

New Jersey's Hostile Attitude Toward New York Lawyers

BY ROY SIMON

Based on the final report and recommendations of the ABA Commission on Multijurisdictional Practice, many lawyers are optimistic that they will soon be able to practice more freely across state borders. New York lawyers looking for ways to expand their practices without opening a branch office may therefore be casting a hopeful eye toward New Jersey.

New Jersey's attractions as a source of potential clients are considerable. The latest census counted nearly 8,500,000 people in New Jersey. Well over a million New Jersey citizens have graduated from college, and New Jersey's median household income in 1997 was almost \$48,000 - about \$10,000 above the national average. New Jersey manufacturers shipped nearly \$100 billion worth of products in 1997, and New Jersey's retail sales that year were just under \$80 billion. That's a big economic base on which to build a lot of legal business.

But if your firm is thinking about serving New Jersey clients without opening a bona fide New Jersey law office staffed by attorneys admitted in New Jersey, I have one word of advice: don't. New Jersey has a bad attitude toward New York lawyers who want to serve New Jersey clients.

This article will discuss various opinions of the New Jersey Supreme Court's Committee on the Unauthorized Practice of Law (available online at <http://lawlibrary.rutgers.edu> (click at left on "N.J. Ethics Opinions," then on the box entitled "Browse the opinion index," which will bring up links to the Committee's opinions in numerical order). New York lawyers must take New Jersey's UPL opinions seriously because DR 3-101(B) of the New York Code of Professional Responsibility provides that a lawyer "shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." If New Jersey stamps certain conduct with an "unauthorized practice" label, then a New York lawyer who engages in that activity is not only violating New Jersey's unauthorized practice laws, but is also violating New York's DR 3-101(B).

On top of that, if a New York lawyer gets into a dispute over fees for services constituting the unauthorized practice of law in New Jersey, the lawyer may not get paid. That's what caused all the buzz a few years ago when the California Supreme Court decided *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal.4th 119 (1998), in which the California courts denied legal fees to a New York law firm that had violated California's unauthorized practice statute. Unauthorized practice laws thus pose a triple threat - civil penalties, disciplinary sanctions, and denial or disgorgement of legal fees.

New Jersey Opinion 38: Serving a New Jersey Estate

The most recent pronouncement of New Jersey's Committee on Unauthorized Practice is Opinion 38 (July 1, 2002), which posed a simple question: When may an out-of-state attorney not licensed in New Jersey

provide legal services to a New Jersey estate without engaging in the unauthorized practice of law? The answer is: not often. According to Opinion 38, an out-of-state lawyer may perform legal work in connection with a New Jersey estate only in two narrow circumstances:

(1) New Jersey and out-of-state issues are so "tangled and interwoven" that it would be impractical and inefficient to have New Jersey counsel address them separately; or

(2) there are out-of-state issues and there is a long standing and close relationship between the out-of-state law firm and the decedent's affairs, which relationship renders retention of the out-of-state firm rather than another economically efficient for the estate.

In cases falling under the second exception, however, there is a further restriction:

Responsibility must be divided so that the New Jersey firm handles matters of New Jersey law and practice, and the out-of-state firm handles matters pertinent to its jurisdiction and business matters with which it is intimately familiar due to the long term representation of the decedent.

"In the absence of circumstances such as those outlined above," the Committee said, "the provision of legal services to a New Jersey estate by an out-of-state attorney constitutes the unauthorized practice of law."

But what if a New Jersey estate poses some thorny federal tax issues? Would that justify a foreign lawyer's intrusion into a New Jersey estate? No, it would not. "The mere existence ...of federal tax issues - common to most estates - does not constitute license for an out-of-state attorney to provide legal services to the New Jersey estate," the Committee said.

