Out-Of-State Law Firms In A New York State Of Mind

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Think twice before opening an office in New York. And both times you think, think about the ethics rules.

OPENING A NEW YORK OFFICE of an out-of-state or foreign law firm may involve various ethical considerations. Each U.S. jurisdiction has its own set of ethics rules. Many states follow the American Bar Association ("ABA") Model Rules of Professional Conduct ("Model Rules") but some states do not. New York has not adopted the Model Rules verbatim. Although the New York Rules of Professional Conduct ("NY Rules") are largely based upon the Model Rules, the NY Rules differ in certain respects from the Model Rules and the ethics rules of some states.

NY Rule 5.1 imposes responsibility for ethical compliance on "law firms" for the professional conduct of its lawyers. Assuming that a New York office of an out-of-state firm would be treated the same as a "law firm" for purposes of the NY Rules, it appears that the New York office would be responsible for ensuring its New York-licensed lawyers comply with the NY Rules.

So, out-of-state firms located or headquartered in jurisdictions that follow or diverge from the Model Rules should be aware of some of the quirkier aspects of the NY Rules before opening its doors in New York. This ar-

ticle highlights some of the ethical issues that are often encountered when a New York office is established, and draws attention to some of the distinctions between the NY Rules and the Model Rules to illustrate how the ethical terrain in New York may not be consistent with the Model Rules or the ethics rules in other jurisdictions where the out-of-state firm may have offices.

CHECKING FOR CONFLICTS OF INTEREST •

Conflicts System

The duty of loyalty to clients requires avoiding conflicts of interest. Most states have conflicts of interest rules that generally require lawyers to identify, analyze and resolve different types of conflicts. Notably, New York's conflicts checking rule, NY Rule 1.10(e), expressly requires a law firm to make a written record of its engagements at or near the time of each new engagement and to implement and maintain a "system" by which proposed engagements are checked against current and previous engagements in four specific situations: when the firm agrees to represent a new client or an existing client in a new matter, hire or associate with another lawyer, or an additional party is named or appears in a pending matter.

ABA Amendment Permits Limited Disclosure To Detect And Resolve Conflicts

To permit sharing of limited information between law firms to detect and resolve conflicts of interests that may be triggered by lateral lawyer movement or law firm mergers, the ABA recently added an exception to Model Rule 1.6 (duty of confidentiality) to allow disclosure of client confidences if reasonably necessary, and only to the extent the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client. *See* Model Rule 1.6(b)(7). Comment [13] to Model Rule 1.6 explains that such limited information should ordinarily include no more than the identity of persons or entities involved in a matter, a brief summary of the general issues, and whether the matter has terminated, and may be disclosed only once substantive discussions regarding the new relationship have occurred. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-455 (2009). It is unclear if New York and/or other jurisdictions around the country are considering adopting Model Rule 1.6(b)(7).

A New York office of an out-of-state law firm should consider implementing procedures and practices that comply with NY Rule 1.10(e) for its New York engagements.

LETTERS OF ENGAGEMENT •

Writing Requirement

Out-of-state firms having offices in states that have adopted Model Rule 1.5(b) may use forms of engagement letters that follow the Model Rule's writing and other requirements. Note, NY Rule 1.5(b) is not identical to Model Rule 1.5(b). For example, while NY Rule 1.5(b) requires a writing to the client to communicate the scope of work and the basis or rate of fees and expenses "where required by statute or court rule," Model Rule 1.5(b) simply says such a communication shall be "preferably in writing." The exceptions to the writing requirement and the criteria required for an updated writing are not the same under the two rules.

New York's Court Rule

New York also has a long-standing court rule on written engagement letters which requires that, "an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation." See 22 NYCRR §1215.1. A signed written retainer agreement between the client and the lawyer also satisfies the rule. *Id.* Engage-

ment letters and retainer agreements must be updated if there is a significant change in the scope of services or in the fees to be charged. *Id.* This court rule applies to all civil and criminal representations, unless certain exceptions apply. Domestic relations or matrimonial matters are governed by a different court rule, 22 NYCRR Part 1400.

