

ETHICS OPINION

RO-86-52

Limitations on in-house counsel of corporation who is not admitted to practice law in Alabama

QUESTION:

“As discussed in our telephone conversation, I would appreciate your assistance in clarifying a question I have concerning State Bar requirements for a prospective employee at Kinder-Care. I am considering hiring as an attorney for the legal staff at Kinder-Care a member of the Oregon Bar and need to know if this prospective employee needs to take our State Bar examination.

The duty of any staff employee at Kinder-Care would be to provide general advice to other Kinder-Care employees in the field in connection with the operation of over 1100 Kinder-Care centers located in forty states and Canada. In addition, staff attorneys would be involved in assisting Kinder-Care real estate development operations as needed in acquiring sites and constructing new Kinder-Care centers in the various states. A Kinder-Care staff attorney would be a full-time employee of Kinder-Care and would not be involved in the private practice of law.

Under the facts as outlined above, I would appreciate you giving me some guidance as to what requirements, if any, such an in-house staff attorney would be required to meet in Alabama. I certainly appreciate your assistance regarding this matter and look forward to hearing from you in the near future. If you need additional information, please do not hesitate to contact me.”

ANSWER:

If a full-time employee of Kinder-Care Learning Centers, Inc., not admitted to the Alabama State Bar, although admitted to the Bar of another state, performs acts in Alabama which constitute the practice of law as defined by the Alabama statutes and the courts, he would be guilty of the unauthorized practice of law. However, if the attorney is a full-time employee of Kinder-Care and the legal work is done exclusively for his employer, Kinder-Care, this would not constitute the unauthorized practice of law in Alabama and the attorney may advise other employees of Kinder-Care if the advice involves legal problems of Kinder-Care, but may not practice law individually for the other employees. We do not believe the attorney should make court appearances for Kinder-Care.

DISCUSSION:

Alabama is one of a few states that has a comprehensive legislation definition of what constitutes the practice of law.

Section 34-3-1, Code of Alabama, 1975, provides:

“If any person shall, without having become duly licensed to practice, or whose license to practice shall have expired either by disbarment, failure to pay his license fee within 30 days after the day it becomes due, or otherwise, practice or assume to act or hold himself out to the public as a person qualified to practice or carry on the calling of a lawyer, he shall be guilty of a misdemeanor and fined not to exceed \$500.00, or be imprisoned for a period not to exceed six months, or both.”

Section 34-3-6, Code of Alabama, 1975, provides:

- “(a) Only such persons as are regularly licensed have authority to practice law.
- (b) For the purpose of this chapter, the practice of law is defined as follows:

Whoever,

- (1) In a representative capacity appear as an advocate or draws papers, pleadings or documents, or performs any act in connection with proceedings pending or prospective before a court or a body, board, committee, commission or officer constituted by law or having authority to take evidence in or settle or determine controversies in the exercise of the judicial power of the state or any subdivision thereof; or
- (2) For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, advises or counsels another as to secular law, or draws or

procures or assists in the drawing of a paper, document or instrument affecting or relating to secular rights; or

- (3) For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, does any act in a representative capacity in behalf of another tending to obtain or secure for such other the prevention or the redress of a wrong or the enforcement or establishment of a right; or
- (4) As a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense;

is practicing law.

- (c) Nothing in this section shall be construed to prohibit any person, firm or corporation from attending to and caring for his or its own business, claims or demands, nor from preparing abstracts of title, certifying, guaranteeing or insuring titles to property, real or personal, or an interest therein, or a lien or encumbrance thereon, but any such person, firm or corporation engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles to real or property are prohibited from preparing or drawing or procuring or assisting in the drawing or preparation of deeds, conveyances, mortgages and any paper, document or instrument affecting or relating to secular rights, which acts are hereby defined to be an act of practicing law, unless such person, firm or corporation shall have a proprietary interest in such property; however, any such person, firm or corporation so engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles shall be permitted to prepare or draw or procure or assist in the drawing or preparation of simple affidavits or statements of fact to be used by such person, firm or

corporation in support of its title policies, to be retained in its files and not to be recorded.”

* * *

Disciplinary Rule 1-105(A) provides:

“(A) This Code shall apply to and govern the conduct of any lawyer not licensed in Alabama but who is associated as a partner or otherwise who has formed a professional corporation or association with a lawyer licensed in Alabama for the practice of law in Alabama with respect to professional activities in Alabama.”

Ethical Consideration 3-9 provides:

“Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in in practice where he is not permitted by law or by court permission to do so.”

Disciplinary Rule 3-101(B) provides:

“(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.”

