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the in-house bar association℠

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The Law of Inside Counsel

III. UNAUTHORIZED PRACTICE OF LAW

Whether someone is engaged in the unauthorized practice of law is a highly fact-sensitive inquiry. Both New Jersey and New York courts have, therefore, adopted a case-by-case approach.

Because the phrase "practice of law" all but defies definition, in-house counsel can never be certain that their activities will not be questioned. This is particularly true where in-house counsel are not admitted to practice in the state in which they are employed. Some counsel take the view that the rendering of advice to their "employer/client" does not constitute the "practice of law." Caselaw in both jurisdictions belies that position. But, as we show below, that is not the end of the inquiry. While both jurisdictions have developed very similar rules addressing the issue, the approaches of the New Jersey and New York courts are quite dissimilar.

Before turning to the law of New York and New Jersey, we turn to an extraordinary case from California.

The California Supreme Court determined that a New York firm practiced law in California when they represented a California client in a dispute by making preliminary arbitration plans and by negotiating a settlement. Birbrower, Montalbano, Condon & Frank, P.C. v. ESQ Business Services, Inc., 17 Cal. 4th 119 (1998).

The dispute involved a California software developer, ESQ. ESQ retained the New York law firm of Birbrower, Montalbano, Condon & Frank, P.C. to review a software development and marketing agreement. The attorney retained to do the work was admitted to practice in New York, but not California. Two years later, ESQ contacted the same law firm to investigate claims for copyright infringement, antitrust violations and breach of contract under the agreement. The agreement called for binding arbitration in California.

Birbrower filed an arbitration on behalf of ESQ and a team of New York attorneys went to California to work on the case. ESQ eventually settled the matter before arbitration. ESQ was not happy with the legal advice received from Birbrower in the dispute and therefore sued the firm for malpractice. The California Supreme Court concluded that the out-of-state lawyers were unauthorized to practice law in the state and were therefore not entitled to recover fees for the services provided.

While Birbrower involved outside counsel, many in-house counsel have felt comfortable representing their employers in arbitrations nationwide. There are two separate worrisome aspects to Birbrower.

First, as the dissent points out, 17 Cal. 4th 119 at 147, most jurisdictions to consider the question had concluded that representing a party in an arbitration is not the practice of law. The legal reasoning that justified this conclusion was based on the well established doctrine that a judicial award can not be vacated by a court solely because it is contrary to the law. Thus, because the arbitrator is not bound by the law, those presenting a case to the arbitrator

are not acting as lawyers. The practical reasoning that produced this result was that the most common form of arbitrator history is the labor arbitration; replacing the shop steward and foreman who usually represent the employee and employer with lawyers would revolutionize and complicate labor relations nation wide. Based partly on a statute that expressly excluded labor and international arbitrations from the definition of the practice of law, the Birbrower majority was apparently the first court to hold that representing a client in an arbitration constitutes the practice of law in California.

Second, the breadth of the decision may have much more significant ramifications for in-house counsel.

> What worries attorneys most is the breadth of the Birbrower decision, which did not simply involve a "foreign" lawyer practicing before a state tribunal. Instead, the California Supreme Court touched on fundamental aspects of any multi-state practice. One important ramification of the decision is that out-of-state lawyers may not even be in California when they tender advice, yet still be vulnerable to charges of unlawful practice. Law firms and in-house counsel doing business around the country fear that other states will soon retaliate if California's position is allowed to stand.

Lori Tripoli, Ill Wind From the West . . . State Efforts to Restrict Legal Practice Challenged By Lawyers Nationwide, 12 No. 9 Inside Litig. 10 (September 1998). Thus, counsel in one state may be practicing law in another without ever setting foot there.

> [O]ne may be practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means.

Birbrower, 17 Cal. 4th at 128-9.

The California legislature responded to the Birbrower decision by amending the California Code of Civil Procedure. ﷺ.4 (b) of the Code now allows out-of-state attorneys to participate in arbitrations.

> Notwithstanding any other provision of law, . . . an attorney admitted to the bar of any other state may represent the parties in the course of, or in connection with, an arbitration proceeding in this state, provided that the attorney, if not admitted to the State Bar of California, timely files the certificate described in subdivision (c) and the attorney's appearance is approved by the arbitrator, the arbitrators, or the arbitral forum.