Client's Right To Arbitrate

Significantly, 22 NYCRR Part 1215 requires the engagement letter to provide notice of a client's right to arbitrate fee disputes, where applicable. Under Part 137 of the Rules of the Chief Administrator of the Courts, a client may be entitled to participate in the New York State Fee Dispute Resolution Program which provides for the formal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation. The program is limited to disputes over legal fees and does not apply to amounts in dispute involving a sum of less than $1,000 or more than $50,000.

Monetary Threshold

In New York, a monetary threshold may determine if an engagement letter or retainer agreement is required in order to undertake a client engagement. So, when the fee to be charged is expected to be less than $3,000, no engagement letter or retainer agreement is normally required. See 22 NYCRR Part 1215.2. Notably, depending on where the out-of-state law firm has offices, there may be different monetary thresholds or no threshold at all (for example, California and Washington (State) require engagement letters), thereby making engagement letters necessary for every client representation.

Thus, a New York office of an out-of-state firm should be mindful of the applicable New York threshold and, what if any additional provisions the New York form of engagement letter or retainer agreement may need to include for clients represented by the New York office that the firm's existing form of engagement letter may not address.

ADVANCE PAYMENT RETAINERS •

Where To Deposit Retainers

Once engaged to represent a client, most lawyers and firms ask for an advance retainer to begin the work. But which account should the retainer be deposited into — the firm's operating account or the attorney trust account? Many states follow the Model Rule approach: Model Rule 1.15(c) provides, "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance…" Unlike the Model Rules, New York does not expressly require any specific treatment of advance fee payments. NY Eth. Op. 570 (N.Y. St. Bar. Assn. Comm. Prof. Eth.), June 07, 1985 and NY Eth. Op. 816 (N.Y. St. Bar. Assn. Comm. Prof. Eth.), October 26, 2007, conclude that a lawyer may ethically deposit advance retainers in the law firm's operating account unless the client and law firm have expressly agreed (i.e., in the engagement letter) that it be placed in an attorney trust account. Thus, in New York, a lawyer may place advance retainers in the law firm's operating account or in a trust account. This is not the rule in other states such as Massachusetts and Indiana where the funds must be placed in a separate account. Massachusetts Bar Association Opinion No. 78-11 (1978); Indiana Judicial Ethics Advisory Opinion #4-77 (IN Comm. Jud. Qual.), 1998.

Lawyers in a New York office of an out-of-state firm should be aware that depending on how they have agreed to treat advance retainers with clients, if the funds are placed in a trust account, there may be additional obligations under the escrow account requirements governed by NY Rule 1.15 that they may need to understand and comply with.

ESCROW ACCOUNT REQUIREMENTS •

More Rules, More Compliance

State ethics rules from around the country, whether modeled after Model Rule 1.15 or not,

prohibit commingling and misappropriation of funds, and require safekeeping of client funds, proper maintenance of bank accounts, and appropriate bookkeeping and record keeping practices. NY Rule 1.15 reaches much further than Model Rule 1.15 to include specific and detailed provisions, and ends with the warning, "a lawyer who does not maintain and keep the accounts and records as specified and required by this Rule … shall be deemed in violation of these Rules and shall be subject to disciplinary proceedings." For example, NY Rule 1.15(e) requires that all special account withdrawals be made only to a named payee and not to cash. The rule also requires that only New York-admitted lawyers can be authorized signatories of a special account. These are requirements that the lawyers in the New York office may need to comply with if they open and maintain escrow accounts.

SCREENING LATERAL LAWYERS •

Imputed Disqualification

To staff a New York office, an out-of-state firm may look to hire some lateral attorneys. Hiring laterals from other law firms where they represented clients whose interests may differ from the clients represented by the lateral's new firm may create a conflict of interest. Under Rule 1.10(a) of both the Model Rules and the NY Rules, if a lawyer is personally disqualified from a representation, such disqualification is presumptively imputed to the entire firm, so that all firm lawyers are likewise precluded from the representation. Accordingly, when a law firm acquires a lateral hire who has been at a firm representing an adversary, the law firm becomes presumptively disqualified from continuing the representation opposing the adversary represented by the lateral hire's prior firm.

