

Occupational Boundary Setting and the Unauthorized Practice of Law  
by Real Estate Brokers

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Real estate brokers and lawyers have been engaged in a longstanding "boundary dispute" over which activities brokers can perform in real estate transactions without engaging in unauthorized practices of law. In general, state court decisions have lacked uniformity and no universal standard has emerged for making unauthorized practice of law determinations, some broker activities have been found to be clearly unauthorized practices while others have not surfaced as issues in these cases. This paper examines the manner in which courts have resolved jurisdictional disputes between licensed lawyers and licensed real estate brokers and considers whether the precedents established have tended to promote or impede the efficiency of exchange in the market.

The economic analysis of the boundary dispute between brokers and lawyers parallels approaches taken to examine occupational licensing regulation. Licensing tends to increase competition by alleviating informational problems in [he market, but has anticompetitive side effects. The conclusion from this analysis is that restrictive boundary-setting will likely exclude acceptable services (anticompetitive effect) as well as inferior services (procompetitive effect) from the market since the expertise of real estate brokers is substitutable for the expertise of lawyers in routine transactions. Any adverse effects on the market will be exaggerated if the demand for legal services in real estate transactions is fairly inelastic.

## I. INTRODUCTION

State courts have adjudicated a large number of cases brought by state bar associations representing legal professionals claiming that real estate brokers engage in unauthorized practices of law.<sup>1</sup> Usually these actions, which have also been brought against escrow agents (see Hino, 1982), title insurance companies (Brossman and Rosenberg, 1979), and lending institutions (see, e.g., Comment, 1972), seek injunctive relief from certain legal activities performed by nonlawyers during the course of a real estate transaction, including the preparation of sales contracts, deeds, mortgages, and leases.

While state court decisions in general have lacked uniformity and no universal standard has emerged for making unauthorized practice of law determinations, some broker activities have been found to be clearly unauthorized practices while others have not surfaced as issues in these cases.<sup>2</sup> By exclusion, a significant gray area remains in the relationship between lawyers and real estate brokers. State courts, for example, have not agreed on whether real estate brokers should be allowed to fill in blanks on prepared contract for sale, deed, and mortgage forms. The scores of unauthorized practice cases involving real estate brokers (and other parties performing like activities) and the absence of a consensus among state courts are manifestations of a "boundary dispute" between these two licensed groups.

Responsibility for regulating the practice of law in each state is vested in the state's Supreme Court. The Arizona Supreme Court in 1962, for example, held that real estate brokers filling in blanks in standard forms were in violation of the state's unauthorized practices rule.<sup>3</sup> Shortly thereafter, a statewide

referendum was passed which legalized these activities (for further discussion see Adler, 1963). In the state of Washington the issue of unauthorized practice of law by lay persons involved in real estate sales resulted in the recent enactment of a state statute<sup>4</sup> that was later ruled unconstitutional by the Washington Supreme Court (Hagan & Van Kamp v. Kassler Escrow).<sup>5</sup> In certain states boundaries are drawn closely in favor of lawyers, while in other states the courts have been more tolerant of real estate brokers performing legal functions directly related to their business. Such actions by the courts are a form of market intervention and the courts can exert a significant impact on the price-quality equilibrium in the market depending on how the boundaries between licensed occupations are drawn. Thus, one criterion for examining legal precedents involving claims of unauthorized practices of law by real estate brokers is their effect on the efficiency of exchange in the market.

This paper examines the manner in which courts have resolved jurisdictional disputes between licensed lawyers and licensed real estate brokers and considers whether the precedents established have tended to promote or impede the efficiency of exchange in the market.<sup>6</sup> Section II contains a review and discussion of the approaches used by state courts to resolve occupational boundary disputes, in general, and conflicts between lawyers and real estate brokers specifically. In Section III, the economics of occupational boundary setting are discussed. The economic concepts presented here are applied in Section IV to assess the relative efficiency of boundary setting between lawyers and real estate brokers by courts in the various states. This analysis considers previous research into the economic functions of real estate brokers in real estate

transactions. A summary of the results and conclusions is provided in the final section.

