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TEST # 57

1 HOUR CREDIT

LEGAL ETHICS

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Avoiding Unauthorized Practice

California Joan reviews the perils faced by non-admitted associates and out-of-state lawyers working here

By **ELLEN R. PECK**

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Meryl Terpitude peered around the corner of her doorway, brandishing a bribe of California Joan's favorite café mocha latte. "I have a tiny ethics question. . ."

Meryl, sitting comfortably in her easy chair, posed his question:

"It's June; law school graduations are sending would-be lawyers to take the General California Bar Examination and thereafter our new 'associates' who have taken the bar but not been admitted to practice will start their careers with this firm. The management committee has put me in charge of looking at our procedures for supervising new non-admitted associates, lateral hires and transfers of out-of-state lawyers not admitted in California. I need your help!"

"One café mocha latte is not enough, Meryl!" Cali almost choked on the enormity of issues to be discussed.

Meryl grinned, "Cali, if you leave it to us, we'll get it wrong and be charged with aiding and abetting the unauthorized practice of law in violation of rule 1-300(A), Rules of Professional Conduct (CRPC). You'd also be condemning innocent associates and out-of-state lawyers to potential admission delay or denial for engaging in the unauthorized practice of law in violation of Business and Professions Code §6125."

"Or for holding out that they were entitled to practice law in California in violation of §6126(a)," Cali retorted heatedly. "Section 6126(a) also provides potential criminal exposure for violating these statutes:

“Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, or otherwise authorized pursuant to statute or court rule to practice law in this state at the time of doing so, is guilty of a misdemeanor punishable by up to one year in a county jail or by a fine of up to one thousand dollars (\$1,000), or by both that fine and imprisonment.”

“Yikes!” Meryl exclaimed, pondering the risk. “Section 6125 just states, ‘No person shall practice law in California unless the person is an active member of the State Bar.’ The baffling mystery is: what constitutes the unauthorized practice of law in California?”

“Meryl,” responded Cali, “you have just stated the three elements to determine: First, does the conduct or activity constitute the practice of law? Second, if it does, is it authorized? Third, was the conduct ‘in California’?” Cali began the framework for analysis.

“Cali, I understand that in *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119, 128-129, the California Supreme Court held that an attorney, not physically present in California, can virtually be ‘in California’ by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer or other modern technological means,” Meryl said. “Since all of the associates or out-of-state transfers will occur here in California, we can dispense with discussion of the third element.”

“Meryl, *Birbrower* also held that the practice of law falls into three broad categories,” Cali added. (*Id.*, at p. 128.) “The first is ‘the doing and performing services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure.’” (*People ex rel. Lawyers’ Institute of San Diego v. Merchants’ Protective Corp.* (1922) 189 Cal. 531, 535 (*Merchants.*))

Meryl conceded, “O.K., so we won’t send non-admitted associates to court on behalf of our clients.” But, he asked, “Can’t out-of-state lawyers not admitted in California represent clients in court proceedings so long as another admitted California attorney is associated on the case?”

“No!” Cali replied. “*Birbrower* observed that there is no statutory exception to §6125 which allows out-of-state attorneys to practice law in California as long as they associate local counsel in good standing with the State Bar, except by *pro hac vice* admission.” (*Id.*, at p. 126, fn. 3; Cal.Rls. Ct. 9.40.)

“Don’t even think,” Cali spoke quickly, seeing the glint in Meryl’s eye, “that you can have out-of-state attorneys who transfer here admitted *pro hac vice*. Any resident out-of-state lawyers are not eligible for *pro hac vice* admission.”

“One of my non-admitted associates is quite good at drafting stipulations and releases for transactions and simple litigation matters. I give her a term sheet, she gets the stip and

releases done, sends them out to the client and opposing counsel and we are done,” Meryl boasted proudly. “I would like to expand this program for the new non-admitted associates.”

Cali’s eyes blazed with horror. “Under California law, the practice of law includes the preparation of contracts and other documents that secure legal rights, whether the matter is pending in court or not. Preparation of stipulations and releases constitutes the practice of law. (*In re Garcia* (9th Cir.BAP 2005) 335 B.R. 717, 728.) Without your direct review and authorization of the documents, you are aiding the unauthorized practice of law (CRPC 1-300(A)) and your non-admitted associate is engaging in the unauthorized practice of law. (Bus. & Prof. §6125.)”

“But the documents are so simple!” Meryl protested.

“The courts have observed that a document’s complexity is not dispositive as to whether their drafting is properly within the sphere of legal services, since the preparation of any legal document that secures legal rights is considered practicing law,” Cali retorted. (*Id.*)

“O.K., so I have to review every stipulation, release or other legal instruments or contracts by which legal rights are secured prepared by any non-admitted person,” Meryl conceded. “I guess the documents should go out with a cover letter with my signature or that of another admitted attorney.”

