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Guest Article

Florida Ethics Opinion Highlights Multi-Jurisdictional Practice Landmine

By Jeffrey A. Baskies

In September 2003, the Florida Bar issued an ethical opinion on Multi-Jurisdictional Practice ("MJP") rules that indirectly impacts estates and trusts lawyers. Florida Bar Staff Opinion 24894 (Sept. 3, 2003).

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The gist of the opinion is that a lawyer outside of Florida would be illegally practicing law in Florida by advising a client about Florida law, whether the attorney or the client was physically present in Florida or not. Moreover, a Florida lawyer would be unethically assisting or encouraging the unlicensed practice of law if he corresponded with the out-of-state lawyer.

If this far-reaching opinion becomes the standard in Florida (and maybe elsewhere), then it could spell trouble for estate and trusts attorneys around the country. After all, our clients are often subject to the laws of multiple jurisdictions due to owning homes, forming businesses or doing asset protection planning. Moreover, clients who enjoy long-standing relationships with their attorneys often desire to have access to their counsel, even though the client may have moved to a different jurisdiction.

The Florida Bar Opinion

In Florida, an attorney from the state requested an advisory ethics opinion regarding his real estate practice. Florida Bar ethics counsel are authorized by the Florida Bar to issue informal advisory ethics opinions in response to inquiries from bar members.

The inquirer stated that he represents individuals, many of whom own property in Florida but live out-of-state for part of the year. He said that many of these individuals have counsel in other states for matters that arise in those other states. However, he stated, often the out-of-state attorneys give their clients legal advice based upon Florida law. They even sometimes send

demand letters or other correspondence to the inquiring lawyer's clients interpreting Florida real estate documents, Florida condominium documents and Florida law in general.

The inquirer then stated that he and his firm often tell these out-of-state attorneys that they cannot respond to them or assist them as doing so would constitute the unlicensed practice of law in Florida. The inquirer stated this response tended to upset the out-of-state attorneys and that's why he sought the formal opinion. The inquirer asked how to respond to these out-of-state attorneys.

Rule 4-5.5 of the Florida Rules of Professional Conduct provides, in relevant part, as follows:

"A lawyer shall not:

"(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

"(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unlicensed practice of law."

In Staff Opinion 24894, Florida bar counsel responded:

"Based upon the facts provided, it appears that the inquirer and his firm are acting appropriately in alerting out of state practitioners to Florida rules regarding the unlicensed practice of law. Pursuant to Rule 4-5.5(b), set forth above, the inquirer cannot assist or encourage the out of state attorneys in the unlicensed practice of law. As stated by the court *in The Florida Bar v. Sperry*, 140 So.2d 587, 598 (Fla. 1962), the practice of Law includes 'the giving of legal advice and counsel to others as to their rights and obligations under the law . . . although such matters may not then or ever be the subject of proceedings in a court'), rev'd on other grounds, 373 U.S. 379 (1963). See also, *The Florida Bar v. Beach*, 675 So.2d 106 (Fla. 1996)."

A Potentially Significant Shift?

This opinion could represent a landmark change in MJP rules.

While there are probably 50 different rules on the subject and it is not possible to cite to every particular state's rule, there is, in general, a line of cases and unlicensed practice opinions basically stating that it was not the unlicensed practice for an attorney to advise a client about the law in a state where he was not admitted - especially if the attorney was physically present in that state.

For example, there was a decision basically stating that it was OK for an attorney from one state (let's say Illinois) to continue providing estate planning services for his client who moved to another state (let's say Florida). The attorney could even fly to Florida to meet the client.

Essentially those old opinions held that so long as the out-of-state attorney did not come into the state and solicit business there, then he was not practicing law in that state without a license. For ease, we will call that the "physical presence and solicitation" test.

The positive aspect of the physical presence and solicitation test was that it was relatively easy to follow. If a client called you and asked for a new will, you could create it (although it might be prudent to have it reviewed by local counsel). You could even go visit the client to oversee the execution of it - and maybe take a nice vacation. But you couldn't go to Florida for six months and set up an estate planning "store-front" soliciting legal business in Florida. Most lawyers could understand that rule and could successfully abide by it.

Those who feel the physical presence and solicitation standard was not strong enough and who

support the Florida ethics opinion assert that the more strident rule in the opinion is necessary to protect clients. And, they assert, shouldn't that be our top priority?

If, however, the Florida opinion is a reflection of the law on unlicensed practice, then any time a lawyer is asked to give an opinion that involves some consideration of the law of another jurisdiction, then the lawyer would be engaged in the unlicensed practice unless he retained local counsel to provide the advice. Moreover, even if the attorney did retain local counsel, it seems the attorney cannot even be involved in relating the legal opinions regarding that jurisdiction to his client.

