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Potential revision to ethics rules to facilitate out-of-state practice for transactional attorneys?

By Markus May

Effective January 1, 2010, Illinois Ethics Rule 5.5 was amended to allow out-of-state attorneys to practice law in Illinois on a temporary basis so long as the legal services are reasonably related to the lawyer's out-of-state practice. Services are considered temporary even if the lawyer provides services on a recurring basis or for an extended period of time, as when a lawyer is representing a client in a single lengthy negotiation. Comment 14 to the Rule sets forth factors indicating if services arise out of, or are reasonably related to, a lawyer's practice in a jurisdiction in which a lawyer is admitted. These factors include the client being previously represented by the lawyer or having substantial contacts with the jurisdiction in which the lawyer is admitted.

For out-of-state transactional attorneys and in-house counsel, this is of great import. If an out-of-state attorney represents a client who is buying real estate in Illinois or participating in a merger with an Illinois company, the out of state attorney is now explicitly allowed to represent the client in Illinois.

However, an Illinois attorney is not necessarily accorded the same privilege in other states. If the other state has adopted Model Rule 5.5 or some variation thereof, the Illinois attorney can represent the client with respect to such matters. However, some states have chosen not to adopt Rule 5.5 and may argue that an Illinois attorney drafting a contract, negotiating a purchase agreement, or filing a deed related to an isolated transaction in that state is engaging in the unauthorized practice of law. Rule 8.5 of the Illinois rules provides that the rules of professional conduct of a foreign state will apply to an Illinois attorney if the "predominant effect of the conduct" is in the other state. Therefore, there is uncertainty and a potential ethics violation in certain situations for attorneys who have Illinois clients who participate in multi-state transactions.

Wisconsin and Minnesota have attempted to remedy this by modifying Rule 5.5 to provide that if a WI or MN attorney practices in another state and that state's attorney is allowed to conduct activities in WI or MN under 5.5(c), then the WI or MN attorney is allowed to conduct activities related to the other state. The question arises whether Illinois should consider a change to its rules. Below are the applicable Illinois and Wisconsin provisions and some potential pros and cons.

The Corporation, Securities and Business Law Section Council is considering whether to pursue this matter further and is interested in input from its members. Please provide additional pros, cons, and comments to: Markus May at mmay@eckhart.com, mmay@illinois-business-lawyer.com or 312-236-0646.

Illinois' new ethics rule 5.5

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

...

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

...

(2) are [before a tribunal and authorized to practice – pro hac vice];

(3) are [related to ADR]; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

Wisconsin's rule with new language bolded

A lawyer shall not:

(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction except that a lawyer admitted to practice in Wisconsin does not violate this rule by conduct in another jurisdiction that is permitted in Wisconsin under SCR 20:5.5(c) and (d) for lawyers not admitted in Wisconsin;

Pros to Modifying the Current Rule

1. In the age of computers and increasing multijurisdictional transactions, this would allow attorneys to practice in certain instances without triggering an ARDC violation in Illinois.

2. Attorneys wouldn't need to research all the case law, comments and other interpretations in the other states' ethics code before engaging in the isolated transaction in that state. This saves both attorney time and money for the client.

3. Many Illinois businesses do business in other states and have contracts with out of state entities. Those contracts may provide that the other state's law applies and questions may arise as to where the contract was formed. This leads to an ambiguity not easily addressed by the current ethics rule. Adopting a WI/MN type provision would give Illinois attorneys more comfort when working on transactions with out-of-state entities.

4. Illinois business clients are not happy when told they may need to hire counsel from another state to negotiate a contract or consummate a deal because this leads to:

a. Extra cost to the client of needing to hire another firm and get the other firm up to speed. Coordination between law firms will also lead to extra expense to the client.

b. Possibly lower quality legal work as the attorney with the ongoing relationship with the company will have greater knowledge of the company, its business and its industry than a new firm.

5. Keeps Illinois companies' legal work in Illinois and fosters stronger attorney-client relations.
6. Allows Illinois attorneys to do in other states what out of state attorneys are allowed to do in Illinois.
7. May prevent some Illinois companies from shifting work to WI or MN firms.

Cons to Modifying the Current Rule

1. Creates a variation from the Model Rules.
2. May lead to some form of liability in the other state?
3. Creates the appearance that other state's laws/rules are not important to Illinois.
4. Illinois attorneys don't know other state's laws as well as the other states' attorneys.

a. Since Illinois attorneys can easily research other states' laws in today's computer age, and since many states have similar laws related to contracts, this is not a major concern. If it were, Illinois would not have allowed out of state attorneys to engage in the limited practice of law in Illinois.

Again, please provide additional pros, cons, and comments to: Markus May at mmay@eckhart.com, mmay@illinois-business-lawyer.com or 312-236-0646. ■