## II. JUDICIAL RESOLUTION OF OCCUPATIONAL BOUNDARY DISPUTES

Jurisdictional disputes are common among licensed occupational groups performing related services. State bar associations, for example, in addition to their quarrels with real estate brokers, have brought unauthorized practice of law suits against certified public accountants for performing certain tax services (Bittker, 1966; Misieurcz and Parsons, 1977). Also, with the advent of licensed paramedical and parodontal occupations in recent decades, some boundary problems have arisen between occupational groups within the medical and dental professions (see Note, 1983).

A review of state court decisions<sup>7</sup> involving jurisdictional disputes between licensed occupations, reveals that such cases are resolved by assigning the disputed service into one of two categories.<sup>8</sup> First, state courts have ruled that certain services are clearly within the domain of particular occupational groups and can only be offered to the public for compensation by those groups. Second, state courts have ruled that some services may be provided by more than one occupational group if provision of the service is incidental to related services that one of these groups is already licensed to market and no separate fee is charged for the "incidental service."

State courts agree that each licensed occupation has certain services which are clearly within the domain of that occupation. Physicians, for example, are uniquely qualified to diagnose and treat disease as are lawyers to litigate conflicts involving matters of law. Disputes about occupational boundaries arise most often from unauthorized practice allegations regarding the

provision of services which are clearly not a part of the core of services of any particular occupational group and may be incidental to the services performed by some group.

While state courts agree on which services clearly fall within the domain of particular licensed occupations, there is no general agreement on whether the services that fall within or near the domain of one occupational group can be performed by other groups as incidental services. The courts in some states (Pennsylvania and Minnesota are examples) set rather flexible boundaries by allowing others to provide services in or near the core of a particular occupational group if the service is incidental to the performance of services in the core of services of others and no separate fee is charged. In these courts, the plaintiff usually bears the burden of proving that the disputed service is both within the domain of services of a group of which the defendant is not a member and not incidental to the performance of services the defendant is licensed to market. In addition, the plaintiff must usually show that the defendant held himself or herself to be specially qualified to perform the disputed service and sought separate compensation (Brossman and Rosenberg, 1979; Weckstein (1978).

Courts in other states (e.g., Kentucky and Florida) have established rather rigid boundaries between licensed occupations by rarely allowing the services which fall within or near the domain of one occupational group to be performed by another group. Specifically, these courts generally require that plaintiffs in unauthorized practice suits to merely show that the disputed service is within the domain of an occupational group of which the defendant is not a member and show that the defendant sought compensation, either directly or indirectly, for performance of the disputed service. Little importance is given to the fact that the

disputed service may be incidental to the provision of services that the defendant is licensed to market (ibid.).

The comparative actions of state courts in interpreting the incidental services doctrine (that is, setting flexible or rigid boundaries between licensed occupations) have varying economic impacts on the markets for licensed services among the states. The economic implication of this form of market intervention by state courts is that consumers in states where occupational boundaries are established flexibly have a broader range of choices among sellers providing related services than do consumers in states where the courts draw boundary lines more rigidly. Thus, occupational boundary setting by state courts has a direct effect on the price-quality equilibrium for occupational services among the states.

#### A. Resolution of Boundary Disputes between Lawyers and Real Estate Brokers

The states license attorneys to practice law and license real estate brokers to intermediate real property transfers. The activities of these occupational groups, however, are not always mutually exclusive. A review of state court decisions resolving unauthorized practice disputes between lawyers and real estate brokers reveals that, in the overwhelming majority of cases the preparation of legal documents for transactions in which brokers were directly involved has been the disputed service. Preparing such documents for transactions in which the broker is not otherwise involved in and brokers offering advice to parties concerning their legal rights, however, have uniformly been found to be unauthorized practices of law.<sup>9</sup>

State courts, in general, tend to permit brokers to prepare legal document incidental to their business.<sup>10</sup> Just what documents are considered incidental is the subject of some disagreement. Shedd (1981) divides the set of documents in a real estate transaction into "first-phase documents" which include listing agreements, offer and acceptance forms, and sales contracts, and "second-phase documents" which are mortgages, title opinions, and deeds. The courts agree in principal that the preparation of listing agreements and offer and acceptance forms are incidental services of real estate brokers and therefore do not constitute unauthorized practices of law. In most states, brokers may also prepare sales contracts as long as this activity is restricted to filling in the blanks of pre-prepared forms that have been either drawn up or approved by an attorney.

