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NOTES AND COMMENTS

Attorneys—Unauthorized Practice of Law by Corporations

In *State v. Pledger*¹ the North Carolina Supreme Court held that an employee of a shell homes corporation, who had prepared either directly or indirectly deeds of trust by filling in the blanks of printed forms in the course of the corporate business, was not guilty of the unauthorized practice of law.² The decision rested on the ground that the defendant did not prepare legal documents "for another person, firm or corporation" within the intent and meaning of G.S. § 84-4. The court interpreted this statute to mean that "a person, firm or corporation having a *primary interest, not merely an incidental interest*, in a transaction, may prepare legal documents necessary to the furtherance and completion of the transaction without violating G.S. § 84-4."³

The court was quite correct in reversing conviction for violation of G.S. § 84-4 prohibiting the practice of law by individuals for *another*. The indictment in this case was against the individual defendant who was an agent of the corporation acting in the course

¹ 257 N.C. 634, 127 S.E.2d 337 (1962).

² Generally, the practice of law is not confined to performing services in court, but includes conveyancing, the preparation of legal instruments of all kinds, advice given to clients, and all actions taken for another in legal matters. See, *e.g.*, N.C. GEN. STAT. § 84-2.1 (1958); *In re Duncan*, 83 S.C. 186, 187, 65 S.E. 210, 211 (1909); 7 C.J.S. *Attorney & Client* § 3(g) (1937).

³ 257 N.C. at 637, 127 S.E.2d at 339 (1962). (Emphasis added.) In preparing deeds of trust for a finance company, defendant was held guilty of violating G.S. § 84-4 because "as to the defendant, this corporation was 'another . . . corporation' within the meaning of the statute . . ." *Id.* at 638, 127 S.E.2d at 340.

The defense used by some corporations who rely on the "incident-to-business" theory is the claim that no separate charge is made for the services. *E.g.*, *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n*, 135 Colo. 398, 312 P.2d 998 (1957); *Cooperman v. West Coast Title Co.*, 75 So. 2d 818 (Fla. 1954). However, other cases hold this defense to be invalid because there is still an indirect compensation to the corporation in the way of business. *E.g.*, *State Bar Ass'n v. Northern N.J. Mortgage Associates*, 32 N.J. 430, 161 A.2d 257 (1960). In still others the court found that there was an unauthorized practice of law because the total services for which the customer paid was so high as to include a fee for the legal services rendered. *E.g.*, *Beach Abstract & Guar. Co. v. Bar Ass'n*, 230 Ark. 494, 326 S.W.2d 900 (1959); *In re Gore*, 58 Ohio App. 79, 15 N.E.2d 968 (1937); *Hexter Title & Abstract Co. v. Grievance Comm.*, 142 Tex. 506, 179 S.W.2d 946 (1944); *Grievance Comm. v. Dean*, 190 S.W.2d 126 (Tex. Civ. App. 1945).

of his employment; but since a corporation can act only through its agents, the corporation was, in effect, the defendant. However, G.S. § 84-5 prohibits the practice of law by corporations.⁴ The court made no reference to this statute and expressed no opinion as to whether the defendant's acts were in violation of its command. It is clear, therefore, that *Pledger* does not preclude an indictment and conviction in North Carolina of persons who prepare deeds of trust in the course of their employment by a real estate corporation, unless the court's construction of G.S. § 84-4 be taken as a gloss on G.S. § 84-5 as well. Under G.S. § 84-4 as now interpreted a corporation may perform legal services so long as they are incidental to its usual course of business. If the two statutes are now construed *in pari materia* it may well be that the court has, perhaps inadvertently, laid the groundwork for a holding that G.S. § 84-5 also permits a limited practice of law by corporations "incident to business." This approach may be necessary to resolve the dilemma propounded when one statute confers a privilege which another purports to take away.⁵

The purpose of all suits to enjoin corporations from preparing legal documents allegedly constituting an unlawful practice of law is

to protect the licenses, privileges and franchises granted to attorneys from encroachment and damage by reason of the alleged unauthorized acts of the defendant . . . [and] to protect the public and particularly those persons participating in

