Committee noted two ways to address the problem. One was to discipline the lawyer who worked for a corporation and engaged in unprofessional activities, such as providing legal services to third parties on behalf of the corporation.\textsuperscript{340} The other way was to prosecute the corporation under the criminal law and seek dissolution of its corporate status.\textsuperscript{341} Regardless of the approach, the Committee noted the need for legal precedents and stated that "many decisions must be made before the definitions of what acts constitute the practice of the law will furnish a complete understanding of this subject."\textsuperscript{342} In the opinion of the Committee, the path to creating these precedents would require an organized system to receive complaints and compile evidence, financial support from the bar, and lawyers committed to prosecuting the offenses.\textsuperscript{343}

The Committee embraced its charge; in 1915, it reported receiving a total of ninety-two complaints.\textsuperscript{344} Twenty-six of those were against corporations and twenty-two were against collection agencies.\textsuperscript{345} The cases against corporations included a law list publishing company, a title company, a corporation engaged in patent litigation, a trade organization, and a realty corporation that provided attorneys to reduce property tax assessments.\textsuperscript{346} Strategies against these corporations included proceedings before the Attorney General to revoke their corporate charter and proceedings brought under the Penal Code, which

\textsuperscript{338} Id. at 237. The report also noted a paper written by George W. Bristol, \textit{The Passing of the Legal Profession}, and published in the \textit{Yale Law Journal} that discussed these problems.  


\textsuperscript{340} Id. at 242.  

\textsuperscript{341} Id.  

\textsuperscript{342} Id. at 243.  

\textsuperscript{343} Cohen, \textit{1914 Report of the Committee on Unlawful Practice of the Law}, supra note 300, at 243–244; \textit{see also} Cohen, supra note 298, at 256 (noting, with respect to the committee’s work, that "[s]tatutes prohibiting practice by unauthorized persons are familiar, but like other criminal statutes they do not enforce themselves, and prosecuting officers under our system are in no position to enforce them without systematic and organized assistance from without").


\textsuperscript{345} Id.  

\textsuperscript{346} Id. at 196.
criminalized the unauthorized practice of law by individuals and corporations.\textsuperscript{347} The Committee participated as \textit{amicus curiae} and submitted briefs on what acts constitute the practice of law.\textsuperscript{348} As the Committee relied on the courts to define the practice of law in opinions, the Committee noted that collection agencies, title companies, and trade associations had introduced amendments to the Penal Code to the legislature, presumably to carve out exceptions for their businesses, but those amendments were defeated.\textsuperscript{349}

The emerging challenge of defining the practice of law continued to animate the Committee's work for the next couple of years in the courts and in the legislature. The Committee's 1916 report noted a growing body of case law in New York, as well as other jurisdictions, that was defining the practice of law.\textsuperscript{350} These decisions resulted from cases that sought to discipline attorneys for aiding the unauthorized practice of law as well as cases that sought to revoke corporate charters as a way to enforce the prohibition on the corporate practice of law.\textsuperscript{351} A guiding definition of the practice of law at the time was as follows:

\begin{quote}
It is too obvious for discussion that the practice of law is not limited to the conduct of cases in courts. According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings, and other papers incident to actions and special proceedings on behalf of clients before judges and courts, and in addition conveyancing, and preparation of legal instruments of all kinds, and in general, all advice to clients, and all action taken for them in matters connected with the law.\textsuperscript{352}
\end{quote}

\textsuperscript{347} \textit{Id.} at 195–96, 198.


\textsuperscript{349} Cohen, 1915 \textit{Report of the Committee on the Unlawful Practice of Law}, supra note 344, at 198. This report also noted other state bars that were taking an interest in the topic and seeking input from the New York County Lawyers' Association. The report stated, "[a]s an example of the interest of the Bar throughout the country, it is of interest to note that in the State of Missouri, the last Session of the Legislature passed an act relating to the practice of law, taking effect on June 20\textsuperscript{th} of this year." \textit{Id.} at 197.

\textsuperscript{350} See, e.g., Cohen, 1916 \textit{Report of the Committee on the Unlawful Practice of Law}, supra note 348, at 180–84 (reporting on the specifics of various cases of UPL within the year).

\textsuperscript{351} See \textit{id.}

\textsuperscript{352} \textit{Id.} Another more concise definition was, "[p]ersons acting professionally in legal formalities, negotiations or proceedings by the warrant or authority of their clients may be regarded as attorneys-at-law within the meaning of that designation, as employed in this country." \textit{Id.} at 185.
Applying this broad definition, courts found that a variety of activities qualified as the unauthorized practice of law. These included the formation of corporations, collection of claims in bankruptcy proceedings, pursuing condemnation proceedings, and helping taxpayers contest property tax assessments. The decisions also made it clear that a corporation could not hire a lawyer to perform these tasks for others, and that lawyers in this arrangement were “guilty of wrongdoing.”

Working in conjunction with the Committee on the Unlawful Practice of Law, the Committee on Discipline would prosecute attorneys who engaged in this wrongdoing.

While court decisions were articulating broad definitions of the practice of law, industries turned to the legislature to try to carve out exceptions. Title companies, trust companies, and collection agencies drafted legislation to try to amend statutory prohibitions on the practice of law. The Committee on the Unlawful Practice of Law believed that the proposed amendments would permit practices that fell within the definition of the practice of law by nonlawyers. Robust efforts by the Committee defeated these legislative efforts.

