

AMERICAN BANKRUPTCY INSTITUTE JOURNAL

May 2008 • Issues and Information for Today's Busy Insolvency Professional • Vol. XXVII, No. 4

Unauthorized or Authorized Practice of Law by Transactional Out-of-State Lawyers in Delaware?

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Two recent decisions of the Chancery Court, *Sample v. Morgan*, 935 A.2d 1046, 1047 (Del. Ch. 2007), and the Delaware Supreme Court, *In the Matter*

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of Valerie Glover Tonwe, 929 A.2d 774 (Del. 2007), though they address two distinct areas of the law, are cases of



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first impression related to the Delaware Supreme Court's broadening of the ability to practice Delaware law by non-Delaware lawyers, while holding those who practice Delaware law accountable in Delaware. The *Sample* decision has been the subject of speculation by at least one commentator that the Chancery Court is at least, in part, complicit in protecting a monopoly on the practice of Delaware law:

I'll take the vice chancellor at his word that this is a relatively rare

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ABI Event Roundup

More than 1,100 Enjoy Annual Spring Meeting and Cherry Blossoms in Washington

Insolvency professionals from 46 states and three foreign countries attended this year's Annual Spring Meeting at the Renaissance Hotel in Washington, D.C. Some 19 hours of CLE credit were available, plus an additional day of programs in the Nuts & Bolts pre-conference for new and



John Rao (National Consumer Law Center; Boston) (l) and Prof. G. Marcus Cole (Stanford Law School; Stanford, Calif.) debated the hot issue of home mortgage modification via chapter 13.



Supreme Court Justice Samuel A. Alito Jr. provided a thoughtful keynote luncheon talk on the judicial function.

young practitioners. Guests heard thoughtful keynote remarks by Justice Samuel A. Alito Jr. on the role of the courts in a democratic society and Sen. Sheldon Whitehouse (D-R.I.) on the congressional agenda to help strapped homeowners, and were entertained by political power couple Mary Matalin and James Carville on the dynamics of

the fall election season. The latter program was hosted by IWIRC.

Plenary sessions covered the role of the CRO, pending legislation affecting consumer credit and mortgages, and a judges' roundtable on hot cases, as well as ethics and

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Sen. Sheldon Whitehouse (D-R.I.) provided an update on the Senate's legislative agenda, including bankruptcy issues.

case driven by the law and facts. And, to be sure, Delaware protects interest in the integrity of its law by extending its sanctions beyond the lawyers within its borders. That's particularly important in this post-Enron era of threats to federalize state law.

But I can't avoid a sneaking suspicion that this may also have a little to do with Delaware's protecting its lawyers' franchise and not just its reputation.¹

A review of the court's revisions to the Delaware Rules of Professional Responsibility (Rule(s)), following revisions to the American Bar Association's (ABA) Model Rules of Professional Conduct, as they relate to multijurisdictional practice will demonstrate that the *Sample* decision is not protectionism. Instead, the *Sample* decision is directly related to the relaxation of restrictions on non-Delaware attorneys practicing Delaware law and the adjunct need to protect their clients. This article does not attempt to provide a definitive answer to the boundaries of multijurisdictional practice of Delaware law. It does argue that sentiments such as Prof. Ribstein's are misguided when an analysis is done of the broadening of the ability to practice Delaware law as a non-Delaware lawyer under Rule 5.5.

Regulation of Multijurisdictional Practice and Civil Liability Systemic or Continuous Presence of Non-Delaware Lawyers in Delaware

Rule 5.5 (b) of the Delaware Lawyers' Rules of Professional Conduct dictates that a lawyer not admitted in Delaware shall not establish a systemic or continuous presence in Delaware for the practice of law. Such presence need not be actual physical presence within the state. In fact, the Delaware Supreme Court has identified as indicia of a systemic or continuous presence regularly advising clients on matters of Delaware law and efforts at client solicitation that could be read as

¹ Posting of Prof. Larry Ribstein to busmovie.typepad.com/ideoblog/2007/12/so-you-want-to.html (Dec. 5, 2007). A discussion of *Sample* in the context of several blog postings can be found at the following posts: Posting of Francis G.X. Pileggi to delawarelitigation.com/articles/chancery-court-updates (Dec. 4, 2007); Posting of Prof. Stephen Bainbridge to businessassociationsblog.com (Dec. 5, 2007); Posting of Prof. Larry Ribstein to busmovie.typepad.com/ideoblog/2007/12/so-you-want-to.html (Dec. 5, 2007).

parallel to those highlighted in the *Sample* opinion. See *In re Tonwe*, 929 A.2d 774 (Del. 2007).

