

The Solicitation Of NY Clients By Out-of-State Lawyers

BY ROY SIMON

In basketball, there's a foul called a "reach in" foul, which is committed when an opponent reaches in to steal the ball but instead hits the player who has the ball. My question in this article is this: When out-of-state lawyers reach into New York to take clients away from New York lawyers, are they committing a "reach in" foul? In other words, when out-of-state lawyers solicit New York clients, are they violating New York's unauthorized practice laws?

To give some life to the question, I've conjured up six out-of-state lawyers, all with separate plans to persuade New Yorkers to hire them.

1. A Florida lawyer seeks to represent the thousands of New Yorkers who own real estate in Florida. His advertising pitch, printed in the New York Times, is, "If you want to sell or refinance your Florida real estate or if you have any legal problems relating to your property in Florida, I would like to be your Florida lawyer."
2. A Kansas lawyer specializing in estate planning wants to expand her practice by drafting wills and leases for wealthy New Yorkers. She gets a list of New Yorkers who have recently inherited money or who own rental property in New York and sends them a letter saying, "If you recently inherited some money, it is vitally important that you have a will, or update any will you currently have. I have substantial experience with federal tax laws relevant to estate planning, and I keep up with New York estate and probate law as well. I also keep up with New York landlord-tenant law and have substantial experience drafting New York leases. Best of all, my low Kansas overhead allows me to charge much less than the typical New York lawyer."
3. A New Jersey lawyer offers to provide employment advice to people who work in New York but live in New Jersey. She buys time on a New York radio station saying, "If you work in New York but live in New Jersey, I can help you negotiate an employment contract or resolve employment discrimination issues with your New York employer. Call me, your New Jersey neighbor, for convenient evening and weekend hours at my New Jersey law office."
4. A Nevada lawyer wants to help New Yorkers get those famous quickie Nevada divorces. He advertises in the New York Post, saying: "If you want or need a divorce, come to Nevada and I'll handle all the legal work necessary to take advantage of Nevada's liberal divorce laws. And I'll charge very reasonable Nevada rates for my services."

5. A Connecticut lawyer defends corporate executives accused of securities fraud. Whenever he reads that a corporation headquartered in New York is under investigation by the S.E.C. or the U.S. Attorney's Office, he sends an email to the corporate officers saying, "If your company is under investigation for securities fraud, you should retain your own personal lawyer. I have experience defending civil and criminal securities fraud suits under federal and New York law."
6. A District of Columbia corporate lawyer wants to serve New York corporations that need to comply with federal laws and regulations. She registers with a web site that allows clients to post requests for proposals ("RFPs") seeking legal advice for specified situations. The lawyer responds to these clients with bids and biographical information.

Before we go any further, let's state some assumptions. First, I assume that none of these six out-of-state lawyers will ever set foot in New York on business, except perhaps the Connecticut lawyer if his clients are sued in the New York courts. I also assume that everything these lawyers say in their advertisements or solicitations is true and readily verifiable, and that none of the six lawyers states or implies that he has a law office or law license in New York. In other words, I assume that there is no problem with the contents of any of the advertisements or solicitations under the ethics rules of any jurisdiction. Finally, I am assuming that none of the out-of-state lawyers is licensed to practice law in New York. They are all strictly out-of-state lawyers, with no right to practice in New York.

New York's Unauthorized Practice Laws

So let's get right to the heart of the inquiry: Are any of the six out-of-state lawyers engaging in the unauthorized practice of law in New York? If an out-of-state lawyer merely solicits prospective clients who live or work in New York, is the lawyer violating New York's statutes prohibiting the unauthorized practice of law? That inquiry begins with a look at the statutes themselves, starting with New York Judiciary Law §478, which provides, in pertinent part:

Practicing or appearing as attorney-at-law without being admitted and registered

It shall be unlawful for any natural person to practice or appear as an attorney-at-law . . . for a person other than himself in a court of record in this state . . . , or to furnish attorneys or counsel . . . to render legal services, or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, or . . . to convey the impression that he is a legal practitioner of law, or in any manner to advertise that he . . . owns, conducts or maintains a law office . . . or office of any kind for the practice of law, without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath. . . [Emphasis added.]

