

Recent Ethics Opinions on the Unauthorized Practice of Law

BY ROY SIMON

In my experience, most law firms seldom worry about issues relating to the unauthorized practice of law. Once in a blue moon, a "lawyer" at a firm turns out not to be admitted to the bar (as happened in a widely publicized story about a well known Manhattan firm earlier this year), and firms that serve regional or national clients occasionally grapple with issues involving multijurisdictional practice; but many lawyers think that unauthorized practice issues concern mainly the limitations on suspended and disbarred lawyers, or on nonlawyers who masquerade as lawyers and prey upon immigrants and others who have little experience with our legal system.

Four recent ethics opinions by the New York State Bar Association Committee on Professional Ethics, however, suggest that lawyers dealing with nonlawyers or out-of-state lawyers need to be on the alert for unauthorized practice of law issues in many settings. The recent opinions - N.Y. State 801 (2006), N.Y. State 803 (2007), N.Y. State 809 (2007), and N.Y. State 813 (2007) - raise difficult issues and provide helpful guidance. Lawyers unaware of these opinions may unnecessarily decline or withdraw from legitimate engagements, fail to provide services requested by their clients, or refrain from entering fruitful relationships with nonlawyers or nonlegal entities. This article will examine the four recent opinions and identify some common themes.

N.Y. State Bar Op. 801 (2006)

In N.Y. State 801, a New York lawyer planned to form a professional partnership with an attorney who is admitted in another state, but not in New York. The partnership would maintain offices only in New York and would work only on matters arising in New York. The firm's letterhead and business cards would indicate that the out-of-state attorney is admitted solely in the other state. The New York attorney would handle all court appearances, while the out-of-state attorney would handle office work and meet with clients. The New York attorney would supervise all of the out-of-state attorney's work and would split fees with the out-of-state attorney.

The Committee did not approve of the arrangement. As a threshold matter, the Committee recognized that "it is clearly permissible for a New York attorney to form a partnership with a lawyer who is admitted only in another jurisdiction." The mere fact of forming a partnership with an out-of-state lawyer is not improper. But under DR 3-101(A), a New York lawyer may not form a partnership with an out-of-state attorney if the out-of-state attorney would be engaged in the unauthorized practice of law in New York. Because the rules on unauthorized practice of law are "creatures of statute" (see Judiciary Law § 478) rather than of the Code of Professional Responsibility, the ethics committee did not opine on whether the specific acts by the out-of-state attorney would constitute the unauthorized practice of law. But if the out-of-state lawyer was engaging in the unauthorized practice of law in New York, then forming a partnership with the out-of-state lawyer would assist him in the unauthorized practice of law in New York, in violation of DR 3-101(A). For example, the Committee took note of *Servidone Construction Corp. v. St. Paul Fire & Marine*, 911 F. Supp. 560, 568 (N.D.N.Y. 1995), in which the court refused to enforce

a New York law firm's retainer agreement for over \$4.1 million in legal services because the services had been performed by a partner who was admitted only in Maryland but maintained his law office in New York. Citing Judiciary Law § 478 (one of New York's main unauthorized practice statutes), the court held that the out-of-state lawyer was engaged in the unauthorized practice of law, even when advising on federal law, and was therefore entitled to no fee.

The Committee did not expressly state that *Servidone* would control the answer to the inquiry in N.Y. State 801, but in my view it would. Even under the relatively liberal language of ABA Model Rule 5.5 ("Unauthorized Practice of Law; Multi-jurisdictional Practice of Law") - which will be recommended to New York courts next year as part of the COSAC recommendations - an out-of-state lawyer must not "establish an office or other systematic and continuous presence in this jurisdiction for the practice of law."