“Yes!” Cali hissed.

Meryl tried another issue. “We have this great attorney from Mexico, awaiting his bar results. Our clients doing business in Mexico just love him. He is very effective in advising them about strategies for negotiating contracts, how the local laws in Mexico work on any given assignment. . .”

Cali, gritting her teeth to keep from screaming, said, “Giving advice regarding the law of a foreign country constitutes the practice of law. A person who gives advice as to local law, federal law, the law of a sister state, or the law of a foreign country, is GIVING LEGAL ADVICE!” (The lawyer from Mexico therefore is practicing law. Bus. & Prof.C. §6125; *Bluestein v. State Bar* (1974) 13 Cal.3d 162, 174. Aiding the conduct is a violation of CRPC 1-300(A) by the supervising attorney.)

“So I guess someone in the firm who specializes in Mexican law should supervise his work. . .” Meryl looked dejected.

“Yes, and the lawyer from Mexico should be advised to never, either orally or in writing, give advice to clients until admitted,” Cali underscored.

“Cali, now that I understand these unauthorized practice issues, I need to ask you about what happened yesterday.” Meryl looked puzzled. “Yesterday, at a deposition of my client by the plaintiff, a young woman who had recently graduated from an out-of-state

law school but was not yet admitted to practice in any state, appeared for another co-defendant. She handed me a business card that showed her firm's name and her name above the words "attorney at law." She also introduced herself to the parties as an attorney from the co-defendant's law firm. No other attorney from the law firm was present. During the deposition, she asked questions of my client and objected to some of the forms of questions.

"One of the other lawyers told her after the deposition that she is not yet permitted to hold herself out as an attorney until she is admitted to a state bar in this state. However, she said that it was just a deposition; that she had a juris doctor degree and her employer, a lawyer of more than 30 years' experience, had authorized her appearance. What do you think Cali?" Meryl asked.

"I think that appearing and participating in a deposition on behalf of another constitutes the unauthorized practice of law in violation of §6125. A deposition is a discovery proceeding for an action pending in a court of law. Therefore, it is a court appearance, meeting the first prong of the *Birbrower* definition. Additionally, she is orally and in writing (the business card) holding herself out as an 'attorney at law.' This constitutes 'holding out' as eligible to practice law, in violation of section 6126(a)," Cali said firmly.

"Well," said Meryl, "we will not send out any non-admitted persons to discovery proceedings on behalf of clients, without another lawyer present. But what about a non-lawyer negotiating simple agreements in less costly or less complex litigation matters?"

"Negotiating and settling claims on behalf of others may amount to the practice of law. If a law firm is retained for a matter that includes the negotiation of a contract or other agreement on behalf of a client, this conduct constitutes the practice of law. Therefore, an attorney may not delegate such functions to a non-attorney." (*In re Carlos* (Bkrtcy.C.D. Cal.1998) 227 B.R. 535, 538-539.)

"What can non-admitted future lawyers do for the firm?" Meryl asked in exasperation.

Cali answered, "Work by law firm non-attorneys must be preparatory in nature. Such work may include research, investigation of details, the assemblage of data or other necessary information, and other work that assists the attorney in carrying out the legal representation of a client. All work must be supervised by an attorney and must become or be merged into the work of the attorney, so that it becomes the attorney's work product." (*Id.*, p. 539.)

"What procedures should we put in place for associates who are not admitted?" Meryl asked.

Cali ticked off a checklist of basic points:

First, any designation of the non-admitted associate in business cards, letterhead, Web sites, announcements or any other written designations should indicate that the associate

is not admitted to practice in California. This will ensure that the firm does not hold the person out as entitled to practice law in violation of §6126(a).

Second, if the associates meet with clients, in person or by telephone, the clients should be told that the associate is not admitted and is not entitled to practice law yet. This, too, will clarify for clients that the person is not a lawyer and not entitled to practice law. (Bus. & Prof. C., §6126.)

Third, all work by non-admitted associates should be supervised to ensure that they are not inadvertently engaged in the practice of law and that the firm is not aiding the practice of law.

Fourth, the associate's name should not appear on the caption of a pleading to be filed or presented to a tribunal. Appearing on behalf of another in the caption of pleadings filed with the court may constitute the unauthorized practice of law where the filer is not licensed to practice or otherwise authorized to appear before the court. (See *Gentis v. Safeguard Business Systems, Inc.* (1998) 60 CA4th 1294, 1308—denying petition for rehearing where attorney not licensed in California was listed in caption as representing petitioner.)

Fifth, the associate should not give legal advice, including any oral legal advice to a firm client or signing any written communication that includes the giving of legal advice.

Sixth, the associate can prepare the first draft of legal instruments and contracts by which legal rights are secured but the version sent to the client or other parties on behalf of the firm must be the “merged” work product of the supervising attorney.

