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Unauthorized Practice

Georgia Law Firm, Lawyers Are Indicted For Unauthorized Practice in North Carolina

A North Carolina grand jury March 15 indicted two Atlanta lawyers and their firm for engaging in the unauthorized practice of law in North Carolina.

The misdemeanor indictments were issued against F. Edwin Hallman Jr., H. King Buttermore III, and their firm Decker, Hallman, Barber & Briggs, over what they did in helping a North Carolina college investigate possible grade-fixing in its basketball program. The Georgia-licensed lawyers and their firm are accused of practicing law in North Carolina without being admitted as active, licensed members of the state bar, in violation of N.C. Gen. Stat. § 84-4.

The case illustrates the dissonance between state unauthorized practice statutes and the way lawyers often do business these days. Legal ethics experts say the matter is noteworthy in that criminal charges are nearly unheard of when licensed lawyers engage in limited cross-border activities.

"Even if the UPL rules were transgressed here, the decision to indict for this single matter is excessive and unique in my experience," New York University law professor Stephen Gillers told BNA. Gillers was a member of the ABA Commission on Multijurisdictional Practice, which formulated changes in the Model Rules of Professional Conduct that govern lawyers' practice across state and national boundaries.

"Criminal UPL prosecutions in cases like this are beyond modern memory," Fordham Law School professor Bruce A. Green said in an interview with BNA. "The lawyers must have felt like they were struck by lightning." Green served as reporter for the ABA's MJP Commission.

Expressing a similar reaction to the indictment was William T. Barker of Sonnenschein Nath & Rosenthal in Chicago. "UPL prosecutions of any kind are rare, as prosecutors typically have other priorities," Barker told BNA. He is the author of *Extrajurisdictional Practice by Lawyers*, 56 Bus. Law. 1501 (2001), and *The Interstate Practice of Law: Are You Crossing the Line?*, 67 Def. Couns. J. 436 (2000).

In a statement provided to BNA, the Decker firm asserted that "at no time did Decker, Hallman, Barber & Briggs practice law in North Carolina, including any work related to the preparation of the report" on the basketball scandal.

Controversial Report.

The Decker firm was hired in September 2002 by the trustees of Gardner-Webb University, a Baptist college located about 50 miles west of Charlotte, N.C., to conduct an internal investigation of a

controversy that erupted when then-president M. Christopher White admitted that he had directed the university's registrar to recalculate the grade-point average of a star basketball player who had previously been flunked in a course due to cheating. The recalculation restored the student's academic eligibility, and he went on to lead the team to a championship.

The chairman of the university's board of trustees issued a public statement that Hallman and his firm had been hired to "look into all aspects of the Gardner-Webb honor code, the situation in question, including actions by the president, and the subsequent unrest on campus."

The law firm interviewed more than 44 witnesses, reviewed university materials, and issued a report that largely cleared White and found fault with the conduct of certain officials and professors. The controversial report, which some professors viewed as a whitewash of White, fueled a heated dispute within the university and drew much attention from the media. After the board of trustees took action against two deans, several professors resigned in protest. White himself resigned in October 2002.

Later the NCAA put Gardner-Webb on probation for three years, partly based on White's conduct in getting the basketball player's grade-point average recalculated.

Local Lawyer Complained.

O. Max Gardner III, a North Carolina lawyer with ties to Gardner-Webb University, filed a complaint with the North Carolina State Bar alleging that the Decker firm and its lawyers had engaged in the unauthorized practice of law in North Carolina. Gardner told BNA that he filed the complaint under Rule 8.3 of the North Carolina Rules of Professional Conduct because, he said, the rule "requires members of the profession to initiate State Bar investigations when they know of a violation of the Rules."

Rule 8.3 states: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter."

Gardner's complaint alleged that the firm's report was "replete with many legal opinions on numerous acts," and that the firm subsequently provided additional legal services to the board of trustees, including letters to community residents in which the firm stated that it had been retained to represent Gardner-Webb University.

In one of those letters, the firm stated, "As attorneys for the University, we have a duty to respond to the University's concerns." The letter also stated, "We stand by our legal advice given to the Trustees." In another letter, the firm stated, "As you know, we have the pleasure of representing Gardner-Webb University concerning the current investigation of alleged impropriety by certain University officials."

Letter of Caution.

The bar's Authorized Practice Committee issued a "letter of caution" to Hallman and Buttermore in July 2003, finding that the lawyers held themselves out as attorneys for the university, both to its board of trustees and to outside parties, and that they had engaged in the unauthorized practice of law in violation of N.C. Gen. Stat. §§ 84-2.1 and 84-4. The letter cautioned the lawyers to refrain from such activity in the future, but the bar took no other action against them. (See *box*.)