The preparation of second-phase documents, however, is viewed by the courts in several states (for example, Florida and Illinois) as affecting title to the property and therefore falls outside of the domain of services of real estate brokers. In other states (e.g., Colorado and Michigan), second-phase documents are treated by the courts like sales contracts in that brokers may fill in the blanks of pre-prepared forms as long as an attorney has drawn up or approved the forms and no separate fee is charged by brokers for the incidental service.

While the courts have invoked a variety of tests in broker-unauthorized practices of law cases in addition to the incident-to-business test (that is, incidental services), including the simple-complex test, the legal skill test, the public policy test, the compensation test, the traditional-practice test, and the pretense of legal credentials test (see Brossman and Rosenberg, 1979, p. 442), cumulatively these tests simply mean that the courts attempt

to balance public protection and public convenience and expense when allowing real estate brokers to perform legal services incidental to their business, provided they do not hold themselves out as lawyers and do not charge a separate fee for the incidental services. As in the general case of occupational boundary setting, the courts in some states apply the incidental services doctrine strictly, thus drawing rigid boundaries between lawyers and real estate brokers (e.g., Florida and Illinois). Other state courts interpret the incidental service doctrine more broadly in broker-unauthorized practice of law cases, thus establishing more flexible boundaries (e.g., Colorado and Michigan). The degree of rigidity in the boundaries between lawyers and brokers will affect consumer choices and the price-quality equilibrium of the market for legal services in real estate transactions. While some empirical evidence exists to suggest that public injury is not widespread when legal services in real estate transactions are performed by lay persons (Rhode, 1981), examining this issue in an economic context as a direct trade-off between the price and the quality of services seems to be the appropriate theoretical path to follow.

### III. Economic Analysis of Occupational Boundary Setting

The establishment of boundaries between two or more licensed occupations can exert a significant impact on the efficiency of exchange in the markets for shared services.<sup>11</sup> The efficiency of exchange in occupational service markets is defined as the extent to which the marginal product (MP) of the service, an indicator of quality, corresponds to the price (P) of the service. In the short run, the price-quality equilibrium for a service can assume one of three states,

1.  $MP = P$
2.  $MP > P$
3.  $P > MP$

where  $MP = P$  is a state of efficient exchange,  $MP > P$  is a state of exchange characterized by informational problems, and  $P > MP$  is a state of seller-dominated exchange. An economic assessment of occupational boundary setting therefore can proceed from an examination of whether the establishment of highly restrictive boundaries tends to cause  $P$  and  $MP$  to converge or diverge, given the prevailing state of the market.

The magnitude of the impact on the market for a service from the imposition of occupational boundaries depends on certain characteristics of the shared service and characteristics of the market in which the service is traded. So, prior to considering any market effects, a discussion of the relevant characteristics of occupational services and their markets is warranted.

#### A. Factor Substitution in the Provision of Occupational Services

Assuming that suppliers of occupational services are profit-maximizing firms, the most important input to the production of such services (i.e., determinant of the firms' ability to supply these services) is the sellers' expertise. Expertise is acquired by the training a person obtains. This training can be either "general" or "specific" (Becker, 1962, 1975, pp. 19-37). General training (e.g., liberal arts college education) gives a person "general expertise" that is applicable in a wide variety of situations and localities. Specific training (e.g., special

schooling provided by a particular firm in a particular industry) gives a person "specific expertise" that is applicable only in a particular situation or locality. While most training a person receives is neither completely general nor completely specific, this classification system is useful for explaining why more than one occupational group may be technically capable of supplying a particular service. The substitutability of general and specific expertise is a central concern in evaluating the impact of occupational boundary setting. Even though members in a licensed occupation possess considerable general expertise, members of other occupational groups with specific expertise may be able to perform the service equally well if general and specific expertise are substitutable.<sup>12</sup>

