NEW YORK STATE BAR ASSOCIATION
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COMMITTEE ON PROFESSIONAL ETHICS

Opinion 835 (12/24/09)

TOPIC: Multijurisdictional law practice by corporate counsel

DIGEST: The question of whether an out-of-state lawyer may serve as in-house counsel for a New York corporation and maintain an office in New York is not answered by the New York Rules of Professional Conduct, but rather is a question of law beyond the Committee's jurisdiction.

RULES: Rule 5.5.

QUESTION

1. May a person who is not admitted to practice law in New York but who is admitted to practice law and is in good standing in another U.S. jurisdiction serve as general counsel for a corporation headquartered in New York and maintain an office in New York for that purpose?

OPINION

2. In New York, as elsewhere, the law generally forbids the unauthorized practice of law ("UPL"), which may include legal work performed by out-of-state lawyers as well as by non-lawyers. (The term "out-of-state lawyer" is not defined in the Rules but we use the term "out-of-state lawyer" for purposes of this opinion to mean a person who is not admitted to practice in New York but is admitted to practice and in good standing in another U.S. jurisdiction.) In New York, §§ 476-a, 478 and 484 of the Judiciary Law govern the unauthorized practice of law. Generally speaking, these provisions forbid individuals from maintaining a law practice or otherwise providing legal services in New York unless they are licensed to practice law in this state or otherwise authorized to render particular legal services in New York (for example, by admission *pro hac vice*).

3. The scope and application of these Judiciary Law provisions is a question of law that courts of New York have addressed, albeit infrequently. *See, e.g., El Gemayel v. Seaman*, 72 N.Y.2d 701, 707 (1988) (finding that "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"); *Spivak v. Sachs*, 16 N.Y.2d 163 (1965) (holding that a California attorney engaged in the unlawful practice of law in New York by assisting an acquaintance in New York with her divorce, where the California attorney became substantially involved in the client's New York affairs -- spending 14 days in New York attending meetings, reviewing drafts of a separation agreement, discussing the client's financial and custody problems, recommending a change in New York counsel and, based on his knowledge of New York and California law, rendering his opinion as to the proper jurisdiction for the divorce action and related marital and custody issues).

4. Among other things, the case law suggests that out-of-state lawyers are not engaging in the "unauthorized practice of law" in New York when they perform "incidental and innocuous" legal work in New York in the course of representing clients from their home jurisdictions. *El Gemayel v. Seaman*, 72 N.Y.2d at 707; *accord Spivak v. Sachs*, 16 N.Y.2d at 168 ("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").

5. In New York, the question of whether an out-of-state lawyer is engaged in the unauthorized practice of law in New York is exclusively a matter of law. Unlike the professional conduct rules of most other states, the New York Rules of Professional Conduct ("N.Y. Rules") that took effect on April 1, 2009 do not include provisions modeled on ABA Model Rule 5.5(b), (c) & (d). In jurisdictions in which the courts have adopted provisions comparable to Model Rule 5.5(b)-(d), the provisions have two related effects – they both judicially "authorize" out-of-state lawyers to practice law in the jurisdiction within the limits set by Rule 5.5, and they interpret the conduct authorized by Rule 5.5 as conduct that does not violate the jurisdiction'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 to practice in the jurisdiction within the limits described in Rule 5.5. (Of course, even in states that have adopted ABA Model Rule 5.5, an out-of-state lawyer who desires to appear in court in a state where the lawyer is not licensed to practice must still seek formal admission *pro hac vice* to that court.)

6. The New York State Bar Association has twice recommended (first in 2003, then again in 2008) that the New York courts adopt provisions similar to those in ABA Model Rule 5.5, but both times the Appellate Divisions have declined to do so. Consequently, the N.Y. Rules include no provision comparable to ABA Model Rule 5.5(d)(1), which would authorize out-of-state lawyers to work in New York as in-house corporate counsel other than in proceedings in which *pro hac vice* admission is required. 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. See ABA Model Rule for Registration of In-House Counsel (adopted by the ABA

House of Delegates in August 2008).[1]

7. The jurisdiction of this Committee is limited to answering questions about the meaning and application of the New York Rules of Professional Conduct. We do not interpret court rules or statues. The question whether an out-of-state lawyer may serve as in-house corporate counsel with an office in New York without gaining admission to the New York Bar is entirely a matter of state law governed principally by the Judiciary Law, which is statutory. It is not governed by any provision in the N.Y. Rules of Professional Conduct. Consequently, this Committee lacks jurisdiction to answer the question.

CONCLUSION

8. The question whether an out-of-state lawyer may serve as in-house counsel for a New York corporation and maintain an office in New York for that purpose is a question of law, and is not answered by the New York Rules of Professional Conduct. The question is therefore beyond our jurisdiction and we offer no opinion on the question. Because the question is a recurring one, however, this Committee urges the Appellate Divisions and/or the New York 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.

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[1] available at *www.abanet.org/legaled/standards/noticeandcomment/ModelRule.DOC.*