Sub-section (c) requires an attorney who is not admitted to the California Bar to submit a certificate to the arbitrator, the State Bar of California and all other parties involved in the arbitration.

Sub-section (f) permits out-of-state attorneys to represent California clients in arbitrations taking place in other states.

> [A]n attorney who is a member in good standing of the bar of any state may represent the parties in connection with rendering legal services in this state in the course of and in connection with an arbitration pending in another state.

Section 1282.4 will expire on January 1, 2001 without any additional action by the California legislature.

Although ACCA filed an amicus brief asking the United States Supreme Court to grant a writ of certiorari to the Supreme Court of California, the petition was denied. Birbrower, Montalbano, Condon & Frank, P.C. v. ESQ Business Services, Inc., 119 S.Ct. 291 (October 5, 1998). What the continuing effect of Birbrower will be remains to be seen. See Unauthorized Practice: The California Perspective, (editorial), New Jersey Lawyer Newspaper, February 1, 1999, p.6.

A. New Jersey

1. The Practice of Law

In New Jersey,

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> [i]t is, of course, clear that the practice of law is not confined to litigation but extends to legal activities in many non-litigious fields which entail specialized knowledge and ability. Oftentimes the line between such activities and permissible business and professional activities by non-lawyers is indistinct. . . . [E]ach individual set of circumstances must be passed upon "in a common-sense way which will protect primarily the interest of the public and not hamper or burden that interest with impractical and technical restrictions which have no reasonable justification." Courts have sometimes sought to distinguish between simple and complex legal work but this distinction appears to lack any real force. . . . In their efforts to protect the public and to draw a common, sensible line between permissible and impermissible activities by laymen, the courts throughout the country have frequently differed in emphasis and result.

New Jersey Bar Ass'n v. N. New Jersey Mortgage Assoc., 32 N.J. 430, 437-38 (1960) (citations omitted).

New Jersey's statutory bar on the unauthorized practice of law was codified at N.J.S.A. 2A:170-78 through -85 until 1994 when those sections were repealed. They have been replaced with a criminal statute, 2C:21-22 which provides:

> Unauthorized practice of law, penalties: a. A person is guilty of a disorderly persons offense if the person knowingly engages in the unauthorized practice of law.
>
> b. A person is guilty of a crime of the fourth degree if the person knowingly engages in the unauthorized practice of law and:
> (1) Creates or reinforces a false impression that the person is licensed to engage in the practice of law; or
> (2) Derives a benefit; or
> (3) In fact causes injury to another.
>
> c. For the purposes of this section, the phrase "in fact" indicates strict liability.

As we show below, the New Jersey Supreme Court has "exclusive jurisdiction over the admission to the practice of law" in the State of New Jersey. New Jersey Bar Ass'n, 32 N.J. at 436. And while the Legislature "may not constitutionally authorize the practice of the law by anyone not duly admitted to the bar by" that court, it "may adopt a statute which penalizes the unlawful practice of the law . . . ." Id. at 437, 436. As the comment to 2C:21-22 notes:

> This section was enacted by L. 1994, c. 47. It replaces 2A:170-78 through 2:170-85. It differs from its predecessor in that certain "unauthorized practice" is made a crime rather than a disorderly persons offense and that no definition of "practice of law" is attempted. The definition is left to the Supreme Court which is given the power to regulate the practice of law by the New Jersey Constitution.

Judicial decisions make clear that the practice of law is not confined to litigation. Certain other "legal activities" constitute the practice of law. Some of the criteria regarding the unauthorized practice of law in New Jersey were set forth in New Jersey State Bar Ass'n v. N. New Jersey Mortgage Assoc., 22 N.J. 184 (1956). There, the New Jersey Supreme Court reviewed the acts of attorney-employees for an abstract company and their responsibilities at closings.

In 1995, the New Jersey Supreme Court overruled its prior judgments in the New Jersey Bar Ass'n cases, In re Opinion No. 26 of Committee on Unauthorized Practice of Law, 139 N.J. 323 (1995). In In re Opinion 26, the court applied the same legal analysis to a new record and a set of practices changed in response to other decisions of the Court, and said that the public interest would be served by allowing buyers and sellers to participate in real estate transactions without attorneys. Id. at 359. Furthermore, attorneys for the broker and real estate company are permitted to prepare legal documents and clear minor objections to title on behalf of buyers and sellers. Id.

