

DUAL PRACTICE OF LAW AND ACCOUNTANCY: A LAWYER'S PARADOX

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If a man is qualified both as a lawyer and as a certified public accountant, is there any reason to prohibit him from practicing both professions at the same time? The Professional Ethics Committee of the ABA thinks so, but the author of this article, a lawyer-CPA himself, strongly disagrees. He argues that the Committee's position is not in the public interest, not a proper interpretation of the Canons of Ethics, and perhaps even unconstitutional.

IN 1961 THE Professional Ethics Committee¹ of the American Bar Association rendered Opinion 297,² proclaiming that the dual practice of law and accountancy by one trained in both professions violated the Canons of Professional Ethics. This opinion has been adopted by a few state bar associations and rejected by others; most of the states are neutral.³

I believe that it is perfectly proper for a lawyer qualified as a certified public accountant to practice both professions concurrently. Ethically conducted in the true tradition of both professions, dual practice serves a genuine public interest and suitably performs the proper functions of both. To suppress or restrict the dual practice is a disservice to the bar and to the public, and such suppression or restriction is not only unwarranted but is constitutionally impermissible.

I

THE BACKGROUND

A. History

To view the issues in proper perspective, the controversies, negotiations, and accords between the two professions during the

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¹ Hereinafter frequently referred to as Ethics Committee.

² COMMITTEE ON PROFESSIONAL ETHICS & GRIEVANCES, ABA, OPINIONS 8 (Supp. 1964) (*Lawyer-Accountant Relationship*, Opinion 297, 1961).

³ For the views of bar associations rejecting the opinion, see part V of this article.

past quarter-century must be reviewed. The story begins in the early 1940's. By that time a goodly number of hardy professional people had qualified themselves in both professions and were engaged in their concurrent practice. The simple fact that they existed and prospered attested to the public need, interest, and acceptance of dual practice.

By that time, too, the National Conference of Lawyers and Certified Public Accountants had been established. It was composed of a committee of lawyers selected by the American Bar Association and a committee of certified public accountants selected by the American Institute of Certified Public Accountants.⁴ The National Conference was designed to collaborate on problems common to the two professions.

On March 4, 1946, the National Conference promulgated certain questions touching on dual practice. These questions were presented both to the ABA Ethics Committee through the ABA Committee on the Unauthorized Practice of the Law, and to the Professional Ethics Committee of the AICPA.⁵ The latter declined to declare itself opposed to the dual practice,⁶ a position to which it has consistently adhered to the present time. The Ethics Committee of the ABA, on the other hand, issued on October 25, 1946, its Opinion 272,⁷ which condemned dual practice from a single office, but, because of a lack of unanimity in the Committee, did not foreclose the possibility of dual practice from separate offices.⁸

At about this same time there arose the unfortunate and unseemly conflict between the two professions concerning their respective roles in tax practice, culminating in the celebrated case of *New York County Lawyers Ass'n v. Bercu*,⁹ in which the

⁴ The AICPA was at that time denominated the American Institute of Accountants. The organization will be referred to as the former throughout this article.

⁵ The full text of the answers formulated by both committees appears in 83 J. ACCOUNTANCY 171-75 (1947).

⁶ *Id.* at 172.

⁷ COMMITTEE ON PROFESSIONAL ETHICS & GRIEVANCES, ABA, OPINIONS 565 (1957) (Opinion 272, 1946). This opinion was superseded by Opinion 297.

⁸ *Id.* at 569.

⁹ 273 App. Div. 524 (1948), 78 N.Y.S.2d 209 (1948), *aff'd mem.*, 299 N.Y. 728, 87 N.E.2d 451 (1949). Another significant case is *Agran v. Shapiro*, 127 Cal. App. 2d 807, 273 P.2d 619 (Super. Ct. 1954), where an accountant was denied compensation because his services had unlawfully included a decision on a question of tax law.

The conflict between the two professions concerning tax practice alerted many members of each profession to the desirability of becoming qualified in the other, and as a result, the number of dually-qualified practitioners has increased considerably since 1950.

ABA and the AICPA opposed each other as amici curiae in the New York Court of Appeals.

While this controversy on tax practice was pending, the National Conference of Lawyers and Certified Public Accountants suspended its meetings. By 1951, harmony had been restored, and in that year the National Conference approved a joint *Statement of Principles* to regulate the interface between the two professions. It was approved by the ABA Board of Governors on February 24, 1951,¹⁰ by the ABA House of Delegates on February 27, 1951,¹¹ and by the Council of the American Institute of Certified Public Accountants on May 8, 1951.¹² It has thus been officially accepted by the highest authority in both professional organizations. The *Statement of Principles* continues in effect to this date, without modification. It is republished annually in the Martindale-Hubbell Law Directory¹³ and in the Annual Reports of the ABA.¹⁴ It does not deal expressly with the theme of dual practice, but it does stress that the *joint* skills of the two professions are "in the best public interest"¹⁵ and that both the ABA and the AICPA "set a high standard of professional practice and conduct, including prohibition of advertising and solicitation."¹⁶

On February 24, 1961, the ABA Ethics Committee promulgated its Opinion 297, superseding Opinion 272 and all other formal and informal opinions dealing with this subject. Opinion 297 squarely declares, for the first time, that the dually qualified person "must choose between holding himself out as a lawyer and holding himself out as an accountant."¹⁷

Opinion 305,¹⁸ issued in 1962, adds nothing that is material here. Informal Decision 565,¹⁹ also issued in 1962, declares that the use of separate letterheads will not satisfy Opinion 297 and that

¹⁰ See 76 A.B.A. REP. 559 (1951).

¹¹ See *id.* at 529.

¹² See 91 J. ACCOUNTANCY 801, 802 (1951).

¹³ 3 MARTINDALE-HUBBELL LAW DIRECTORY 189A (1966).

¹⁴ The latest republishing is 89 A.B.A. REP. app. 85-86 (1964).

¹⁵ *Id.* at app. 85.

¹⁶ *Ibid.*

¹⁷ COMMITTEE ON PROFESSIONAL ETHICS & GRIEVANCES, ABA, OPINIONS 11 (Supp. 1964) (Opinion 297, 1961).

¹⁸ COMMITTEE ON PROFESSIONAL ETHICS & GRIEVANCES, ABA, OPINIONS 28 (Supp. 1964) (*Lawyer-Accountant Relationship*, Opinion 305, 1962).

¹⁹ COMMITTEE ON PROFESSIONAL ETHICS, ABA, INFORMAL DECISION 565 (1962), summarized in COMMITTEE ON PROFESSIONAL ETHICS & GRIEVANCES, ABA, OPINIONS 52 (Supp. 1964).

dual listings in directories and law lists are "directly contrary to the basic principle"²⁰ of Opinion 297.

