

**DISCIPLINARY NOTE:
ASSISTING OR ENGAGING IN
THE UNAUTHORIZED PRACTICE
OF LAW**

Recently it has come to the attention of the Disciplinary Board that there exists a lack of understanding about how the Board interprets the Rules of Professional Conduct that prohibit engaging or assisting in the unauthorized practice of law in New Mexico, particularly in cases where an individual is not a member of the State Bar of New Mexico but is licensed to practice law in another jurisdiction. A question also has arisen about whether the Board views Rule 17-201 NMRA 2001 of the Rules Governing Discipline as providing any authority for a member of another state's bar to practice in this state without becoming a member of the

State Bar of New Mexico. The Disciplinary Board's position is that Rule 17-201 does not provide any authority for individuals licensed in other jurisdictions to practice in New Mexico.

Rule 17-201 states, in relevant part, that the New Mexico Supreme Court and the Disciplinary Board have exclusive disciplinary jurisdiction over "[a]ny attorney regularly admitted to practice law in this state, any attorney specially admitted to practice by a court of this state or any individual admitted to practice as an attorney in any other jurisdiction who engages in the practice of law within this state as house counsel to corporations or other entities, as counsel for government agencies or otherwise." While it is true that "[a]ny attorney regularly admitted to practice law in this state," as well as "any attorney specially admitted to practice by a court of this state," are subject to the disciplinary jurisdiction of the Disciplinary Board and the New Mexico Supreme Court under this rule, it does not follow that the other categories of individuals who are subject to the disciplinary jurisdiction of these New Mexico tribunals under Rule 17-201 are thereby authorized to practice law in this state. Being subject to the jurisdiction of a disciplinary tribunal in New Mexico is not the same as being admitted to practice law in this state.

The judicial power of the New Mexico Supreme Court under our state constitution includes the power "to grant or to withhold the rights of admission to the practice of law in this state," *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 85 N.M. 521, 525-26, 514 P.2d 40, 44-45 (1973), as well as the power "to define and regulate the practice of law" in New Mexico, *State Bar v. Guardian Abstract & Title Co., Inc.*, 91 N.M. 434, 439, 575 P.2d 943, 948 (1978). Thus, the question whether an individual is authorized to practice law in New Mexico generally is answered by determining whether the New Mexico Supreme Court has admitted that individual to practice pursuant to the Rules Governing Admission to the Bar of this state.

The Rules Governing Admission to the Bar establish general requirements regarding such things as an applicant's age, law school education, character, fitness, and compliance with child support obli-

gations. See Rule 15-103 NMRA 2001. In addition, the Rules Governing Discipline, the Rules for Minimum Continuing Legal Education, and the Rules Governing the New Mexico Bar establish general requirements for maintaining a license to practice law in this state. See Rules 17-202(A) (annual registration), 17-203(A) (annual disciplinary fee assessment), 17-203(C) (compliance with court-ordered child support), 18-201 (continuing legal education), 24-102 NMRA 2001 (annual license fee). Rule 17-201 provides no exception to any of these general requirements.

In the case of individuals licensed to practice in other jurisdictions whose contacts with New Mexico are brief, isolated, and incidental to their practice in another state, however, it must be acknowledged that the disciplinary jurisdiction established by Rule 17-201 cannot extend further than the "minimum contacts" test required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution will allow. See, e.g., *Robinson-Vargo v. Funiyak*, 1997-NMCA-095, 123 N.M. 822, 945 P.2d 1040 (affirming the dismissal of a declaratory judgment action against a Montana attorney based on a lack of personal jurisdiction); *DeVenzeio v. Rucker, Clarkson & McCashin*, 1996-NMCA-064, 121 N.M. 807, 918 P.2d 723 (affirming the dismissal of a legal malpractice action against California attorneys based on a lack of personal jurisdiction). It follows that lawyers from other jurisdictions are not subject to discipline for the unauthorized practice of law in New Mexico if their activities do not establish the minimum contacts that are constitutionally required for a New Mexico tribunal to exercise personal jurisdiction over them.