The proposal in N.Y. State 801 ran afoul of that restriction. The proposal called for the out-of-state lawyer both to set up an office in New York and to form a partnership with the New York lawyer. This plan put the New York lawyer smack in the middle of Scylla and Charybdis. If the out-of-state lawyer acted as a lawyer, then he would be engaged in the unauthorized practice of law, and the inquiring attorney would be assisting him in that unauthorized activity. If the out-of-state lawyer did not act as a lawyer (i.e., he acted only as a paralegal), then the New York lawyer could not form a partnership with him because that would violate DR 3-102 (prohibiting a lawyer from sharing legal fees with a non-lawyer) and DR 3-103 (prohibiting a lawyer from forming a partnership with a non-lawyer "if any of the activities of the partnership constitute the practice of law"). In my view, therefore, the Committee correctly disapproved the plan. (The Committee expressed no opinion on whether its conclusion would apply to a partnership with a retired lawyer who was admitted in a state other than New York but was not physically working in New York.)

N.Y. State Bar Op. 803 (2006)

In N.Y. State 803, a law firm that represents creditors in New York sought to engage in debt collection activities outside New York. The firm's lawyers were admitted to practice only in New York, and the firm did not want to engage in the practice of law outside New York. The question addressed was: May the firm assist its clients in debt collection activities as a non-legal service in jurisdictions where its lawyers are not licensed to practice? Yes, the Committee said, provided the firm met certain conditions.

Under DR 3-101(B), the "threshold question is whether the collection activities will violate the regulatory provisions of the jurisdictions in which the activities take place." If so, then the out-of-state collection activities would subject the firm to discipline in New York. (Of course, the Committee did not have jurisdiction to opine on whether the out-of-state collection activities would or would not comply with the laws of other states, and did not offer any opinion on that question.)

Even assuming that the out-of-state collection activities would be construed as nonlegal services in the other states and thus would not cause the inquiring lawyer to violate DR 3-101(B) - the collection activities would nevertheless "presumptively be subject to the disciplinary rules governing an attorney-client relationship" Therefore, pursuant to DR 1-106(A)(4), "a law firm seeking to avoid the obligations of an attorney-client relationship must advise the client in writing that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the non-legal

services." In addition, the law firm must avoid misleading the debtors with whom it communicates in its collection efforts. For example, the law firm "may not use its law firm letterhead in communicating with debtors and must otherwise avoid suggesting to debtors in such communications that the firm or its representatives are functioning as lawyers engaged in the representation of the creditor-client or that the firm or its representatives might undertake legal action on the creditor-client's behalf."

In sum, a New York law firm may assist its clients in debt collection activities as a non-legal service in jurisdictions where its lawyers are not licensed to practice if (1) the collection activities are permitted by the applicable rules of the other jurisdictions including their regulation of the unauthorized practice of law; (2) the law firm advises clients in writing that the services are not legal services and that the protection of an attorney-client relationship does not exist with respect to the non-legal services; and (3) the law firm does not use its law firm letterhead in communicating with debtors and does not otherwise mislead debtors to believe that they are acting as lawyers.

N.Y. State 809 (2007)

N.Y. State 809 addressed the following question: "Is a lawyer aiding the unauthorized practice of law where the lawyer, in order to carry out the representation of a client in a transaction, communicates and deals with a non-lawyer who has been engaged by the client's counter-party and may be engaged in the unauthorized practice of law?" (The opinion does not concern litigation situations, where a lawyer who discovers that someone is engaged in the unauthorized practice of law might have special duties to the tribunal.)

The Committee began its analysis by setting out three concrete examples. In the first example, a lawyer representing the existing lender in a mortgage refinancing transaction learns that the mortgage broker and the proposed new lender are not represented by a lawyer but have instead each chosen nonlawyer entities known as "settlement" companies to handle their part of the transaction. (The settlement companies perform tasks such as "reviewing notes for proper endorsements and closing the new loan.")

In the second example, the lawyer represents the seller in a real estate transaction. The buyer is not represented by a lawyer, but instead has engaged a real estate agent to handle the transaction. The lawyer hears the real estate agent advising the buyer on the legal meaning of terms in the transactional documents, and observes the real estate agent preparing for the buyer's signature other instruments affecting title to the real estate.

In the third example, the lawyer represents the groom in negotiating a pre-nuptial agreement. The bride is represented by a person the lawyer knows to be a suspended or disbarred lawyer.