If we read this language literally, any form of advertising in New York by anyone not licensed to practice law in New York would appear to violate Judiciary Law §478. The statute does not distinguish between lawyers from other states, on one hand, and nonlawyers who have never earned a law degree, on the other hand. Nor does §478 depend on where the legal services are to be performed, or on what jurisdiction's law is involved, or on whether the advertising conveys the impression that the lawyer has an office or practices law in New York. As far as §478 is concerned, it would appear to be unlawful for any out-of-state lawyer to advertise legal services "in any manner."

New York also has another broad unauthorized practice provision, Judiciary Law § 484, which provides, in pertinent part:

None but attorneys to practice in the state

No natural person shall ask or receive . . . compensation for appearing for a person other than himself as attorney in any court . . . or for preparing deeds, mortgages, assignments, discharges, leases or any other instruments affecting real estate, wills, codicils, or any other instrument affecting the disposition of property after death, or decedents' estates, or pleadings of any kind in any action brought before any court of record in this state. . . unless he has been regularly admitted to practice, as an attorney or counselor, in the courts of record in this state .

. . .

Putting together the title and the language of § 484, it is unlawful for anyone other than a "regularly admitted" New York attorney to take money for any of four specified types of legal work in New York: (1) representing another in court; (2) preparing "instruments affecting real estate"; (3) preparing any "instrument affecting the disposition of property after death"; or (4) preparing pleadings for litigation in New York courts. Finally, Judiciary Law §485 makes violation of either §478 or 484 a misdemeanor.

Applying the Unauthorized Practice Laws

How do §478 and §484 apply to the six out-of-state lawyers who want to advertise their legal services in New York? Are they all committing a misdemeanor, or just some of them, or none of them?

1. The Florida lawyer is seeking to represent New Yorkers in Florida regarding the most local of all things, real estate. I simply cannot believe that the legislature intended to encompass Florida real estate work by a Florida lawyer within the sweep of §478 or §484. It is true that §484, by its literal terms, prohibits anyone other than a "regularly admitted" New York lawyer from accepting fees for representing another in any court or from preparing "instruments affecting real estate" wherever located, but these prohibitions must logically be qualified to reach only New York courts and New York real estate. Representing New York clients in Florida courts or drafting real estate documents for New York clients based on Florida law regarding Florida real estate just cannot be the unauthorized practice of law in New York, and advertising these Florida services in the New York Times cannot transform it into the unauthorized practice of law in New York. Thus, the Florida lawyer should not be in trouble with the New York authorities.
2. The Nevada divorce lawyer is a lot like the Florida real estate lawyer. The Nevada lawyer is not offering to provide any legal services in the New York courts, and is not offering to advise on New York law. Although §484 literally prohibits an out-of-state lawyer from accepting fees for representing another person in any court, I again do not think the New York legislature intended to reach a Nevada lawyer who will appear solely in Nevada courts and will advise solely on Nevada matrimonial law. Although the ad will appear in New York and the clients will be from New York, in my view the Nevada lawyer is not engaging in the unauthorized practice of law in New York and has no reason to fear New York authorities.