Ethical Walls

The presumption of disqualification may be overcome by, among other things, instituting an "ethical screen" that is designed to insulate the new hire from the conflicting representation. In contrast to Model Rule 1.10(a)(2), NY Rule 1.10 does not permit screening the conflicted lateral lawyer to cure a conflict of interest. Screening under the NY Rules is only allowed to remedy conflicts relating to prospective client relationships, former or current government lawyers or employees, former judges, arbitrators and mediators. However, New York state and federal courts have permitted the use of ethical screens in some instances to avoid disqualification involving ordinary lateral hires. E.g., *320 West 111th Street Housing Development Fund Co. v. Taylor*, 2009 WL 1815079 (N.Y. Sup. Ct., Apr. 23, 2009); *Hempstead Video Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127, 133-39 (2d Cir. 2005).

Lawyers in the New York office of an out-of-state firm should be familiar with how lateral lawyer screening is treated under the NY Rules and case law in order to implement effective screens, if necessary.

DUTIES OWED TO PROSPECTIVE CLIENTS •

Protecting Prospects

Prospects who consult with a lawyer but do not ultimately hire the lawyer may still be owed certain duties. Under both Model Rule 1.18 and NY Rule 1.18, a person who consults with a lawyer about the possibility of forming a client-lawyer relationship regarding a matter is a "prospective client." Even where no client-lawyer relationship develops, the lawyer may owe the prospective client a duty of confidentiality that forbids the lawyer to use or reveal information learned in the consultation, similar to the duty owed to former clients. In addition, the lawyer may owe a duty to avoid conflicts of interest in the same or a substantially related mat-

ter where the interests of the prospect and another client are materially adverse — much like the duty owed to former clients — but only if the lawyer received information from the prospect that could be "significantly harmful" to the prospect in the matter. Prospective client conflicts may be cured with client consent or through screening procedures. *See* Model Rule 1.18 and NY Rule 1.18.

New York's Exceptions

One striking difference from the Model Rules that a New York office of an out-of-state firm should be aware of is NY Rule 1.18(e) which goes beyond Model Rule 1.18 to limit the duties owed to prospective clients in certain situations. Under NY Rule 1.18(e), prospects who communicate information unilaterally to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship or interact with a lawyer for the purpose of disqualifying the lawyer from handling a materially adverse representation for a client arising from the same or a substantially related matter, are *not* entitled to the protection afforded by the rule. Note, Model Rule 1.18 does not contain similar exceptions although Comment [2] to the rule does mention them.

A New York office of an out-of-state firm that represent clients in Model Rule (or non-Model Rule) states may find that the outcome of a potential conflict of interest involving prospective clients and conflicted current or former clients may be different under the NY Rules. *See* NY Rules 1.7 and 1.9. The conflicts issues may become more complicated where, for example, the prospective client is represented by the firm's out-of-state office whose ethics rules may follow the Model Rules (where no exceptions to the prospective client conflicts rules apply) whereas the conflicted client is represented by the New York office which is governed by NY Rule 1.18 (where certain exceptions to prospective client conflicts rules apply).

METADATA •

Hidden Data Creates Duties

In the digital age, most lawyers can expect to encounter "metadata" which is data embedded in electronic files. The danger is that such hidden information may contain confidential and/or privileged material belonging to the client. Two important issues arise with respect to metadata: first, protection of confidential client information contained in metadata; and second, the ethical propriety of reviewing or "mining" for metadata in electronic documents sent to the receiving lawyer. Not all jurisdictions take a consistent approach to the ethical concerns surrounding metadata. For example, many states have taken different views on whether the transmitting lawyer has any duty when transmitting metadata, whether the receiving lawyer has a duty to notify the sender if metadata is found, and whether the receiving lawyer may review and use metadata.

"Reasonable Care" To Prevent Disclosure

The New York State Bar Association's Committee on Professional Ethics (the "Committee") issued NY Eth. Op. 782 (N.Y. St. Bar Assn. Comm. Prof. Eth.), December 08, 2004 under the old Lawyer's Code of Professional Responsibility (the "Code"), which concluded that "[l]awyers have a duty … to use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences…" Given the substantive similarities between NY Rule 1.6(a) (i.e., the duty of confidentiality) and the corresponding Code provision, it is prudent to consider that New York lawyers may have a duty to prevent the disclosure of metadata containing client confidences.