Perfect factor substitution for the case of general and specific expertise is depicted in Figure 1. The vertical and horizontal axes represent the levels of specific expertise and general expertise respectively necessary to provide a particular quality of service. The isoline  $Q_1$  is the lowest quality level of service while  $Q_3$  is the highest. Points  $A_i$  ( $i = 1 \dots 3$ ) represent the combinations of specific and general expertise at various quality levels maintained by suppliers who possess more specific than general expertise. And,  $G_i$  ( $i = 1 \dots 3$ ) represent combinations where general expertise dominates.

These relationships are quite general since the degree of factor substitution will vary across services. There are, however, two important implications which emerge when a high degree of substitutability exists between general and specific expertise. First, members of an occupational group with greater specific expertise than general training may be able to perform a service at the same quality level as another group which has more general

training than specific expertise. Second, members of an occupational group may be able to increase the quality level of the services they offer by acquiring either more general expertise or more specific expertise. The strength of this factor substitution determines the extent to which boundary strength of this factor substitution determines the extent to which boundary setting actually restricts supply by precluding qualified, but not necessarily identically trained, suppliers from the market.

## B. Elasticity of Demand

If occupational boundary setting restricts the supply and increases the price of a service, then consumers will either seek available substitutes or elect to do without the service when demand for the service is sufficiently elastic. The availability of substitutes for restricted services is determined by the ability of the market to provide acceptable surrogates via alternative forms of information or performance. For example, if consumers are willing to consult a book on do-it-yourself divorce instead of an attorney, then such publications can be viewed as substitutes for the corresponding services. In general, consumers will shift to a substitute only if the transfer costs" are lower than the increase in the price of the restricted service. Thus, restrictions on supply imposed by restrictive occupational boundary setting I will induce consumers to adopt substitutes only if the increase in the price of the restricted service is sufficient to offset the transfer costs. Since transfer costs vary from service to service, as well as from consumer to consumer, substitutes may not be uniformly available to all consumers. In general, the greater the availability of substitutes for a restricted service, the smaller

the impact exerted on the market price-quality equilibrium by restrictive boundary setting.

Overall, the elasticity of demand for a restricted service is determined by both the availability of substitutes and the willingness of consumers to do without the service altogether. Therefore, occupational boundary setting which causes a decrease in the supply of a service for which demand is relatively inelastic (i.e., a necessity) will generally exert a greater impact on the market than boundary setting which decreases the supply of a service commonly regarded as a luxury.

### C. Informational Problems in the Market

Over the past decade economists have begun to evaluate occupational licensing in terms of its ability to provide information to potential consumers about quality of services. The emergence of this informational perspective on the role of occupational licensing (and, in turn, occupational boundary setting) can be traced to a seminal paper by George Akerlof (1970). Akerlof suggests that occupational licensing may improve the efficiency of exchange in markets in which buyers are unable to effectively differentiate the various services offered for sale on the basis of quality. In such markets, sellers possess information about quality but may refuse to disclose it to potential buyers. Accordingly, if this information disparity or "asymmetry" between buyers and sellers is not corrected, a type of market failure referred to as "adverse selection" may result (see Johnson and Corgel, 1983, for more details).

Licensing is one approach to reducing informational asymmetry in the markets for occupational services (for alternative approaches see *ibid.*) and since restrictive boundary setting tends to increase the impact of occupational licensing, it may improve the efficiency of exchange in markets where consumers are unable to distinguish alternative services on the basis of quality. Conversely, in service markets not characterized by informational asymmetry, it may lower the efficiency of exchange.

The extent to which occupational boundary setting increases or decreases the efficiency of exchange in a service market is determined by both the nature of the restrictions imposed and the pre-existing state of the market. For example, boundary setting that excludes only the sale of inferior quality services may improve the efficiency of exchange in a market characterized by informational asymmetry. Conversely, boundary setting that excludes the sale of both inferior quality services and services of acceptable quality may decrease the efficiency of exchange in a market in which consumers are able to differentiate services on the basis of quality.