Disciplinary Rule 3-103(B) provides:

“(B) A lawyer shall not be associated, as a partner or otherwise, in the practice of law with another person who is not then licensed in Alabama to practice law, or who is then suspended or disbarred from the practice of law, provided that this rule shall not apply to association, as a partner or otherwise, with an attorney of a state other than Alabama who is authorized to practice and is practicing in such other state.”

Our research reveals no opinions of courts or ethics committees holding that where an attorney is not admitted to the Bar of a particular state but is admitted to the Bar of another state, that lawyer can perform certain services which do constitute the unauthorized practice of law as long as those services are performed for only one single client.

The case of Appell v. Reiner, 195 Atl. 2d 310 (N.J. 1963) involved the legality, vel non of an agreement whereby a New York attorney agreed to perform certain services in New Jersey although he was not admitted to the Bar of New Jersey. Although the facts of the case are not particularly helpful, the following language sets forth the reason for requiring admission to the Bar of a particular state before allowing the practice of law although the attorney involved may be admitted to some other state. The opinion contains the following:

* * *

“The practice of law is not confined to the conduct of litigation in the courts, but is engaged in whenever and wherever legal knowledge, training, skill and ability are required. In general, all advice to clients, and all actions taken for them in matters connected with the law, constitute the practice of law. Under modern conditions, it consists in no small part of work performed outside of a court and having no immediate relation to proceedings in court.

* * *

If attorneys from foreign jurisdictions were able to practice law in New Jersey, they would, in effect, be holding themselves out as attorneys with the privileges attendant thereto, although they would not be subject to the control of our Supreme Court and our ethics and grievance committees. Thus, they would be permitted to practice law in an uncontrolled atmosphere. Hence, in attempting to define the outer limits of what constitutes the practice of law in New Jersey, the definition adopted should be one sufficiently broad to permit the vigorous enforcement of the strong policy of judicial control over members of the bar for the protection of the public interest.

In determining whether a foreign attorney is practicing law in New Jersey we should consider the following factors: (1) were the services rendered in the jurisdiction of this State; (2) were the services and legal advice rendered based upon the laws of this State; (3) did the legal services relate to a transaction, property right or subject matter, the res of which is in New Jersey, and (4) if litigation might result, would the forum be the courts of this State.”

* * *

A number of states permit interstate law firms and have a Disciplinary Rule similar to Alabama’s DR 2-102(D) which provides:

“(D) A partnership shall not be formed or continued between or among lawyers licensed in different states (including the District of Columbia) unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the limitations on those members and associates of the firm not licensed to practice in all listed states; however, the same firm name may be used in each state.”

The case of New York Criminal and Civil Courts Bar Association v. Jacoby, 460 N.E. 2d 1325 (N.Y. Ct. App. 1984), involved an attempt of the Bar Association to restrain multistate law firms from practicing in New York. The Court held that the multistate law firm was entirely legal, the name of the firm could consist of the surnames of lawyers not admitted to New York, but emphasized that only members of the New York Bar could perform acts in New York which constituted the practice of law. The opinion contains the following:

* * *

“Disciplinary Rule 2-102(D) of the Code of Professional Responsibility, adopted to prescribe the standards of professional conduct on the part of the burgeoning number of multistate firms, provides: ‘A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the

members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.’

* * *

The practice of law by firms comprised of partners and associates some of whom are not residents of the State of New York and some of whom are not licensed to practice law in the State is not, as such, prohibited under our State law. It is the policy of the State of New York to foster the availability of a wide range of professional services by lawyers qualified to render them. But no natural person whether or not a partner or associate of a multistate firm, may practice law in New York State unless he or she is admitted to practice here. The practice of law by multistate firms, therefore, may be conducted in New York only by partners and associates who are licensed to practice in this State. No claim is advanced in this case, however, that the practice of the firm of Jacoby & Meyers is conducted in New York State other than by lawyers who are admitted to practice here.”

Section 34-3-6(c) in part provides:

“(c) Nothing in this section shall be construed to prohibit any person, firm or corporation from attending to and caring for his or its own business, claims or demands,”

Despite the above-quoted language the Unauthorized Practice of Law Committee is of the opinion that corporations can make court appearances through non-lawyer employees only in small claims court. Section 12-12-31, Code of Alabama, 1975, provides in part as follows:

* * *

“A party, including an individual, partnership, or corporation, may appear in cases on the small claims docket of district court with or without representation by an attorney; provided, however, that if a partnership appears without representation by an attorney, the person representing the partnership shall be a partner or employee of the partnership; and provided further, that if a corporation appears without representation by an attorney, the person representing the corporation shall be an officer or full-time employee of the corporation.”

* * *

This statute evidences a legislative intent to confine the representation of corporations without an attorney to small claims court and the corporations must appear in other courts through the representation of an Alabama attorney.

WHMjr/vf

5/26/86