

BY JAMES P. SCHALLER

Ethics Violators and More

Ethics

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In the District of Columbia, as in most jurisdictions, the prosecution of legal ethics violations and the prevention of unauthorized practice of law (UPL) are handled by two different arms of the court or bar. Rarely, if ever, do bar counsel get involved in cases of unauthorized practice, for the very good reason that the bar has jurisdiction over lawyers who are admitted to the bar—and unauthorized practitioners are by definition not within that category. Hence, as a rule, when UPL matters are brought to bar counsel, the only action bar counsel takes is to refer them to the Committee on Unauthorized Practice (CUP).

There are additional reasons for this division of labor in the District. The CUP is principally concerned with compliance, with making sure that those who are not authorized to practice law here do not do so and that those who wish to practice get admitted. The Office of Bar Counsel, on the other hand, is a disciplinary agency that metes out punishment for bar members found to have committed ethics violations.

Increasingly, however, pressure has been placed on bar counsel to act in matters of unauthorized practice.

This new pressure is a result of at least two factors. The first is the so-called multijurisdictional practice movement—the move toward liberalization of restrictions on a lawyer's practicing law outside the jurisdiction to which she is admitted. The second is the increasing resort by disciplinary authorities to reciprocal discipline. Thus, a lawyer admitted in more than one jurisdiction is likely have his ethics violations in Jurisdiction A reported by the authorities in that jurisdiction to their counterparts in Jurisdiction B, in which the lawyer is also admitted.

It is now a short step, under a slightly different scenario, to a decision on the part of the unauthorized practice committee of

Jurisdiction A, where a lawyer is not admitted, to inform bar counsel in Jurisdiction B, where the lawyer is admitted, of her unauthorized practice in Jurisdiction A.

And it is not much of a larger step to a scenario in which a lawyer admitted in Jurisdiction B who engages in unauthorized practice in Jurisdiction A would be charged with an ethics violation in Jurisdiction B, regardless of whether Jurisdiction A proceeds against him for unauthorized practice.

Further, suppose the CUP in the District, in the course of investigating a Maryland attorney for unauthorized practice here, uncovers evidence of activity other than mere unauthorized practice that would constitute an ethics violation in either jurisdiction. Under D.C. Rule of Professional Conduct 8.3 (the so-called mandatory snitch rule), the lawyer members of the CUP, like other lawyers, have an obligation to report unethical conduct to the "appropriate professional authority." To be sure, the conduct must be such as to "raise [] a substantial question as to . . . honesty, trustworthiness or fitness in other respects," but that is very much in the eye of the beholder.

Taking it yet another step, suppose the unauthorized practice of a lawyer under investigation by the committee appears to have been sufficiently notorious that partners or supervisors in her firm knew or should have known of it, and did nothing to stop it. What is the CUP's authority or discretion—or responsibility—for suggesting that the firm or members of its executive committee or the lawyer's supervisors are themselves guilty of infractions of D.C. Rule of Professional Conduct 5.5(b), which prohibits assisting in the unauthorized practice of law, and perhaps 8.3 as well?

There is a complicating factor in all this, which is causing consternation within unauthorized-practice committees across the country. That complication arises out of the nearly universal rule that CUP investigations are supposed to be confidential until such time as the committee decides it must institute formal proceedings against the lawyer.

The issue is squarely raised in a recent case decided by the Maryland Court of Appeals, *Attorney Grievance Commission of Maryland v. John Walker-Turner Sr.*, Misc. Docket AG No. 52, September term, 2002, in which a client lodged a com-

plaint against an attorney with the grievance commission involving alleged mishandling of a case. The commission initially charged the lawyer with violations of Maryland Rules 1.1 (Competence), 1.3 (Diligence), 1.4(a)(b) (Communication), 1.15(a)(b) (Safekeeping Property), 1.16(d) (Terminating Representation), and 5.5(a) (Unauthorized Practice). At the hearing, all charges except the unauthorized practice charge were voluntarily dismissed by the commission.

The attorney was found to have violated the District of Columbia unauthorized practice rule (DCCA Rule 49) in an evidentiary hearing conducted by the Circuit Court for Prince George's County, which recommended a 90-day suspension. The Court of Appeals affirmed the finding, but reduced the penalty to a suspension of 30 days.

What is interesting about the case is that the D.C. unauthorized-practice committee was not involved in the investigation or in the finding of unauthorized practice, yet the Maryland court found the ethical violation under its Rule 5.5 sufficient basis for imposition of the 30-day suspension, something that the D.C. UPL committee would not have been able to do.

Numerous questions suggest themselves. For example, had the client complained not to the Maryland authorities but to the D.C. Committee on Unauthorized Practice, would the committee have been justified in bringing the matter to the attention of the Maryland Grievance Commission to prosecute the unauthorized practice as an ethics violation? Would the D.C. committee have been justified to suggest to the commission some of the alternative theories (which in the event the commission itself alleged against the attorney) as well?

And given that the respondent engaged in his unauthorized practice while he shared office space and had at one time a loose partnership arrangement with two D.C. lawyers who were themselves admitted here, might not the Maryland authorities have felt justified in reporting that fact to D.C. bar counsel as constituting the aiding and abetting of the respondent's unauthorized practice? Would it have been appropriate for the D.C. committee to have done so, had the complaint initially been lodged with it?

Supposing that the respondent were an admitted member of the bar in some state other than Maryland, would it have been appropriate for Maryland or the District to have suggested reciprocal discipline in that third state?

Moreover, under an amendment to the American Bar Association Model Rules proposed by its Multijurisdictional

Practice Commission and adopted by the ABA, bar counsel would be deemed to have authority to subject to discipline any attorney practicing within her jurisdiction, whether the attorney was admitted or not (this is already the case for in-house counsel in Maryland and the District, and Virginia is about to join its neighbors). This would be a further incursion by legal ethics authorities on the jurisdiction of unauthorized practice committees.

These are not easy questions. They raise grave concerns about a deceptively simple case turning into a multijurisdictional nightmare for the offending lawyer. Indeed, it is already relatively common for a lawyer accused of ethics violations that include assertions of unauthorized practice to be reported by bar counsel to the CUP; perhaps to the Admissions Committee if the attorney has, since the conduct in question, attempted to apply for admission; and to the correspondent authorities in any other state or states in which she happens also to be admitted.

The outcome of these issues will be affected not only by the work of the ABA Commission on Multijurisdictional Practice and parallel groups at the local level, such as the D.C. Bar's committee, but also by the recent undertaking by the ABA to define the practice of law. Whether the emerging definition—assuming the task force comes up with one—will make the situation more or less complicated, only time will tell.

For the moment, however, one hopes that unauthorized-practice committees will continue to concern themselves principally with compliance with the rules, which is to say with prevention of unauthorized practice. Surely that very important function is job enough to prompt them to exercise with great restraint whatever discretion they may deem themselves to be clothed with in the realm of other ethical violations.

One thing is absolutely clear. The "good old days" when a lawyer charged with unauthorized practice could get out of it with no more than a consent order in which he essentially denied engaging in unauthorized practice but promised never to do so again, are gone forever.

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