Some bar associations have rejected Opinion 297, some have taken a position of neutrality, some have adopted the Opinion but have refrained from enforcement. Other bar associations have undertaken enforcement on a "person by person" basis, with no attempt at judicial enforcement against those not yielding to non-court pressures.

B. *The Authoritative Sources of Disciplining the Profession*

As officers of the courts, lawyers are required to meet certain ethical standards, in order to maintain a high order of integrity throughout the judicial system. These ethical standards have come to be equated with the ABA Canons of Ethics. But what actual force do the Canons possess? The Illinois Supreme Court has noted that "the canons of ethics of the State and American Bar Associations are not binding obligations and are not enforced by the courts as such; however, they constitute a safe guide for professional conduct and an attorney may be disciplined for not observing them."²¹ The United States Supreme Court, in upholding Judicial Canon 35 last year, pointed out that "Canon 35, of course, has of itself no binding effect on the courts but merely expresses the view of the Association in opposition to the broadcasting, televising and photographing of court proceedings."²²

While not possessing binding effect, however, the Canons have been adopted by some courts as a guide.²³ At least in these states, then, and probably in all states, the Canons will carry great weight in determining what is and what is not ethically permissible conduct.

The opinions of the ABA Professional Ethics Committee are purportedly *interpretations* of the Canons. As such, they are inherently less authoritative than the Canons themselves.²⁴ This in-

²⁰ COMMITTEE ON PROFESSIONAL ETHICS, ABA, INFORMAL DECISION 565 (1962).

²¹ *In re Heirich*, 10 Ill. 2d 357, 386-87, 140 N.E.2d 825, 839-40 (1956), *cert. denied*, 355 U.S. 805 (1957).

²² *Estes v. Texas*, 381 U.S. 532, 535 (1965).

²³ *E.g.*, *In re Krasner*, 32 Ill. 2d 121, 204 N.E.2d 10, 14 (1965); *In re Heirich*, 10 Ill. 2d 357, 386-87, 140 N.E.2d 825, 839-40 (1956), *cert. denied*, 355 U.S. 805 (1957); *Shapiro v. Wendell Packing Co.*, 366 Mich. 289, 294, 115 N.W.2d 87, 89 (1962); *In the Matter of Duffy*, 19 App. Div. 2d 177, 179, 242 N.Y.S.2d 665, 667 (1963); *In the Matter of Connelly*, 18 App. Div. 2d 466, 469, 240 N.Y.S.2d 126, 129 (1963).

²⁴ *See, e.g.*, *In the Matter of Stein*, 1 N.J. 228, 236, 62 A.2d 801, 805 (1949); *State v. Willenson*, 20 Wis. 2d 519, 524, 123 N.W.2d 452, 455 (1963).

herent limitation is specifically recognized in the ABA framework. It is the Board of Governors, not the Ethics Committee, which "may censure, suspend or expel any member for cause,"²⁵ and such action is taken "upon the recommendation of the Committee on Professional Grievances"²⁶ and then only after hearing. The role of the Committee on Professional Ethics is a narrow one. It shall "formulate and recommend standards of ethics and conduct in the practice of law as a profession"²⁷ and "express its opinion concerning proper professional or judicial conduct, but these opinions shall not deal with questions of judicial decision or judicial discretion"²⁸ The rules of procedure of the Committee expressly provide that "the Committee will not render opinions on questions of Law,"²⁹ and that "the Committee will render opinions . . . involving the ethics of the past conduct of a lawyer upon the *request only* of the Committee on Professional Grievances"³⁰

None of the opinions here under discussion has been approved by the ABA Board of Governors or the ABA House of Delegates or the ABA membership. Like all opinions, they are simply Committee interpretations, adopted by the Committee, without hearing or opportunity for opposing comment. To the best of my knowledge and belief, the American Bar Association has never undertaken enforcement of these Committee interpretations, through the ABA Grievances Committee or in any other manner.

Thus it seems conclusively clear that the opinions of the ABA Ethics Committee possess only such force as may flow from the considered views on matters of ethics of the eight men who from time to time compose the Committee. The opinions are not necessarily a correct interpretation of the Canons; they do not constitute the "law" of any bar association, nor the law of the land; they do not fix or determine the public policy of state or nation; they have no binding force or effect; a failure to observe them, or any one of them, does not constitute grounds for disciplinary action. It is true that the opinions do often carry weight in state disciplinary proceedings.³¹ But no court in any state has adopted or approved

²⁵ ABA CONST. art. II, § 3, in 89 A.B.A. REP. app. 2 (1964).

²⁶ *Ibid.*

²⁷ ABA BY-LAWS art. X, § 7(x) (1), in 89 A.B.A. REP. app. 35 (1964).

²⁸ ABA BY-LAWS art. X, § 7(x) (3), in 89 A.B.A. REP. app. 35 (1964).

²⁹ Rule I (1), in COMMITTEE ON PROFESSIONAL ETHICS & GRIEVANCES, ABA, OPINIONS 80 (Supp. 1964).

³⁰ Rule II (2), in *id.* at 80-81. (Emphasis added.)

³¹ *E.g.*, cases cited note 23 *supra*.

Opinion 297 or any of its predecessors. And, as pointed out previously, only a few state bar associations have adopted it.

State bar committees, and eventually the courts, are thus wholly uncommitted and free to determine, with the Canons and not necessarily the opinions "as a guide," whether the dual practice may, in the public interest, be suppressed or restricted by the law or policy of the state; and the determination must be made subject to the strictures of both state and federal constitutions.

II

OPINION 297

Opinion 297 declares that "it is a violation of *Canon 27* for a lawyer to hold himself out as qualified to practice both law and accounting."³² This is so, says the Committee, because "the dual holding out . . . constitutes self-touting, and because the lawyer-accountant firm would almost inevitably serve as a feeder to the legal firm."³³ The result is that the CPA-lawyer "must choose between holding himself out as a lawyer and holding himself out as an accountant."³⁴ And if he chooses the latter, "he must not practice law or he will violate *Canon 27* in that he will be using his activity as an accountant to feed his law practice."³⁵

But Opinion 297 encourages the lawyer to do accounting work:

The employment by a firm of lawyers of a public accountant on a salaried basis for the purpose of *doing accounting work for the law firm in its practice of the law* does not in and of itself result in the law firm being engaged in unethical conduct.

. . . .