353 See, e.g., id. at 184–88 (discussing cases interpreting the definition of the practice of law); Julius Henry Cohen, Report of the Committee on Unlawful Practice of the Law, in N.Y. City Lawyers’ Ass’n, Year Book 1917 213, 214–15 (1917) [hereinafter Cohen, 1917 Report of the Committee on the Unlawful Practice of the Law] (discussing a case in which the court determined that a corporation was unlawfully engaged in the practice of law when it represented property owners before the Board of Commissioners of Taxes and Assessments).

354 Cohen, 1916 Report of the Committee on the Unlawful Practice of Law, supra note 348, at 178, 181. One opinion noted that “[T]he old ideals in the relation of attorney and client, which meant so much to mankind, have suffered and have been threatened with demoralization. This is wrong. The loss of the individual personal relation involved in the attempt by corporations to practice law is so serious to the community that it is against public policy . . . .” Id. at 177–78.

355 See Cohen, 1917 Report of the Committee on the Unlawful Practice of the Law, supra note 353, at 219 (“The necessity for complete co-operation between these Committees is obvious.”); Julius Henry Cohen, Report of the Committee on Unlawful Practice of the Law, in N.Y. City Lawyers’ Ass’n, Year Book 1918 188, 190 (1918) [hereinafter Cohen, 1918 Report of the Committee on the Unlawful Practice of Law] (Explaining that the unlawful practice of law by corporations is facilitated by attorneys and that “the practices have been and are usually stopped by an investigation and prosecution of laymen and lawyer alike”).


357 See, e.g., id. at 189 (opposing an amendment proposed by the Corporation Trust Company in January, 1916 on the grounds that it would “permit practices condemned by the Committee”); id. at 190–91 (opposing legislation that would give title companies the power to draw deeds, give legal advice, and draft titles that would affect title of real estate).

358 See id. at 189–94. The Committee continued to defeat legislation proposed to exempt certain corporate activities in subsequent years. See, e.g., Cohen, 1917 Report of the Committee on the Unlawful Practice of the Law, supra note 353, at 211 (noting the
the Committee wanted to amend the legislation to strengthen prohibitions on the unauthorized practice of law, it was successful.\textsuperscript{359}

By 1919, the Committee reported much success with its efforts. Some of the success came from cooperative efforts with industry groups, such as the Trust Company Section of the American Bankers' Association, which seemed to agree on drawing some boundaries between the work of trust companies and the work of lawyers.\textsuperscript{360} The Committee, however, remained frustrated by the efforts of other industries, such as title companies, which introduced legislation to allow them to engage in activities that the Committee believed were the practice of law.\textsuperscript{361} The Committee defended its efforts to defeat such legislation as necessary to protect the public, as well as to protect the integrity of lawyers:

This is not a matter of selfish interest to the Bar. The legitimate activities of title companies are fully protected by law. Your Committee believes that it truly represents your Association when it takes the stand that to permit title companies to practice law generally in connection with real property will result in lasting injury to the laymen and the degradation of lawyers who by force of circumstances or otherwise in the employ of these companies are forced into the eminently unprofessional, unethical and immoral position of representing conflicting interests in the same transaction. If title companies succeed in their attempts to obtain special legislation permitting them directly or indirectly to practice law, we know of no reason why this permission should be limited to them.\textsuperscript{362}
This time period in New York showed the development of themes that would continue to evolve in the following decades. As the nature of lawyers' work outside the courtroom expanded, the need to more precisely define the practice of law arose. Whether the courts or the legislatures should define the practice of law was a question that was not squarely raised at this time, but the seeds of the question were being sown.

As this Part has illustrated, the New York County Lawyer's Association initially relied on the legislature to criminalize the unauthorized practice of law, but it then relied on the courts to define the practice of law. By using the legislature to aid its efforts, however, it opened the door to corporate interests also trying to use the legislature to further their business interests; the New York County Lawyer's Association however, was clearly successful in defeating these efforts.

B. Illinois

Similar to the experience in New York, within a few years after its formation in 1905, the Chicago Bar Association's Committee on Persons Assuming to Practice Law Without a License received complaints about corporate entities practicing law. During the second decade of the 1900s, the CBA's efforts to curb the unauthorized practice of law began to examine how corporations were encroaching on the legal profession's territory.

In 1911, the report of the Committee on Persons Assuming to

358, at 169.


365 Julius Henry Cohen, Report of the Committee on Unlawful Practice of the Law, in N.Y. CTY. LAWYERS' ASS'N, YEAR BOOK 1922 172, 179 (1922) [hereinafter Cohen, 1922 Report of the Committee on the Unlawful Practice of Law] (describing attempts by "collection agencies, or associations of laymen, to secure legislation which would permit some individual or group of individuals to engage in the business of standing between the client and the lawyer" and noting that "we have thus far succeeded in defeating them"); see also Christensen, supra note 1, at 181 (describing the increase in unauthorized practice legislation in the 1920s and 1930s).

366 See, e.g., D.F. Flannery, Report of the Committee on Persons Assuming to Practice Law Without a License, in CHICAGO BAR ASS'N, ANNUAL REPORT—1911 46, 46 (1911) (reporting that the committee received six complaints regarding individuals engaged in the unauthorized practice of law that year).
Practice Law without a License stated that it had received six complaints against persons and, for the first time, it reported complaints against two corporations. With respect to the corporations, the Committee concluded that they were “found to be engaged in the collection business, or other lawful pursuits” that did not amount to the unauthorized practice of law.

