

Multijurisdictional Law Practice By Corporate Counsel

BY LAZAR EMANUEL

Since April 1, 2009, when the new Rules of Professional Conduct became effective, the Committee on Professional Ethics of the State Bar has been busy issuing Ethics Opinions on issues arising under the Rules. In most of these Opinions, the Committee has discussed how the Rules modify or depart from the Code and the ECs. We discuss Opinion *835 (12/24/09) in this column.

In this Opinion, the Committee considered and answered the following question:

May a lawyer who is admitted to practice law in another US jurisdiction but who is not admitted in New York serve as General Counsel for a corporation with headquarters in New York? May the lawyer maintain an office in New York in connection with his work as General Counsel?

The question puts at issue the right of an out-of-state lawyer to perform any legal functions or services in New York, and also a description of the services allowed. The Rules of Professional Conduct offer no guidance on these questions, except to apply the conventional approach to the unauthorized practice of law. (“A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction” – Rule 5.5(a)).

The Committee defined an out-of-state lawyer as a lawyer who is not admitted to practice in New York but who is admitted and in good standing in another US jurisdiction. At bottom, the issue is a matter of law beyond the jurisdiction of the Ethics Committee. Presently, the issue is controlled by §§ 476-a, 478, and 484 of the Judiciary Law, which prohibit the unauthorized practice of law. Under these provisions, only lawyers admitted in New York are permitted to practice law or to render legal services in New York, except by admission in a matter *pro hac vice* or other judicial intervention.

The scope of services which an out-of-state lawyer may provide in New York has been the subject of a surprisingly small number of cases. In *El Gemayel v. Seaman*, 72 N.Y.2d 701 (1988), the court found, “in the circumstances of this case, phone calls to New York by plaintiff, an attorney licensed in a foreign jurisdiction, to advise his client of the progress of legal proceedings in that foreign jurisdiction, did not, without more, constitute the ‘practice’ of law in this State in violation of [Judiciary Law] § 478.”

In *Spivak v. Sachs*, 16 N.Y.2d 163 (1965), a lawyer admitted in California was found to have engaged in the unlawful practice of law in New York by assisting in a friend’s New York divorce. Among other things, he had spent 14 days in New York “attending meetings, reviewing drafts in a settlement agreement, discussing the client’s financial and custody problems, recommending a change in New York counsel” and rendering his opinion whether New York or California was the proper jurisdiction for the divorce action and related issues.

Under the cases (*El Gemayel* and *Spivak*) it's clear that out-of state lawyers who perform "incidental and innocuous" services in New York for their out-of-state clients do not violate the Judiciary Law – "recognizing the numerous multi-State transactions and relationships of modern times, we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York," *Spivak*, 168.

In Opinion #835, the Ethics Committee expressed its strong regret that the Appellate Divisions had not incorporated in the new Rules of Professional Conduct the approach of the ABA Model Rules to the interstate practice of law. In those States which have adopted Model Rule 5.5, as the Committee pointed out, the Rule has had two related effects – it "judicially" authorizes out-of-state lawyers to practice law within the State, under the conditions expressed in the Rule, and it interprets the conduct authorized by the Rule "as conduct that does not violate the State's statutory and common law regulation of UPL." The Rule "functions as if it were a global *pro hac vice* order admitting every out-of-state lawyer in the jurisdiction" – within the limits of the Rule. As the Committee recognized, however, the ABA Rule does not permit an out-of-state lawyer to appear in an action in another jurisdiction without admission *pro hac vice*.

The State Bar Committee noted that the State Bar had twice recommended that the New York Courts adopt the approach of the ABA in Model Rule 5.5, but that the Courts had declined to honor either request. The consequence is that out-of-state lawyers may not presently serve in New York as in-house corporate counsel except in matters in which they have received authorization *pro hac vice*. "Nor does New York have a court-adopted 'in-house registration' rule, like that of many states, authorizing out-of-state lawyers who satisfy registration requirements to practice law in the state."

The Committee confirmed that the question it was assigned to answer is a question of law governed essentially by the Judiciary Law, and not by any provision of the Rules of Professional Conduct. Therefore, the question is not within the Committee's jurisdiction and it is unable to supply an answer.

However, because the question is a recurring one, the Committee urged the Appellate Divisions and/or the State Legislature, "to provide further guidance regarding whether and to what extent out-of-state lawyers – especially in-house lawyers who provide services solely to a corporate employer – are authorized to practice law in New York."

Vital Question Remains Unanswered

Unfortunately, the NYSBA Committee did not quote ABA Model Rule 5.5 in its Opinion. This makes it impossible to understand what the Model Rule says that the Rules of Professional Conduct do not say. The Committee would have done us all a service by quoting the relevant portions of Model Rule 5.5:

- (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. ...

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice admission*.

The Comments to MR 5.5 are also relevant to the question before the NYSBA Committee:

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. ...

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. ... With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction.

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction.

Author's Comment: The Appellate Division judges who drafted the Rules of Professional Conduct must have decided that the concepts embodied in the Model Rules were either improvident or too cumbersome. In so doing, they have left a vital question without answer in a state which probably has more corporate offices than any other.

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