If he elects to hold himself out as a lawyer, he will not violate any Canon of Ethics merely because in rendition of legal services he *utilizes and applies accounting principles*.³⁶

Canon 27, which Opinion 297 purports to interpret, reads in pertinent part as follows:

It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations.

³² COMMITTEE ON PROFESSIONAL ETHICS & GRIEVANCES, ABA, OPINIONS 11 (Supp. 1964) (Opinion 297, 1961).

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Id.* at 10-11. (Emphasis added.)

Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position, and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible; but the customary use of simple professional cards is not improper.³⁷

The Committee's position is that self-laudation is present in violation of Canon 27 when a lawyer permits the public to *know* that he is also a member of another recognized profession and is engaged in practice as such. At the same time, Opinion 297 would leave the lawyer, as a lawyer, free to range over virtually the whole field of accounting practice, however limited his accounting competence might in fact be.

It is interesting to compare this view with the one officially announced by the American Institute of Certified Public Accountants in 1947, after invitation by the ABA to join in declaring the dual practice to be unethical:

Both the American Bar Association and the American Institute of Accountants maintain rules against advertising, solicitation, and division of fees with the "laity," a term which in the view of each profession applies to members of the other.³⁸

The Institute therefore declined to pronounce the concurrent practice to be unethical. It said: "the practice of law by a member of the Institute who was a member of the bar as well as a certified public accountant, would not be incompatible or inconsistent with the practice of public accounting."³⁹

III

DOES OPINION 297 PROPERLY INTERPRET THE CANONS?

In all problems of legal ethics, the public interest is paramount; every authoritative statement on ethics so declares. A basic premise so obvious would seem to foreclose discussion were it not unfortunately true that too many lawyers regard the Canons as a bill of rights enacted solely for their own benefit.

³⁷ ABA, CANONS OF PROFESSIONAL ETHICS 5 (1962).

³⁸ 83 J. ACCOUNTANCY 171 (1947).

³⁹ *Id.* at 172.

The Canons are currently being reviewed by a Special Committee on Evaluation of Ethical Standards.⁴⁰ Former President Powell has said "many aspects of the practice of law have changed drastically" since the Canons originally were adopted in 1908.⁴¹ "They . . . should be reexamined particularly in view of the *increased recognition of the public responsibility of our profession.*"⁴²

Article I of the ABA constitution states that the Association's "objects shall be . . . to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; . . . in the interest of the legal profession and of the public."⁴³ The *Preamble* to the Canons recites: "The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men."⁴⁴

In 1942 the ABA Ethics Committee recognized that common sense and the public interest are the appropriate tests in the interpretation of the Canons: In Opinion 244 the Committee announced that the Canons are to be "interpreted in accordance with their spirit and intent, in order to prevent the abuses at which they were obviously aimed, as distinguished from a technical or literal construction which would have them cover practices not generally regarded by the Bar as inherently improper or unethical."⁴⁵

To determine whether Opinion 297 is a proper and correct interpretation of the Canons, therefore, it is necessary at all times to keep the public interest in mind. With this fact in view, let us proceed to investigate the wisdom of Opinion 297.

A. Advertising and Self-Laudation

Canon 27 prohibits advertising and self-laudation.⁴⁶ But the only self-laudation involved when a lawyer is known to be a certified public accountant is laudable laudation, impliedly approved by Canon 27 itself. Canon 27 declares, as reprehensible, only "all other

⁴⁰ 89 A.B.A. REP. 381-83 (1964).

⁴¹ *Id.* at 381.

⁴² *Ibid.*

⁴³ ABA CONST. art. I, in 89 A.B.A. REP. app. 1 (1964).

⁴⁴ ABA, CANONS OF PROFESSIONAL ETHICS § (1962).

⁴⁵ COMMITTEE ON PROFESSIONAL ETHICS & GRIEVANCES, ABA, OPINIONS 488-89 (1957) (Opinion 244, 1942).

⁴⁶ See text of Canon 27 accompanying note 37 *supra*.

like self-laudation";⁴⁷ to be known as a CPA is so utterly *unlike* the proscribed conduct indicated in Canon 27 as to merit commendation, not condemnation. Far from "offend[ing] the tradition and lower[ing] the tone"⁴⁸ of the legal profession, the honor and dignity of the lawyer are enhanced when he achieves the difficult and coveted CPA certificate.

The Committee would bring down the curtain to shut off from the eyes and ears of the public any intimation that these superior accounting skills are available. But does merely allowing the public to know that one is a CPA constitute "advertising"? Mr. Drinker has said, "where publicity is the normal by-product of able and effective service, whether of a professional or non-professional character, this is a kind of 'advertisement' which is entirely right and proper."⁴⁹ If the fruits of meritorious performance in non-accounting areas are to be extolled, are those flowing from accounting excellence to be condemned as reprehensible? All that a lawyer is (through charm or force of personality) and all that a lawyer does (in practice, in his club, in the community) tend to enhance or diminish his stature as lawyer; why should it be considered otherwise as to accounting practice?

The proper answer is that Canon 27 will bear no such interpretation. Canon 27 is directed to the end that lawyers shall not discredit their high calling by *unseemly* advertising. The aim of Canon 27 is not to conceal the lawyer's skills; it does not seek to withhold from the public the knowledge of the existence of those talents. It is designed only to repress the unseemly. The announcement that one is a CPA can hardly be placed in that category.

B. Solicitation: The "Feeder" Contention

Opinion 297 asserts that Canon 27 is violated "because the lawyer-accountant firm would almost inevitably serve as a feeder to the legal firm."⁵⁰ The Committee's fear of "feeding" is at the heart of the case; the fear is one of "unfair competition."

Canon 27 does not mention "feeding"; it is concerned with advertising and solicitation. Feeding must therefore be reprehensible

⁴⁷ See text of Canon 27 accompanying note 37 *supra*. (Emphasis added.)

⁴⁸ See text of Canon 27 accompanying note 37 *supra*.

⁴⁹ DRINKER, LEGAL ETHICS 218 (1953) [hereinafter cited as DRINKER].

⁵⁰ COMMITTEE ON PROFESSIONAL ETHICS & GRIEVANCES, ABA, OPINIONS 11 (Supp. 1964) (Opinion 297, 1961).

because it constitutes a form of solicitation. Absent any evidence of actual solicitation, the charge is that the concurrent practice, however ethically conducted under the regulations of both professions, per se constitutes solicitation.

To serve as a feeder implies some overt activity of solicitation not otherwise available to the professional man. What, then, is solicitation? In the case of *In re Heirich* the court noted that "solicitation of business . . . is inimical to the good reputation of the bar."⁵¹ But the decision continued: "Courts, however, have refrained from defining what constitutes such solicitation and have frequently stressed the motive of the solicitation in determining its propriety."⁵² To the extent that motive is relevant, it would seem that the desire to serve the public in another recognized profession is a laudable motive.