Complaints against corporations continued modestly the following year. In 1912, the CBA Committee reported that it had received complaints against individuals as well as against collection agencies. The Committee did not find evidence that would warrant prosecution in any of the cases. With respect to the collection agencies, the Committee concluded that their business methods “would probably be considered unethical if practiced by an attorney at law, but the acts complained of did not amount to practicing law without a license.” The Committee lamented its lack of resources to investigate such claims adequately.

In 1913, the Committee’s annual report noted even more issues arising from the encroachment of other businesses into the practice of law. The Committee received a complaint that real estate agents were filing and trying forcible entry and detainer cases in municipal court, which the Committee brought to the attention of the chief justice. While there were no specific complaints, the Committee also received a suggestion that newspapers were in the habit of giving legal advice to their readers. Lastly, mirroring issues in New York, the Committee received a suggestion to investigate trust companies that were...
advertising free legal advice and will drafting services.\textsuperscript{376} At this time, however, there was no legislation prohibiting the corporate practice of law in Illinois like there was in New York.\textsuperscript{377}

By 1914, the Illinois State Bar Association ("ISBA") also began to take an interest in the unauthorized practice of law by corporations.\textsuperscript{378} Specifically, the ISBA began to focus on the activities of abstract companies, bonding companies, mortgage brokers, bond dealers, and other corporations.\textsuperscript{379} The ISBA particularly focused on commissions or rebates that these corporations paid to lawyers "on business procured through them."\textsuperscript{380} A motion was made during the ISBA's 1914 annual meeting to create a committee to examine these issues.\textsuperscript{381}

The motion passed unanimously.\textsuperscript{382} Following the passage of the

\textsuperscript{376} Id. In this report the committee expressed frustration with the number of anonymous complaints it was receiving that lacked specific names and data. "Members of the Bar seem to hesitate about furnishing the committee with evidence of violations of our statute in regard to practicing law without a license. Should the Bar generally co-operate more freely with the committee, it is probable that better results could be obtained." Id. We are left to speculate about the members' hesitation in this area, but it is a theme that dates back to the first years of the association in the 1870s and continued in subsequent years. See KOGAN, supra note 56, at 43 (noting that the CBA's 1876 year-end report "complained of a lack of cooperation from lawyers who were quick to make general charges against alleged miscreants but reluctant to give specific shape to such charges. ... ").

\textsuperscript{377} See Rigertas, Lobbying and Litigating, supra note 3, at 102 n.178, n.235.

\textsuperscript{378} Like the CBA, the ISBA also had a Grievance Committee, but that committee referred any complaints against Chicago lawyers to the CBA and only addressed complaints against lawyers in other parts of the state. M. J. Daugherty, Report of the Committee of the Association on Grievances, in ILL. STATE BAR ASS'N, PROCEEDINGS OF THE ILLINOIS STATE BAR ASSOCIATION THIRTIETH ANNUAL MEETING 104, 104 (John F. Voigt, Jr., ed., 1906) ("The cases of offenders in Chicago have been ably cared for by the Chicago Bar Association and we commend that body for its efficiency. We believe that it is better equipped to deal with its local affairs than the Grievance Committee of this Association.").

\textsuperscript{379} ILL. BAR ASS'N, PROCEEDINGS OF THE ILLINOIS STATE BAR ASSOCIATION THIRTY-EIGHTH ANNUAL MEETING 269 (John F. Voigt, Jr., ed., 1914) [hereinafter ILL. BAR ASS'N, THIRTY-EIGHTH ANNUAL MEETING].

\textsuperscript{380} Id.

\textsuperscript{381} Id. at 271–72. The motion stated:

In view of the reputed practice of certain corporations and the stand taken by the courts of other states upon the subject the Executive Committee recommends to the association that the incoming President be directed to appoint a sub-committee of five to investigate the subject of corporations assuming to practice law directly or indirectly and the responsibilities of the attorneys for such corporations for such unethical practice; to interview the principal corporations concerned and their attorneys and to make a full report to the next meeting of this association, including in the report the legislative and judicial action in other states on this subject and the recommendations of the committee.

\textsuperscript{382} ILL. BAR ASS'N, THIRTY-EIGHTH ANNUAL MEETING, supra note 379, at 272.
motion, a member specifically asked if the resolution intended to include "corporations like the Title & Trust Company, or the realty companies," a question to which the ISBA president affirmed "yes" after further clarifying that the resolution included "any corporation that is practicing law, directly or indirectly." In response to this motion, the ISBA created an eleven person Special Committee on Corporations Assuming to Practice Law without a License.

By 1917, the Special Committee on Corporations Assuming to Practice Law without a License had drafted a bill to prohibit corporations from practicing law. The bill was similar to the law that New York enacted in 1909. Prior to submitting the bill to the legislature, the ISBA discussed it with members all over the state. Through these discussions, the ISBA concluded that "it was made plain that not only in the larger Cities, but in the smaller rural communities, the practice of law by banks, trust companies and other corporations had made larger inroads upon the field of legal work which should rightfully and properly belong to the licensed attorney." Some members criticized the legislation for not being "drastic enough," but the Committee concluded that it was "impossible to meet these views without endangering the passage of the bill, or having a bill which could not be enforced if passed." A revised version of the bill passed the Illinois House of Representatives and Senate unanimously and became law in June of 1917.

