Give Me Shelter: The Ethics of Out-of-State Lawyering

By Gary M. Kaleita, Alexander Dobrev, and
Adam R. Lewis, Lowndes, Drosdick, Doster, Kantor & Reed, P.A., Orlando, Florida

Many Florida real estate lawyers have no doubt dealt with out-of-state clients and attorneys that are involved in buying and selling real property located in Florida. Moreover, in the contemporary legal milieu, using out-of-state real property as collateral for a loan is an increasingly common practice. As such, real property located in Florida may be used as collateral for loans that otherwise may have little connection to the state of Florida. Given that Florida is a haven for real estate investment (e.g. condominiums, timeshare and seasonal homes), out-of-state investors routinely buy and sell Florida real property, and their out-of-state attorneys often represent them in these transactions. Of course, whether via investing or estate planning, Florida attorneys also represent clients in transactions that involve out-of-state property.

In these scenarios, many (if not most) out-of-state attorneys choose to engage local counsel. However, there have been and continue to be times when local counsel is not engaged. This can leave the client exposed to liabilities stemming from the potential differences in law of which the attorney might have been unaware. In such cases, several considerations arise. First – is this practice ethical, and might the attorney be subject to disciplinary action; and second – is this a practice that places the client at risk and might the attorney be subject to a malpractice claim?

With regard to the ethics issue, one must first consider the Florida Rules of Professional Conduct. Rule 4-5.5 stipulates that, "a lawyer shall not practice law in a jurisdiction other than the lawyer's home state, in violation of the regulation of the legal profession in that jurisdiction, or in violation of the regulation of the legal profession in the lawyer's home state or assist another in doing so."[1] Similarly, one who is not admitted to practice in Florida may not establish an office for the practice of law or hold out to the public that they are admitted to practice in Florida. What constitutes the practice of law has undergone some discussion, but in *The Florida Bar v. Sperry*,[2] the Florida Supreme Court stated that, "[if engaged in] the giving of advice and performance of services [that] affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law."

In the scenarios posed above, there is little dispute as to whether the behavior constitutes the practice of law, but rather whether the practice may be considered *unauthorized* or having taken place *in the state*. A foreign attorney dealing with Florida property has likely not stepped foot on Florida soil, but nonetheless is drafting documents that concern Florida property and Florida law. The same is true of the Florida attorney who deals with out-of-state property. Even so, unauthorized practice of law (UPL) statutes are often reserved for non-lawyers actually located within the state that threaten the integrity of the profession. However, this is not definitive. When applying the UPL standards, the Florida Supreme Court has stated that "the single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation."[3] Accordingly, if any particular representation threatens the public in this manner, the Florida Bar may see fit to intervene.

Lawyers licensed to practice in other states may, however, provide legal services in Florida if those services are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is authorized to practice, or if those services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is authorized to practice. For the reasons indicated below, preparing loan documents in another state and using Florida property as collateral would likely fall into this category (assuming that preparing such documents that touch and concern Florida property would not violate the unauthorized practice of law rule in the first place, which is unclear). After all, the attorney in this scenario has only practiced law in his or her own state, and has prepared documents that are likely governed by the laws of that state. It may be considered a mere ancillary concern that Florida law might apply to the creation, perfection and enforcement of a security interest in collateral here. Note, however, that there are specific documents that non-lawyers (which term would include lawyers licensed in other jurisdictions[4]) are forbidden from preparing, as such preparation would constitute the unauthorized practice of law. These include deeds, land trusts, leases, mortgages and other liens.[5] If the out-of-state attorney is prudent, he or she should consult with a Florida attorney regarding such documents.

There are still some questions as to whether preparation by an out-of-state attorney of a contract that affects Florida property constitutes the unauthorized practice of Florida law. It might be useful to consider what state's law would govern such a contract in order to shed light on the jurisdiction in which the attorney should be licensed. However, rather than merely applying the law of the state where the contract was formed, the Restatement (Second)

of Conflicts of Laws asserts that the court should ascertain which state has the "most significant relationship" to the parties and transaction. The Florida Supreme Court has held that a non-lawyer was engaged in the unauthorized practice of law by "having direct contact in the nature of consultation, explanation, recommendations, advice and assistance in the provision, selection and completion of forms"[6] pertaining to Florida law.