But let us assume that feeding is present. Wherein lies the mischief? Every well-established law practice becomes such through excellence of service; a job well done is the best of feeders. A satisfied client returns and brings his friends.

In brief, except for actual solicitation, it is immaterial whether the concurrent practice does or does not result in feeding the practice of either profession. In any particular case, it may or it may not; moreover, it may well result in negative feeding, in starving, one or the other or both. In these respects, the concurrent practice differs not at all from the great host of other potential sources of feeding. The concurrent practice fulfills an important public need; feeding, if any there be, is purely secondary and is a normal by-product of satisfactory service.⁵³

It has long been recognized that a lawyer may engage in other businesses so long as he does not use either his law practice or alternate business to aid the other.⁵⁴ Presumably the practice of

⁵¹ 10 Ill. 2d 357, 387, 140 N.E.2d 825, 840, *cert. denied*, 355 U.S. 805 (1957).

⁵² 10 Ill. 2d at 387, 140 N.E.2d at 840.

⁵³ See Comment, 3 U.C.L.A.L. Rev. 360, 368-70 (1956).

⁵⁴ See DRINKER 221-22, and authorities cited therein. Lawyers in the United States engage in a wide variety of activities. "[M]any lawyers besides practicing law are engaged in other gainful activity. . . . Lawyers are . . . widely occupied in political affairs. In 1965, five members of the President's Cabinet, sixty-seven United States Senators and a majority of the members of the House of Representatives were lawyers. Many governmental agencies are headed by lawyers The chief characteristic of the professional activity of American lawyers is its rich variety." AMERICAN BAR FOUNDATION, THE LEGAL PROFESSION IN THE UNITED STATES 1-2 (1965).

accounting is so close to the practice of law as to *inherently* constitute mutual feeding. But underlying this contention is the premise that the CPA-lawyer practices exclusively *business* law—taxation and the like. There is no reason to assume that the CPA-lawyer does not also practice in other areas of the law where his accounting work will bear no relationship to his legal practice. Whenever a lawyer engages in another business, that business will inevitably act as a feeder for certain aspects of his law practice; it seems clearly arbitrary to single out CPAs for prohibition of dual practice. By similar reasoning, doctor-lawyers should be prohibited from dual practice because of the obvious connection in personal injury cases. Lawyers should be prohibited from selling insurance; from being real estate brokers; from holding public office. All such activities tend to directly feed certain aspects of the lawyer's practice. Conversely, the CPA-lawyer who handles solely personal injury cases should be allowed to maintain a dual practice.

These conclusions, which seem to follow inevitably from the decision of the Ethics Committee, illustrate the fallacy of the Committee's approach—an approach which seeks to *prevent* activities, no matter how ethically conducted, which will feed the law practice. Carried to its extreme, it would ban all outside activities of the lawyer, or at least prevent him from practicing in any area connected with his activities. The proper approach is the one that has always been used—to require the lawyer to refrain only from *unseemly* feeder practices, and to discipline him when and if he engages in them.

The American Institute of Certified Public Accountants officially rejected the Committee's "feeder" contentions in 1946⁵⁵ and still rejects them. It refused to be concerned with the fear of feeding, because the rules of both professions "are similar with respect to fee-splitting, advertising, and solicitation"⁵⁶ and observed that "any attempt by a member of the Institute to evade existing rules [of the accounting profession] . . . could be dealt with quite readily under the provisions"⁵⁷ of those rules. Similarly, any violation by a lawyer is clearly a call for discipline under the Canons of Ethics.

⁵⁵ See 83 J. ACCOUNTANCY 171-73 (1947).

⁵⁶ *Id.* at 172.

⁵⁷ *Ibid.*

C. Practice of a "Specialty"

It is generally impermissible for a lawyer to hold himself out as a "specialist" in one area of the law. But accounting is not a "specialty"; by definition, to engage in law and accounting conjointly is *dual* practice of two professions. Accounting is an independent, legally-recognized, strictly-governed profession, entitled to its own separate and distinct identification.

The distinction emerges with clarity when we recall that the National Conference of Lawyers and Certified Public Accountants, in their joint 1951 *Statement of Principles*, agreed that:

An accountant should not describe himself as a "tax consultant" or "tax expert" or use any similar phrase. Lawyers, similarly, are prohibited by the canons of ethics of the American Bar Association and the opinions relating thereto, from advertising a special branch of law practice.⁵⁸

The American Institute of Certified Public Accountants has adopted the full text of the foregoing section, with the express provision that any violation invites expulsion or suspension from the Institute.⁵⁹ At the same time, the Institute adheres to its position that the dual practice is not incompatible.

Hence, the distinction is clear: Identification of a professional practice is not a "prohibited self-designation" of a specialty. The CPA is governed by statutory and professional rules of conduct that parallel those of the bar; and the concurrent practice is subject to the rules of *both* professions.

Why, then, cannot a lawyer designate himself as also being a CPA? A clear analogy can be drawn to the allowance by Canon 27 of self-designation by a proctor in admiralty or patent attorney.⁶⁰ These exceptions are presumably allowed because such a specialist is *more* than merely proficient in one area; he has also met certain standards prescribed by official authority and is subject to the sanc-

⁵⁸ 89 A.B.A. REP. app. 86 (1964).

⁵⁹ Committee on Professional Ethics, AICPA, *Prohibited Self-Designations* (Opinion No. 5), in AICPA, BY-LAWS & CODE OF PROFESSIONAL ETHICS 39 (1965).

⁶⁰ "It is not improper for a lawyer who is admitted to practice as a proctor in admiralty to use that designation on his letterhead or shingle or for a lawyer who has complied with the statutory requirements of admission to practice before the patent office, to so use the designation 'patent attorney' or 'patent lawyer' or 'trademark attorney' or 'trademark lawyer' or any combination of those terms." ABA, CANONS OF PROFESSIONAL ETHICS 5 (1962) (Canon 27).

tions which that authority may impose. The CPA meets these tests by definition.

D. *Ethical Standards in the Accounting Profession*

The *Code of Professional Ethics* of the American Institute of Certified Public Accountants includes the following:

1.02 A member or associate shall not commit an act discreditable to the profession.

1.03 A member or associate shall not violate the confidential relationship between himself and his client.

....

3.01 A member or associate shall not advertise his professional attainments or services.

Publication in a newspaper, magazine or similar medium of an announcement or what is technically known as a card is prohibited.

[Directory listing is rigidly restricted.] . . .