The *Tonwe* case was a case of first impression in Delaware under the revised Rules, specifically, Rule 5.5 (b)(1). In *Tonwe*, after reinstatement in Pennsylvania related to a prior infraction, Tonwe claimed that the Pennsylvania Ethics Hotline advised her that "she could conduct 'pre-litigation' meetings with Delaware clients who had personal injury claims arising from Delaware accidents." See *id.* at 776 (noting that would-be respondent to such call contradicted Tonwe's version of events). Tonwe developed a sizeable Delaware clientele in Delaware through church groups, civic activities and her husband's medical practice. See *id.* at 776-77. Tonwe argued that she conducted all these legal services from her Pennsylvania office and, thus, had not provided legal services in Delaware, providing her safe harbor under Rule 8.5(b). See *id.* at 778.

In addition to noting three instances in which Tonwe was physically present in Delaware, the court noted that physical presence was not required to establish legal services that were provided in Delaware. *Id.* Delaware residents, Delaware car accidents and seeking redress under Delaware insurance were sufficient. *Id.* The court found that though "[Tonwe] did everything short of appearing in Delaware courts," she established a "regular pattern of representation of Delaware clients [which] constituted the practice of law 'in Delaware' for the purposes of Rule 8.5." *Id.* Furthermore, the record contained substantial evidence to support the Board's finding that Tonwe "established a systemic and continuous presence in Delaware for the practice of law in violation of Rule 5.5(b)." See *Id.* at 779. Although Tonwe found no sanctuary in the exceptions to Rule 5.5, there can be relief from liability for unauthorized practice of law if the out-of-state attorney is providing legal services in Delaware on a "temporary basis." See Rule 5.5(c) and (d).

Reciprocal Jurisdiction

Rule 8.5(a) allows for jurisdiction in disciplinary actions even where the lawyer is not admitted in the state, when the lawyer has provided or offered to provide legal services in the state. The 2002 Report of the ABA Commission

on Multijurisdictional Practice ("Commission Report" or "Report") states in its commentary to the recommendation for amendment of Rule 8.5 that "sanctions must be available both against lawyers who do unauthorized work outside their home states and against those who violate rules of professional conduct when they engage in otherwise permissible multijurisdictional law practice." Commission Report at 31-32. Under the revised Rules, attorneys who have a multijurisdictional practice, whether practicing in Delaware or outside of it, are subject to the discipline of the Delaware Supreme Court. Recent action by the Disciplinary Board of the Supreme Court confirms that the unauthorized practice of law by non-Delaware lawyers in Delaware will trigger disciplinary jurisdiction in Delaware pursuant to Rule 8.5(a). See *In the matter of Valerie J. Glover*, 93 DB 2007, ___ Pa. D. & C. 4th ___ (2008)(reciprocal disbarment order by Disciplinary Board of Supreme Court of Pennsylvania of Valerie Glover Tonwe, Pennsylvania lawyer previously found to have violated Rule 5.5 in Delaware); *cf.* Delaware Lawyers' Rules of Disciplinary Procedure, Rule 18 (Delaware's reciprocal discipline rule, distinct from Rule 8.5(a)).

Civil Liability

Vice Chancellor Strine's opinion in *Sample v. Morgan*, 935 A.2d 1046, 1047 (Del. Ch. 2007), found that non-Delaware corporate lawyers and their firms could be sued in Delaware "as to claims arising out of their actions in providing advice and services to a Delaware public corporation, its directors, and its managers regarding matters of Delaware corporate law..." The court found arranging the filing of a certificate amendment with the Delaware Secretary of State through a third party to be enough to satisfy personal jurisdiction in Delaware through the state's long-arm statute. Further, the court ruled that the regular provision of advice about Delaware law makes the exercise of jurisdiction by Delaware courts over lawyers and law firms constitutional, as lawyers and law firms should reasonably expect to face suit in Delaware for breach of fiduciary duties related to this advice.