It also must be acknowledged that the Rules Governing Admission to the Bar expressly carve out a few, carefully delineated exceptions to the general requirements for admission to the State Bar of New Mexico. Currently, these exceptions include limited appearances by University of New Mexico law professors admitted in another jurisdiction, see Rule 15-303 NMRA 2001, limited admission of state public defenders admitted in another jurisdiction; see Rule 15-301.1 NMRA 2001, and certification of foreign legal consultants admitted elsewhere,

UPCOMING MEETINGS!

May 9

Senior Lawyers Division -
Board of Directors, 3:30 p.m.,
State Bar Center

May 10

Task Force on Multijurisdictional
Practice, 3 p.m., Teleconference

May 11

Law Office Management Commit-
tee, 1:30 p.m., State Bar Center

May 16

Committee on Women in the Legal
Profession, noon, Eastham,
Johnson, Monnheim & Jontz

May 31

Task Force on the Advisability of
the Adoption of a Death Penalty
Moratorium in New Mexico, noon,
State Bar Center

June 1

Business Law Section -
Board of Directors, 3:30 p.m.,
State Bar Center

June 8

Legal Services and Programs -
Planning Subcommittee, 1:30 p.m.,
State Bar Center

June 9

Legal Services and Programs -
Transition Subcommittee, 10 a.m.,
State Bar Center

**CHANGES OR CANCELLATIONS
MAY OCCUR**

see Rule 26-101 NMRA 2001. In addition, the Rules of Civil Procedure for the District Courts expressly delineate exceptions under which an individual licensed to practice law in another jurisdiction may obtain special authorization to appear before such a court in a particular matter if certain conditions are met, see Rule 1-089.1(A) NMRA 2001, or may participate in discovery proceedings in this state which arise out of litigation pending in another state or territory, see Rule 1-089.1(C). Similar procedural rules allow for limited appearances by clinical law students under certain conditions. See, e.g., Rule 1-094 NMRA 2001.

The fact that New Mexico authorities list these few carefully delineated exceptions to the general requirements for admission to the State Bar of New Mexico implies that no other exceptions exist. See *City of Santa Rosa v. Jaramillo*, 85 N.M. 747, 749-50, 517 P.2d 69, 71-72 (1973) (citing the canons that "the inclusion of one thing is the exclusion of the other" and that "[w]e are not permitted to read into a statute language which is not there, particularly if it makes sense as written") (citation and internal quotation marks omitted). As the New Jersey Supreme Court recently observed with respect to its rules governing admission to the bar of that state, "[t]he care with which the exceptions have been carved out underscores the Court's commitment to the rule requiring a . . . plenary license in order to engage in the practice of law." *In re Jackman*, 761 A.2d 1103, 1106 (N.J. 2000). Even a cursory review of the Rules Governing Admission to the Bar and the Rules of Civil Procedure "should put a reasonable person on notice that a license is required unless one is acting pursuant to a carefully delineated exception." *Id.*

Rule 17-201 does not override or render superfluous any of these carefully delineated exceptions. Thus, absent specific authorization under the Rules Governing Admission to the Bar, Rule 1-089.1, or a similar procedural rule, an individual who practices law in New Mexico risks violating the regulation of the legal profession in this jurisdiction.

Rule 16-505(A) NMRA 2001 of the Rules of Professional Conduct provides that a lawyer shall not practice law in a jurisdiction where doing so violates the regulation

of the legal profession in that jurisdiction. In addition, Rule 16-505(B) NMRA 2001 provides that a lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law. This rule prohibits New Mexico lawyers from assisting in the unauthorized practice of law regardless of whether the person whom they assist is a member of another state's bar. See *In re Bailey*, 97 N.M. 88, 88, 637 P.2d 38, 38 (1981) (publicly censuring a lawyer who "aided a person not authorized to practice law in this State to engage in practice and held that person out as his partner in his advertising, although he had not been admitted to this bar") (emphasis added); *ABA/BNA Lawyers' Manual on Professional Conduct* 21:8201 (1999) ("Lawyers may violate the prohibition against assisting in others' unauthorized practice by . . . [w]orking with . . . out-of-state lawyers who are improperly practicing law.").

