Advice for advising clients across borders

DENTONS

October 25, 2016

As modern legal practices expand nationally and globally, attorneys serve clients in regions all over the country and around the world. This expansion offers great opportunities for clients who have legal needs beyond simply their home state, as well as for law practices who can increase their base of work and enhance their expertise.

No doubt this expansion is aided by the rapid development of technology, allowing attorneys to counsel clients in the most cost-effective and efficient manners without having to be in the same room. However, as with many developments of this age, these technological advances come with additional, albeit manageable, risk.

Until recently, these risks seemed more hypothetical than real. Law practices are discovering that a national or international practice can create some hazards such as the potential unauthorized practice of law, inconsistent ethics rules, and legal malpractice exposure under the laws of multiple states. For example, a law practice could be subject to the jurisdiction of a state in which it does not maintain an office, even where its contacts with the client have nothing to do with that state's laws or regulations. As a result, the law practice and individual attorneys may be forced to defend themselves in a foreign location, subject to the rules and laws regarding professionalism and malpractice that are completely different from those where the law practice operates.

These risks can be reduced or even wholly minimized with a few simple steps.

Cross-border case law

Attorneys can help identify solutions once they are aware that counseling clients who reside in other states might subject them to the jurisdiction of those states. State courts frequently exercise personal jurisdiction over out-of-state attorneys and their law firms under long-arm statutes. For example, in *Beverage v. Pullman & Comley*, 316 P.3d 590 (Ariz. 2014), the Arizona Supreme Court affirmed a lower court decision ruling that a Connecticut attorney and law firm, retained by Arizona residents to provide a tax-shelter transaction opinion letter, were subject to the specific jurisdiction of Arizona courts.

In so holding, the court found that the lawyer and law firm had "sought Arizona-specific information" and "used these pieces of Arizona-based information to craft an opinion letter." It determined that, although these contacts did not relate to Arizona specifically, they were "Arizona-client-specific contacts."

In California, the Supreme Court case of *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1 (Cal. 1998), sets forth the rule on out-of-state attorneys' exposure to California jurisdiction. In that case, two New York attorneys entered into an agreement with a California client to provide legal services relating to a contract governed by California law. After the attorneys traveled to California, met with their client, and rendered legal advice, the client sued both attorneys in California state court for malpractice. The attorneys filed a counterclaim for legal fees.

In rejecting their counterclaim, the court held that the attorneys violated California Business and Professions §6125,

which provides: "No person shall practice law in California unless the person is an active member of the State Bar."

The court explained that: "In our view, the practice of law 'in California' entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer's activities in the state. Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law 'in California.' The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations."

The court was sure to highlight that the unlicensed attorneys' physical presence was not a prerequisite to exercising personal jurisdiction over them. Instead, it noted: "One may practice law in the state in violation of section 6124 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."

The standards set forth in *Birbrower* and *Beverage* are by no means the national standard, but they provide insight to practitioners faced with contextualizing more traditional personal jurisdiction analyses outside of the legal malpractice context. For example, the Supreme Court of Mississippi has held that a single act targeted at that state is sufficient to confer specific personal jurisdiction if that act gives rise to the claim at issue. New York similarly exercises long-arm personal jurisdiction if there is a sufficient nexus between the defendants' contacts with the state and legal dispute at issue. And Florida courts look at whether a tortious act was committed in the state or whether a tortious act arising out of an act or omission occurring outside the state caused injury to a person or property inside the state. If either is established, then due process is assessed.

Importantly, the risk of uncertainty regarding jurisdiction extends internationally. The province of Ontario, Canada, for example, generally considers an attorney to be practicing law if the attorney merely gives legal advice on the laws of Ontario or the laws of Canada applicable to Ontario. Thus, an attorney might be found to have practiced law in Ontario even without physically entering the province. This could include giving legal advice regarding Ontario's laws by telephone, email, or other written correspondence that crosses provincial or international borders.

Approaching borders with caution

With these risks in mind, there are a few options available. For starters, attorneys can associate counsel in a foreign jurisdiction at issue or employ attorneys licensed there, where necessary. Additionally, under today's liberalized reciprocity rules, there may be avenues for admission to jurisdictions in which an attorney has a client or an issue. Of course, if the attorney is rendering advice on national issues, that does not itself lead to unauthorized practice of law merely because the advice relies on state-specific facts or interpretation of another jurisdiction's laws. Thus, attorneys should consider the actual risk when deciding how best to proceed.

Before entering into a multijurisdictional attorney-client relationship, many attorneys carefully consider the risk that the laws of another jurisdiction might apply. In making this determination, attorneys may wish to familiarize themselves with the jurisdiction's rules of professional conduct as well as the possibility of defending themselves against a legal malpractice claim in that state.

Multistate and international practice does not need to be avoided. In fact, its benefits more often than not outweigh its risk. Being aware of the issues provides the most security.

As published by *The Recorder*

Your Key Contacts

Shari L. Klevens
Partner, Washington, DC
D +1 202 496 7612
shari.klevens@dentons.com