The act made it unlawful for any corporation "to practice law or to appear as an attorney at law for any reason in any court in this State" or to "hold itself out to the public as being entitled to practice law," or to

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383 Id.
384 ILL. BAR ASS'N, PROCEEDINGS OF THE ILLINOIS STATE BAR ASS'N THIRTY-NINTH ANNUAL MEETING 578 (John F Voigt, Jr., ed., 1915). The 1915 report of the annual proceedings indicates that the Committee gave a report, but there is no record of it contained in either the 1915 or the 1916 annual report.
386 Id.
387 Id.
388 Id.
389 Straus, 1917 Report of Special Committee on Corporations Assuming to Practice Law, supra note 385.
390 Id.
391 Id. at 217.
"to furnish legal advice," or to "furnish attorneys or counsel." It also prohibited corporations from soliciting legal claims. The penalties in the bill were corporate fines of not more than $500, and misdemeanor charges and fines of $200 to $500 for any "officer, trustee, director, agent or employee" of the corporation "who directly or indirectly engages in any of the acts herein prohibited or assists such corporation to do any such prohibited act. . . ." Like the Illinois Attorney Act, this bill also did not define the practice of law. The act did, however, carve out some exceptions that mirrored the exceptions carved out in the New York statute:

[The prohibitions do not] apply to associations organized for benevolent or charitable purposes or for assisting persons without means in the pursuit of any civil remedy or the presentation of a defense in courts of law, nor shall it apply to duly organized corporations lawfully engaged in the mercantile or collection business or to corporations organized not for pecuniary profit.

While the passage of legislation prohibiting the corporate practice of law in 1917 was the major legacy of the ISBA's Special Committee on Corporations Assuming to Practice Law without a License, the annual reports in subsequent years do not contain a report from this committee. By 1922, the ISBA does not even list the Committee as active.

392 Laws 1917, p. 309, § 1 (1917) (current version at 705 ILL. COMP. STAT. 220 § 1).
393 Id. § 2.
394 Laws 1917, p. 309 § 3 (1917) (current version at 705 ILL. COMP. STAT. 220 § 3)
395 Laws 1917, p. 309 § 5 (1917) (current version at 705 ILL. COMP. STAT. 220 § 5); see also Bill to Prevent Practice of Law by Corporations, CHI. LEGAL NEWS, Feb. 8, 1917, at 221 (containing the text of the bill before it was approved and enacted). The New York Penal Code prohibiting the corporate practice of law contained the following exception:
This section shall not apply . . . to organizations organized for benevolent or charitable purposes, or for the purpose of assisting persons without means in the pursuit of any civil remedy, whose existence, organization or incorporation may be approved by the Appellate Division of the Supreme Court of the Department in which the principal office of said corporation or voluntary association may be located.
Cohen, 1917 Report of the Committee on the Unlawful Practice of the Law, supra note 353, at 213 (analyzing an application under this exception).
In 1919, however, the CBA’s Committee—which changed its name to the Committee on Unauthorized Practice in 1917—was still addressing the issue of the unauthorized practice of law. In particular, the CBA Committee turned its attention to drafting an act to regulate the practice of law. A goal of the bill was to codify an expansive definition of the practice of law. The Committee report stated: “As the law stands now, practically nothing is prohibited in the way of practicing law except appearances in courts of record.” The records suggest debates among the CBA members about the scope of the bill. For example, the Chairman of the CBA Committee on the Amendment of the Law thought that the bill should be limited to acts completed for compensation. The Committee on Unauthorized Practice disagreed and reasoned that the draft bill was “intended primarily to protect the public from suffering property losses at the hands of persons who assume to act but are in fact incompetent to perform the services they undertake to perform.” After undergoing some amendments, the Committee forwarded the proposed bill to the CBA membership. The records located for this project do not indicate what happened to the proposed bill after that point.

V. THE AMERICAN BAR ASSOCIATION BEGINS TO ADDRESS THE UNAUTHORIZED PRACTICE OF LAW

New York and Illinois were not the only states to focus on the
unauthorized practice of law and begin to grapple with how to define the practice of law during the second decade of the 1900s. Bar associations in other jurisdictions—such as Pennsylvania, Virginia, Rhode Island, Washington, California, Tennessee, Minnesota, Missouri, Massachusetts and the District of Columbia—were also initiating efforts to prohibit the unauthorized practice of law by the second decade of the twentieth century. As interest in the topic began to spread among the states, it soon reached the American Bar Association ("ABA"), which began to articulate a national strategy. The initial national strategy focused on seeking the help of state legislatures to define the practice of law.

The ABA’s efforts to curb the unauthorized practice of law are most commonly associated with its formation of a Standing Committee on the Unauthorized Practice of Law in 1933. ABA members, however, first raised the issue at the Conference of Bar Delegates during the ABA’s 1919 annual meeting. The Conference of Delegates, which first met in 1916, was a group of state and local bar associations that met during the ABA’s annual meeting to discuss topics of interest to the bar. In 1919, the issue of unauthorized practice was of concern to the group; in particular, the delegates were concerned about the corporate practice of law. The attendees were interested in legislative efforts to curb the unauthorized practice, and New York’s laws were noted as a model.