3.02 A member or associate shall not endeavor, directly or indirectly, to obtain clients by solicitation.

....

4.04 A member or associate shall not engage in any business or occupation conjointly with that of a public accountant, which is incompatible or inconsistent therewith.

4.05 A member or associate engaged in an occupation in which he renders services of a type performed by public accountants, or renders other professional services, must observe the by-laws and Code of Professional Ethics of the Institute in the conduct of that occupation.⁶¹

In addition, the Institute's by-laws provide:

A member or associate renders himself liable to expulsion or suspension by the trial board or a sub-board thereof if

....

(b) he infringes any of these by-laws or any provision of the Code of Professional Ethics⁶²

State statutes regulating the practice of accountancy generally empower the state board of accountancy to adopt rules of professional conduct.⁶³ Such rules have virtually the force of law; infringement may, depending upon the gravity of the offense, result

⁶¹ AICPA, BY-LAWS & CODE OF PROFESSIONAL ETHICS 31, 34, 35 (1965).

⁶² Art. V, § 4, AICPA, BY-LAWS & CODE OF PROFESSIONAL ETHICS 7 (1965).

⁶³ E.g., FLA. STAT. ANN. § 473.04 (1965); MICH. STAT. ANN. § 18.2 (1957); N.Y. EDUC. LAW § 7406 (Supp. 1965).

in revocation of the license to practice or other milder sanctions.⁶⁴ These state rules usually adopt the *Code of Professional Ethics* of the Institute.

These standards for CPAs parallel the Canons of Ethics and, in some respects, are even more stringent. If the basic aim of the Canons is to prevent unethical conduct on the part of lawyers, it is difficult to perceive how conduct meeting these standards could bring any form of ill repute to the legal profession or the judicial system.

E. Summary

It thus appears that Opinion 297 is attempting to speak in terms of what is desirable, and not in terms of what is mandatory. And it does not do even this very well. It is desirable that every lawyer in America achieve the topmost heights of professional capacity, but if the privilege of practice were confined to those who attain the summit, how thin the ranks of the bar would be! All that a lawyer does adds to his stature in the profession or diminishes it; to engage in the practice of accountancy may in the one case add or in the other case diminish, depending largely on individual diligence and industry. A lawyer may engage in church functions, or in horse-racing and dice; all detract from his professional time, and for better or for worse affect his standing as a lawyer. Shall all such activities be permitted, or all proscribed, or all officially ignored? As to all these themes, we can and should have ideals; but it will hardly do to prescribe rigid rules, save at the recognized boundaries of moral conduct.

IV

THE PUBLIC INTEREST

Having examined Opinion 297 as a proper or improper interpretation of the Canons of Ethics, let us now turn our attention to its wisdom as a broader matter of furthering the public interest.

In 1946, the American Institute of Certified Public Accountants perceptively pinpointed the overriding factor of public interest:

In any case, we believe, [questions of feeding] . . . are of secondary importance in view of the primary justification for rules of professional conduct or ethics, that is, to safeguard the public interest.

⁶⁴ E.g., CAL. BUS. & PROF. CODE § 5100 (Supp. 1965); MICH. STAT. ANN. § 18.25 (1957); N.Y. EDUC. LAW § 7406 (Supp. 1965).

The compelling consideration, in our opinion, is the desirability of allowing the public complete freedom in the selection of lawyers or certified public accountants who the public believes can render most effectively the professional services it desires.⁶⁵

The public interest is best served by the joint skills of the two professions; this truth is attested to in unison by the highest authority of both professions in a single document. The *Statement of Principles* adopted by the National Conference of Lawyers and Certified Public Accountants declares in part:

Frequently the legal and accounting phases are so inter-related and interdependent and overlapping that they are difficult to distinguish. . . .

. . . .

In many cases, therefore, the public will be best served by utilizing the joint skills of both professions.⁶⁶

The contention that an agreement for joint service by a lawyer and an accountant in a tax case was illegal because the CPA was practicing law "in partnership" with the attorney was rejected in 1963 by the New York Court of Appeals:

An arrangement such as was here arrived at assures the sort of co-operative effort whereby the expertise of both lawyer and accountant in their respective fields may be availed of and is designed to achieve for the client who retained them the best possible result. Indeed, such an arrangement *comes close to the ideal* setup contemplated by [the *Statement of Principles*] . . .⁶⁷

If the arrangement in this case *came close* to the ideal, is not that ideal more fully realized in the concurrent practice of the CPA-lawyer? That is the conclusion stated at the close of a Note in the *Harvard Law Review*:

The combination in one person of the functions of lawyer and accountant, representing the ultimate degree of co-operation between the two professions, would give the client the advantage of more continuous and timely professional supervision. This feature would seem especially valuable to the small businessman who can afford only limited professional assistance.⁶⁸

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

⁶⁶ 89 A.B.A. REP. app. 85-86 (1964).

⁶⁷ *Blumenberg v. Neubecker*, 12 N.Y.2d 456, 460, 191 N.E.2d 269, 271, 240 N.Y.S.2d 730, 732 (1963). (Emphasis added.)

⁶⁸ Note, 63 HARV. L. REV. 1457, 1458 (1950).

This "valuable feature" is not limited to the small businessman. Sheldon S. Cohen, CPA and attorney, was confirmed by the Senate as Commissioner of Internal Revenue, far from a small business, in January 1965. Secretary of the Treasury Dillon hailed Mr. Cohen as an expert in both accounting and law.⁶⁹ The "joint skills ideal" has also entered the area of criminal law; in recent major financial crimes in New York City:

The cases were prepared by Assistant District Attorney Oscar J. Cohen, together with Edgerton Hazard, CPA. Both are on the staff of District Attorney Frank S. Hogan. This reflects a new technique established by the DA's office of combining the experience and abilities of lawyers and CPA's to ferret out and prosecute financial crimes.⁷⁰

To applaud the joint skills and the public's need of them, on the one hand, and to withhold from the public any knowledge of where those skills may be enlisted, appears manifestly inconsistent. It is like the physician telling the patient what medicine is best for him but refusing to let him know where he can get it.

Several more specific objections have been raised to dual practice: (1) he who practices both professions cannot be proficient in either one; (2) dual practice poses an inconsistency between the role of the CPA as an "impartial" evaluator and the role of the lawyer as an "advocate"; (3) dual practice confuses and may destroy the protection of "privileged communications."