The vice chancellor describes at length the defendant law firm's multijurisdictional practice involving

Delaware law. The court noted that the defendant law firm “advertises itself as a national, indeed, international, firm that regularly advises public corporations in matters of corporate and securities law. It touts its coast-to-coast platform.” *Sample*, 935 A.2d 1063. “For sophisticated counsel to argue that they did not realize that acting as the *de facto* outside general counsel to a Delaware corporation and regularly providing advice about Delaware law about matters important to that corporation and its stockholders might expose it to this court’s jurisdiction fails the straight-face test.” *Sample*, 935 A.2d 1065.

The Court of Chancery has no jurisdiction over the Rules, and accordingly does not adjudicate professional conduct. *See* Del. Supr. Ct. R. 61-64. Thus, Vice Chancellor Strine did not have a matter before him under Rule 5.5. Nonetheless, the description of the defendant law firm’s activities in *Sample* may imply that the defendant law firm was engaged in activity that was more than “temporary.” If so, the activity might fall within the “systemic and continuous activity” prohibited by Rule 5.5.

The decision is a reinforcement of the responsibility that comes with the rights granted by the Delaware Supreme Court to engage in a multijurisdictional practice. Non-Delaware lawyers will be held accountable for their actions when practicing Delaware law, and such actions may be answerable in Delaware courts.

The Delaware Supreme Court’s Acknowledgment of Multijurisdictional Practice Safe Harbors in Rule 5.5

The ABA Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000 Commission) and the Commission Report both reflect a desire “for the proper balance between the interests of a state in protecting its residents and justice system, on the one hand, and the interests of clients in a national and international economy in the ability to employ or retain counsel of choice efficiently and economically.” Commission Report at 5. On Aug. 12, 2002, the American Bar Association House of Delegates adopted all nine recommendations contained in the Report, including renaming the Model Rule of Professional Conduct 5.5

“Unauthorized Practice of Law; Multijurisdictional Practice of Law” and carving out the safe harbors recommended by the Report.

There are four exceptions under Rule 5.5(c) and two under Rule 5.5(d) that lay the framework for the Delaware Supreme Court’s acceptance of multidistrict practice. Rule 5.5(c)(2) and (3) provide limited safe harbors to lawyers anticipating admission *pro hac vice* or participating in alternative dispute resolution in matters reasonably related to their practice outside of Delaware where *pro hac vice* admission is not required. Rules 5.5(d)(1) and (2) provide protections for in-house and government lawyers and exceptions to unauthorized practice created by federal or Delaware statute, court rule, executive regulation or judicial precedent. *See* Rule 5.5 cmt 18; *see, e.g.*, Del. Supr. Ct. R. 55.1. Likewise, limited exceptions to *pro hac vice* requirements have been carved out under various local rules and are preserved by Rule 5.5(b)(1). *See, e.g.*, Local Rules U.S. Bankruptcy Court for the District of Delaware, Rule 9010-1(c) (permitting counsel to file and prosecute proof of claim or response to objection to proof of claim without assistance of local counsel in absence of extensive discovery or trial time).

Safe Harbors in the Wake of *Sample* and *Tonwe*

In light of *Sample* and *Tonwe*, more relevant exceptions to the prohibitions of Rule 5.5 (b) can be found in (c)(1) and (4). Subject to the temporary nature of the representation, Rule 5.5(c)(4) provides that a non-Delaware attorney may advise a Delaware client on Delaware law where the representation arises out of or is reasonably related to the lawyer’s practice where the lawyer is admitted to practice. However, none of the comments to Rule 5.5 appear to embrace the facts of *Sample*, a non-Delaware attorney advising a Delaware corporation in matters of Delaware general corporate law and drafting and filing documents in furtherance of that advice.² Comment 14 alludes to a fact-

² Paragraph (c)(4) require[s] that the services arise out of or be reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer’s client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer’s work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client’s activities or the legal issues involve multiple jurisdictions, such as when the officers of a

based test that would determine whether services arise out of or are reasonably related to the lawyer’s practice in a non-Delaware jurisdiction, *i.e.*, previous representation of the client by the lawyer, whether the client is a resident in or has substantial contacts with the non-Delaware jurisdiction, or whether the matter to which the services relate has significant connections to another jurisdiction. In many cases, previous representation could contradict the “temporary basis” prerequisite of this safe harbor discussed in Comment 6. Many Delaware corporations are residents in or have substantial contacts with other jurisdictions. However, a non-Delaware practitioner would be hard-pressed to argue that provision of legal services in Delaware is acceptable simply because the client lives or owns property in another jurisdiction.

