Unauthorized Practice of Law in Florida: You May Be Guilty

By Elisabeth Hessler

The Florida Bar recently issued a Staff Opinion that may have widespread ramifications for the New York estate planning community. Florida Bar Staff Opinion 24894[1] (the "Florida Opinion") states that Florida attorneys should not communicate with out-of-state attorneys on matters involving Florida law. The Florida Opinion was issued specifically in regard to out-of-state attorneys interpreting Florida real estate documents and Florida law in general. However, the principles set forth in the Florida Opinion can be interpreted to mean that an out-of-state attorney engages in the unlicensed practice of law in Florida when drafting estate planning documents having Florida implications.

Florida Bar Staff Opinion 24894

A Florida Bar Staff Opinion is an informal advisory ethics opinion issued to a member of the Florida Bar who questions whether contemplated conduct fits squarely with the Florida ethics rules. The Board of Governors of the Florida Bar authorizes Florida Bar ethics counsel to issue Staff Opinions. Staff Opinions are akin to Private Letter Rulings issued by the Internal Revenue Service, and are not to be relied on by attorneys other than the inquirer. A Staff Opinion does not carry judicial force and is not a substitute for a judge's decision or the decision of a grievance committee. However, Staff Opinions provide insight into how the Florida Bar may respond to such future conduct. These opinions are not published by the Florida Bar but may be obtained on request from the Florida Bar ethics counsel.

The Florida Opinion was issued to a Florida attorney (the "inquirer") who represented clients who own property in Florida but live out-of-state for part of each year. These "snowbird" clients have counsel in other states who are not licensed in Florida. In counseling their clients, these out-of-state attorneys interpret Florida real estate documents and other issues of Florida law. It was the inquirer's practice to send the following cease-and-desist notice when contacted by out-of-state attorneys to discuss the clients' legal issues:

> It is inappropriate for me to communicate with unadmitted attorneys regarding the interpretation of Florida law and Florida real estate documents. Accordingly, I respectfully demand that you cease and desist from communication with my client. Any further communication regarding this issue should be handled through a Florida-admitted attorney, addressed to my attention. We will continue to respond to your client through your office until we receive your consent to communicate directly with him/her or until we are advised that he/she is represented by Florida counsel. We assume you will forward our correspondence as appropriate.

Upon receipt of the inquirer's notice the out-of-state attorneys frequently cried foul. The inquirer sought assurance from the Florida Bar ethics counsel that his conduct was appropriate to prevent the unlicensed practice of law by out-of-state practitioners.

In issuing the Florida Opinion, the Florida ethics counsel relied on Florida Rules of Professional Conduct and Florida caselaw, and concluded that the inquirer had acted appropriately. The Florida Opinion reminded the inquirer of his duty to alert the out-of-state attorneys of the Florida rules related to the unlicensed practice of law, and one must necessarily conclude by implication that the Florida ethics counsel believed that the out-of-state attorneys had engaged in the unlicensed practice of law.

Florida attorneys must abide by the Rules of Professional Conduct. Rule 4-5.5(b) prohibits the inquirer from assisting or encouraging an out-of-state attorney in the unlicensed practice of law:

> Rule 4-5.5
> 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.

The Comment to the Rule provides that the definition of the practice of law is established by law; limiting the practice of law to licensed attorneys is intended to protect the public. The Comment states

that the Rule "does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies."[2] 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."[3] Based on the facts presented by the inquirer, the Florida Opinion concluded that the inquirer acted appropriately in alerting the out-of-state attorneys of the rules regarding the unlicensed practice of law in Florida.

ActionLine Article

One commentator has evaluated the applicability of the Florida Opinion to wills, trusts and estates practices. The Spring 2004 issue of *ActionLine*, the Florida Bar's Real Property, Probate & Trust Law Section's quarterly newsletter, includes an article in which the author, Keith Kromash, concludes that a literal reading of the Florida Opinion means that Florida attorneys should "probably not review estate planning documents prepared by an out-of-state attorney because such a practice is akin to assisting or encouraging in the unlicensed practice of law."[4] In reaching his conclusion, Kromash relied on the Rules of Professional Conduct as enacted in Florida and on Florida caselaw.

Kromash's article sets forth the Florida rules related to the unlicensed practice of law, which are reviewed here. An out-of-state attorney who is not licensed in Florida is a nonlawyer.[5] The Comment to Rule 4-8.5 of the Rules of Professional Conduct states that if a lawyer's activity in the jurisdiction is "substantial and continuous" that activity may constitute the practice of law in Florida.[6] Florida defines the unlicensed practice of law to be "the practice of law, as prohibited by statute, court rule, and case law of the state of Florida."[7] The practice of law includes the giving of legal advice and counsel to others about their rights and responsibilities under the law.[8]

Rule 4-5.5 mandates that Florida lawyers shall not assist nonlawyers in the unlicensed practice of law.[9] Therefore, a nonlawyer who advises her clients of their rights and responsibilities under Florida law is engaging in the unlicensed practice of law. Where a Florida lawyer enables a nonlawyer to give legal advice and counsel to others about their rights and responsibilities under Florida law, the Florida lawyer has assisted in the unlicensed practice of law.

Kromash applies his analysis to two trust-and-estate scenarios, and evaluates whether the out-of-state attorney would be engaged in the unlicensed practice of law. In the first scenario, an out-of-state beneficiary of a trust or estate administered in Florida seeks legal advice from an out-of-state attorney. Kromash concludes that "if, in giving the beneficiary advice, the out-of-state attorney interprets Florida law with respect to wills, trusts or estates, that attorney will have engaged in the unlicensed practice of law."[10] Kromash counsels Florida attorneys representing Florida trustees and personal representatives to avoid assisting out-of-state attorneys who provide legal advice on Florida law to their clients. Kromash advises these Florida attorneys contacted by out-of-state attorneys to respond with cease-and-desist notices similar to the one described in the Florida Opinion.