Another potential means of determining whether an out-of-state lawyer is engaged in the unauthorized practice of law in Florida is to determine whether Florida jurisdiction would extend to the out-of-state client. For example, in *A.B.L. Realty Corp. v. Cohl*, the court found that the Florida long-arm statute applied because the defendant-corporation was engaged in a business venture in Florida by buying and selling a Florida condominium.[7] The same determination was made regarding the purchase and sale of a Florida citrus grove.[8] Of course, Fla. Stat. § 48.193 enumerates acts that can subject a person to Florida's jurisdiction, and provides that "owning, using, possessing, or holding a mortgage or other lien on any real property within the state" is sufficient.[9] It follows that if a client will be subject to Florida jurisdiction because of the transaction at hand, an out-of-state attorney's involvement in the transaction might be considered the practice of law in Florida. This is, of course, speculative, and there have been cases that have concluded that mere ownership of property in the state is not sufficient to invoke the Florida long-arm statute.[10]

If potential UPL issues can be ruled out, then one must inquire about the ethics of the behavior, which in turn touches upon competency and reasonable billing. Rule 4-1.1 stipulates: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Of course, a lawyer is not expected to know all there is to know about every legal subject, and may provide competent representation by way of adequate preparation, necessary study, or by consulting with another lawyer more knowledgeable in a particular area. Given the flexibility of the competency requirements, it is entirely possible for an attorney to provide competent representation to a lender who loans against out-of-state collateral, or even an investor who purchases out-of-state property (granted that a local attorney may be required for closing). However, the lawyer must attain a certain level of competence in order to satisfy the Rules of Professional Conduct, and it would be unethical to bill a client for all of the time that it takes to learn about an entirely unfamiliar subject.

There may also be finer points of general ethics and morality to consider. When any lawyer is presented with the opportunity to represent a client involved in an interstate transaction, he or she should ask him or herself, "do I feel comfortable with this?" Each attorney must decide whether he or she honestly believes that adequate and competent representation can be provided, and whether consulting out-of-state counsel is necessary and appropriate.

Part of this decision should include consideration of whether the client will be exposed to an unacceptable level of risk. Laws vary subtly from state to state, and a simple unawareness of the nuances of a particular state's law could have catastrophic consequences. For example, in the area of real property law, some states, such as New York, Nevada, and California, are "one action" states; several states have anti-deficiency statutes in place; and in California anti-deficiency statutes only extend to purchase money loans. These are just a few examples of the many differences between the laws of each state. It would surely take significant research in order to become competent in the laws of a state in which an attorney is not licensed to practice, and even then, not seeking counsel in the relevant state could be viewed as negligent.

This leads to the ultimate concern whether an attorney engaging in such interstate practices could be subject to discipline or claims of malpractice. Simply put, maybe. There is no precedent to presuppose that the Florida Bar would drag an out-of-state attorney into Florida for an unauthorized practice of law claim (though certainly anything is possible). However, a Florida attorney who is found to have engaged in the unauthorized practice of law in another jurisdiction would be subject to discipline in Florida given the language of Rule 4-5.5, and it is likely that other states have similar rules. Furthermore, any person who practices law in Florida or who holds himself or herself out as a lawyer but is not licensed to practice in Florida is guilty of a third degree felony under Florida law.[11] Claims of malpractice are also very likely. Succeeding in a malpractice claim is no easy task if spawned by the lawyer's representation during litigation, but if a client loses property or a significant amount of money because his or her attorney failed to understand how the laws of the foreign jurisdiction affected a transaction, that client will no doubt seek retribution and it would likely be easier to demonstrate malpractice. Additionally, "In 2010, the Florida Supreme Court interpreted Rule 10-7.1(d)(3) of the Rules Regulating the Florida Bar as permitting a party to bring a private civil action against an unlicensed practitioner to recover fees and damages," and further, it is not required that the defendant has been subject to a Florida Bar proceeding.[12] This interpretation could impose liability on out-of-state lawyers for damages resulting from an inadequate knowledge of local law.