The law firm defendant in *Sample* cited two similar facts in its attempt to avoid personal jurisdiction in Delaware: that all of the legal work was done outside of Delaware and that the only activity occurring in Delaware was the filing of a certificate amendment. *See Sample*, 935 A.2d 1055. The court was not convinced and found that a breach of a fiduciary duty occurs in the “chosen home—Delaware—the situs that reflects the center of gravity of the corporation for all issues involving its internal affairs.”³ *See Id.* at 1057-58.

The court’s comments were made without consideration of the unauthorized practice of law given the Court of Chancery’s jurisdictional limits and the issues before it. Nonetheless, it is instructive on the weight to ascribe to significant connections to other jurisdictions if asked to construe Rule 5.5(c)(4).

Although not expressly adopted by the Delaware Supreme Court, the ABA’s “Report of the Commission on Multijurisdictional Practice,” August 2002, recommended changes to Rule 5.5 in part to liberalize multijurisdictional law practice while not “creat[ing] an unreasonable regulatory risk... In identifying these new standards, the Commission has taken a conservative approach,

multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer’s recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign or international law.” Delaware Lawyers’ Rules of Professional Conduct Rule 5.5(c)(4) cmt.

³ Corporate damage to a balance sheet and voting dilution are “suffered” in “its chosen domicile.” *Id.*

addressing only those classes of conduct that do not pose unacceptable risks to the public interest.” *See* Commission Report at 20-21. The Commission discusses the intent of Rule 5.5(c)(4) as “authoriz[ing] legal services to be provided on a temporary basis outside the lawyer’s home state by a lawyer who, through the course of regular practice in the lawyer’s home state, has developed a recognized expertise in a body of law that is applicable to the client’s particular matter.”⁴ Nowhere does the Commission mention the common situation illustrated by *Sample*. Highly specialized non-Delaware attorneys in the role of outside general counsel to Delaware corporations like the law firm defendants in *Sample* would be wise to consider the tenor of the court’s opinion before arguing that their services are both temporary and reasonably related to their practice in a jurisdiction outside of Delaware.

Other exceptions to Rule 5.5(b) include aligning oneself with a Delaware lawyer. Rule 5.5(c)(1) allows non-Delaware lawyers to provide legal advice on Delaware matters affecting Delaware clients on a temporary basis if undertaken in association with a lawyer admitted to practice in Delaware and who actively participates in the matter. “Temporary basis” has no single definition, but Comment 6 to Rule 5.5 states “[s]ervices may be ‘temporary’ even though the lawyer provides services in [Delaware] 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.”

“Active participation” indicates that the relationship between Delaware and non-Delaware counsel is expected to be a substantive one, including advising on Delaware case law, local practice as enshrined in rulings from the bench, unreported opinions, etc. Delaware’s Office of Disciplinary Counsel has warned that when Delaware lawyers act as local counsel in transactional matters are well-advised to “have access to all documents necessary to provide legal advice and render a legal opinion.”⁵

⁴ This assumes, we think rightly, that the Commission’s reference to a client’s interest in retaining a specialist in the law of a foreign jurisdiction contemplates jurisdictions outside of the United States. Nevertheless, the specific examples that follow do not include advising a corporate client registered in a jurisdiction other than one in which the lawyer is admitted on matters related to the law of the other jurisdiction. *See* ABA Comm. on Multijurisdictional Practice, Report at 25-26 (2002).