In all three of these transactional situations, the lawyer "may suspect or may actually know that the counter-party's representative is engaged in the unauthorized practice of law." That implicates DR 3-101(A), which provides: "A lawyer shall not aid a non-lawyer in the unauthorized practice of law." The key question is: "If the lawyer continues to represent his or her own client and therefore necessarily communicates and deals with the non-lawyer representative, has the lawyer violated DR 3-101(A)?"

As always, the Committee did not determine whether the actions by the nonlawyers in these examples constituted the unauthorized practice of law - a question of law on which this Committee does not opine -

and a question sometimes "quite vexing and without a clear answer." The Committee then divided the world into three categories:

- (1) "In situations where a lawyer merely suspects that the non-lawyer may be engaged in UPL, the lawyer is under no duty to inquire further."
- (2) "If the situation is unclear, the lawyer may properly proceed with the transaction in the normal manner, dealing with the non-lawyer as necessary to conclude the transaction."
- (3) If it is "quite clear to the lawyer that the non-lawyer is engaging in UPL," the issues require more complex analysis. This analysis occupied the remainder of Opinion 809.

The key question is the meaning of the word "aid" in DR 3-101(A). The Committee offered a clear and helpful answer:

We believe that "aid" as used in DR 3-101(A) requires an intention to *substantially* assist or cause another to commit an act that constitutes the unauthorized practice of law, as opposed to doing something for one's own purposes that incidentally permits the other person to commit that act.
[Emphasis by the Committee.]

In prior opinions concerning DR 3-101(A), the common thread was that the lawyer was engaging in an "affirmative act that substantially enabled the non-lawyer to practice law and was done with the purpose and intent of doing so." Here, in contrast, "through no fault and no act by, and no encouragement from, the lawyer (or the client), the lawyer finds that the counter-party has chosen to engage a non-lawyer to carry out the transaction." The lawyer did not cause this situation in any way, and the lawyer was continuing the transaction "to serve the lawyer's client, not to facilitate the non-lawyer in UPL." The lawyer is "not substantially enabling the non-lawyer's engaging in UPL nor is that incidental result intended by the lawyer." Merely continuing to represent a client in a transaction into which a third party beyond the lawyer's (or client's) control has introduced a non-lawyer is not aiding that non-lawyer in UPL. In short:

... Absent any affirmative intent or desire to substantially assist the non-lawyer in UPL, or some direct financial or other benefit to the lawyer from the non-lawyer's engaging in UPL (other than the ordinary benefit arising from completing the transaction for which the lawyer was engaged), the lawyer is not aiding UPL. All the lawyer is doing is representing a client; the incidental effect of that proper act is that the non-lawyer is able to engage in UPL.

If the rule were the opposite - if merely continuing to represent a client after a lawyer discovers that a non-lawyer is working for another party to the transaction constitutes "aiding" UPL - clients could suffer significant harm. The lawyer's refusal to deal with the non-lawyer might well force the client to handle the transaction without any lawyer at all, or cause the client to abandon a favorable transaction. A rule requiring the lawyer to refuse to deal with the non-lawyer thus "would allow the counter-party effectively to deny the client the right to have representation by a lawyer."

The Committee rejected a contrary authority, Arizona Opinion 99-07, which had concluded - over two dissents - that it would be improper for an Arizona lawyer to negotiate with a nonlawyer insurance

adjuster representing an opposing party. The N.Y. State Committee agreed with the Arizona dissent that the majority's interpretation of the word "assist" in the Arizona equivalent to DR 3-101(A) "failed to balance properly the client's right to zealous representation by counsel against the policy of discouraging the unauthorized practice of law."

N.Y. State Bar Op. 813 (2007)

In N.Y. State 813, several debt collection agencies (some from New York, some not) had retained a New York lawyer to assist in collecting debts. The lawyer, in turn, had hired employees of the debt collection agencies to assist in the collection work, including preparing letters to debtors. Some of the debt collection employees were located in New York; others were located out of state. The question addressed by the Committee was: "May the lawyer use the lawyer's letterhead in sending letters to the debtors?" The Committee said yes.