The second scenario involves an out-of-state attorney who seeks review by a Florida attorney of estate planning documents drafted for a "snowbird" client. Presumably the estate planning document has some nexus with Florida, although Kromash does not make clear the extent of the client's contacts with Florida. Kromash concludes that based on a literal interpretation of the rules, caselaw, and the Florida Opinion, the Florida attorney should not review the estate planning documents, since reviewing the documents may constitute assisting or encouraging the unlicensed practice of law in Florida.

Advice for the New York Practitioner

These recent developments in Florida may cause New York attorneys some difficulty in conducting their estate planning practices. This is particularly important now, as the "snowbird" clients return to New York for the summer months. Although New York attorneys are not bound by the Florida Opinion, they may be affected by it and should be aware of its existence.

New York attorneys must abide by the Code of Professional Responsibility (hereinafter the "Code"). Disciplinary Rule 6-101 addresses the lawyer's duty of competency and provides the New York attorney guidance in the face of the Florida Opinion. Rule 6-101 states that:

> A. A lawyer shall not:
> 1. Handle a legal matter which the lawyer knows or should know that he or she is not competent to handle, without associating with a lawyer who is competent to handle it.
> 2. Handle a legal matter without

preparation adequate in the circumstances.
3. Neglect a legal matter entrusted to the lawyer.

This rule poses a serious problem to a New York attorney enlisted to draft an estate plan that may have Florida implications. For example, if an attorney is drafting a will for a client who owns a condominium in Florida and the attorney is unfamiliar with the governing law, that attorney has an ethical duty to investigate the Florida law. If the New York attorney interprets Florida law, the New York attorney has engaged in the unlicensed practice of law in Florida and may be subject to discipline. In light of the Florida Opinion, Florida attorneys may now be unwilling to explain the law to a New York attorney for fear of assisting in the unlicensed practice of law. This leaves the New York attorney hard pressed to competently advise her client.

Similarly, a New York attorney may endeavor to draft an estate plan for a New York domiciliary who plans to retire to Florida. At the time the attorney drafts the will, it is unclear whether the client will die domiciled in New York or Florida. The New York attorney owes a duty to the client to ensure that the will is valid in both states and may not ignore the realistic possibility of a Florida probate. In carrying out her duty to the client, it may be necessary to enlist a Florida attorney to review the New York will. If the Florida Opinion is to be adhered to, the Florida attorney should refuse to review the document because doing so would necessarily constitute assisting in the unlicensed practice of law.

The impact of Florida Opinion on New York attorneys remains to be seen. A Staff Opinion does not carry judicial force, but it is an indication of possible future action by the Florida Bar. In light of Kromash's article in *ActionLine*, many Florida attorneys have been made aware of the Florida Opinion. Florida lawyers will likely proceed with caution when enlisted by a New York attorney in estate planning matters and may choose to send a cease-and-desist notice instead of offering advice and counsel.

On the other hand, New York Bar members should proceed with caution, knowing that the Florida Bar may be looking for a case to test the principles set forth in the Florida Opinion. Ethically speaking, nothing in the Code of Professional Responsibility prohibits a New York attorney from drafting an estate plan that may have implications in Florida. In fact, the Disciplinary Rules mandate that the New York attorney competently represent her client, which may require enlisting an expert in Florida law. However, as a non-attorney in Florida, the New York attorney may be found to have engaged in the unlicensed practice of law and enjoined from such practices. Furthermore, the New York attorney may be sanctioned by the New York Bar for engaging in the unlicensed practice of law in Florida. The New York Bar will have to monitor how aggressively the Florida Bar proceeds with this issue. While the law in this area is far from settled, it is now clear where the Florida Bar stands.

Endnotes

1. September 3, 2003.
2. R. Regulating Fla. Bar 4-5.5 (2004).
3. *Florida Bar v. Sperry*, 140 So. 2d 587, 591 (Fla. 1962), *rev'd on other grounds*, 272 U.S. 379 (1963). *See also Florida Bar v. Beach*, 675 So. 2d 106 (Fla. 1996).
4. Keith Kromash, *A Primer on Florida Attorneys' Ethical Obligation to Avoid Assisting in the Unlicensed Practice of Law—Florida Bar Staff Opinion 24894*, ActionLine (Florida Bar Real Property, Probate and Trust Law Section Newsletter), Spring 2004, at 1.
5. R. Regulating Fla. Bar 10-2.1 (2004).
6. R. Regulating Fla. Bar 4-5.5 (2004).
7. R. Regulating Fla. Bar 10-2.1 (2004).
8. *Sperry*, 140 So. 2d at 591. *See Florida Bar v. Heller*, 247 So. 2d 434 (Fla. 1971) (the practice of law includes searching public records for lands and money which may have been abandoned, or unclaimed, by true owners, locating missing heirs and offering to recover funds, upon agreement to share the proceeds of the recovery); *Florida Bar v. Lister*, 662 So. 2d 1242 (Fla. 1995) (Wisconsin attorney engaged in the unlicensed practice of law in Florida when he represented that he was an attorney, prepared a mortgage and quitclaim deed for client, improperly created and used power of attorney, described himself as "Esquire" on correspondence, identified himself as an attorney in phone conversations, and had checks imprinted with words representing that he was an attorney).
9. R. Regulating Fla. Bar 4-5.5 (2004).
10. *ActionLine* at p. 5.

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