(1) The Internal Revenue Service, the "small businessman," and anyone else may choose the dual practitioner or not, as best suited to his needs. Others may think and choose otherwise, rejecting the lawyer-CPA both in law and in accountancy as being not well enough qualified in either. The public has freedom of choice and the public exercises that right; the lawyer, or the CPA, or the lawyer-CPA must stand or fall, prosper or fail, on the merits of his competence to satisfy the public need. If there is incompetence, the law provides remedies for it.⁷¹ The need of the public to be protected in its right to select qualified services is as great as the public need to be safeguarded against incompetence and unlawful practice.

⁶⁹ *News Report*, J. Accountancy, March 1965, p. 9, at 12.

⁷⁰ *Id.*, April 1965, p. 7, at 16.

⁷¹ See Annot., 96 A.L.R.2d 823 (1964) (incompetence as ground for disciplinary action).

Businessmen generally have achieved an awareness of the need to enlist accounting as well as legal thought as aids to solution of their problems; they will not view with sympathy any effort by either profession to deprive them of direct and full access to the talents of both, either singly or in combination.

(2) Some claim that there may be an inherent inconsistency in the dual practice, a call for mutually exclusive talents: impartiality in accountancy as opposed to advocacy in the law. Assuredly it is true that success in the joint practice demands a high order of talents, but so does attainment in the higher reaches of the law itself. Who shall be the judges in our courts, if not members of the bar who have capacity both for advocacy and impartiality? Who shall be chosen as arbitrators, if not those who have such dual talent? In our complex society, calling now for delicate negotiations and now for the drafting of intricate contracts and now for opinions on abstracts of title, what lawyer can hope to achieve high success without a talent for being impartial when occasion demands? Is the bar prepared to say that the lawyer must have a one-track mind, dedicated wholly and solely to advocacy?^{71a}

Does not tax practice itself demand of lawyer and of CPA and of lawyer-CPA faithful impartiality in reporting and, as well, a high order of advocacy to maintain and defend a choice among competing concepts, at times in accounting and at times in law? Does not the CPA himself, purely in the domain of accountancy, need to make a choice among competing accounting concepts—and then staunchly defend that choice?⁷²

We may concede that, for the lawyer-CPA, occasions of conflict of interest may arise. For example, when he renders a certificate or opinion in his audit report, after he has counselled as attorney on one or more significant transactions involved, he may be obliged to withdraw as an accountant. But situations of conflict of interest

^{71a} "In his planning, the lawyer aims at arrangements that will achieve the client's immediate objectives, safeguard his larger interests, regularize the means by which his objectives are achieved, and prevent him from becoming embroiled in legal controversy. The lawyer in private practice is therefore not only an advocate, legal counselor, and a draftsman, he is also something of a business and political statesman, a management consultant, an ethical counselor, and a medium for form, order, and cooperative activity." AMERICAN BAR FOUNDATION, *op. cit. supra* note 54, at 10.

⁷² "[I]n counseling their clients both the attorney and the CPA should maintain essentially the same attitude of objectivity." Comment, 19 LA. L. REV. 830, 838 (1959).

are not unknown to the lawyer as a lawyer. Such occasions probably arise with less frequency for the lawyer-CPA as such than for the lawyer as lawyer. When they do occur, it is the lawyer-CPA who suffers in his practice, not the client.

(3) As to privileged communications, we may note at the outset that in a matter where the point is likely to be vital, the client will probably not consult the CPA-lawyer, or even his regular counsel—more likely he will seek a specialist in criminal law. In consequence, the CPA-lawyer's practice, not the interests of the client, will suffer. The risk of non-privilege is minimal, in view of the CPA successes in the tax field. In any case, we deal here with aspects at the periphery, not at the heart of the problem.

We should be careful not to overstate the limitations of the CPA as to privileged communications nor to overstate the extent of the privilege with respect to attorneys.⁷³ By statute in thirteen states or more, the CPA enjoys various degrees of privileged communication,⁷⁴ and even in other states the privilege does apply where the information is given to the CPA-lawyer as lawyer.⁷⁵ In addition, non-CPA-lawyers engage extensively in accounting work; when the attorney renders such service, he occupies the same status as to privilege as does the CPA-lawyer: "It seems established that when an attorney acts as an accountant in particular transactions with a client, the privilege which is ordinarily characteristic of attorney-client communications is lost."⁷⁶ Furthermore, the attorney's privileged status has significant limitations, notably where his accounting service or the independent CPA's work is performed prior to the client's initial consultation with the lawyer.⁷⁷

In summation, it appears that all factors point to the conclusion that banning dual practice is contrary to the interests of the public. Indeed, it is difficult to conceptualize *any* public good which is served by the prohibition.

⁷³ For an extensive discussion of these matters, see Subcommittee on the Attorney-Client Privilege Study, *Report*, ABA Section of Taxation Bulletin, April 1965, p. 83.

⁷⁴ See 8 WIGMORE, EVIDENCE § 2286, at 533 n.22 (1961).

⁷⁵ Annot., 38 A.L.R.2d 670 (1954); *cf.* *United States v. Threlkeld*, 241 F. Supp. 324 (W.D. Tenn. 1965) (extent of privilege of CPA-lawyer in tax case); *In re Fisher*, 51 F.2d 424 (S.D.N.Y. 1931) (no privilege for accounting information given to lawyer); *Clayton v. Canida*, 223 S.W.2d 264, 266 (Tex. Civ. App. 1949) (same).

⁷⁶ Annot., 38 A.L.R.2d 670, 671 (1954). "The cases are in conflict regarding the circumstances under which the attorney-client privilege extends to accountants." Annot., 96 A.L.R.2d 125, 131 (1964).

⁷⁷ See *United States v. Threlkeld*, 241 F. Supp. 324 (W.D. Tenn. 1965).

V

STATE BARS WHICH DISAGREE WITH OPINION 297

There are probably many more CPA-lawyers in New York than in any other jurisdiction. It was the New York County Lawyers Association that initiated the litigation in the celebrated *Bercu* case, thus provoking the stormy controversy between the two professions.⁷⁸ Yet these New York Bar Associations were the first to reject the view adopted by the ABA Ethics Committee that the dual practice is unethical. In a joint opinion issued in 1950, the New York County and City Bar Associations concluded that the dual practice and the dual designation are entirely proper, provided that the dual practitioners "in the practice of their profession as certified public accountants, adhere to the professional standards applicable to attorneys at law with respect to advertising and solicitation."⁷⁹

The New York Committees felt that dual designation was not advertising. They expressly recognized the principle

that an attorney at law, acting as such, may not by any form or medium of advertising, announce to the public at large that he has a special skill in a particular branch of the law. This prohibition extends to every type of publicity, including legends on office doors, stationery, announcements, letters, circulars, etc.⁸⁰

But the committees found no impropriety, for example, in placing a legend on the office door designating the occupants as both lawyers and CPAs. "In our opinion the proposed legends on the office door would merely identify the firms occupying the premises and the professions practiced by them therein, and would not constitute either advertising or solicitation . . . within the meaning of Canon 27."⁸¹

The opinion of the New York City and New York County committees on professional ethics has been adopted by the Nassau Bar Association.⁸²

⁷⁸ See paragraph accompanying note 9 *supra*.