For many litigators, that rule may not be so bad. But for the average estate planning attorney, the Florida opinion is a hard pill to swallow. If that really is the rule on unlicensed practice, the consequences could lead to absurd results.

T&E Lawyers Uniquely Impacted

Our clients often ask us questions that involve our ability to consider the laws of other states. Some examples are:

- our clients own real estate in several states (vacation homes, interests in real estate family partnerships, investment properties) and ask if they should create revocable trusts;

- our clients are beneficiaries of estates and trusts administered in other states, and they may call us for counsel;

- our clients may desire to engage in asset protection planning (often involving corporations, partnerships and/or trusts in other states - or overseas);

- our clients ask us to help form business entities for them, and they want our opinions on where to form them, and what state's laws are most advantageous - after all, we know there so many corporations in Delaware for a reason;

- our clients ask us to consider forum shopping for tax planning (for example, Florida lawyers, ironically, were famous for creating out-of-state trusts all the time to evade the Florida intangibles tax); and

- our clients want us to prepare wills for their parents or children who live in other states.

Let's consider a fairly common situation. A new client (a doctor) comes to see her estate planning attorney and asks about asset protection planning, including setting up a domestic asset protection trust ("DAP"). She wants her attorney to advise her if using a DAP would be a good part of her overall estate planning and if so, where she should create one (and let's assume she doesn't live in Nevada or one of the other DAP-friendly states). How can that attorney ever manage a reasonable answer? To do so on the spot would surely mean giving some opinion regarding the laws of a state or states favorable toward DAPs. Furthermore, if the attorney tries to retain local counsel in one state (let's say Nevada for example) to analyze Nevada law and advise if that would be a good jurisdiction to consider establishing the DAP, how could the client ever get a fair reading on whether Nevada was the *best* jurisdiction in which to create it? Again doing so would surely involve an attorney making opinions on the relative benefits of Nevada law versus the law of one or several other jurisdictions (and let's assume few lawyers are admitted in all the states having DAPs).

Even if the Nevada attorney could advise about the value of Nevada DAPs, that attorney presumptively still couldn't give advice on whether or not using a Nevada DAP is advisable for that client - since doing so would require considering the existing estate planning and the asset protection options available in the client's home state.

What if this client also has questions about creating a family investment partnership to manage a small shopping mall she and her siblings own in another state?

You get the idea.

Certainly trusts and estates attorneys would not be the only practitioners affected if the MJP rules are not clarified and if the states are free to adopt opinions like this Florida Bar opinion, but due to our practices we are perhaps uniquely situated to be impacted by it.

Indeed, without a model rule for MJPs, the Florida opinion may be just the first shot in a drawn-out battle where each state tries to build protectionist walls to keep out-of-state attorneys out - and without any concern even for physical presence. That would be a profound change in the status of MJP law and not necessarily a change for the better.

Conclusion

The Florida Bar Staff Opinion could not be clearer. In their opinion, it is the unlicensed practice of law for an out of state attorney to advise a client (regardless of where the client or the out-of-state attorney is physically present or resides) regarding Florida law. And, it is also forbidden for any Florida lawyer to assist or encourage any non-Florida lawyer in advising a client on Florida law. Thus anything a Florida lawyer does which may be seen as facilitating the non-Florida lawyer in advising a client on Florida law (even if it is just responding to a seemingly innocuous inquiry) could lead the Florida lawyer into trouble.

Now in the name of full disclosure, I must admit that I am a member of the Florida bar - presently in good standing and hoping to always remain so. Thus, I will not go so far as to be hostile to this decision (although I think it is wrong). But if Florida can do this (and it isn't successfully challenged - although I hope it will be challenged and revoked), then what can the other 49 states do? And if they all adopt MJP rules like this one, how can estates and trusts lawyers properly do their jobs without ever running afoul of the rules? Can we really never again advise a client to create an entity in Delaware? I can't imagine the Delaware Legislature would take that sitting down!

However, there may be a way to reach a uniform solution. For the last several years, the American Bar Association and the American College of Trusts and Estates Council have debated the MJP issue. To date, there has been no successful set of model rules developed and adopted across the country. But the time for adopting a standard set of rules and adopting them uniformly in the states is definitely upon us. Perhaps an opinion like this one from Florida will push that process forward.

In the end, if the legal community (and the estate planning community in particular) fails to reach a consensus and build some uniform rules, then the states are going to step in, adopt their own rules and generally make a total mess of the entire field. Without some standard rules uniformly adopted, MJP issues threaten to become - and may already be - a legal and ethical minefield.

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