What if the New York lawyer engages New Jersey co-counsel? Or suppose New Jersey counsel hires the New York lawyer because the New York lawyer is a well known specialist in estate law? It is hard to believe that New Jersey prohibits a New Jersey lawyer from seeking the advice of a New York lawyer who specializes in estate law, but Opinion 38 makes no exception for foreign co-counsel unless the second exception applies - there must be "some out-of-state issues" (other than federal tax issues), and there must be "a long standing and close relationship between the out-of-state law firm and the decedent's affairs." That would not seem to leave any room for a New Jersey attorney to engage a new New York lawyer (i.e., a lawyer formerly unconnected with the decedent's affairs) to assist in representing a New Jersey estate, even at the client's request.

Yet unless the New Jersey Supreme Court modifies Opinion 38, the Opinion will state the law of New Jersey regarding estate work. According to New Jersey Supreme Court Rule 1:22-3A, "any aggrieved member of the bar, bar association, person or entity may seek review" by filing a petition with the New Jersey Supreme Court within 20 days after an opinion is published. I think the odds are good that someone will challenge it.

Opinion 38 is only the latest example of New Jersey's barbed-wire approach to out-of-state lawyers. The rest of this article will review some other opinions, organized by area of practice.

Real Estate

In 1968, in its very first opinion (Opinion 1), New Jersey's UPL Committee was asked whether an out-of-state lawyer could represent a New Jersey resident in a transaction involving the purchase of real estate in New Jersey. Specifically, the foreign attorney wanted to order a title search, debate title questions involving New Jersey law, prepare the necessary bond and mortgage for the purchaser, settle all the closing adjustments, and be present to advise and guide the purchaser regarding the final settlement, which would take place in New Jersey. The Committee said that "such action constitutes the unauthorized practice of law."

Opinion 17 (1975) addressed a related question: Is an out-of-state lawyer "guilty of the unlawful practice of law in New Jersey if he draws a deed to convey real estate in the State of New Jersey?" The Committee again answered yes. Drawing legal instruments for others was "clearly within the traditional definition of the practice of law," and it "made no difference" that the person drawing the deed was a lawyer in good standing in another jurisdiction. Moreover, the foreign attorney would violate New Jersey's unauthorized practice law even if he performed all of the legal work in New York.

The Committee said:

[T]he fact that the foreign attorney may never set foot within this jurisdiction is immaterial for the clear intent of his act in the preparation of a deed to convey real estate in New Jersey is to affect real property, the parties and their respective rights and duties as governed by the laws of the State of New Jersey. The touchstone of all decisions governing the unauthorized practice of law is the public interest.

The laws of New Jersey governing real estate often differ materially from the laws of foreign states. For example, the law of New Jersey as to dower and curtesy is quite different from that of many states, and in this important area, *it is doubtful whether the foreign attorney has the necessary skill and knowledge to efficiently serve his client*. If the foreign attorney believes there is special reason why he should prepare a deed affecting New Jersey real property, the proper procedure for him to follow is to forward the deed as prepared by him to a New Jersey attorney to approve its conformity with New Jersey law. By so doing, the public interest is fully served. [Citations omitted; emphasis added.]

Therefore, the Committee concluded that a foreign attorney could not lawfully draw a deed to convey real estate situated in the State of New Jersey.

Federal Law Practice

In Opinion 7 (1971), the Committee addressed whether a New York lawyer could open a New Jersey law office "if he limited his practice to matters involving the United States customs and tariff laws." The lawyer wanted to represent clients at the administrative level in New Jersey before federal agencies with jurisdiction over customs matters, but he would not engage in any matter involving New Jersey law or the New Jersey State courts or agencies. He would litigate only before the United States Customs Court in New York City, or before the Court of Customs and Patents Appeals or the United States Tariff Commission in Washington, D.C.