Cases decided after N. New Jersey Mortgage Assoc. have focused "on the public's realistic need for protection and regulation." See, e.g., In re Application of the New Jersey Soc'y of CPAs, 102 N.J. 231 (1986) (CPAs' preparation of inheritance-tax return does not constitute unauthorized practice of law provided the accountant notifies the client that an attorney's

unauthorized practice of law provided the accountant notifies the client that an attorney's review of the return would be helpful because of legal issues surrounding its preparation).

With regard to staff attorneys, the New Jersey Supreme Court has expressed serious concern for allowing non-lawyers to direct the rendition of legal services. See In re Education Law Ctr., Inc., 86 N.J. 124, 135 (1981) ("[a]n overriding fear in this regard is that the corporation may place its own interests, whether political goals or profits, ahead of the interests of its clients, a situation which can give rise to a variety of evils.")

Despite its concerns, the court ultimately determined that non-profit corporations should be excepted from the general rule prohibiting corporations from practicing law.

The court said:

> In sum, we reaffirm the policies on which the general prohibition of the practice of law by corporations is based. However, we believe that competing policy considerations call for an exemption of non-profit corporations operating for charitable and benevolent purposes, provided such organizations respond to the concerns which are the source of the prohibition.

Id. at 140.

In re 1115 Legal Serv. Care, 110 N.J. 344, 347 (1988), involved "a prepaid legal service program funded by employers pursuant to a collective bargaining agreement . . . ." The New Jersey Supreme Court reemphasized "that the central concern motivating the ban on the corporate practice of law is that non-lawyers might be in a position to direct the rendition of legal services." Id. at 351 (citing Educ. Law Ctr., supra). The organization rendered "legal services through qualified lawyers on a prepaid basis to clients with a common nexus -- their membership as employees of a labor organization -- in need of the professional services of lawyers." 1115 Legal Serv., 110 N.J. at 351.

Although 1115 Legal Service Care "operate[d] for different purposes, advance[d] different objectives and cater[ed] to a different clientele" from the organization at issue in Educ. Law Ctr., the court deemed the services it did render and the purposes it did advance sufficiently "similar to those validated by" its opinion in Educ. Legal Serv. 1115 Legal Serv., 110 N.J. at 351. In addition, the court found "that 1115 Legal Service Care . . . [was] organized in such a manner as to prevent the abuses at which . . . [its] regulatory strictures over the profession are directed." Id. at 352. The court reasoned that the organization provided legal services to persons who might not otherwise be able to obtain such services, that the individual attorneys remained professionally responsible and accountable for their conduct, and that there was no "control over the rendition of legal services" by non-lawyers. Id. at 352-53. Accordingly, it "carve[d] out an exception to the restriction against practice by attorneys who are employees of a corporation or similar entity." Id. at 350.

The above reasoning is instructive for in-house counsel who are susceptible to questions regarding their dual role. The perception that an attorney/employee may be controlled by non-attorneys could subject in-house counsel to an allegation of the unauthorized practice of law. This is a particular concern in light of the increased number of third-party lawsuits against in-house counsel. Any potential claims against an in-house attorney could be exacerbated by a claim that the attorney was engaged in the unauthorized practice of law.

A recent opinion from the New Jersey Supreme Court's Unauthorized Practice of Law Committee (the "Committee") may have significant ramifications for in-house counsel. In July 1998, the Committee issued Opinion 33 which concludes,

> attorneys who are not admitted to practice law in New Jersey are engaged in the unauthorized practice of law when they advise New Jersey governmental bodies in connection with the issuance of state and municipal bonds.

The Opinion relies on its earlier Opinion 22 to define the practice of law as:

> The preparation and drafting of legal documents, such as trust instruments, contracts, and corporate documents, for execution or use by others is the practice of law.

The Opinion also says,

The Opinion also says,

> Even where an out-of-state firm has opened a New Jersey office, it is still the unauthorized practice of law if the lawyers in that office performing the legal services are not licensed in the State of New Jersey. Opening an office in New Jersey does not grant a license to the entire legal staff of the out-of-state law firm - each attorney must be **individually** licensed to practice law in New Jersey. (emphasis added).

The Opinion cites approvingly Birbrower discussed in the introduction to this section of these materials.