"We see no impediment in the New York Code of Professional Responsibility to a New York lawyer, acting as a lawyer, using law office letterhead in seeking to collect a debt, assuming no violation of any other jurisdiction's rules," the Committee said. The lawyer will offer legal services to the lawyer's debt-collection-agency clients, so "the lawyer is acting as a lawyer in seeking to collect the debt, and can use law office letterhead in doing so."

The Committee cautioned, however, that "in conducting such a debt-collection practice, the lawyer must adequately supervise his or her non-lawyer employees." As stated in EC 3-6, delegating tasks to clerks, secretaries and other nonlawyers is proper if the lawyer "maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work product." A lawyer must retain "full professional responsibility and meaningful involvement" in supervising the activities of law firm employees. For example, the lawyer could not ethically turn the lawyer's collection letters over to the collection agency or to the lawyer's debt-collection employees without following up to read, review, and approve all letters before they were sent, and without knowing to whom they were sent.

In sum, the New York Code of Professional Responsibility does not prevent a lawyer offering *legal services* from using the lawyer's letterhead when representing clients in collecting a debt. But if the law firm offers debt collection services as a non-legal service where doing so is otherwise permitted, the lawyer should not use law firm letterhead in doing so because that would suggest that the lawyer is offering legal services. (As usual, the Committee expressed no opinion on what constitutes unauthorized practice of law in New York, and expressed no opinion on the law or ethics rules of any other jurisdiction.)

Common Themes in the Opinions

The four opinions contain some common themes. In N.Y. State 803 and N.Y. State 813 (both of which arise in debt collection settings), the Committee emphasized the importance of avoiding deception. Specifically, N.Y. State 803 stressed that a New York lawyer performing legitimate nonlegal services outside New York may not deceive a client into believing that the client is receiving legal services, and may not mislead the debtors with whom it communicates into believing that the law firm is authorized to file suit against the debtor or otherwise practice law in the foreign jurisdiction. Similarly, N.Y. State 813 warned against using a law firm letterhead or otherwise suggesting that the law firm is performing legal services outside of New York when in fact it is performing only nonlegal services.

Both N.Y. State 801 and N.Y. State 813 raised supervision issues. In N.Y. State 801, no amount of supervision by a New York lawyer could cure the unauthorized practice of law in New York by an out-of-state lawyer who would be establishing an office in New York and forming a partnership with a New York lawyer. The plan probably would have been permissible if the out-of-state had been content to serve as a salaried employee rather than a partner who would share legal fees, because then the out-of-state lawyer would be no different from any other salaried paralegal or other non-lawyer who is closely supervised by a lawyer.

N.Y. State 813 addressed the quality of that supervision, emphasizing that close supervision of nonlawyers is the key. When nonlawyers are assisting a lawyer in performing legal services, the lawyer must maintain "meaningful involvement" in the work of the nonlawyers. Activities that a non-lawyer may ethically perform under close supervision may be transformed into the unauthorized practice of law, whether in New York or elsewhere, if the lawyer abdicates supervisory authority and abandons meaningful involvement.

However, N.Y. State 809 shows that lack of involvement in a nonlawyer 's activities can be a virtue. If a lawyer does not cause or encourage a nonlawyer who is working for another party to a transaction to engage in the unauthorized practice of law, then the lawyer's mere continued representation of her own client in the transaction does not violate DR 3-101(A) - despite the lawyer's knowledge of the unauthorized practice - because the lawyer does not "aid" the nonlawyer in the unauthorized practice.

These are not profound themes, but they are important ones. The four recent opinions by the New York State Bar Association Committee on Professional Ethics have thus addressed unauthorized practice situations that may confront many lawyers. The opinions have also demarcated clear boundaries that will help lawyers avoid assisting nonlawyers in the unauthorized practice of law in New York and help lawyers avoid engaging in the unauthorized practice of law outside New York.

Roy Simon is the Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra University School of Law and is the author of Simon's New York Code of Professional Responsibility Annotated, published annually by Thomson West. The 2007 edition is now available.