Stripping Metadata

Like New York, a majority of states have taken a "reasonable care" approach to the sending lawyer's duty regarding transmitting metadata. For

example, in both Pennsylvania and Washington, D.C., the sending attorney has a duty of reasonable care to delete unwanted metadata from electronic documents before sending them to a third party. Pa. Bar Ass'n Formal Op. 2009-100 (2009); Opinions of the Bar's Legal Ethics Committee, D.C. Bar Opinion 341 (2007) (review and use of metadata in electronic documents). In contrast, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-442 (2006) (discussing review and use of metadata) found no explicit duty relating to metadata but suggested a number of methods for removing metadata if lawyers are concerned about disclosure of metadata containing client confidences in documents sent to opposing counsel.

Getting Behind Documents

Different states have taken diverse positions regarding metadata "mining." Some states allow it, others prohibit it, and yet others take a case-by-case approach. In New York, the Committee's Opinion 749 analyzing the issue under the old Code observed, "[a] lawyer may not make use of computer software applications to surreptitiously 'get behind' visible documents or to trace e-mail." Thus, under the Code, metadata mining was not permitted. NY Rule 4.4(a) now provides that, "[i]n representing a client, a lawyer shall not … use methods of obtaining evidence that violate the legal rights of … a person." Compare Pennsylvania, where attorneys may decide to use metadata on a case-by-case basis, factoring in other ethical duties to the client and evaluating them in light of relevant law. Pa. Bar Ass'n Formal Op. 2009-100 (2009). In Vermont, a lawyer who receives an electronic file from opposing counsel may not be ethically prohibited from reviewing that file using any available tools to expose the file's content, including metadata, because such restriction would limit the ability of a lawyer to diligently and thoroughly analyze material received from opposing counsel. Vermont Bar Association Professional Responsibility Section, Advisory Ethics Opinion 2009-1 (2009).

Duty To Notify Sender

NY Rule 4.4(b) creates a duty to notify the sender if a lawyer receives an inadvertently sent document relating to the representation of a client. But NY Rule 4.4(b) and the Comments to the rule are silent on whether the receiving lawyer has any duty to notify the sender about inadvertently forwarded metadata. In contrast, Comment [2] to Model Rule 4.4 provides that, "[m]etadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer."

Thus, lawyers in a New York office of an out-of-state law firm should take note that they may be prohibited from reviewing or using metadata contained in documents sent by out-of-state opposing counsel but depending on the jurisdiction, out-of-state adverse counsel may be ethically permitted to review and use metadata included in documents transmitted by lawyers in the New York office.

IN-STATE OFFICE RULES & VIRTUAL PRACTICE •

NY Judiciary Law Section 470

In New York, lawyers may be able to practice without a physical brick-and-mortar office. Virtual law offices may be a viable option. New York's in-state office rule, Judiciary Law section 470, does not require that New York lawyers residing in New York maintain an office to practice law. However, it does require New York-licensed attorneys who reside in an adjoining state (e.g., New Jersey) to have an in-state office. A recent U.S. District Court decision concluded that the statute was unconstitutional. *Schoenefeld v. New York*, 907 F. Supp.2d 252 (N.D.N.Y. 2011). The decision was appealed, but the appeal has not yet been decided.

Virtual Practice In Other States

Notably, effective February 1, 2013, New Jersey modified its "bona fide office" rule (R. 1:21-1(a)) so that New Jersey-admitted attorneys now no longer need a physical office provided that the attorney has means of prompt and reliable communication and one or more fixed physical locations where business and financial records are kept, mail and hand deliveries can be made, and where legal process may be served. Also this year, the Virginia State Bar Legal Ethics Opinion 1872 (2013) on virtual law offices and the use of temporary office space, noted that a "…virtual law office that is advertised as a location of the firm must be an office where the lawyer provides legal services. Depending on the facts and circumstances, it may be improper … for a lawyer to list or hold out a rented office space as her 'law office' on letterhead or other public communications." The opinion observed that for lawyers who are licensed to practice in Virginia by motion (rather than by bar exam), there is "an additional difficulty in using an executive office rental or virtual office" because they must maintain a Virginia office where clients can be seen on the premises.