New Jersey Attorney General Peter Verniero filed a Notice of Petition for Review with the Court in August 1998, and applied for a stay of the Opinion. The Committee voluntarily agreed to the stay.

The Attorney General opposes Opinion 33 and notes that it may have unintended consequences for in-house counsel. In a brief filed with the Supreme Court, the Attorney General said

> The opinion perforce impacts on legal advice rendered in the context of other types of financial transactions, for example, as well as advice rendered by in-house New Jersey corporation counsel who are not admitted to practice in New Jersey. . . The breadth of Opinion 33 is extensive. For example, although not specifically mentioned, the broad language of Opinion 33 seemingly poses a problem for in-house corporate counsel of New Jersey corporations who may not be New Jersey admitted attorneys.

As the Attorney General notes, the Opinion could be a serious impediment to in-house lawyers working at New Jersey corporations. In-house lawyers working at New Jersey corporations would have to be admitted to practice in New Jersey. Furthermore, in-house counsel who are not admitted to practice in New Jersey will not even be able to work under a lawyer who is admitted to practice in New Jersey.

As of February 1999, the Opinion was still being considered by the New Jersey Supreme Court. However, a similar bill was introduced in the New Jersey Assembly on February 18, 1999 and in the New Jersey Senate on March 15, 1999. As of mid-March, both bills are pending in their respective Judiciary Committee.

2. Who May Practice

As mentioned above, and as we show below, the New Jersey Supreme Court has "exclusive jurisdiction" over the practice of law in the State of New Jersey. That control manifests in New Jersey's court rules.

In general, R. 1:21-1(a) prohibits any "person" from practicing law in New Jersey unless first licensed to do so. The rule specifically permits "[a] person not qualifying to practice pursuant to the first paragraph of" the rule to appear pro se.

R. 1:21-1 sets forth the general rules for the practice of law in New Jersey. The rule prohibits a person from practicing law in New Jersey "unless that person is an attorney holding a plenary license to practice in this State . . . ." Therefore, it appears that in-house counsel in New Jersey must be admitted to practice in this State in order to "practice law."

R. 1:21-1(c) prohibits corporations from practicing law in New Jersey. See In re Opinion No. 26 of Comm. on Unauthorized Practice of Law, 139 N.J. 323, 346 (1995) (observing that "the clear prohibition against the practice of law by corporations, long a part of . . . [New Jersey's] jurisprudence . . . [was] codified by R. 1:21-1(c)). And, generally speaking, corporations may not be licensed to practice law.

R. 1:21-1(c) rule was amended in 1994 at ACCA's behest to clearly permit corporations to be represented in court by in-house attorneys, provided the in-house attorney is authorized to practice law in the State of New Jersey. The rule now reads as follows:

> Except as otherwise provided by paragraph (d) of this rule and by R. 1:21-1(A) (professional corporations), R. 6:10 (appearances in landlord-tenant actions), R. 6:11 (appearances in small claims actions), R. 7:4-2(b) (pleas in municipal court), R. 7:4-4(a) (presence of defendant in municipal court) and by R. 7:7-4 (municipal court violations

> (presence of defendant in municipal court) and by R. 7:7-4 (municipal court violations bureau), a business entity other than a sole proprietor shall neither appear nor file any paper in any action in any court of this State except through an attorney authorized to practice in this State.

The amendment removed the prohibition against officers, trustees or directors of a corporation representing the corporation. "The deletion of the provision of the rule which had been apparently misconstrued from time to time should leave no doubt as to the scope of an attorney's authority to represent a corporation which he also serves in another capacity." Pressler, Current N.J. Court Rules, Comment R. 1:21-1(c).

As stated above, the amendment to R. 1:21-1(c) now expressly permits corporate counsel to appear in court on behalf of the corporation. In fact, a corporation can appear without a lawyer in certain limited circumstances. For example, R. 6:11, which applies to actions in the Small Claims Section of the Special Civil Part (claims not exceeding $2,000), expressly permits "any authorized officer or employee [to] prosecute and defend on behalf of a party which is a business entity . . . provided that such officer or employee is neither a suspended or disbarred attorney nor one who has resigned."

