



26 Law. Man. Prof. Conduct 45 (January 20, 2010)

Corporate Counsel

**Lack of New York Ethics Rule on MJP Leaves
Open Question on In-House Lawyers' Licenses**

Whether a lawyer licensed out of state may serve as in-house counsel for a corporation in New York is a question of law rather than ethics and needs clarification from the court system or the legislature, the New York State bar's ethics committee concluded Dec. 24 (New York State Bar Ass'n Professional Ethics Comm., Op. 835, 12/24/09).

Given the lack of a New York ethics rule on multijurisdictional practice, an out-of state lawyer who works for a company in New York must consult the state's unauthorized practice statutes and the sparse case law applying those statutes to lawyers from other jurisdictions to determine whether or not the lawyer's activities are authorized, the opinion states. The committee explained that it cannot answer questions of law.

The opinion ends with a plea: "Because the question is a recurring one, ... 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 lawyer—are authorized to practice law in New York."

No Ethics Rule on MJP

The question asked—but not answered—in the opinion is this: May a person who is not admitted to practice law in New York but who is an attorney 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?

The committee observed that, unlike the professional conduct rules of most other states, the New York Rules of Professional Conduct that took effect on April 1, 2009, do not include provisions patterned on ABA Model Rule 5.5(b) through (d). In jurisdictions that have adopted those components of Model Rule 5.5, the committee said, the provisions have two related effects: they judicially authorize out-of-state lawyers to practice law in the jurisdiction within the limits of Rule 5.5, and they interpret the conduct authorized by Rule 5.5 as not violating the jurisdiction's statutory and common law regulation of unauthorized practice.

"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 by Rule 5.5,"the committee said.

The opinion points out that although the New York State Bar Association recommended in 2003 and again in 2008 that the New York courts adopt MJP provisions similar to Model Rule 5.5, the appellate divisions declined both times to do so. (See 24 Law. Man. Prof. Conduct 666).

Consequently, the committee said, the New York professional conduct rules have no provision comparable to Model Rule 5.5(d)(1) that would authorize out-of-state lawyers to work in New York as in-

house corporate counsel except in proceedings requiring pro hac vice admission.

Nor does New York have a court-adopted “in-house registration” rule, like many states, that would authorize out-of-state lawyers who satisfy registration requirements to practice law in the state, the committee added. It noted that in August 2008, the ABA adopted a Model Rule for Registration of In-House Counsel. See 24 Law. Man. Prof. Conduct 443.

The question posed in this opinion is simply not answered by the New York Rules of Professional Conduct, the committee declared, concluding that the question is one of law and therefore beyond its jurisdiction.

UPL Statutes

Although the committee said it was offering no opinion on the issued presented, it briefly reviewed N.Y. Judiciary Law § § 476-a, 478, and 484, which govern the unauthorized practice of law in New York. Generally speaking, the committee said, these provisions prohibit individuals from maintaining a law practice or otherwise providing legal services in New York unless they are licensed to practice law in New York or otherwise authorized to render legal services in the state, such as by admission pro hac vice.

The committee summarized two decisions discussing the scope and application of these statutes: *El Gemayel v. Seaman*, 533 N.E.2d 245 (N.Y. 1988), and *Spivak v. Sachs*, 211 N.E.2d 329 (N.Y. 1965). Those cases, the committee said, suggest 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.”

The *ABA/BNA Lawyers’ Manual on Professional Conduct*, a multivolume reference and notification service, is available by subscription through the ABA Web Store at <http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=2170002MOPC> or by contacting BNA at 1-800-372-1033 or customer care@BNA.com. For a free trial subscription go to www.bna.com/products/lit/mopc.htm