The New Mexico Supreme Court recently addressed the question of what constitutes the practice of law in the case of a lawyer who continued to accept new clients and prepare legal documents after his law license was suspended. See *In re Chavez*, 2000-NMSC-015, 129 N.M. 35, 1 P.3d 417. Reviewing its precedents, the Court noted that it has "determined what constitutes the practice of law in each case by conducting a fact-specific inquiry that takes several different indicators into consideration." *Id.* ¶ 26. Among these indicators are: "(1) representation of parties before judicial or administrative bodies, (2) preparation of pleadings and other papers incident to actions and special proceedings, (3) management of such action and proceeding, and non-court related activities such as (4) giving legal advice and counsel, (5) rendering a service that requires the use of legal knowledge or skill, (6) preparing instruments and contracts by which legal rights are secured." *Norvell*, 85 N.M. at 526, 514 P.2d at 45; accord Rule 20-102(B) NMRA 2001.

Under this fact-specific approach, the Court has "declined to adopt a definition of the practice of law that is limited to signing pleadings or appearing in court on another's behalf." *In re Chavez*, 2000-NMSC-015, ¶ 26 (quoting *In re*

Herkenhoff, 1997-NMSC-007, ¶ 14, 122 N.M. 766, 931 P.2d 1382); accord *In re Jackman*, 761 A.2d at 1106-07. The Court has held that people are practicing law in circumstances where their communications indicate that they are leading others to believe that they are attorneys representing a client, see *In re Chavez*, 2000-NMSC-015, ¶ 29, or that they are "giving legal advice and counsel, . . . rendering a service that requires the use of legal knowledge or skill, . . . [or] preparing instruments and contracts by which legal rights are secured." *Norvell*, 85 N.M. at 526, 514 P.2d at 45.

Individuals who engage in communications of this nature cannot escape the conclusion that they are practicing law simply by virtue of the fact that their communications are directed to someone other than a client or a court. The rules prohibiting the unauthorized practice of law apply notwithstanding the fact that an individual only performs transactional work which does not involve communication with a court and notwithstanding the fact that an individual holds a governmental position which does not involve the type of communication with a client that ordinarily occurs in a private lawyer-client relationship. "All attorneys admitted to practice before the courts are officers of the court and hold a unique position as agents of the court to help it insure that the law is upheld and the unauthorized practice of law prevented." *Guardian Abstract*, 91 N.M. at 437, 575 P.2d at 946.

Care also must be taken to distinguish the activities of a lawyer from those of a legal assistant or law clerk who works under a lawyer's supervision. "While an unlicensed person's preparation of legal documents ordinarily does not constitute the unauthorized practice of law when it is performed under the proper supervision of a licensed attorney who retains responsibility for the unlicensed person's work, see Rule 16-505 cmt., the same conclusion does not follow when proper supervision and exercise of responsibility by a licensed attorney is absent." *In re Chavez*, 2000-NMSC-015, ¶ 27. Such proper supervision and exercise of responsibility is absent if the lawyer relies solely on the nonlawyer to act as an interme-

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diary or "conduit for giving legal advice," as evidenced by the lawyer's lack of knowledge of the existence or content of meetings between the nonlawyer and the client or the lawyer's failure to use independent professional judgment to determine which documents prepared by the nonlawyer should be communicated outside the law office. *Id.* (quoting *Florida Bar v. Beach*, 675 So.2d 106, 109 (Fla. 1996); *In re Bright*, 171 B.R. 799, 804 (Bankr. E.D. Mich. 1994)); *see also In re Jackman*, 761 A.2d at 1106-07 (concluding that a person is not "functioning as a law clerk, preparing legal research and documents for review and action by another responsible [licensed] attorney" when he or she has "taken on all the duties of a lawyer rendering legal services to clients," such as interviewing and counseling clients, preparing and signing documents to or on behalf of clients, and negotiating with lawyers on the matters he or she handles).