Another legislative model that took center stage was a 1915 Missouri statute that defined the practice of law. Inspired by this statute, the Conference of Delegates agreed to create a special committee

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404 See Cohen, 1916 Report of the Committee on the Unlawful Practice of Law, supra note 348 (reporting on requests for information that the committee received from these states); Cohen, 1917 Report of the Committee on the Unlawful Practice of the Law, supra note 353, at 224 (reporting the same).
405 See Rigertas, Lobbying and Litigating, supra note 3, at 94; Rutherford, supra note 2, at 93–94.
406 Rigertas, Lobbying and Litigating, supra note 3, at 96–98; see also Rutherford, supra note 2, at 96.
407 Rigertas, Lobbying and Litigating, supra note 3, at 94; see also Rutherford, supra note 2, at 97–98 (explaining that the National Bar Program was initiated in 1933).
408 Rigertas, Lobbying and Litigating, supra note 3, at 94; Rutherford, supra note 2, at 93–94 (“The truth of the matter is that the organized movement against unauthorized practice...was first agitated as many other matters were, in the Conference of Bar Association Delegates in 1919.").
409 Id. at 95–96.
410 Id. at 96.
411 Id. at 96; see also Cohen, supra note 298, at 277–78 (discussing the nature and influence of the 1915 Missouri statute).
that would prepare a brief about what constituted the practice of law.\textsuperscript{413} There was no discussion recorded about whether the state legislatures had the power to define the practice of law.\textsuperscript{414} In 1920, the special committee returned with this brief, and the state and local bar associations were urged to return home and try to have their legislatures enact the definitions into law.\textsuperscript{415} Copies of the brief were sent to all state and local bar associations.\textsuperscript{416} Little fruit was born of these efforts; only a handful of states enacted legislative definitions of the practice of law.\textsuperscript{417} By 1923, for reasons unknown, the annual report of the Conference of Delegates was no longer discussing the issue.\textsuperscript{418}

The ABA’s concerns about the unauthorized practice of law became fairly dormant until the 1930s when it created a Special Committee on the Unauthorized Practice of Law.\textsuperscript{419} When this committee became a standing committee in 1933, it embraced a very different approach to defining the practice law; members believed that statutes could, and should, prohibit the practice of law, but they were adamant that the power to define the practice of law should reside in the courts.\textsuperscript{420} A 1934 handbook that the ABA published stated that statutes “should not undertake to define the practice of law, for definitions undertaking this have been universally found to be self-limiting and to invite evasion. Whether or not a particular course of conduct constitutes the practice of law should be left to the courts for determination.”\textsuperscript{421}

This movement to reserve defining the practice of law to the courts was eventually anchored in a constitutional separation of powers argument that the independence of the judicial branches of state government required them to have exclusive jurisdiction over defining the practice of law.\textsuperscript{422} Whether this power is firmly grounded in

\textsuperscript{413} Rigertas, \textit{Lobbying and Litigating}, supra note 3, at 97.
\textsuperscript{414} Id.
\textsuperscript{415} See id. at 101.
\textsuperscript{416} Id.
\textsuperscript{417} Rigertas, \textit{Lobbying and Litigating}, supra note 3, at 101–02 (noting that only 27 states had passed legislation defining the practice of law by the year 1927).
\textsuperscript{418} Id. at 102 (citing \textit{Proceedings of the Eighth Annual Conference of Bar Association Delegates}, 48 A.B.A. \textit{REPORTS} 548–64 (1923)).
\textsuperscript{419} Id. at 107–08.
\textsuperscript{420} Id. at 111–12.
\textsuperscript{421} Rigertas, \textit{Lobbying and Litigating}, supra note 3, at 113 (citing Hicks & Katz, supra note 1, at 5–6; \textit{Report of the Special Committee on Unauthorized Practice of the Law}, 58 A.B.A. \textit{REPORTS} 483 (1933)). Some members of the bar still thought it was useful to have a definition of the practice of law. Id. at 115.
\textsuperscript{422} See, e.g., Judd v. City Trust & Sav. Bank, 12 N.E.2d 288, 290 (Ohio 1937) (holding that the state judicial branch had the power to prevent banks from drafting certain legal
constitutional doctrine, as opposed to resulting from the bar associations’ frustration with a lack of control and influence over the legislative process, however, is a fair question to ask.\textsuperscript{423} Recall that the New York County Lawyers’ Association was frustrated with the attempts of certain businesses to legislatively carve out exceptions from the prohibitions on the corporate practice of law.\textsuperscript{424} Some attendees at the Conference of Delegates similarly noted that they had difficulty getting legislation passed because of lobbying efforts of businesses like trust companies.\textsuperscript{425} There were also general discussions at the Conference of Delegates regarding the issue of bar organizations not having adequate influence in the state legislatures.\textsuperscript{426} As a later ABA report stated, “lay groups generally have enough influence with the legislature to obtain undesirable exceptions in their favor that are extremely dangerous.”\textsuperscript{427}