⁷⁹ COMMITTEES ON PROFESSIONAL ETHICS OF THE NEW YORK CITY BAR ASS'N & THE NEW YORK COUNTY LAWYERS' ASS'N, OPINIONS 447 (1956) (County Opinion 388, 1950; City Opinion 743, 1949).

⁸⁰ *Ibid.*

⁸¹ *Ibid.* The opinion is discussed in DRINKER 224-25, and in Note, 63 HARV. L. REV. 1457 (1950).

⁸² *Newsday* (Long Island, New York), April 15, 1965.

The Hennepin County (Minnesota) Ethics Committee concluded in a well-considered opinion that "the dual practice by itself and dual listings alone are not, under the facts presently presented, in violation of the Canons of Ethics."⁸³ It rejected the Opinion 297 interpretation as not binding "even though the Canons of Ethics of the American Bar Association have been adopted by the Supreme Court of Minnesota."⁸⁴ It overruled the arguments of "self-touting" and "feeder"; it stressed the public welfare; and it adopted the New York view. This Minnesota committee suggested the wisdom of separate letterheads and the like, but imposed no such requirements.⁸⁵

The Committee on Professional Ethics of the Idaho State Bar, in an extensive opinion, decided that:

An attorney who is also qualified as a certified public accountant may carry the designation "Certified Public Accountant" on his office door, his professional card, and on his letterhead; and may practice both professions from the same office, providing that he adheres to the professional standards applicable to attorneys at law with respect to advertising and solicitation.⁸⁶

In twenty-seven states the concurrent practice is either affirmatively approved by the bar committees or is not regarded as an appropriate area of challenge in the public interest.⁸⁷

VI

CONSTITUTIONAL LIMITATIONS

Even if it were admitted that dual practice by a lawyer-CPA should be suppressed as a matter of ethics, the enforcement of such suppression by the courts in their supervisory role over the conduct of lawyers raises serious constitutional problems. Dual practice may well be a constitutionally-protected right which cannot be abridged.

⁸³ Hennepin County (Minn.) Ethics Comm., *Opinion on Dual Practice by Attorneys and CPAs*, May 28, 1964.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ COMMITTEE ON PROFESSIONAL ETHICS, IDAHO STATE BAR, OPINION NO. 10, in *The Advocate* (Idaho State Bar Foundation), April 1959, p. 4.

⁸⁷ Informal correspondence between the bar associations of the several states and members of the American Association of Attorney-Certified Public Accountants, Inc. has been summarized, showing that the bar committees in 27 states have taken no position with respect to the concurrent practice; that 6 other states are indecisive; and that in most of the 15 states where the bar committees have declared in favor of Opinion 297, no meaningful implementation is in evidence.

The state cannot arbitrarily limit the practice of law, even though it can place restrictions thereon.⁸⁸ "We need not enter into a discussion of whether the practice of law is a 'right' or 'privilege.' Regardless of how the State's grant of permission to engage in this profession is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons."⁸⁹ "We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association."⁹⁰

It is true that the statements quoted above come from cases where some first amendment right was involved, and that in the absence of an infringement of such preferred rights, the Supreme Court has in recent years been most hesitant to interfere with legislative judgments where the interest involved is a purely commercial one.⁹¹ On the other hand, the freedom of the lawyer to operate in

⁸⁸ "A State can require high standards of qualification, such as good moral character or proficiency in its law, . . . but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. . . . Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory." *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957). Cf. *Willner v. Committee on Character & Fitness*, 373 U.S. 96 (1963); *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117 (1926). But cf. *Martin v. Walton*, 368 U.S. 25 (1961) (per curiam).

It is possible that in some areas of practice the lawyer-CPA will be completely insulated from state interference. In *Sperry v. Florida*, 373 U.S. 379 (1963), the petitioner had been enjoined by Florida from preparing and prosecuting patent applications because he was a non-lawyer and his activities constituted the unauthorized practice of law in Florida. The Supreme Court reversed on the basis of the supremacy clause because petitioner was registered to practice by the United States Patent Office. The case is significant for two reasons. First, it would clearly seem to permit CPAs, and hence lawyer-CPAs, who are licensed to practice before the Treasury Department, to engage in tax work even if doing so violates state law. See Dean Griswold's comments in *Proceedings of the Assembly: 86th Annual Meeting, Chicago*, 49 A.B.A.J. 980, 992 (1963). Second, the case perhaps gives some indication of the Supreme Court's disfavor of the practice of granting an individual the right to engage in professional activity with the one hand, and restricting that right with the other.

If the ABA itself attempted to impose sanctions on the lawyer-CPA, such as barring him from ABA membership, the attempt might be unconstitutional. See *Falcone v. Middlesex County Medical Soc'y*, 34 N.J. 582, 170 A.2d 791 (1961); *Kurk v. Medical Soc'y, Inc.*, 46 Misc. 2d 790, 260 N.Y.S.2d 520 (Sup. Ct. 1965).

⁸⁹ *Schwartz v. Board of Bar Examiners*, *supra* note 88, at 239 n.5.

⁹⁰ *Konigsberg v. State Bar*, 353 U.S. 252, 273 (1957).

⁹¹ E.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963), where the Court refused to declare invalid a statute forbidding non-lawyers from engaging in debt adjusting: "Unquestionably, there are arguments showing that the business of debt adjusting has social

the best interests of the public seems to include elements which transcend the commercial scene.⁹² In this connection, *NAACP v. Button*⁹³ and especially *Brotherhood of Railroad Trainmen v. Virginia*⁹⁴ indicate an awakening of the proposition that there is a deep public interest in having available adequate legal aid in whatever form the public requires it.⁹⁵ While both of these cases did involve the protection of some group's first amendment rights, they nevertheless indicate that perhaps the Court will not refuse to strike down limitations on the activities of lawyers which tend to violate the due process and equal protection clauses, despite the Court's recent general attitude in commercial cases.⁹⁶

It is also highly possible that the Court's "hands off" attitude in commercial regulation is inapplicable in the situation at hand. When the courts of a state (or the local bar associations) adopt a rule banning the dual practice, there is a serious problem in the separation of powers—it is not the legislature which is adopting

utility, but such arguments are properly addressed to the legislature, not to us." *Id.* at 731. "If the State of Kansas wants to limit debt adjusting to lawyers, the Equal Protection Clause does not forbid it." *Id.* at 732-33. (Footnote omitted.) *Cf.* *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949). *But cf.* *Morey v. Doud*, 354 U.S. 457 (1957).