⁴ "[N]o corporation shall . . . draw agreements, or other legal documents . . . or practice law, or give legal advice . . . by or through any person . . ." N.C. GEN. STAT. § 84-5 (1958). The only corporations excepted from this statute are banks, and then only in specified circumstances. One cannot help but wonder why the indictment was drawn under G.S. § 84-4. It is a well known rule of criminal procedure that the indictment must state a crime. Even though the defendant may in fact be guilty under the facts of some crime, unless that crime is charged specifically in the indictment he must be found innocent. *State v. Law*, 227 N.C. 103, 40 S.E.2d 699 (1946); 42 C.J.S. *Indictments & Informations* §§ 137, 261 (1944). If the complexities of indicting corporations are insurmountable in a particular case it should be possible to obtain an injunction against further violations of the law. See *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n*, *supra* note 3, where injunction was used instead of indictment.

⁵ The answering argument is that G.S. § 84-4 does not confer a right on corporations to practice law incident to their business, but merely does not prohibit it. Construed in this way G.S. § 84-4 as interpreted in the principal case and G.S. § 84-5 are corollary; that which is omitted from G.S. § 84-4 is prohibited by G.S. § 84-5. This would seem to be the best argument, but the language of the case gives the impression that the court would be inclined to the other line of reasoning.

real estate transactions through brokers, from the dangers inherent in the preparation of legal documents by persons unskilled in the intricacies of the law rather than by lawyers.⁶

Nearly all states, either by statute⁷ or judicial decision,⁸ forbid a corporation to practice law under any circumstances. Due to the nature of corporations it necessarily follows that "acts of officers of a corporation who are regular, salaried employees, performed in the course of their employment, are acts of the corporation as affecting the determination as to whether the corporation is engaged in the practice of law."⁹ In spite of the flat prohibition of their statutes, several states allow certain corporations to transact their own legal business and to perform certain acts necessarily incident to the proper performance of their authorized business function, even though these very acts would constitute the unauthorized practice of law were they not so permitted.¹⁰ These jurisdictions have avoided statutes similar to G.S. § 84-5 on two grounds: (1) such acts do not constitute the practice of law,¹¹ (2) public policy favors such activities by corpora-

⁶ Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 135 Colo. 398, 413, 312 P.2d 998, 1006 (1957).

⁷ E.g., MASS. ANN. LAWS ch. 221, § 46 (1955); N.C. GEN. STAT. § 84-5 (1958); N.J. STAT. ANN. § 2A:170-78 (1953); N.Y. PENAL LAWS § 280 (1944); OHIO REV. CODE §§ 1701.03, 4705.01 (1954); PA. STAT. ANN. tit. 17, § 1608 (1930); S.C. CODE §§ 56-141, -142 (1962); TENN. CODE ANN. § 29-303 (1955); TEX. REV. CIV. STAT. ANN. art. 320a-1, § 3 (1959) (see note 16, *infra*).

⁸ E.g., State Bar v. Arizona Land Title & Trust Co., 90 Ariz. 76, 366 P.2d 1 (1961); State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 140 A.2d 863 (1958); Bump v. District Court, 232 Iowa 623, 5 N.W.2d 914 (1942). In State *ex rel.* Seawell v. Carolina Motor Club, Inc., 209 N.C. 624, 184 S.E. 504 (1936), the court held that the right to practice law is personal and, therefore, a corporation cannot do it either directly or indirectly by employing lawyers to practice for it.

⁹ 19 C.J.S. *Corporations* § 956, at 404 (1940).

¹⁰ See generally cases and statutes cited notes 11 & 12, *infra*; Annot., 157 A.L.R. 285 (1945); 19 C.J.S. *Corporations* § 956, at 406 (1940).