The bar's rules governing the Authorized Practice Committee define a letter of caution as a communication from the committee to any person "stating that past conduct of the person, while not the

basis for formal action, is questionable as relates to the practice of law or may be the basis for injunctive relief if continued or repeated.”27 N.C. Admin. Code 1D § .0203(12).

Under Section .0206(4), the committee has the power to issue a letter of caution “in cases wherein probable cause is not established but the activities of the respondent are deemed to be improper or may become the basis for injunctive relief if continued or repeated.”

Pending are proposed bar rule amendments that would give the authorized practice committee the express authority to issue letters of caution when it finds probable cause to believe that the unauthorized practice of law has occurred. The amendments also would remove the definition of “letter of caution” from the bar rules governing the committee.

Lightning Strikes.

A grand jury in Cleveland County, N.C., issued indictments against Hallman, Buttermore, and the Decker firm, charging the lawyers with violating N.C. Gen. Stat. § 84-4 (“Persons other than members of State Bar prohibited from practicing law”). That statute makes it unlawful for any person or association, except those licensed as active members of the state bar, to prepare legal documents, to provide legal advice or services, or to act as an attorney or hold himself out as an attorney.

The indictments charge that from September 2002 through January 2003, Hallman, Buttermore, and the Decker firm unlawfully and willfully engaged in the practice of law without being admitted as an active member of the state bar and without being licensed to practice as an attorney-at-law by the North Carolina bar.

Under N.C. Gen. Stat. § 84-8, a violation of Section 84-4 is a Class 1 misdemeanor. For an individual with no prior convictions, the maximum penalty is 45 days' imprisonment or community punishment, and a fine in the discretion of the court. For a defendant that is not an individual, the penalty may consist of a fine only. N.C. Gen. Stat. § 15A-1340.23.

“Practice law” is defined in Section 84-2.1 to mean “performing any legal service for any other person, firm or corporation,” including advising and giving opinions about others' legal rights.

MJP in N.C.

After the ABA amended Model Rule 5.5 to authorize lawyers to engage in specified work outside their home state, North Carolina was one of the first states to embrace the new rule.

Like its Model Rule counterpart, North Carolina's version of Rule 5.5 allows an out-of-state lawyer to provide legal services if the lawyer is associated in the matter with local counsel who “actively participates in the representation.” In its statement on the UPL matter, the Decker firm asserted that “the Board of Trustees had separate local counsel available and present at the time of all meetings to advise it on legal issues in North Carolina law.”

North Carolina's version of Rule 5.5 also permits out-of-state lawyers to provide legal services for which pro hac vice admission is not required if the matter is reasonably related to “the lawyer's representation of a client” in a jurisdiction in which the lawyer is admitted to practice. The corresponding part of Model Rule 5.5 requires that the lawyer's services be reasonably related to “the lawyer's practice” in a jurisdiction where he is admitted.

North Carolina's amended Rule 5.5 went into effect March 1, 2003—after the conduct for which the

Decker firm and its attorneys were indicted. The bar committee that drafted the rule realized that it is at variance with the strict prohibition against unauthorized practice set out in North Carolina statutes, but concluded that the rule should reflect the reality of existing cross-border practice, according to a memorandum by the bar official who served as counsel to the committee. See 19 Law. Man. Prof. Conduct 151.

UPL or Not?

Gillers told BNA that until the facts are clear, it is not possible to say whether the Georgia lawyers practiced law in North Carolina or, if they did, whether they fall within a safe harbor permitting their conduct. According to Gillers, relevant questions include:

- where the lawyers did their work and what proportion was in North Carolina,
- the nature of the work they did,
- the laws they construed, and
- how they presented themselves to others.

Work the lawyers did in Georgia—even giving legal advice on North Carolina law—would not ordinarily be deemed the practice of law “in” North Carolina, Gillers said. “Nor is a factual investigation law practice, as private investigators know. And a statement that you ‘represent’ someone does not amount to holding out as a lawyer because all agents, not just lawyers, represent principals,” he said.

Boundaries Still Unclear.

Green pointed out that the ABA launched its study of multijurisdictional practice because it recognized that lawyers are providing all manner of legal services outside the states in which they are licensed and that clients are often well served as a result, while also recognizing that these practices were typically at odds with state UPL laws that fail to distinguish between legitimate and illegitimate interstate practices.

This controversy, Green said, illustrates that even after the MJP reforms “the lines between permissible and impermissible practices are unclear, although obviously to a much lesser extent than before.” The ABA’s MJP Commission anticipated that state courts would fill in the gaps by issuing interpretive opinions, but it certainly never anticipated that this work would be done in criminal court, Green said.