⁹² This same argument, of course, can be and has been made in any case of commercial regulation. However, the important role which lawyers in the United States have traditionally played in protecting the fundamentals of our system seems to place regulation of them in a more preferred position than the ordinary merchant or businessman.

⁹³ 371 U.S. 415 (1963). The Court invalidated as an unconstitutional restriction on freedom of association an effort by Virginia to suppress the NAACP's practice of encouraging and providing legal counsel for litigation to secure constitutional rights of Negroes.

⁹⁴ 377 U.S. 1 (1964). Citing *NAACP v. Button*, the Court invalidated Virginia's suppression of a union's practice of encouraging suits by its members and their families against the railroads for employee injuries, and of recommending specified lawyers for such suits.

⁹⁵ *Cf.* the following language from *Kurk v. Medical Soc'y, Inc.*, 46 Misc. 2d 790, 801-02, 260 N.Y.S.2d 520, 531 (Sup. Ct. 1965), in which the court compelled the defendant society to admit the plaintiff to membership: "[T]he offending provisions of the society's constitution and by-laws are void not only because they violate the fundamental rights of the petitioner as an individual, but also because, in addition, the public is also injured to the extent that it is restricted in its free and voluntary choice of a physician. In *United States v. American Med. Assn.* (110 F.2d 703, 712, cert. den. 310 U.S. 644) the court succinctly stated its concern for the public weal in matters such as this when it said (p. 712): 'Restraints prohibited . . . are those which unduly hinder a person from employing his talents . . . in any lawful undertaking and thus keep the public from receiving . . . services as freely as it would without such restraints.'"

⁹⁶ This is suggested by McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CR. REV. 34, 58-62. *Cf.* *Harper v. Virginia State Bd. of Elections*, 34 U.S.L. WEEK 4305 (U.S. March 24, 1966).

the policy, and hence the usual power of the electorate and all members thereof to maintain an influence on the policy adopted is absent.⁹⁷ When it is solely the judiciary which is formulating the policy, the Supreme Court's role is not so limited as it is when the legislature has made the decision.

In combination with these factors is the point that a part of a man's livelihood is being taken away from him. With increased government regulation of a man's opportunity to make a living, it is becoming increasingly important to maintain safeguards on the possibility of arbitrary governmental action,⁹⁸ and the Court is perhaps becoming cognizant of this. Perhaps the fact that all the recent Supreme Court decisions involving conduct of lawyers were first amendment cases is unimportant; the language quoted at the beginning of this section may mean exactly what it says.

If in fact the Court would, therefore, be willing to review the reasonableness of the dual practice ban, it would appear that the ban could not pass constitutional muster. So far as due process is concerned, not only does there seem to be no rational basis for this serious limitation on the activity of lawyers, as has been previously pointed out in this article,⁹⁹ but in addition:

1. There is an adequate alternative available which does not so seriously limit the individual¹⁰⁰—the continuing control of lawyers' conduct exercisable by the judiciary whenever actual, not merely potential, ethical transgressions occur. There is no indication that this control has ever proved inadequate.

2. Lawyer-CPAs are denied an opportunity to be heard at the time the policy is adopted, in a situation where they constitute a fairly small group, the policy is directly aimed at them, and there is an immediate and serious impact on their activities.¹⁰¹

⁹⁷ The separation of powers imposed by the Constitution on the federal government is not, of course, binding on the states. However, the presence or absence of a proper allocation of powers may indicate whether or not a deprivation of due process exists. *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957). *Cf. United States v. Brown*, 381 U.S. 437 (1965).

⁹⁸ See generally Linde, *Constitutional Rights in the Public Sector*, 40 WASH. L. REV. 10 (1965); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

⁹⁹ See part III of this article.

¹⁰⁰ "In a series of decisions, this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

¹⁰¹ See *Morgan v. United States*, 298 U.S. 468 (1936). See generally 1 DAVIS, ADMINISTRATIVE LAW § 7 (1958).

3. When the policy is adopted, the lawyer-CPA must either abide by it or risk serious disciplinary sanctions by challenging it,¹⁰² unless the state has declaratory judgment machinery which would somehow allow the CPA-lawyer to seek mandamus against the entire judiciary to prevent them from enforcing the ban against him—a difficult problem when the judiciary is deciding whether or not to enjoin itself.

There also seems to be a violation of equal protection. No valid reason can be formulated to justify singling out the lawyer who is also a CPA for restrictive treatment without additionally banning dual practice by, for example, the lawyer who is also a doctor.¹⁰³ Remember that the dual practice is not allowed even by a CPA-lawyer whose accounting business is unrelated to his law practice. While “the reform may take one step at a time,”¹⁰⁴ it is not the legislature which is here acting—nor, as pointed out previously, is the “evil” which is the subject of the reform an evil at all. The situation thus dangerously approaches, indeed probably becomes, a case of invidious discrimination.¹⁰⁵

These are difficult and largely unexplored constitutional problems. The foregoing exposition is not intended to be an exhaustive study of them, for that would involve a whole article in itself, if not more. But at the least, the arbitrary ban on dual practice brings to the fore substantial and important constitutional inquiries.

CONCLUSION

The concurrent practice of law and accountancy, ethically conducted in the true tradition of both professions, serves a genuine public interest and suitably performs the proper functions of the two professions. To suppress or restrict the dual practice would be a disservice to the bar and to the public.

Contrary to Opinion 297, therefore, it is submitted that it is permissible and not unethical for a lawyer who is also a certified public accountant: (1) to engage concurrently in the practice of both professions on his own account, in one office or in separate offices;

¹⁰² Cf. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965): “Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights.”

¹⁰³ See paragraphs accompanying and following note 54 *supra*.

¹⁰⁴ *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955).

¹⁰⁵ See *Morey v. Doud*, 354 U.S. 457 (1957). *But see* *Martin v. Walton*, 368 U.S. 25 (1961) (per curiam).

(2) to identify himself as an attorney and as a certified public accountant; (3) to so identify himself in professional directories, in telephone directories (including the classified section), in city directories, in building directories, on his office door or shingle, on his letterheads, cards and other permissible professional announcements, since these are appropriate professional identifications, not multiple listings and not the advertisement of a specialty; (4) to be a member of a law partnership with other lawyers; and (5) to be a member of a CPA partnership with other CPAs.