¹¹ Bar Ass'n v. Union Planters Title Guar. Co., 46 Tenn. App. 100, 326 S.W.2d 767 (1959) held that even though activities of the title guaranty company constitute practice of law within the meaning of TENN. CODE ANN. § 29-303 (1955) forbidding a corporation to practice law, they will not be declared unlawful if incidental to the main business of the corporation. Title Guar. Co. v. Denver Bar Ass'n, 135 Colo. 423, 428, 312 P.2d 1011, 1014 (1957), decided on COLO. REV. STAT. ANN. § 12-1-17 (1953), held that "a layman or a corporation may prepare instruments to which he or it is a party without being guilty of the unauthorized practice of law." In the Colorado case the corporation as mortgagee was allowed to prepare mortgages, but not to fill in blanks affecting conveyancing of property. State Bar Ass'n v. Connecticut Bank & Trust Co., 20 Conn. Supp. 248; 264, 131 A.2d 646, 655 (Sup. Ct. 1957), relying on CONN. GEN. STAT. ANN. § 51-88 (1960), held

tions.¹²

The New York Penal Law § 280 provides that no corporation shall itself or by or through its officers, agents, or employees render legal services. A corporation, under this statute, is not to receive compensation directly or indirectly for preparing legal instruments. It excepts corporations lawfully engaged in examining and insuring titles to real property from its provisions in so far as preparation of legal instruments is necessary to the examination and insuring of titles and necessary or incidental to loans made by the corporation. Up to this point the New York statute appears very liberal. However, it further provides that no corporation may render any legal services which may not be rendered by a layman. The purpose of the statute, as expressed in subsequent New York decisions,¹³ is to

that a bank which had given information on tax law and prepared legal documents pertaining to estates and trusts, had not violated the statute because in performing such acts they "are acting primarily for themselves in the proper exercise of their functions as fiduciaries . . . and are not engaged in the practice of law." *Ingham County Bar Ass'n v. Walter Neller Co.*, 342 Mich. 214, 69 N.W.2d 713 (1955), permitted conveyancing as incidental to a broker's business. See *Cooperman v. West Coast Title Co.*, 75 So. 2d 818 (Fla. 1954). *LaBrum v. Commonwealth Title Co.*, 358 Pa. 239, 56 A.2d 246 (1948), construing PA. STAT. ANN. tit. 17, § 1608 (1930), did not consider the gratuitous preparation of legal papers in question to be the practice of law. *Childs v. Smeltzer*, 315 Pa. 9, 171 Atl. 883 (1934) held that the drafting of legal instruments is prohibited only when not connected with the immediate business of the person preparing them.

¹² *State ex rel. Reynolds v. Dinger*, 14 Wis. 2d 193, 109 N.W.2d 685 (1961), WIS. STAT. ANN. §§ 227.014, 256.30 (1957). *New Jersey State Bar Ass'n v. Northern N.J. Mortgage Ass'n*, 32 N.J. 430, 445, 161 A.2d 257, 265 (1960), interpreting N.J. STAT. ANN. § 2A:170-78 (1953) which forbids corporations to practice law, said that a corporation can "in pursuance of its lawful business activities, insure titles and cause searches and abstracts to be made . . ." In this case the title company as mortgagee was allowed to draw the bond and mortgage provided no charge was made; if the fee charged for the services is so high as to imply the inclusion of a separate fee for the legal services it will be held to constitute the unauthorized practice of law. *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n*, 135 Colo. 398, 312 P.2d 998 (1957), having considered COLO. REV. STAT. ANN. § 12-1-17 (1953) which is similar to N.C. GEN. STAT. § 84-4 (1958), held that a licensed real estate broker could, without separate charge, prepare deeds and related instruments at the request of his customers in connection with a bona fide real estate transaction. The court in this case while rejecting the "incident-to-business" theory allowed such corporate activities because it was the custom for brokers to render such legal services incidental to their business and, therefore, they were acting in the public interest. *Cowern v. Nelson*, 207 Minn. 642, 209 N.W. 795 (1940), involved MINN. STAT. ANN. § 481.02 (1958) prohibiting a corporation to practice law.