The relationship between the efficiency of occupational boundary setting and the pre-existing state of the market, examined in the next section, implies that the efficiency of a particular set of restrictions cannot be assessed without reference to the market that they affect. Accordingly, a boundary setting scheme that is efficient in one market may be inefficient in another.

#### IV. ECONOMIC EFFICIENCY OF BROKER/LAWYER BOUNDARY SETTING

As discussed in Section II there is considerable variance in the manner in which the courts in different states apply the

"incidental services" doctrine. State courts that apply the doctrine narrowly tend to establish rigid territorial boundaries between lawyers and real estate brokers, while courts that apply the doctrine more broadly tend to allow real estate brokers greater latitude in providing legal services incidental to real estate transactions.

As discussed in Section III, the extent to which occupational boundary setting can alter the market price-quality equilibrium for a restricted service is determined by the extent to which potential suppliers of the service are precluded from the market, the elasticity of demand for the service, and the extent of information asymmetry in the market. Since this paper is concerned with economic efficiency and the unauthorized practices of law by real estate brokers, the emphasis here is on narrow, rather than broad, applications of the incidental services doctrine. Such applications by the courts will be evaluated on the basis of these three factors affecting the market price-quality equilibrium (i.e., the relationship between MP and P).

#### A. Efficiency of Lawyer/Broker Boundary Setting from Narrow Applications of the Incidental Services Doctrine

From a partial equilibrium perspective, the greater the tendency for the courts to exclude competent suppliers from the market the greater the tendency for  $P > MP$ . Thus, restrictive boundary setting will serve to increase the price of legal services in a real estate transaction above the marginal product of the service if competent suppliers are being excluded. A determination as to whether real estate brokers are competent to perform incidental legal services (i.e., filling in the blanks for phase

two documents) depends on the degree of substitutability between the specific expertise acquired by real estate brokers through their handling of numerous transactions and the general legal expertise of college-trained lawyers. The economic literature on the role of real estate brokers in the market for transactional services is silent on this point. Yet the empirical finding that public injury has not been widespread when legal services in real estate transactions are performed by lay persons implies that the specific expertise of brokers can be substituted for the general expertise of lawyers without causing the public undue harm. Such results suggest that in states with rigid boundaries between lawyers and brokers  $P > MP$  for legal services in ordinary real estate transactions.

In general,  $P > MP$  when the demand for a service subject to restrictive boundary setting is relatively inelastic. While no estimates have been made of the price elasticity of demand for legal services in a real estate transaction, let alone the price elasticity of broker services, there would not appear to be any available and inexpensive (i.e., low transfer costs) substitutes. Thus, rigid boundaries drawn between lawyers and brokers for certain legal service in a routine real estate transaction would tend to increase prices above the marginal product of the service.

Finally, the greater the informational asymmetry in the market for the disputed service the greater the tendency for  $P = MP$  if boundary setting excludes only inferior-quality suppliers from the market. One might argue that the extent of informational problems is potentially great in every service market, yet it is more difficult to judge the effectiveness of a regulatory scheme designed to alleviate informational problems, whether it is a state imposed regulation, such as licensing;" or a judicial measure to

strengthen or supplement the licensing requirement, such as occupational boundary setting. Unauthorized practices of law prohibitions against real estate brokers will exclude incompetent brokers from providing incidental legal service thus improving the efficiency of exchange; however, some competent brokers may also be excluded.

## V. Conclusions and Implications for State Courts

Occupational boundary setting by state courts serves as a mechanism for the enforcement of occupational licensing laws. This form of judicial market intervention can therefore be evaluated as to its economic impacts in much the same way as the economic effects of licensing have been examined (see note 15 *infra*). Evaluation of occupational regulation reduces to an analysis of the trade-off between the competitive and anticompetitive effects of the regulation. Occupational regulations tend to increase competition by alleviating informational problems in the market that would otherwise lead to market failure (i.e., adverse selection). Anticompetitive side effects stem from the fact that competent suppliers may be excluded from the market by the regulatory scheme. These effects would be more severe the more inelastic the demand is for the service.