The pivot away from legislative acts that define the practice of law and toward courts to define the practice of law through case law or rulemaking powers was solidified during the 1930s.\textsuperscript{428} In fact, by the 1930s, a handbook that the ABA published expressly stated that while statutes should be enacted to impose penalties on individuals and corporations who engage in unauthorized practice, such statutes “should not undertake to define the practice of law, for definitions undertaking this have been universally found to be self-limiting and to invite evasion. Whether or not a particular course of conduct constitutes the practice of law should be left to the courts for determination.”\textsuperscript{429} While there is

\begin{footnotes}
\footnote{documents because “the power to regulate, control, and define the practice of law rests in the judicial branch”); Clark v. Austin, 101 S.W.2d 977, 981–82 (Mo. 1937) (holding that the inherent power of the judicial branch to regulate the practice of law was necessarily implied by the Constitution); Meunier v. Bernich, 170 So. 567, 576 (La. Ct. App. 1936) (explaining that the Supreme Court has the inherent authority to regulate the practice of law); R.I. Bar Ass’n v. Auto. Serv. Ass’n, 179 A. 139, 142 (1935) (acknowledging that the power to regulate the practice of law was vested in the judiciary by the Rhode Island State Constitution); People ex rel. Illinois State Bar Ass’n v. People’s Stock Yards State Bank, 176 N.E. 901, 905 (Ill. 1931) (reiterating that the judicial branch has the authority to regulate the practice of law in Illinois).}
\footnote{Rigertas, \textit{Lobbying and Litigating}, supra note 3, at 118 (describing bar associations’ shift “from lobbyist to litigant” and their role in shaping the unauthorized practice of law into a separation of powers question).}
\footnote{id. at 93–94 (citing \textit{Unlawful Practice of the Law by Laymen and Corporations—Report of a Committee of the New York County Lawyers’ Association, in 79 CENT. L. J. 22, 22–23 (1914)).}
\footnote{id. at 102.}
\footnote{id. at 97–98.}
\footnote{Rigertas, \textit{Lobbying and Litigating}, supra note 3, at 116.}
\footnote{Rigertas, \textit{Stratification of the Legal Profession}, supra note 6, at 112.}
\footnote{HICKS & KATZ, supra note 1, at 5–6.}
\end{footnotes}
some differentiation among the states, this is a fairly accurate statement of our contemporary approach.\textsuperscript{430} This, in turn, has impacted modern efforts to innovate the delivery of legal services.\textsuperscript{431}

VI. THE MODERN IMPACT OF THE MOVE AWAY FROM LEGISLATURES

As illustrated, in the early days of unauthorized practice of law enforcement, the bar associations in Illinois and New York saw the legislatures as the appropriate bodies to define the practice of law.\textsuperscript{432} By the time the issue reached heightened concern in the 1930s, however, bar associations switched gears and successfully argued that under the inherent powers doctrine, the legislatures were prohibited from defining the practice of law under state constitutions.\textsuperscript{433} Under this doctrine, each branch of government has inherent powers that state constitutions may not specifically enumerate.\textsuperscript{434} This was a successful strategy.\textsuperscript{435}

As Professor Wolfram has asserted, the inherent powers doctrine is "a judge-made, lawyer supported doctrine holding that courts, and only courts, may regulate the practice of law."\textsuperscript{436} Professor Wolfram has broken the doctrine into what he calls the affirmative and negative aspects of the doctrine.\textsuperscript{437} The affirmative aspect is the proposition that "even in the absence of statutes [or constitutions] specifically stating that a court may do so, a court nonetheless 'inherently' has the power to regulate the legal profession."\textsuperscript{438} The negative aspect is the proposition that courts have the exclusive power to regulate lawyers.\textsuperscript{439} Another iteration of the inherent powers doctrine, as discussed by Professor Johnstone, is that the courts have the ultimate power over the regulation

\textsuperscript{430} See Johnstone, supra note 3, at 823–30 (describing courts' inherent powers over the unauthorized practice of law). A more detailed exploration of the solidification of this position during the 1930s is beyond the scope of this article.
\textsuperscript{431} See id. at 841.
\textsuperscript{432} See supra, Part III.
\textsuperscript{433} Rigertas, Lobbying and Litigating, supra note 3, at 92.
\textsuperscript{434} Id. at 120–23 (discussing courts’ inherent powers); see also Bennion v. Kassler, Inc., 635 P.2d 730, 736 (Wash. 1981) ("[T]he regulation of the practice of law is within the sole province of the judiciary, encroachment by the legislature may be held by this court to violate the separation of powers doctrine.").
\textsuperscript{435} See Rigertas, Lobbying and Litigating, supra note 3, at 118–19 (explaining that the bar associations' strategy shaped the constitutional debate over the unauthorized practice of law).
\textsuperscript{436} Wolfram, supra note 3, at 3.
\textsuperscript{437} Id. at 4.
\textsuperscript{438} Id.
\textsuperscript{439} Id. at 6.
of the practice of law. Under this interpretation, the judicial branch’s position will prevail when there is a conflict between its position and any other branch. Whether a state court has the exclusive power or the ultimate power over the practice of law, the effect is to constrain the legislature’s ability to define the practice of law or to carve out areas where nonlawyers can compete.

This impact of this doctrine can be illustrated by a relatively modern issue in the state of Washington regarding the preparation of legal documents related to real estate transactions. During the 1970s, Great Western Union Federal Savings and Loan Association (“Great Western”) provided closing services to purchasers and sellers, which included the selection and completion of legal documents. The Washington Bar Association successfully filed a lawsuit in which the court enjoined Great Western from continuing this practice because it was the unauthorized practice of law. In direct response to this case, the Washington legislature passed a statute in 1979 that authorized financial institutions to prepare the types of documents that the Washington Supreme Court had prohibited in Great Western.