¹³ *People v. Alfani*, 227 N.Y. 334, 125 N.E. 671 (1919), where defendant who drew legal instruments was held to have violated N.Y. PENAL LAW § 270 requiring a license to "practice as an attorney at law." *People v. People's Trust Co.*, 180 App. Div. 494, 167 N.Y. Supp. 767 (1917); *People v. Purdy*, 174 App. Div. 694, 162 N.Y. Supp. 70 (1916).

prevent corporations from performing legal services which can only properly be done by licensed attorneys, under direct supervision of the court, whose interest is in their clients rather than the corporation. In later cases,¹⁴ however, the New York courts held that the statute did not prohibit an employee of a corporation authorized to guarantee mortgages from filling in the blanks of a form mortgage and charging a fee for the service. Considering the public convenience and long-standing practice involved, the court said that such single occurrences did not constitute the practice of law or violate the penal code since no legal advice was given, and a layman could lawfully perform such acts. Subsequent New York decisions¹⁵ apparently overruled these cases by holding a title insurance company which drafted mortgages to have practiced law in violation of the penal law.

The Texas statute¹⁶ has been strictly construed to hold that

¹⁴ *Wollitzer v. National Title Guar. Co.*, 148 Misc. 529, 266 N.Y. Supp. 184 (Sup. Ct. 1933), *aff'd*, 241 App. Div. 757, 270 N.Y. Supp. 968 (1934); *People v. Title Guar. Co.*, 191 App. Div. 165, 181 N.Y. Supp. 52, *aff'd*, 230 N.Y. 578, 130 N.E. 901 (1920). The dissent in the appellate division, in the latter case said that the corporation through its employees went beyond its chartered powers in advising on legal matters. 191 App. Div. at 167, 181 N.Y. Supp. at 53 (1920) (dissent). In *People v. Title Guar. Co.*, 227 N.Y. 366, 125 N.E. 666 (1919), the court held that although the legislature has allowed the defendant to search and insure titles, such work being between the corporation and its employees, the drawing of legal instruments is legal work which though it relates to insurance of titles affects individuals in other ways also and, therefore, such legal service should be performed by lawyers.

¹⁵ *People v. Lawyer's Title Corp.*, 282 N.Y. 513, 520, 27 N.E.2d 30, 33, *reversing* 258 App. Div. 916, 16 N.Y.S.2d 357 (1940), held that "the defendant is not protected by the provisions of section 280, which exempt a corporation engaged in the examination and insuring of titles to real property. That exemption has no application whatever to services which cannot be lawfully rendered by a person not admitted to practice law in the state of New York Nor may the defendant protect itself behind the claim that the services rendered were necessary to the examination of titles and the issuance of its policies of insurance." See also *Application of N.Y. County Lawyers' Ass'n*, 181 Misc. 632, 43 N.Y.S.2d 479 (Sup. Ct. 1943), in which a tax and management corporation which gave legal advice to and prepared legal documents for its subscribers was held to have engaged in the "illegal practice of law" even though it told its clients to consult private attorneys.

¹⁶ *TEX. REV. STAT. ANN.* art. 320a-1, § 3 (1959) prohibits all persons who are not members of the bar from practicing law in Texas. *Tex. Sess. Laws 1933*, ch. 238, § 62, repealed by *Tex. Sess. Laws 1949*, ch. 301, § 62, prevented any corporation, person, firm or association from practicing law. The reason given for the repeal of this statute was that it had no practical value since the State Bar Act subsequently enacted (*TEX. REV. CIV. STAT. ANN.* art. 320a-1 (1959) prohibits all persons not members of the bar from practicing law. The present statute gives power to the courts to define "practice of law" and to protect the public from its practice by laymen and corporations through civil proceedings.

corporations who draft any kind of legal instrument are guilty of the unauthorized practice of law. The Texas court¹⁷ has consistently held that in performing these acts corporations were rendering legal services to others and acting ultra vires.

In answer to the argument that the practice of law by corporations is in the interest of public policy it can be argued that a corporation cannot give legal advice without regard to its own interests. When an employee of a corporation, whether he is a layman or an attorney, renders legal services for his corporation and another, the non-corporate party is cheated.¹⁸ The North Carolina Supreme Court argues that the purpose of G.S. § 84-4, and inferentially G.S. § 84-5, is to protect the public rather than the legal profession; but the question remains as to whether this is the way to protect the public. There are persuasive opinions saying it is not,¹⁹ for the public is entitled to a legal representative who has a legal education and whose first and only loyalty is to his client's interests.