This same trade-off between competitive and anticompetitive effects underlies the evaluation of restrictive boundary setting between lawyers and real estate brokers. Does the public need to be protected from real estate brokers who perform incidental legal services? Are such violation of the license law serious enough to overcome arguments in favor of the incidental services doctrine? The theory presented here suggests that the anti-competitive side

effects of narrow applications of the incidental services doctrine in the case of real estate brokers are potentially serious enough to drive prices of incidental legal services above the marginal product of such services. While the empirical evidence is weak, the little evidence that does exist suggests that the expertise of real estate brokers (mainly specific) is substitutable for the expertise of lawyers in routine real estate transactions. Thus, restrictive boundary setting will likely exclude acceptable services as well as inferior services from the market. In addition, any adverse impacts on the market will be exaggerated if the demand for legal services in a real estate transaction is fairly inelastic, as expected.

## NOTES

1. "Broker" is used here as a generic term to describe both licensed real estate brokers and real estate salespersons. For discussions of recent cases and citations of earlier cases and literature see Craig (1978), Weckstein (1978), and Shedd (1981).
2. Shedd, *supra* note 1, finds that the preparation of legal documents by a real estate agent for a transaction in which the agent has no direct involvement and advising clients as to their legal rights clearly constitute unauthorized practices of law. Agent activities, such as the preparation of listing agreements and offers and acceptance documents, have not generally been issues in unauthorized practice suits.
3. *State Bar v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 366 P. 2d 1 (1961), *aff'd on rehearing*, 91 Ariz. 293, 371 P. 2d 1020 (1962).
4. Act of April 30, 1979, Ch. 107, 1979 Wash. Laws 1303 (codified at Wash. Rev. Code. Ch. 1962 (1981)).
5. *Hagan & Van Kamp, P. S. v. Kassler Escrow, Inc.*, 96 Wn. 2d 443, 635 P.2d 730 (1981). Also see Hino (1981).
6. This paper is concerned specifically with the problem of economic efficiency in judicial boundary setting between two licensed occupations. While presenting some interesting issues of its own, occupational licensing is taken as given. See Corgel and Jaffe (1984) and see note 16 *infra*.
7. Most cases of this type brought in federal courts have been dismissed on jurisdictional grounds. Federal courts have often concluded that such disputes involve interpretations of state rather than federal law. See Johnson and Corgel (1983).

8. Most state statutes merely prohibit unauthorized practices in licensed occupations, such as law, medicine, dentistry, and so forth, without defining their respective scopes of services. Some states' statutes offer a circular approach by defining, for example, the practice of law as what lawyers do. Thus, because of the vagueness of state statutes, the law underlying unauthorized practice decisions tends to be judicially derived. See Rhode (1981).
9. See, for example, *Hulse v. Criger*, 247 S.W.2d 855, 861 (Mo. 1952).
10. Additional discussion on this point and numerous case citations are found in Craig (1978), Weckstein (1978), and Brossman and Rosenberg (1979).
11. The initial part of Section III and parts of subsequent sections are abstracted from Johnson and Corgel, note 7 supra.
12. Licensed medical and licensed paramedical groups are good examples of these two types of occupational groups.
13. The most important of these costs is the loss, if any, in quality by changing to a substitute.
14. See Yinger (1981), Crockett (1982), Carney (1982), Jud (1983). Much of this literature is directed toward the pricing of real estate broker services and is reflective of the antitrust controversies of recent years. For discussions of the antitrust issues see, for example, Owen (1977), Miller and Shedd (1979), and Trombetta (1980).
15. Rhode (1981), pp. 33-35. Another point regarding the substitutability of specific for general expertise in the provision of incidental legal services in real estate transactions is that

substitutability should be strong given that the majority of such transactions are routine.

16. The occupational licensing literature is extensive. See, for example, Friedman (1962, pp. 137-160; Holen (1965); Maurizi (1974); Sebepard (1978); White (1979); Smith (1982); and Johnson and Corgel (1983).