3. Approach

The New Jersey Supreme Court's "power over the practice of law is complete." Opinion No. 26, 139 N.J. at 326 (1995) (citing N.J. Const. art. 6, 7 § 2, ¶ 3). It is "given the power to permit the practice of law and to prohibit its unauthorized practice." Opinion No. 26, 139 N.J. at 326. And, "`[w]hat constitutes the practice of law does not lend itself to precise and all inclusive definition. There is no definitive formula which automatically classifies every case.'" Id. at 341 (quoting Auerbacher v. Wood, 142 N.J.Eq. 484, 485 (E. & A. 1948)). Accordingly, "the Court decides what constitutes the practice of law on a case-by-case basis." In re Opinion No. 24, 128 N.J. 114, 122 (1992). In doing so, however, New Jersey courts will be sensitive to the realities of "modern times." As the New Jersey Supreme Court said in Appell v. Reiner, 43 N.J. 313, 316 (1964):

> The Chancery Division correctly delineated the generally controlling principle that legal services to be furnished to New Jersey residents relating to New Jersey matters may be furnished only be New Jersey counsel. We nevertheless recognize that there are unusual situations in which a strict adherence to such a thesis is not in the public interest. In this connection recognition must be given to the numerous multi-state transactions arising in modern times. This is particularly true of our State, situated as it is in the midst of the financial and manufacturing center of the nation. An inflexible observance of the generally controlling doctrine may well occasion a result detrimental to the public interest, and it follows that there may be instances justifying such exceptional treatment warranting the ignoring of state lines.

For New Jersey courts:

> [t]he message is clear: not only is the public interest the criterion for determining what is the unauthorized practice of law, but in making that determination practical considerations and common sense will prevail, not impractical and technical restrictions that may hamper or burden the public interest with no reasonable justification.

Opinion No. 26, 139 N.J. at 343-44. Earlier in that opinion, the court had elaborated on what constitutes the unauthorized practice of law.

> The question of what constitutes the unauthorized practice of law involves more than an academic analysis of the function of lawyers, more than a determination of what they are uniquely qualified to do. It also involves a determination of whether non-lawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law. . . .
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> * * *
>
> We determine the ultimate touchstone -- the public interest -- through the balancing of the factors involved in the case, namely, the risk and benefits to the public of allowing or disallowing such activities. In other words, like all of our powers, this power over the practice of law must be exercised in the public interest; more specifically, it is not a

> practice of law must be exercised in the public interest; more specifically, it is not a power given to us in order to protect lawyers, but in order to protect the public, ...

Opinion No. 26, 139 N.J. at 327.

B. New York

1. The Practice of Law

In New York,

> the practice of law "manifestly includes the drafting of many documents which create legal rights. It does not follow, however, that the drafting of all such documents is always the practice of law." "The practice of law is not confined to court work. It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition, to conveyancing, the preparation of legal instruments of all kinds, the giving of advice to clients, and in general all action taken by them in matters connected with law".

New York County Lawyers' Ass'n v. Dacey, 283 N.Y.S.2d 984, 999 (App. Div.) (Stevens, Justice, dissenting), rev'd on dissent, 287 N.Y.S.2d 422 (N.Y. 1967) (citations omitted). "[T]o practice as an attorney at law means to do the work, as a business, which is commonly and usually done by lawyers here in this country." People v. Alfani, 227 N.Y. 334, 339 (1919). In short, "the practice of law . . . in [New York] includes legal advice and counsel as well as appearing in the courts and holding oneself out as a lawyer." Spivak v. Sachs, 263 N.Y.S.2d 953, 955 (N.Y. 1965) (citing, e.g., People v. Alfani, supra). And finally, "the essential of legal practice[] [is] the representation and the advising of a particular person in a particular situation." Dacey, 283 N.Y.S.2d at 998.

New York courts, like their New Jersey counterparts, however, recognize the realities of "modern times," and are prepared to address this issue on a case-by-case basis. For instance, in Spivak, supra, the New York Court of Appeals emphasized:

> There is, of course, a danger that section 270 [of New York's Penal Code, the precursor to section 478 of the Judiciary Law] could under other circumstances be stretched to outlaw customary and innocuous practices. We agree with the Supreme Court of New Jersey (Appell v. Reiner, 43 N.J. 313, 204 A.2d 146) [discussed above] that, recognizing the numerous multi-State transactions and relationships of modern times, we cannot penalize every instance in which an attorney from another State comes into our State for conference or negotiations relating to a New York client and a transaction somehow tied to New York. We can decide those cases when we get them . . . .