Lawyers in a New York office of an out-of-state firm that may employ resident and non-resident New York-admitted lawyers should be advised to follow the *Schoenefeld* case, current New York Judiciary law and the NY Rules relating to virtual law practice and in-state office rules, at least until a decision is reached on the *Schoenefeld* appeal.

MULTI-JURISDICTIONAL PRACTICE •

Unauthorized Practice Prohibited

Similar to other states, New York generally prohibits the unauthorized practice of law. New York Judiciary Law Sections 476-a, 478 and 484 govern unlicensed practice which forbid individuals from maintaining a law practice or providing legal services in New York unless they are admitted to practice in New York or otherwise authorized to provide legal services in New York by admission pro hac vice. Case law in New York has held that out-of-state lawyers who perform "incidental and innocuous" legal work in New York in the course of advising clients from states where they are licensed are not engaging in the unauthorized practice of law in New York. *See El Gemayel v. Seaman,* 72 N.Y.2d 701, 707 (1988). *See also, Spivak v. Sachs,* 16 N.Y.2d 163, 168 (1965) in which the Court observed, "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 conferences or negotiations relating to a New York client and a transaction somehow tied to New York."

No Safe Harbor Rules In New York

Unlike the ethics rules of many other states, NY Rule 5.5 on unauthorized practice does not contain multi-jurisdictional practice provisions modeled on Model Rule 5.5(c) to permit out-of-state lawyers to temporarily practice law in New York within the parameters of the rule. Model Rule 5.5(c) permits a lawyer admitted in another state (and not disbarred or suspended from practice in any state) to provide legal services on a temporary basis in a state where the lawyer is not admitted if the services:

- Are undertaken in association with a lawyer who is admitted to practice in the state and who actively participates in the matter;
- Are in or reasonably related to a pending or potential proceeding before a tribunal if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
- Are in or reasonably related to a pending or potential alternative dispute resolution proceeding, if the services arise out of or are reasonably related to the lawyer's practice in a state where the lawyer is admitted to practice and are not

services for which the forum requires pro hac vice admission; or

- Otherwise arise out of or are reasonably related to the lawyer's practice in a state where the lawyer is admitted to practice.

The New York office of an out-of-state firm should be aware that only New York-licensed lawyers may practice law in New York, unless otherwise authorized, and that temporary practice in New York by out-of-state lawyers of the firm that may be related to their practice where they are admitted, may be prohibited in New York.

ATTORNEY ADVERTISING RULES • A New York office of an out-of-state firm may wish to publicize the office opening by engaging in various marketing and advertising activities on firm websites or other media to inform clients and contacts about the firm's expanded presence in New York. The attorney advertising requirements under the New York Rules are lengthier and far more complex than the Model Rules. They include specific content-based restrictions, rules on client testimonials and endorsements, disclaimer requirements, rules on advertising fee information, a labeling requirement, retention and record keeping rules, and a host of other elaborate rules. *See* NY Rule 7.1 and Model Rule 7.1.

Lawyers in the New York office should consider reviewing these requirements before undertaking marketing or advertising activities relating to the New York office.

WEBSITE DOMAIN NAMES • A new Internet domain name is ordinarily not required to open a New York office of an out-of-state law firm. However, the lawyers in the New York office should look at the firm's website domain name for compliance with the NY Rules. While the Model Rules do not have any specific rules concerning a law firm's website domain name, the NY Rules do. NY Rule 7.5(e) permits the use of a domain name that does not include the name of the lawyer or law firm, but only if "(1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm; (2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name; (3) the domain name does not imply an ability to obtain results in a matter; and (4) the domain name does not otherwise violate these Rules."

Thus, a New York office of an out-of-state firm whose existing website may be permissible in the states where the firm currently has offices should review the requirements of NY Rule 7.5(e) if the firm's name is not included in the firm's website domain name.

CONCLUSION • Opening the doors of a New York office without observing the NY Rules may be inviting in trouble. Best practices suggest doing the homework — on ethics.