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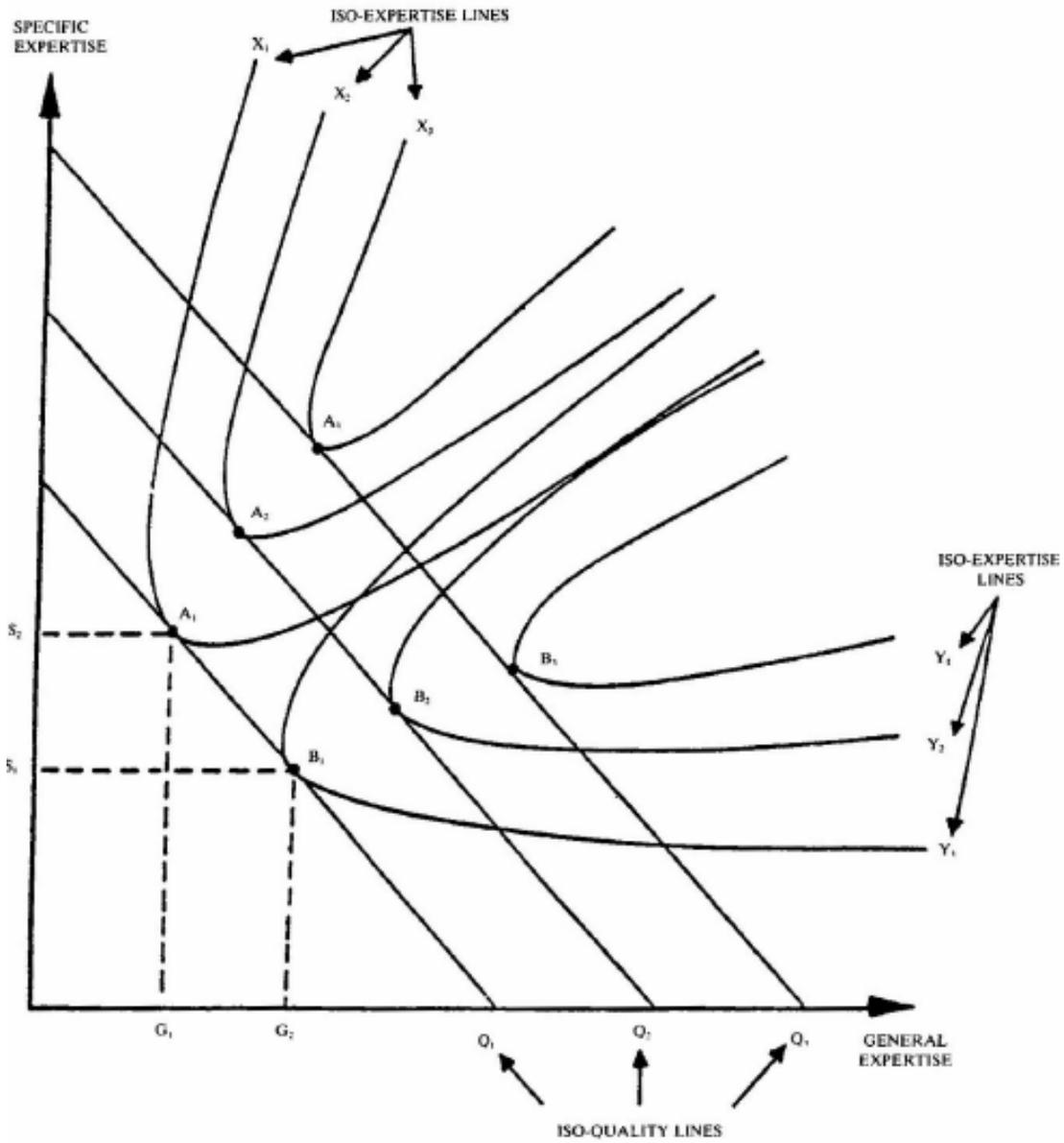


FIGURE 1. Substitutability of Specific Expertise for General Expertise in the Provision of Services