No License Required: Temporary Practice in New York State

Patrick M. Connors, New York Law Journal

In a Feb. 26, 2016, Outside Counsel piece titled "Lowering the New York Bar: Will New Exam Prepare Attorneys for Practice?" we discussed the changes in store for the New York State Bar Exam, which will essentially be replaced by the Uniform Bar Exam in July. Given the scant knowledge of New York law required to pass the new bar exam, it is highly probable that there will be an increase in the number of newly admitted attorneys who have minimal knowledge of our state's law.

Developments on another front will allow attorneys with no training in New York law to come here and provide legal services, at least on a temporary basis. This is all thanks to a new Part 523 of the Rules of the Court of Appeals, which became effective on Dec. 30, 2015. Part 523, titled "Rules of the Court of Appeals for the Temporary Practice of Law in New York," tracks much of the language in Rule 5.5 of the ABA Model Rules of Professional Conduct, which provides for the "Multijurisdictional Practice of Law."

Part 523 contains some important distinctions from the ABA Rule, including allowing lawyers who are admitted in a foreign country to provide legal services on a temporary basis in New York. Section 523.2(a)(1) states that "a member of a recognized legal profession in a non-United States jurisdiction, the members of which are admitted or authorized to practice as attorneys or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority" fall within the rule's ambit.

The question of whether a foreigner will qualify under this language can be a difficult one. Cf. New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 1072 (2015) (responding to inquiry from New York lawyer contemplating forming a partnership with a Japanese "benrishi," the committee noted that "a New York lawyer must engage in an independent inquiry to confirm that the educational requirements for the foreign lawyer are equivalent to those for a New York lawyer and that such a partnership would not compromise the New York lawyer's ability to uphold the ethical requirements of this State.").

'Temporary' Practice

There are a few caveats in Part 523. Lawyers not admitted in New York who provide temporary legal services here cannot "establish an office or other systematic and continuous presence in this State for the practice of law" unless authorized by law to do so. 22 N.Y.C.R.R. §523.1(a). For example, immigration lawyers who are admitted in one state are "authorized by law" to practice before a federal Immigration Court in all states, and can operate an office to do so. See generally 8 C.F.R. §§1001.1(f), 1292.1(a)(1). Part 523 also prohibits a lawyer not admitted to practice in

New York to "hold out to the public or otherwise represent that the lawyer is admitted to practice law in this State," such as on a website. 22 N.Y.C.R.R. §523.1(b).

Section 523.1(a) presupposes that a lawyer's presence can fall within the prohibited realm of "systematic and continuous" even if the lawyer does not have a bricks and mortar outpost in New York. A lawyer might, for example, have an online presence that implies that she can represent clients regularly in New York, or a pervasive advertising campaign in the state. This type of conduct will likely run afoul of Part 523, but it will often be difficult to delineate the border between the permissible rendering of "temporary" services and a prohibited "systematic and continuous presence" in New York.

The American Bar Association, which gave birth to the modern concept of multijurisdictional practice, has acknowledged that "[t]here is no single test to determine whether a lawyer's services are provided on a 'temporary basis'." ABA Model Rule 5.5, cmt. 6 ("Services may be 'temporary' even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.").

Part 523's Requirements

The lawyer providing temporary legal services in New York must meet several criteria. First, the lawyer must be "in good standing in every jurisdiction where admitted or authorized to practice." 22 N.Y.C.R.R. §523.2(a)(2). Second, the services provided by the lawyer here must be of a type that "could be provided in a jurisdiction where the lawyer is admitted or authorized to practice." 22 N.Y.C.R.R. §523.2(a)(3). Presumably, this means that the lawyer performing the work here must be able to perform the same services in a jurisdiction in which she is admitted.

Third, the services must be those that "may generally be provided by a lawyer admitted to practice" in New York. Id. There is, however, no registration requirement for lawyers to demonstrate that they have satisfied these criteria. By comparison, lawyers not admitted in New York who register as in-house counsel in the state must file proof with the appellate division that they satisfy the criteria contained in the Rules of the Court of Appeals for the Registration of In-House Counsel. See 22 N.Y.C.R.R. §522.2.

Circumstances

If the above three criteria are met, a lawyer not admitted in New York may provide legal services on a temporary basis here in four designated circumstances. First, the lawyer can provide legal services "undertaken in association with a lawyer admitted to practice in this State who actively participates in, and assumes joint responsibility for, the matter." 22 N.Y.C.R.R. §523.2(a)(3)(i). The latter portion of this provision, requiring the New York lawyer to assume "joint responsibility for the matter," is not contained in ABA Model Rule 5.5(c)(1) and appears to be unique to Part 523.

The language is similar to that contained in the fee-splitting provision in Rule 1.5(g)(1) of the New York Rules of Professional Conduct, which allows a lawyer to split fees with a lawyer outside her firm if, among other things, "each lawyer assumes joint responsibility for the representation" in a writing given to the client.