263 N.Y.S.2d at 956 (citation omitted).

New York has rejected the broad territorial reach of California's Birbrower decision and has determined that an attorney not licensed in that state is not "practicing" law in New York when he calls a client in New York to discuss the progress of legal proceedings in a foreign jurisdiction. El Gemayel v. Seaman, 536 N.Y.S.2d 406 (N.Y. 1988).

2. Who May Practice

(a) Section 478

Section 478 of New York's Judiciary Law makes it "unlawful for any natural person" to practice law in New York without having first been licensed to do so. In Spivak, the court explained the purpose of the predecessor to section 478, New York's Penal Code section 270. It said:

> The statute aims to protect our citizens against the dangers of legal representation and advice given by persons not trained, examined and licensed for such work, whether they be laymen or lawyers from other jurisdictions.

Spivak, 263 N.Y.S.2d at 956. Moreover:

> [t]his restriction placed on foreign attorneys is not due to a monopolistic desire on the

> [t]his restriction placed on foreign attorneys is not due to a monopolistic desire on the part of the state to keep New York lawyers employed, but rather because the requirements for admission vary in each state in addition to the fact that New York has a greater power to impose sanctions upon its own attorneys who do not keep within the minimum ethical confines New York has established. These factors help ensure that attorneys admitted in New York and practicing law there will practice ethically and with a certain minimum level of expertise.

18 Int'l Ltd. v. Interstate Express, Inc., 455 N.Y.S.2d 224, 225-26 (Sup. Ct. 1982).

(b) Section 495.

Like section 478, section 495 of the Judiciary Law makes it unlawful for any "corporation or voluntary association" to practice law in New York; and, generally, unlike "natural persons," such organizations cannot be licensed to do so.

In Feinstein v. Attorney-General, 366 N.Y.S.2d 613 (Ct. App. 1975), the New York Court of Appeals explained the purpose for the enactment of section 495 of the Judiciary Law. The court said:

> The purpose is an obvious one, namely, to prevent the commercialization of the profession, and to retain judicial supervision over the professional and public obligations of lawyers.

Id. at 617.

As to the concern for the "commercialization of the profession," the court in People v. People's Trust Co., 167 N.Y.S. 767, 768-70 (App. Div. 1917), said:

> [i]t was to remedy the growing tendency of corporations to enter the field of practicing law, and perform legal services through lawyers in their general employ, and owing loyalty primarily to them and not to the client, that this law [section 280 of New York's Penal Code, the precursor to section 495 of the Judiciary Law] was enacted.
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> * * *
>
> Motives which often, if not usually, actuate men, would cause some attorneys in such a situation to regard primarily the interest of the corporation, and secondarily only that of the client. To prevent this divided allegiance, this law was passed.

In New York, corporations are not only prohibited from practicing law for the benefit of others, they may not appear in court even on their own behalf. "[P]arties as a rule may prosecute or defend their own civil actions, but corporations can appear only by attorney." Matter of Sharon B., 534 N.Y.S.2d 124, 125 (N.Y. 1988) (citing CPLR § 321[a]).

> When the party to an action is a fictional person--a legal entity with limited liability --the general rule is that it cannot represent itself but must be represented by a licensed practitioner, whether outside counsel or staff counsel, answerable to the court and other parties for his or her own conduct in the matter.

Matter of Sharon B., 534 N.Y.S.2d at 125 (citing Austrian, Lance & Stewart v. Hastings Properties, Inc., 385 N.Y.S.2d 466 (Sup. Ct. 1976)) (citation omitted).

> In Hastings Properties, the court explained:
>
> > The reason corporations are required to act through attorneys is that a corporation is a hydraheaded entity and its shareholders are insulated from personal responsibility. There must therefore be a designated spokesman accountable to the Court.

385 N.Y.S.2d at 467.

As in New Jersey, however, corporations may appear in court without a lawyer under certain circumstances. For instance, the Uniform District Court Act, Article 18-A provides that

> [a] corporation may appear in any action brought pursuant to this article by an attorney as well as by any authorized officer, director or employee of the corporation provided that the appearance by a non-lawyer on behalf of a corporation shall be deemed to

> that the appearance by a non-lawyer on behalf of a corporation shall be deemed to constitute the requisite authority to bind the corporation in a settlement or trial.