Seventh, all non-admitted associates should be trained about activities in which they should not engage.

“What about lateral hires and transfers of out-of-state attorneys?” Meryl asked. Cali responded with some basic procedures, borne of difficult experiences by Cali's outside lawyer clients:

- The admission records of all attorneys to be hired by the firm should be checked to ensure that the person is truly admitted. There are a number of cases of firms hiring people without checking their admission. After the supposed lawyers represented firm clients for months or years, the firms discovered to their dismay that the purported attorneys graduated from law school, passed the California bar examination but were never actually admitted to practice in California.
- Any out-of-state lawyer who is hired and who resides in California should be subjected to the same procedures for non-admitted associates.
- There is an exception. State law cannot regulate or interfere with the practice of law before federal administrative agencies. (*Benninghoff v. Sup.Ct.* (State Bar)

(2006) 136 Cal. App 4th 61, 74.) But be careful: federal law relevant to the practice of law before a federal agency may adopt or incorporate state law standards and requirements regarding such practice. (*Augustine v. Department of Veterans Affairs* (Fed. Cir. 2005) 429 F.3d 1334, 1340–1341.)

■ Regarding business cards, Web sites, letterheads and other communications showing a non-California-admitted out-of-state lawyer: the communication may state the other jurisdictions in which the lawyer is admitted but should also clarify that the lawyer is not admitted in California, if the out-of-state lawyer resides in California.

As Meryl prepared to implement these and other procedures to ensure that the firm did not aid an unlicensed person to engage in the unauthorized practice of law in California, he thanked Cali for once again showing him the path away from perdition.

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Test — Legal Ethics
1 Hour MCLE Credit

This test will earn one hour of MCLE credit in Legal Ethics.

1. A person who engages in the unauthorized practice of law in violation of Business and Professions Code §6125 may be guilty of a crime.
2. An out-of-state lawyer who is not eligible to practice law in California, but who holds herself out as entitled to practice law in violation of Business and Professions Code §6126(a), is not guilty of a crime.
3. A lawyer who aids a person to engage in the unauthorized practice of law in violation of rule 1-300(A), Rules of Professional Conduct (CRPC) may be subject to professional discipline.
4. Useful elements for determining what is the unauthorized practice of law are: (1) does the conduct or activity constitute the practice of law; if so, is it authorized and was the conduct “in California.”
5. It is necessary to prove that an out-of-state lawyer, who is not eligible to practice in California, engaged in the practice of law within the boundaries of California in order to prove that the lawyer violated the unauthorized practice of law statute.
6. An out-of-state lawyer, not eligible to practice law in California and not physically present in California, can practice law by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer or other technological means.
7. Appearing in a court of law on behalf of another in California constitutes the practice of law.
8. A non-admitted out-of-state lawyer who resides in California may still be eligible to be admitted *pro hac vice* in a case in California.
9. An out-of-state lawyer not admitted in California may represent clients in court proceedings so long as another admitted California attorney is associated on the case.
10. The practice of law includes the preparation of contracts and legal instruments by which legal rights are secured, whether or not the matter is pending in court.
11. Preparation of a simple stipulation and release is not the practice of law.

- 12.** A lawyer admitted to the practice of law in France but not eligible to practice in California may nevertheless give legal advice in California solely about French law.
- 13.** Giving legal advice affecting the legal rights of others constitutes the practice of law.
- 14.** Law firm is retained for a matter which includes the negotiation of a contract or other agreement on behalf of a client. Firm attorney may delegate the negotiation of the contract to a non-attorney.
- 15.** Work by non-attorneys can include research, investigation of details, the assemblage of data or other necessary information and other work that assists the attorney in carrying out the legal representation of a client as long as the work becomes or is merged into the work of the attorney, so that it becomes the attorney's work product.
- 16.** Appearing on behalf of another in the caption of pleadings filed with a California court may constitute the unauthorized practice of law where the filer is not licensed to practice or otherwise authorized to appear before the court.
- 17.** An out-of-state lawyer ineligible to practice law in California may be able to practice law before federal administrative agencies.
- 18.** A law firm may authorize a firm employee who is a graduate of a California law school awaiting bar examination results to use a business card that states the name of the firm, the person's name and "attorney at law."
- 19.** A non-admitted law school graduate awaiting bar examination results, employed by a law firm, may prepare the first draft of legal contracts or other legal instruments by which legal rights are secured if supervised by an attorney.
- 20.** As a matter of risk management, clients first meeting an associate who is a non-admitted law school graduate awaiting bar examination results should be told that the associate is not a lawyer and is not entitled to practice law.

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- This self-study activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of one hour of legal ethics.
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LEGAL ETHICS

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Name

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State Bar Number (required)

1. True___ False___
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