“Keep in mind that criminal laws must give clear notice of where the lines between lawful and unlawful conduct are drawn,” he said. “Plus, in criminal UPL cases, the prosecution presumably must prove mens rea—that the lawyers knew their work was not authorized by North Carolina’s rule.”

“Did the lawyers have fair notice? Assuming they crossed the line in the first place, did they do so knowingly? There’s good cause for doubt,” Green said. “Prosecutors ordinarily don’t bring misdemeanor prosecutions on such dubious factual and legal theories.” Green is a former federal prosecutor.

This case raises the issue of who should clarify the laws regulating interstate law practice, Green stated. He pointed out that when it adopted the MJP reforms, the ABA reaffirmed that regulation of the legal profession is the province of the state courts. “Where the disciplinary rules are uncertain, as in this case, the lines ordinarily should not be drawn by criminal prosecutors and juries,” he said. Green added: “If a UPL committee decided that a warning was all that was needed here, why is the prosecutor making this into a criminal case?”

Proceed With Caution.

According to William Barker, "Out-of-state lawyers need to be especially careful when working for a local client in the host state. This case underscores the need to treat dispute work in nonjudicial forums with great care, because pro hac vice admission is not available to make the work authorized practice."

In theory, Barker said, it might be possible to represent a school in NCAA proceedings or prepare a report without practicing law. "But if one wants to have the internal investigation and report protected by the privilege, the work needs to be a legal representation." Moreover, he noted, holding oneself out as a lawyer and rendering legal advice clearly constitute the practice of law.

"At a minimum," he said, "lawyers involved in such a situation without the benefit of something like Model Rule 5.5(c)(4) would be well advised to work with local counsel who are actively involved in the representation and have direct access to the client."

Barker said that in states with statutes simply forbidding unauthorized practice of law, a rule like Model Rule 5.5 should provide the authorization necessary to make the statute inapplicable. But because the North Carolina statute turns on membership in the North Carolina State Bar, that analysis would not work there, he said.

If, as in most states, authority to regulate the practice of law is vested exclusively or primarily in the courts, a rule like Model Rule 5.5 may implicitly repeal the statute to the extent of any conflict, Barker suggested.

by Joan C. Rogers

Letter of Caution Issued by North Carolina Bar Authorized Practice Committee to Two Georgia Attorneys

On July 31, 2003, the North Carolina State Bar's Authorized Practice Committee sent this "letter of caution" to counsel for two Atlanta attorneys:

"On 2003, the Authorized Practice Committee met and considered the results of our investigation made into the activities of your clients, Hallman and Buttermore of the law firm Decker, Hallman, Barber & Briggs with respect to Gardner-Webb University. As you will recall, you were advised of the questioned conduct. You and your clients responded and presented their version of the facts.

"Based upon all of the evidence available, the Committee made the following findings and conclusions. None of the attorneys engaged through the firm on behalf of Gardner-Webb University are licensed to practice law in North Carolina. The attorneys were employed directly by the Executive Committee of the Board of Trustees for the University. Although the matter for which the firm was engaged involved allegations of violations of NCAA rules and the policies and procedures of the University, the report also outlined and advised the Board concerning the University's potential legal liabilities. Further, Mr. Hallman asserted to third parties on at least two occasions that the firm represented the University in a legal

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capacity and not simply as a factual investigator of the events. Mr. Hallman also provided a legal assessment of the rights and potential legal problems arising from the actions of certain faculty members to the Board of Trustees and informed the Board that it was a confidential attorney-client communication. Mr. Hallman responded to a demand letter sent by the attorney for the student involved. Finally, Mr. Buttermore wrote a letter that was captioned as 'Attorney-Client privileged drafted in anticipation of litigation' to the Chair of the Board that outlines the legal ramifications of potential litigation against the University.

“It is the unauthorized practice of law for any persons other than licensed members of the North Carolina State Bar to practice law in the State of North Carolina. The practice of law includes the preparation of legal documents, engaging in legal advice or counsel, acting as attorney, or furnishing the services as an attorney. N.C. Gen. Stat. § 84-2.1 & 4. Even assuming (without deciding or conceding) that the conduct of a factual investigation into the events did not constitute the practice of law, your clients did not limit their activities to such services. Your clients held themselves out as attorneys for the University, both to the Board of Trustees and to outside parties. The Committee concluded that the conduct of your clients constituted the unauthorized practice of law in violation of these statutes. Accordingly, it voted to issue this Letter of Caution.

“The Committee expects that this caution will prevent your clients from engaging in this activity in the future. Under North Carolina law, any person committing the unauthorized practice of law is guilty of a Class 1 misdemeanor and can be prosecuted criminally. Unless the Committee receives complaints of future violations, however, it is not reporting this matter to your local district attorney or taking any action against you at this time. (However, as you are aware, the district attorney has been copied on this matter by the complainant.)”

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