Generally, then, a natural person, i.e., a human being, cannot practice law in the State of New York unless he or she is first licensed to do so. The reason for this is to protect the general public from "unworthy" "practitioners" and to allow the State of New York to maintain some modicum of control over those who practice law within its borders.

Also, a corporation generally cannot practice law -- on behalf of others or itself. The reason for this is twofold. First, it prevents the commercialization of the practice of law by corporations, which commercialization, to a great extent, had been creating conflicts of interest between the attorneys employed by the corporations and the third-party "clients" the attorneys were serving. Second, like with the rule regarding natural persons, it allows the State to monitor those engaging in the practice of law within its borders -- in particular, by forcing the corporation to choose a "spokesman" who will be "accountable to the Court."

Finally, and again, generally speaking, the practice of law includes the giving of advice to, as well as the representing in court of, a particular client.

(c) Section 520.11

Section 520.11 of the New York Rules of Court permits an attorney who is a member in good standing of the bar of another state to be admitted pro hac vice to participate in a matter in New York. Two of New York's Departments of it Appellate Division are divided on whether admission pro hac vice extends beyond trial and argument to all aspects of the litigation process including pre-trial discovery. Bivens v. American Baler Company, 632 N.Y.S.2d 774 (Kings Co.. 1995). The Bivens court said it is important to allow the litigant to choose its own counsel for all purposes "especially in cases . . . where out-of-state counsel has a long-standing relationship with its corporate client. . ." *See Id.* at 775.

3. Approach

In light of the above, may the in-house or staff attorney of a corporation with an office in New York who works out of that New York office perform his or her functions without first being licensed by the State of New York to do so?

It would appear that the protection of the public is not implicated in this situation. The attorney is not soliciting the public at large. The corporation/employer is the only client. And, because the corporation/employer is also the client, it would also appear that the conflict of interest concern generated by the commercialization of the practice of law is not implicated. Discounting New York's interest in monitoring those practicing law within its borders, the answer would seem to be yes.

On November 9, 1973, the Unlawful Practice of Law Committee of the New York State Bar Association issued Advisory Opinion #18. The Committee received the following question:

> May a foreign attorney employed by a corporation doing business in the jurisdiction in which the attorney is admitted, act as counsel to the corporation in the corporation's office in New York State?

The Committee responded that "[s]uch activity by a foreign attorney is not the unauthorized practice of law provided:"

> There is no representation or appearance by the attorney that he is authorized to or is practicing law in the State of New York.
>
> There is no letterhead or other stationery indicating that the attorney has an office for the practice of law in the State of New York.
>
> Any opinion or advice issued by the attorney is solely for the use of the corporation in the ordinary course of its business, and shall in no event be given to any individual or entity outside the scope of the representation of the corporation as house counsel.

The Committee's 1973 ruling, then, leaves open the question of whether a staff attorney of a "corporation or voluntary association" with its only office in New York who had not been admitted in New York would be committing the unlawful practice of law simply by performing everyday tasks. In addition, the New York courts could, at any time, decide that their interest

everyday tasks. In addition, the New York courts could, at any time, decide that their interest in monitoring those practicing law within its borders warrants vindication for its own sake, at which point Opinion 18 may be unhelpful.

C. Conclusion

Both New Jersey and New York courts agree that the "practice of law" encompasses far more than mere court appearances. If the subject conduct is something we generally think of as "what lawyers do," it his highly probable that that conduct will be deemed the "practice of law."

A review of New York cases shows that New York courts are very likely to condemn such conduct when engaged in by an individual, or an entity, that has not been licensed in some way to do so. On the other hand, New Jersey courts will look hard at each case and will weigh the various relevant factors to determine how the public interest will be affected. Only if the harm to that interest outweighs any benefits will the conduct be condemned. The conduct may very well be the "practice of law" in a literal sense, but it will not be unlawful -- or "unauthorized."

In sum, the danger for in-house counsel appears more poignant in New York, where any countervailing benefits to the public interest are likely to be accorded little weight, assuming they are considered at all. This is not to say that New York courts will not recognize such benefits -- in all likelihood, they will. And, reliance on the opinion of the Unlawful Practice of Law Committee should provide at least some protection. New Jersey courts, however, have emphasized and reemphasized their commitment to analyzing the questionable conduct in light of "the ultimate touchstone -- the public interest."

