FRANKFURT KURNIT KLEIN & SELZ PC

Nicole Hyland
(212) 826-5552
nhyland@fkks.com

New Jersey Ethics Committee Issues Opinion Clarifying Rules Governing Multijurisdictional Practice of Law

An October 3, 2012 ethics opinion from the New Jersey Committee on Unauthorized Practice of Law provides useful guidance to out-of-state lawyers on the scope of multijurisdictional or cross-border practice under Rule 5.5(b)(3) of the New Jersey Rules of Professional Conduct.

By way of background, in 2004, New Jersey amended Rule 5.5, which restricts out-of-state lawyers from practicing law in New Jersey, to include five narrow exceptions modeled after amendments to ABA Model Rule 5.5. The exceptions include: (i) negotiating transactions for existing out-of-state clients where the transaction originates or relates to the lawyer's jurisdiction; (ii) representing parties in alternative dispute resolution proceedings arising out of or relating the lawyer's practice where *pro hac vice* admission is not required; (iii) engaging in investigation or discovery in New Jersey for a proceeding in the lawyer's jurisdiction; (iv) occasional matters where the lawyer associates with a New Jersey lawyer who takes responsibility for the out-of-state lawyer's conduct; and (v) other occasional circumstances where the activity arises out of the lawyer's representation of an existing client and the lawyer's disengagement would result in substantial inefficiency, practicality or detriment to the client. All lawyers who practice in New Jersey under the multijurisdictional or cross-border rules must maintain a "*bona fide* office" in New Jersey during the period of practice. In addition, lawyers who take advantage of the exceptions in Rule 5.5(b)(3)(i), (iv) or (v) must register with the Clerk of the Supreme Court (including consenting to the Clerk as agent for service of process), submit annual registration statements, and pay annual assessment fees.

Opinion No. 49 clarifies that the purpose of the amendments is to facilitate the "occasional" practice of law in New Jersey, while ensuring that out-of-state lawyers do not establish a "continuous or systematic presence in New Jersey." According to the Opinion, "occasional" practice means "occurring infrequently or from time to time," in contrast to "recurring" or "frequent" practice of law.

The Opinion addresses three specific applications of Rule 5.5(b)(3) that have been the subject of various inquiries to the Committee by out-of-state lawyers. First, registration with the Clerk of the Supreme Court does not permit out-of-state lawyers to appear in a New Jersey court. As the Committee explains, the purpose of the amended rule is to allow lawyers to engage in "certain transactions or other nonlitigation matters in New Jersey." *Pro hac vice* admission is still required for an out-of-state lawyer to appear, with local counsel, in a New Jersey court.

Second, out-of-state lawyers may not engage in the ongoing practice of law by simply bringing a New Jersey lawyer into the law firm. As discussed above, Rule 5.5(b)(3)(iv), which authorizes out-of-state lawyers to "associate" with New Jersey lawyers, permits only the "occasional" practice of law in New Jersey, not the ongoing or recurring practice of law.

Third, an out-of-state lawyer may represent an out-of-state real estate developer in a commercial real estate transaction in New Jersey under the following circumstances: (a) the developer is an "existing" client in the lawyer's jurisdiction; (b) the New Jersey transaction relates to the developer's out-of-state business; and (c) the developer and its business are located in the same jurisdiction where the lawyer is admitted. Assuming these criteria are met, Rule 5.5(b)(3)(i) permits the lawyer only to "negotiate" the terms of the transaction, but not to prepare a contract of sale or other pertinent legal documents, according to the Opinion. Nevertheless, Rule 5.5(b)(3)(v) may permit the lawyer to prepare such contracts or documents because, having negotiated the terms of the contract, the lawyer's disengagement at that point would likely "result in substantial inefficiency, impracticality or detriment to the client." Thus, the lawyer's continued involvement is allowed as long as the practice in New Jersey is also "occasional."

Arguably, the Committee's definition of "negotiating transactions" draws too fine a distinction between "negotiating" and "preparing" contracts. As most lawyers know, the activities involved in negotiating contracts and drafting contracts are usually inextricably intertwined. The Committee provides little insight into why it settled on such a restrictive definition of "negotiation," rather than a more inclusive and – some would argue – practical definition that includes preparing contracts.

Putting aside that small quibble, however, I believe the amendments to Rule 5.5 are a positive step in the direction of improved, efficient multijurisdictional practice and reflect the changing reality of the legal profession and the increasingly mobile world in which we live and practice. Similar amendments have been hotly debated in New York (where I practice) and continue to face substantial opposition from various quarters. Given that New York was the last hold-out in converting from the old Code of Professional Responsibility to the Rules of Professional Conduct, it may take some time for New York to embrace these new changes.

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