In sum, there is no definitive basis to assert that any lawyer representing a client in a transaction involving out-of-state property is engaging in the unauthorized practice of law. Further, it would be inaccurate to claim that any lawyer engaged in such practices is acting unethically. However, the facts of each situation must be examined carefully to make such determination. If an attorney chooses to represent a client in an out-of-state transaction, he or she may

be violating the UPL rules in his or her own jurisdiction, and perhaps in the jurisdiction in which the property is situated. Furthermore, the attorney may put the client's interests at risk unnecessarily by subjecting them to potential loss and to Florida's jurisdiction.[13] The attorney may also expose himself or herself to Bar discipline or claims of malpractice. A simple opinion letter from a licensed attorney in the other relevant jurisdiction may be enough to protect the attorney, and lay to rest any moral dilemma that may have arisen by taking on the particular matter. As always, attorneys everywhere would be wise to listen to that internal voice that should be asking in each circumstance, "does this feel right?"

G. Kaleita

Gary Kaleita *is partner in the Real Estate Group at Lowndes, Drosdick, Doster, Kantor & Reed, and he concentrates on real estate development, finance and transactions, condominiums, property owners' associations, commercial leasing, commercial lending, and title insurance. He can be reached at gary.kaleita@lowndes-law.com*

A. Dobrev

Alex Dobrev *is a partner in the Distressed Real Estate Solutions Group at Lowndes, Drosdick, Doster, Kantor & Reed. He focuses on distressed properties acquisitions, operations and disposition strategies/due diligence, particularly complex residential, office, commercial and mixed use projects. He can be reached at alexander.dobrev@lowndes-law.com.*

A. Lewis

Adam R. Lewis *is an associate in the Real Estate Group at Lowndes, Drosdick, Doster, Kantor & Reed and he focuses on real estate development, finance and transactions, condominiums, commercial leasing, commercial lending, and title insurance. He can be reached at adam.lewis@lowndes-law.com.*

Endnotes

1 Florida Rules of Professional Conduct, Rule 4-5.5.

2 The Florida Bar v. Sperry, 140 So.2d 587, 591 (Fla. 1962), judg. vacated on other grounds, 373 U.S. 379 (1963).

3 The Florida Bar v. Moses, 380 So. 2d 412, 417 (Fla. 1980).

4 Florida Rules of Professional Conduct, Rule 10-2.1.

5 The Florida Bar v. Irizarry, 268 So. 2d 377 (Fla. 1972); The Florida Bar v. Hughes, 697 So. 2d 501 (Fla. 1997); The Florida Bar v. Lister, 662 So. 2d 1241 (Fla. 1995); The Florida Bar v. Valdes, 464 So. 2d 1183 (Fla. 1985); The Fla. Bar re: Advisory Opinion – Activities of Community Association Managers, 681 So. 2d 1119 (Fla. 1996).

6 The Florida Bar v. King, 468 So. 2d 982, 983 (Fla. 1985).

7 A. B. L. Realty Corp. v. Cohl, 384 So. 2d 1351 (Fla. Dist. Ct. App. 4th Dist.1980) (citing Fla. Stat. § 48.181. Service on nonresident engaging in business in state).

8 State ex rel. Weber v. Register, 67 So.2d 619, 620 (Fla. 1953).

9 Fla. Stat. § 48.193(1)(a)(3).

10 James v. Kush, 157 So.2d 203 (Fla. 2d DCA 1963).

11 Fla. Stat. § 454.23.

12 Goldberg v. Merrill Lynch Credit Corp., 35 So. 3d 905, 907 (Fla. 2010).

13 Depending on the nature of the transaction, there is a possibility that a Florida court could determine that a client was "carrying on a business" in Florida. While Florida would certainly have *in rem* jurisdiction over any property located in the state, a client that has sufficient dealings within the state could be determined to be carrying on a business in Florida and therefore subject to personal jurisdiction. *See* A.B.L. Realty, *supra* note 7.