D. Aiding and Abetting the Unauthorized Practice of Law

There is no question that an attorney may delegate tasks to clerks, secretaries and other lay persons without aiding and abetting the unauthorized practice of law. Such delegation is proper, provided the lawyer maintains a direct relationship with the client, supervises the work product and, ultimately, has complete responsibility for the work product. However, it is equally unclear whether in-house counsel's supervision over attorneys not admitted to practice in a particular state may constitute aiding and abetting the unauthorized practice of law.

If the definition of the practice of law is stringently applied to in-house counsel, it appears that in-house must be admitted to practice in the state in which the corporation does business. Although it is clear that admission is necessary (absent admission pro hac vice) to appear in court, legal advice also constitutes the practice of law. "Whether a person gives advice as to [local] law, Federal law, the law of a sister State, or the law of a foreign country, he is giving legal advice . . . To hold otherwise would be to state that a member of the [State] Bar only practices law when he deals with local law, a manifestly anomalous statement." In re Roel, 3 N.Y.2d 224, 165 N.Y.S.2d 31, 35 (1975).

What happens if an attorney admitted in a jurisdiction works with or supervises an attorney not admitted in the state where they work?

RPC 5.5 explicitly prohibits a lawyer from assisting "a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." See also ABA CPR 3-301. "A lawyer shall not aid a non-lawyer in the unauthorized practice of law"; Disciplinary Action Against Attorney for Aiding. . . another. . . is Unauthorized Practice. . ., 41 A.L.R. 4th 361 (1985).

The Committee on Professional Ethics of the Bar Association of the Nassau County has ruled that a disbarred attorney cannot be hired as a paralegal, by a practicing attorney, even if the practicing attorney will exercise the requisite supervision. Nassau Bar Ethics Opinion # 92-15. Indeed, the hiring attorney could be in violation of aiding a non-lawyer in the unauthorized practice of law. *Cf. In re Mitchell, 901 F.2d 1179 (3d Cir. 1990) In Mitchell, the suspended attorney and the attorney who hired him faced disciplinary charges for violating a suspension order and aiding and abetting the violation, respectively. The court did not discipline either one holding that attorney suspended from the bar of the Court of Appeals can have no contact with the Court, its staff or a client, but may act as a law clerk or legal assistant under close supervision of a member in good standing of the bar of the Court.*

Permitting an employee not admitted to practice law in any state to consult with a client and prepare legal papers for the client constitutes aiding and abetting the unauthorized practice of law. In re Martyn Taub, NY Law Journal, Disciplinary Proceedings, Appellate Division, Second Department, November 25, 1991. In Taub, the client was unaware that the employee was not a lawyer.

However, in Wollitzer v. National Title Guar. Co., 266 N.Y.S. 184 (Queens Cty. 1933) a title company was not in violation of the New York prohibition against the unauthorized practice of law by preparing extensions of mortgages of which they have guaranteed payment, conducting foreclosures by lawyers hired by them, soliciting applications for title insurance, preparing contracts, deeds and mortgages and rendering legal opinions as to the marketability of title. The court declined to find a violation because New York statutory law expressly permitted title insurance companies to perform the tasks questioned.

In perhaps the most publicized case on aiding and abetting the unauthorized practice of law, Crown Publishers, Inc. Doubleday & Co. Inc. and Brentano's Inc. were enjoined from reproducing, distributing, marketing and selling a legal self-help book entitled "How to Avoid Probate" by Norman F. Dacey. NY Cty. Lawyers' Assn. v. Dacey, 28 A.D.2d 161, 283 N.Y.S.2d 984 (1st Dept. 1967). The court held that the publisher, distributor and retailer of the legal self-help book aided and abetted author and non-lawyer in the unauthorized practice of law. "The giving of legal advice and counsel, including instructions and advice as to the preparation and use of legal instruments, constitutes the practice of law which is forbidden in this State to all but duly licensed New York attorneys. This is well settled." Id. at 989.

The question of whether or not in-house counsel must be admitted in the state in which they are employed remains unanswered. A technical and strict reading of the "practice of law" could lead to the conclusion that in-house counsel must be admitted to practice. However, that "practice" may not necessarily be unauthorized, particularly in New Jersey where the courts also examine the public interest and protection. In-house counsel's advice to its corporate employer may not implicate the protective devices delineated by the courts. However, the accusation of the unauthorized practice of law may increase with the proliferation of third party suits against them.

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