A law firm successfully challenged the constitutionality of the

441 Id. at 828.
442 Deborah Rhode, Reforming American Legal Education and Legal Practice, Rethinking Licensing Structures and the Role of Nonlawyers in Delivering and Financing Legal Services, 16 LEGAL ETHICS 243, 246 (2015).
443 Wash. State Bar Ass’n v. Great Western Sav. & Loan Ass’n, 586 P.2d 870, 874 (Wash. 1978).
444 Id. at 872. This included documents for buyers and sellers such as promissory notes, deeds of trust and statutorily required disclosure statements. Id. The employees preparing these documents were not lawyers. Id. at 874. Great Western was a party to some of these transactional documents, but for some of the documents only the buyer and seller were parties to the transaction. Id. at 873.
445 Wash. State Bar Ass’n, 586 P.2d at 875. The court held “that the selection and completion of form legal documents, or the drafting of such documents, including deeds, mortgages, deeds of trust, promissory notes and agreements modifying these documents constitutes the practice of law.” Id. The Washington Supreme Court reasoned that:

“[t]he ‘practice of law’ does not lend itself easily to precise definition. However, it is generally acknowledged to include not only the doing or performing of services in the courts of justice, throughout the various stages thereof, but in a larger sense includes legal advice and counsel and the preparation of legal instruments by which legal rights and obligations are established.”

Id.
446 Douglas E. Goe, Great Western and Its Legislative Aftermath: Unconstitutional Usurpation of Court’s Power?, 16 WILLAMETTE L. REV. 917, 922 n.38 (1980). The statute did prohibit the charging of a fee for the preparation of the documents. Id. at 917 n.6 (quoting the text of WASH. REV. CODE § 19.62.010 (1979), which has since been repealed).
statute in *Bennion v. Kassler Escrow, Inc.* The Washington Supreme Court held that in passing the statute, which effectively allowed lay persons to practice law, "the legislature impermissibly usurped the court’s power." The Court’s relied on the inherent powers doctrine, stating that “[i]t is a well-established principle that one of the inherent powers of the judiciary is the power to regulate the practice of law." In support of this principle, the Court cited numerous cases dating as far back as 1918. By enacting the statute that authorized escrow agents to engage in the practice of law, no matter how limited, the legislature encroached on the judiciary’s province. Thus, the statute was unconstitutional.

The *Bennion* case was not, however, the end of the story. The case created a substantial outcry, particularly from real estate brokers, escrow agents, and others in the real estate industry. They began to mobilize efforts to bring an initiative to the voters for an amendment to the Washington Constitution. They had a model for this approach because the Arizona voters had adopted such an amendment to their constitution in 1962. In response to this movement, the Washington State Bar Association appointed a special committee to study the issue and advise it on proposed solutions. Presumably to retain control over the issue, the Washington Supreme Court also used its rulemaking powers to adopt the “Limited Practice Rule for Closing Officers,” and created a new category of lay persons it authorized to provide limited legal services in connection with real estate transactions.

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448 *Id.*
449 *Id.* at 735.
450 *Id.*
451 Bennion, 635 P.2d at 732, 736.
452 *Id.* at 736.
454 *Id.*
455 *Id.* Article 26 of the Arizona Constitution provides:

Any person holding a valid license as a real estate broker or a real estate salesman regularly issued by the Arizona State Real Estate Department when acting in such capacity as broker or salesman for the parties, or agent for one of the parties to a sale, exchange, or trade, or the renting and leasing of property, shall have the right to draft or fill out and complete, without charge, any and all instruments incident thereto including, but not limited to, preliminary purchase agreements and earnest money receipts, deeds, mortgages, leases, assignments, releases, contracts for sale of realty, and bills of sale.

ARIZ. CONST. ART. 26 §1 (2016).
457 *Id.* The Washington Supreme Court defined the purpose of the rule as follows: "The
This chronicle of events in Washington shows the interplay between two branches of government over the practice of law. The judicial branch’s inherent powers trumped legislative efforts to try to authorize a limited provision of legal services by those involved in real estate transactions.\(^{458}\) This dynamic is unique to the legal profession. Compare, for example, the diversity of providers in the area of health care. Nurse practitioners routinely lobby state legislatures to have their scope of practice expanded into areas that physicians previously monopolized, such as prescriptive privileges.\(^{459}\) In that context, all of the stakeholders—nurse practitioners, physicians, consumer groups—can lobby legislatures in support of their position.\(^{460}\) This process has increased access to health care providers.\(^{461}\) This legislative process, however, is largely foreclosed when it comes to the delivery of legal services because of doctrines formed in the early part of the twentieth century.\(^{462}\)

The Bennion court asserted that the division of power regarding the practice of law is “well-established.”\(^{463}\) At the time that the court wrote the Bennion opinion in 1981, the state supreme courts’ constitutional power to define the practice of law and regulate who may engage in it had been firmly established in most states; but this outcome was not explicitly mandated by any state constitution in the country.\(^{464}\) As this article has illustrated, there were periods of time in the early 1900s where the legal profession turned to the legislatures—not the state supreme courts—to define the practice of law and provide tools to regulate UPL.\(^{465}\)

\(^{458}\) Bennion, 635 P.2d at 731, 735.

\(^{459}\) See Rigertas, Stratification of the Legal Profession, supra note 6, at 105–111.

\(^{460}\) Id. at 109.

\(^{461}\) Id. at 127.

\(^{462}\) Id. There are some narrow exceptions to this general statement. For example, some state supreme courts have let stand legislative acts that authorize laypersons to appear in a representative capacity in administrative proceedings. Id. at 118.