⁵ Materials distributed at seminar entitled, “Enhanced Ethics and Delaware Practice, *Pro Hac Vice*: Ethical Challenges of Serving as

Delaware lawyers are cautioned to ensure that they are sharing the same assumptions as non-Delaware counsel and vet those assumptions as necessary.⁶ This implies direct client contact.

Certainly if there is an active matter before the Court of Chancery or a bankruptcy case in the District of Delaware, Delaware counsel should be engaged either as lead counsel or as Delaware local counsel to avoid unauthorized practice of law and comply with the *pro hac vice* rules. The same holds true for transactions that are adjunct or directly related to a pending action in a Delaware court, such as a merger agreement or a sale of substantially all the assets of a debtor through §363 of the Code, both of which would require substantive involvement by Delaware counsel. For example, Delaware lawyers would be expected to analyze fiduciary duties and the associated protections of the business judgment rule when acting as local counsel advising parties in navigating chapter 11 matters. *See, e.g., In re Tower Air Inc.*, 416 F.3d 229 (3d Cir. 3005); *In re SubMicron Systems Corp.*, 432 F.3d 448, 463 (3d Cir. 2006); *In re Network Access Solutions Corp.*, 330 B.R. 67 (Bankr. D. Del. 2005); *Geyer v. Ingersoll Publ’ns Co.*, 621 A.2d 784, 789 (Del. Ch. 1992); *Credit Lyonnais Bank Nederland, N.V. v. Pathe Comm’ns Corp.*, Civ. A. No. 12150, 1991 WL 277613, at *34 and n. 55 (Del. Ch. 1991)). Local counsel should also determine property interests under Delaware law. *See, e.g., Folger Adam Security, Inc. v. DeMatteis/MacGregor, JV*, 209 F.3d 252, 267 (3d Cir. 2000) (Stapleton, J., concurring) (*citing Butner v. United States*, 440 U.S. 48, 54 (1979)).

The more difficult question is whether association with a Delaware lawyer is required when there is a transaction involving Delaware law, unrelated to a pending action in the Delaware courts. Delaware lawyers continue to provide opinion letters on Delaware law in novel or complicated transactions having a Delaware situs.⁷ Typical transactions involve structured finance vehicles that use a Delaware limited liability company or Delaware

Delaware Counsel.” Rocanelli, Andrea L., Esquire, Chief Counsel Office of Disciplinary Counsel, Delaware Supreme Court, Jan. 25, 2008.

⁶ *See Id.*

⁷ Delaware legal opinion letters often focus on issues such as: the validity of the formation of the entity; proper authorization of the transaction; whether the transaction has been structured to separate the mortgaged property in question from other entities, assets, properties, and liabilities; and the bankruptcy-remoteness of the borrower.

Statutory Trust. Opinion letters on Delaware law are commonly requested by real estate lenders and loan-rating agencies.

What remains is the question of whether Delaware counsel is required for the mundane transaction, *e.g.*, advising your corporate client on matters of Delaware corporate law related to formation issues. Assume that a Rule 5.5(b) violation occurs when a non-Delaware lawyer drafts a simple Delaware will for a Delaware client without Delaware counsel per Rule 5.5(c)(1) because the services do not satisfy the specific exceptions of Rule 5.5(c)(4) (services arise out of or are reasonably related to lawyer’s practice in another jurisdiction). *Cf. In re Estep*, 933 A.2d 763 (Del. 2007) (holding that, *inter alia*, drafting of wills by nonattorney accountant constitutes unauthorized practice of law). How can this lawyer’s conduct be viewed differently under Rule 5.5 from that of outside counsel in *Sample* (advising Delaware corporation on matters of Delaware corporate law and drafting certificate amendment for Delaware filing pursuant to that advice)? *See also In re Member of the Bar of Supreme Court of State*, 911 A.2d 803 (Del. 2006) (reasserting that real estate closings are practice of law and holding that related funds be escrowed with Delaware attorney).

Conclusion

This is an untested area of the law. Non-Delaware general corporate counsel and transactional practitioners will be forced to reconcile the factual findings in *Sample v. Morgan* with the relaxation of restrictions on non-Delaware attorneys practicing Delaware law and the need to protect the public in the wake of the new Rules. Though the boundaries of those safe harbors remain largely undefined, the reach of the Chancery Court is not. ■

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