Some courts feel that if a corporation is allowed to prepare legal documents which are necessary to carry out its business objectives there is nothing to stop a building constructor, insurance company, or bank from claiming that because their business requires properly drafted deeds and other instruments affecting title to property they should be allowed to prepare them. There is danger in stretching the "its own business" concept so far that ultimately most of the out-of-court legal work may be performed by corporations and others

¹⁷ O'Neal v. Ball, 351 S.W.2d 670 (Tex. Civ. App. 1961) held that an abstract company could not draft a conveyance even through its agents. In San Antonio Bar Ass'n v. Guardian Abstract & Title Co., 156 Tex. 7, 291 S.W.2d 697 (1956), an injunction was granted to prohibit a corporation engaged in selling abstracts and title insurance from employing an attorney to prepare legal instruments. Rattikin Title Co. v. Grievance Comm., 272 S.W.2d 948 (Tex. Civ. App. 1954) held that it constituted unauthorized practice of law for a title company through attorneys to prepare legal instruments for other persons and corporations in transactions where it had no interest; Grievance Comm. v. Dean, 190 S.W.2d 126 (Tex. Civ. App. 1945) held that the drawing of legal instruments by a corporation although done without compensation constituted illegal "practice of law"; Hexter Title & Abstract Co. v. Grievance Comm., 142 Tex. 506, 179 S.W.2d 946 (1944).

¹⁸ Reisler, *Fundamentals of Unauthorized Practice of Law for the Law Student*, 26 UNAUTHORIZED PRACTICE NEWS 11 (1960). The non-corporate party either receives "incompetent and unethical advice" or is "served by lawyers who are not disinterested, whose real client is not the person advised but the entrepreneur furnishing the services."

¹⁹ Richmond Ass'n of Credit Men v. Bar Ass'n, 167 Va. 327, 189 S.E. 153 (1937).

not licensed to practice law. "The law practice would be hawked about as a leader or premium to be given as an inducement for business transactions."²⁰

According to the *Pledger* case the drafting of legal instruments would be warranted by a corporation provided the legal services so rendered are to its customers pursuant to transactions in which the corporation has a primary interest. It is arguable that this practice is not protective of the public interest.²¹ If the legal services involved require the knowledge, judgment, and advice of an attorney, and the interests of someone other than the corporation are involved, the corporation should not be permitted under G.S. § 84-5 to render that service in spite of the fact that its interest may also be involved. If the employee of the corporation renders this service he is primarily serving the interest of the corporation and is selling the legal service to a customer of the corporation. It is almost impossible for him to serve equally both customer and corporation for he cannot be impartial.²² This could result in harm not only to the legal profession and the lay practitioner²³ who is liable for his mistakes, but also to the customer who does not have the advantage of an impartial representative who can give advice as to the legal implications of the document drafted.

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²⁰ *Hexter Title & Abstract Co. v. Grievance Comm.*, 142 Tex. 506, 519, 179 S.W.2d 946, 953 (1944).

²¹ In *Agran v. Shapiro*, 127 Cal. App. 2d 807, 817, 273 P.2d 619, 625 (Dist. Ct. App. 1954) the court said that "any rule which holds that a layman who prepares legal papers . . . is not practicing law when such services are incidental to another business . . . completely ignores the public welfare." See also *State Bar v. Arizona Land Title & Trust Co.*, 90 Ariz. 76, 366 P.2d 1 (1961).

²² In addition it requires no extensive citation of authority to prove that even so simple an act as filling in the blanks of a form deed is fraught with pitfalls for the inexpert. The reports abound with examples of defective deeds, sometimes fatally so, resulting from carelessness, ignorance or both. The lay practitioner may prepare many hundreds of perfect instruments, but this is small consolation to the unhappy client who, at best, is subjected to an expensive lawsuit to perfect his title or, at worst, loses his land, due to an "honest mistake." True, the same might have happened had he had competent legal advice, but the chances are far less.

²³ *Pelletier, Unauthorized Practice of Law by Real Estate Brokers and Title Insurance Companies*, 27 UNAUTHORIZED PRACTICE NEWS 217 (1961).