3. The Kansas lawyer, in contrast, wants to draft wills and leases for New York clients. In my view, this is the unauthorized practice of law in New York. The lawyer is advising New York residents on New York law. Moreover, the work involves two of the categories expressly set forth in Judiciary Law §484 -- instruments affecting real estate, and instruments affecting the disposition of property after death. Unlike the Florida lawyer, the Kansas lawyer will probably be dealing with New York property located in New York. The fact that the lawyer may do the actual legal work in Kansas makes no difference. Thus, the New York authorities could take action against the Kansas lawyer for advertising services that she is not permitted to perform. (Indeed, the Kansas lawyer would apparently be prohibited from drafting wills or leases for New York clients even if the clients initiated the contact without being solicited. In that instance, the Kansas lawyer would not be violating §478 because she would not be advertising in New York, but she would still be violating § 484 if she accepted fees for drafting either wills or instruments affecting New York real estate.)
4. The New Jersey lawyer is offering to provide employment advice to people who work in New York but live in New Jersey. This advice will typically be based on New York law (such as New York contract law or New York State employment discrimination laws) as well as on federal anti-discrimination laws, but I doubt that the New York legislature intended to prohibit a New Jersey lawyer from advertising to serve New Jersey residents, even if the ads are placed in New York. Nor is the New Jersey lawyer offering any of the services expressly prohibited by §484 (though advice about employment discrimination could blossom into a complaint with New York's Division of Human Rights). In my view, it cannot be the unauthorized practice of law in New York for a New Jersey lawyer working out of a New Jersey office to offer legal services to New Jersey residents, or to advertise those services to New Jersey residents through the New York media. The New Jersey lawyer thus should have nothing to fear from New York authorities.
5. The Connecticut lawyer is offering to advise and defend New York corporate executives who may face securities law charges, no matter where the investigation is taking place and no matter where the charges may be brought. That comes a good deal closer to the prohibitions of §478, because the Connecticut lawyer seems to be trying to "convey the impression that he is a legal practitioner of law" in New York courts if that becomes necessary. It also falls within the prohibitions of §484 against representing others than himself in New York courts and drafting pleadings for litigation in New York courts. It would seem that the New York legislature intended to reach this kind of advertisement, and the advertisements would seem to constitute the unauthorized practice of law. Yet I am uneasy with this conclusion, because the Connecticut lawyer could almost certainly be admitted *pro hac vice* if civil or criminal securities fraud charges were filed against his client in a New York court. Admission *pro hac vice* would make the representation authorized. Why should advertisements to perform services be unauthorized if the actual services themselves could so easily be authorized?
6. That leaves the District of Columbia lawyer, who wants to respond to requests for proposals from New York corporations who want advice about federal laws and regulations. If the D.C. lawyer were offering to lobby in Congress on behalf of the New York corporations, that would be equivalent to the offer of the Florida lawyer to advise about Florida real estate, and it would therefore not be the unauthorized practice of law in New York. On the other hand, if the D.C.

lawyer were offering to provide advice about federal law as it applied to the New York corporations, that would be more like the offer of the Kansas lawyer to draft wills for New York residents, and it would be the unauthorized practice of law in New York. In our hypothetical, however, the D.C. lawyer is not sending solicitations or advertisements directly into New York, but rather is responding to New York clients who have asked for proposals on the web. As Robert Frost said in his famous poem *The Road Not Taken*, "that makes all the difference." Judiciary Law §478 is couched in terms of "advertising." If a potential client asks for a proposal, the lawyer who responds is not engaged in "advertising," and thus does not violate §478. Moreover, since the D.C. lawyer is not drafting any instrument "affecting real estate" or "affecting the disposition of property after death," the D.C. lawyer is probably also not violating §484.

Let me now tentatively sum up my conclusions about what kinds of solicitations out-of-state lawyers may and may not send to potential New York clients. First, out-of-state lawyers may send email solicitations offering to provide out-of-state services relating to out-of-state legal problems essentially unrelated to activities in New York. Second, out-of-state lawyers may solicit residents of their own state for any purpose, including New York legal problems. Third, out-of-state lawyers may not solicit New York residents or New York corporations offering to provide legal advice relating to New York activities, whether the law involved is New York law or federal law. Fourth, out-of-state lawyers may not offer to represent New York clients in New York courts, even if admission *pro hac vice* is available. Finally, out-of-state lawyers may respond to inquiries (such as requests for proposals) from New York clients on any matter other than drafting instruments affecting real estate or the disposition of property after death.

That leaves one category about which I am still unsure. May an out-of-state lawyer offer advice to New York residents about foreign law if the advice does relate to New York activities by the residents? I will leave that question open, and ask you to email me at roy.simon@hofstra.edu with your thoughts. Also, NYPRR and I would like to hear your reactions to my analysis of the six out-of-state lawyers discussed in this article, and to hear your suggestions for amending or improving New York's unauthorized practice statutes. You may write to me at NYPRR, 1328 Boston Post Road, Larchmont, New York 10538.

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