New York lawyers associating with a lawyer providing legal services on a temporary basis under Part 523 must be careful to ensure that the out-of-state lawyer satisfies the criteria above and acts competently and diligently in representing the client. Responsibility for the matter may ultimately be placed at the doorstep of the New York lawyer. See New York Rules of Prof'l Conduct, Rule 1.5, cmt. 7 ("Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.").

The second circumstance in which Part 523 permits a lawyer not admitted in New York to provide legal services here is when the services "are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, 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." 22 N.Y.C.R.R. §523.2(a)(3)(ii). This provision allows temporary practice in New York before the lawyer is formally admitted pro hac vice, as long as the lawyer or a person the lawyer is assisting "reasonably expects" to be admitted.

A lawyer operating under this provision will need to be careful to confirm if the tribunal has its own pro hac vice rules. Interesting questions will arise when a tribunal's pro hac vice rules, such as those of a federal court sitting within New York, are not as expansive as those contained in Part 523. Lawyers should avoid these issues by adhering to the rules of the tribunal before which they are appearing. See ABA Model Rule 5.5 cmt. 9. The provision also allows a lawyer not admitted in New York to conduct a deposition here in connection with an action pending in another jurisdiction, as long as the lawyer is, or reasonably expects to be, authorized to appear in that jurisdiction. See generally ABA Model Rule 5.5, cmt. 10.

The third circumstance in which a lawyer not admitted in New York is permitted to provide legal services here pertains to representation "in or reasonably related to a pending or potential arbitration, mediation or other alternative dispute resolution proceeding held or to be held in this or another jurisdiction, if the services are not services for which the forum requires pro hac vice admission." 22 N.Y.C.R.R. §523.2(a)(3)(iii). This subdivision in Part 523 is not likely a critical one, as most New York courts have held that participating in an arbitration does not constitute the practice of law. See, e.g., *Williamson v. John D. Quinn Constr. Corp.*, 537 F.Supp. 613 (S.D.N.Y. 1982) (holding that New Jersey attorney, who was not admitted in New York and participated in an arbitration here, did not commit unauthorized practice of law under New York law and could recover fees for services rendered in the arbitration).

The fourth circumstance permitting temporary practice by a lawyer not admitted in New York is potentially vast. It allows the lawyer to provide temporary services that are not within the second and third circumstances above and "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted or authorized to practice." 22 N.Y.C.R.R. §523.2(a)(3)(iv). If, for example, a California lawyer's practice concentrates in real estate development, the lawyer can provide legal services on a temporary basis to a client in New York

who has sought the lawyer's services in such a matter. Given the breadth of services permitted under this subdivision, and the ease with which they can be performed, one may wonder if out-of-state lawyers will often associate with New York lawyers under subdivision 523.2(a)(3)(i).

Jurisdiction to Discipline

A lawyer who practices in New York pursuant to Part 523 will "be subject to the New York Rules of Professional Conduct and to the disciplinary authority of this State." 22 N.Y.C.R.R. §523.3. Resolution of the choice of law governing the lawyer's conduct, i.e., the law of New York or the place where the lawyer is admitted to practice, will be controlled by Rule 8.5(b) of the New York Rules of Professional Conduct. This can potentially lead to peculiar choice-of-law outcomes, especially where the lawyer is providing temporary services in a transactional matter. New York Rule 8.5(b)(2), which would apply in these situations, was not drafted to account for the temporary practice permitted under Part 523, and the Judiciary might consider amending the rule to address the various issues that will likely arise under Part 523.

New York lawyers are, of course, permitted to permanently practice in New York. Therefore, they will not likely be concerned with Part 523's workings unless they are assisting a non-New York lawyer in negotiating its provisions, or actively participating in, and assuming joint responsibility for, the matter. See 22 N.Y.C.R.R. §523.2(a)(3)(i). New York lawyers will be most concerned with multijurisdictional practice rules in other states where they are not licensed. The ABA Commission on Multijurisdictional Practice maintains a helpful website that tracks these developments. The website notes that 13 states have adopted a multijurisdictional practice rule that is identical to ABA Model Rule 5.5, and 34 other states have adopted a rule similar to the Model Rule.

Who Will Mind the Store?

Part 523 affords great latitude to lawyers from outside New York to enter the state and provide legal services with minimal regulation or oversight. In transactional matters, the client may be the only one who knows that a lawyer not licensed in New York is practicing law here. Even the client may be ignorant of this fact, as Part 523 does not impose any disclosure obligation on lawyers providing temporary services pursuant to its terms. See Arizona Rules of Prof'l Conduct, Rule 5.5(f) ("Any attorney who engages in the authorized multijurisdictional practice of law in Arizona under this rule *must advise the lawyer's client that the lawyer is not admitted to practice in Arizona, and must obtain the client's informed consent to such representation*.") (emphasis added).

The Office of Court Administration is required to file an annual report with the Chief Judge of the Court of Appeals by Sept. 1, 2016, "reviewing the implementation of [Part 523] and making such recommendations as it deems appropriate." 22 N.Y.C.R.R. §523.4. Although Part 523 will still be in its infancy, several constructive measures could be taken to clarify the scope of multijurisdictional practice in New York and more carefully monitor its implementation.

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