The UPL Committee gave a grudging answer, which was dictated by the United States Supreme Court's decision in *Sperry v. Florida Bar*, 373 U.S. 379 (1963). That case had construed a federal statute (35 U.S.C. 31) that expressly permitted the Commissioner of Patents to authorize nonlawyers to practice before the Patent Office. The Supreme Court said that under the Supremacy Clause of the United States Constitution, non-lawyers could practice patent law to the extent duly authorized by federal law despite state unauthorized practice laws. Citing *Sperry*, New Jersey's UPL Committee responded to the New York lawyer as follows:

A person not a member of the New Jersey Bar, who is admitted to practice before a federal agency, may have an office in this State to perform those functions which are reasonably within the scope of practice authorized to any non-lawyer by any valid federal statute or valid federal administrative regulation. To this extent New Jersey's substantial interest in regulating the practice of law within its borders must yield under the federal supremacy clause, but not beyond.

It follows from all of the foregoing that you can have an office in this State without becoming admitted to the New Jersey Bar if you do what a layman can do in this State under any federal authorization to practice in the customs and tariff field.... It is for you to anchor the *Sperry* holding to your specific fact situation in the customs and tariff field, and to limit your activities accordingly.

Thus, a New York lawyer may do no more in New Jersey regarding federal law than any other nonlawyer could do. Even a nationally renowned patent or customs or antitrust specialist licensed in New York has no greater rights to perform services for New Jersey clients than a high school dropout.

Bond Work

In 1998, in Opinion 33, the Committee on Unauthorized Practice ruled that out-of-state attorneys were engaging in the unauthorized practice of law when they advised New Jersey governmental bodies about state and municipal bonds. (The Committee repeated that "it is no defense to a charge of unauthorized practice of law that all legal services are performed outside the boundaries of the State of New Jersey. The mere fact that bond counsel may not cross the New Jersey State border does not protect the attorney's New Jersey activities from constituting the unauthorized practice of law.")

Opinion 33 came as a shock to bond lawyers in New York and Pennsylvania, who had been serving New Jersey clients for decades. Indeed, until the mid-1970's, New Jersey public entities had relied almost exclusively on out-of-state bond counsel because New Jersey firms lacked the necessary expertise. Opinion 33 also came as a shock to New Jersey's Attorney General, whose office often retained out-of-state bond counsel. The New Jersey Attorney General therefore petitioned for review of Opinion 33.

The New Jersey Supreme Court, applying a "public interest" test, sided with the Attorney General. In *Matter of Opinion 33*, 160 N.J. 63 (1999), the Court stated:

Although the need for the retention of out-of-state lawyers is sharply contested by counsel to the NJSBA, we are satisfied...that the potential benefit to New Jersey issuers and their counsel of the expertise and experience that out-of-state law firms might offer should not be lost because lawyers in those firms are unlicensed in New Jersey. ...We hold that out-of-state firms or lawyers

unlicensed in New Jersey affiliated with multi-state firms that have bona fide offices in New Jersey may perform legal services related to New Jersey bond issues if engaged to do so by New Jersey bond counsel who retains overall responsibility for representation of the issuer.

However, the Court qualified its opinion by adding: "We anticipate that such retentions will be infrequent, and that when they occur the issuer will be prepared to justify the decision to retain directly out-of-state bond counsel." Absent "special circumstances," the Court anticipated that New Jersey bond issuers "ordinarily will retain as bond counsel only law firms with bona fide New Jersey law offices and that the required legal services will be performed primarily by lawyers licensed to practice in this State." Thus, while New York lawyers will have some future role in advising New Jersey clients regarding bonds, that role will be much diminished from what it once was.

Conclusion

New Jersey, with its large, well-educated, affluent population, may seem like a tempting source of clients for New York law firms. But New Jersey's strict view of unauthorized practice makes it dangerous to serve New Jersey clients, even when the clients initiate the contact and the New York lawyer never sets foot in New Jersey. Before providing legal services to New Jersey clients, therefore, a lawyer should carefully study the opinions of New Jersey's Committee on the Unauthorized Practice of Law and the New Jersey Supreme Court cases reviewing and construing those opinions. Failing to do so could risk harsh consequences.

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