\(^{463}\) Bennion, 635 P.2d at 735.

\(^{464}\) See Rigertas, Lobbying and Litigating, supra note 3, at 79–82.

\(^{465}\) See id. at 92–102 (discussing legislative attempts to control the unauthorized practice of law). For instance, in 1920 a group of lawyers from around the country comprised a special American Bar Association committee, called the Conference of Bar Delegates, which was
The inherent powers doctrine has real world implications for exploring alternative ways to deliver legal services and increasing access to justice.\textsuperscript{466} Those implications justify asking whether this inherent power to define the practice of law is a necessary and constitutionally mandated power of the state supreme courts, or whether it is a historical artifact from a time when bar associations decided that legislatures were not an effective partner for their goals.\textsuperscript{467} This article does not attempt to answer those questions, but rather, it explores a slice of history that illustrates a time when states had yet to solidify such an interpretation of their constitutions. In fact, there was a time when the legal profession was quite open to embracing legislatures as an appropriate branch to help define the practice of law and prohibit the unauthorized practice of law.\textsuperscript{468}

VII. CONCLUSION

Today, the separation of powers doctrine—in particular, the inherent powers doctrine—has a significant impact on exploring alternative ways to deliver and regulate legal services.\textsuperscript{469} As illustrated, there are practical implications to this legal framework. For example, a state legislature cannot authorize the legal equivalent to a nurse practitioner because it would be authorizing nonlawyers to engage in the practice of law.\textsuperscript{470} Thus, a company like Legal Zoom cannot go to a state

\textsuperscript{466} See Rigertas, \textit{Stratification of the Legal Profession, supra} note 6, at 135–36 (explaining some of those implications).

\textsuperscript{467} Rigertas, \textit{Lobbying and Litigating, supra} note 3, at 71 (arguing that the inherent powers doctrine developed “not because legislatures lacked the power to define the practice of law, but because the organized bar was concerned about how the legislatures would use that power during a time of economic stagnation”).

\textsuperscript{468} See \textit{id.} at 67, 101 (stating that the main strategy of the organized bar was to lobby state legislatures to enact definitions of the practice of law).

\textsuperscript{469} Rigertas, \textit{Stratification of the Legal Profession, supra} note 6, at 136 (exploring the impact of the inherent powers doctrine on public discourse and the efficient delivery of legal services).

\textsuperscript{470} For a discussion of the difference between the medical profession and the legal profession in authorizing different types of practitioners, see generally, Rigertas, \textit{Stratification of the Legal Profession, supra} note 6, at 99–126.
legislature and get its business model blessed. Instead, it starts its business and then waits to be sued for the unauthorized practice of law; then it litigates whether or not its acts comprise the practice of law. A resulting appellate decision can provide some further clarity about what acts comprise the practice of law, but often such cases settle without any resulting precedent or guidance for future business models.

This article begins the work of looking at the historical basis for the development of the control of the state judicial branches over the definition of the practice of law. In the absence of explicit constitutional authority, this power progressed over time. The reasons for its progression, however, have not been closely examined. One possible reason is that the independence of the judiciary does require this power. The research in this article, however, does suggest that there may be another possible reason: the exclusion of legislatures came at the urging of bar associations. As illustrated in this article, those same bar associations were ironically once quite open to the idea of legislatures defining the practice of law. The history suggests that their pivot in the 1930s may not have been because of an affinity for the separation of powers doctrine; instead, they may have seen the judicial branch—and its relative immunity from the lobbying of outside interests—as a better ally for their goals.

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471 See generally Barton, supra note 1, at 3079–81 (analyzing the implications of legal services being delivered by companies like LegalZoom).
472 Id. at 3081–83 (considering why there have been so few challenges to LegalZoom’s unauthorized practice).
473 Rigertas, Lobbying and Litigating, supra note 3, at 125–26. Most courts exercise their power to define the practice of law on a case-by-case basis, although a few have used their rulemaking powers to provide a working definition of the practice of law. AMERICAN BAR ASS’N, 1994 SURVEY AND RELATED MATERIALS ON THE UNAUTHORIZED PRACTICE OF LAW/NONLAWYER PRACTICE 15–22 (1994). See generally Brooks Holland, Washington States’ Limited License Legal Technician Practice Rule: A National First in Access to Justice, 82 MISS. L.J. 75 (2013) (discussing the Washington Supreme Court’s decision to adopt rules that created a new category of legal services providers called Limited License Legal Technicians).
474 Rigertas, Lobbying and Litigating, supra note 3, at 69.
475 See Johnstone, supra note 3, at 834–35 (suggesting that the power may be more justifiable when applied to controlling who appears in the courts, and less justifiable when applied to transactional work that takes place outside of the courthouse); see also Gillian K. Hadfield & Deborah L. Rhode, How to Regulate Legal Services to Promote Access, Innovation, and the Quality of Legal Services, 67 HASTINGS L.J. 1191, 1203–13 (2016) (discussing alternative regulatory approaches in the United Kingdom, which allow for more competition in legal work outside the courthouse).
476 Rigertas, Lobbying and Litigating, supra note 3, at 68.
477 Id. at 66–67, 101.
478 Id. at 68–69.
associations solidified that pivot in the 1930s is a subject for future research. But, as the legal profession has been unable to crack the significant barriers to the access to justice, it should start to examine the justifications for the current construction of the separation of powers doctrine.