The duties of a partner or supervisory lawyer are further defined in Rule 16-503(B) NMRA 2001, which provides that partners and supervisory lawyers shall make reasonable efforts to ensure that the conduct of their nonlawyer employees or associates is compatible with their own professional obligations as lawyers. In addition, Rule 16-503(C) provides that lawyers shall be held responsible for the conduct of their nonlawyer employees or associates that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner in a law firm in which the nonlawyer is employed, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. Engaging in the unauthorized practice of law is not compatible with the professional obligations of a lawyer and would be a violation of the Rules of Professional Conduct if engaged in by a lawyer. *See* Rule 16-505(A). Thus, a partner or supervisory lawyer who assists an employee or associate in the unauthorized practice of law also may violate Rule 16-503(B), 16-503(C), or both rules. *See In re Scott*, 739 N.E.2d 658, 659-60 (Ind. 2000) (applying Indiana's counterpart to Rule 16-503).

Further, a violation of Rule 16-503 can

result from negligent or unreasonable conduct, *see* Rule 16-503(B), as well as from knowing or intentional conduct, *see* Rule 16-503(C). The ABA Comment that follows Rule 16-501 NMRA 2001 explains that it is possible to violate these rules by failing to "make reasonable efforts" even though "there was no direction, ratification or knowledge of the violation." *See, e.g., Office of Disciplinary Counsel v. Pavlik*, 732 N.E.2d 985, 991-92 (Ohio 2000) (publicly reprimanding a lawyer for violating the prohibition on assisting in the unauthorized practice of law even though the violations "arose more out of neglect by omission ... as opposed to affirmative, deceitful conduct").

The Rules of Professional Conduct also require that "identification of the lawyers of an office of [a multijurisdictional] firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located." Rule 16-705(B) NMRA 2001; *see also* Rule 20-104 NMRA 2001 ("A lawyer will require the legal assistant for whose work the lawyer is responsible to disclose to all persons with whom the legal assistant communicates that the legal assistant is not a lawyer."). Absent this kind of disclaimer, an unlicensed person's signature on substantive communications bearing the letterhead or other identification of a lawyer, law firm, or agency that provides legal services in New Mexico could mislead others to believe that such a person is authorized to practice law in this jurisdiction. *See Pavlik*, 732 N.E.2d at 987 (citing *Cleveland Bar Ass'n v. Misch*, 695 N.E.2d 244 (1998)); *In re Application of Stage*, 692 N.E.2d 993, 995 (Ohio 1998) ("Stage should have had a disclaimer at least on her letterhead indicating that she was not licensed to practice law in Ohio."); *South Carolina Med. Malpractice Joint Underwriting Ass'n v. Froelich*, 377 S.E.2d 306, 307 (S.C. 1989) ("[T]he letterhead of Respondent's law firm had the potential to cause the public to believe he was a licensed practitioner in this State [and] was misleading because it did not sufficiently indicate that Respondent is licensed only in Illinois, not South Carolina."). In order to avoid assisting in the unauthorized practice of law, partners and supervisory lawyers should take steps to ensure that the limited authority occasioned by an employee or associate's unlicensed status is properly disclosed and

that such unlicensed persons do not manipulate the resources of their employer or supervisor to exceed that limited authority. *See* Rule 20-103 NMRA 2001 ("A lawyer is responsible to ensure that a legal assistant for whose work the lawyer is responsible does not practice law."); *Pavlik*, 732 N.E.2d at 992 (disciplining a lawyer for failing to take such steps); *In re Scott*, 739 N.E.2d at 659-60 (similar).

A disclaimer stating that a person is not licensed to practice law in this jurisdiction, however, does not necessarily provide a defense to a charge that such a person is engaged in the unauthorized practice of law if his or her activities constitute the practice of law in this state notwithstanding the disclaimer. *See Chavez*, 2000-NMSC-015, ¶ 25. The fact that only a single client was involved or that a significant percentage of the activities lawfully might have been performed by a non-lawyer also does not necessarily provide a defense to such a charge. *Cf. Harty v. Board of Bar Examiners*, 81 N.M. 116, 117-18, 464 P.2d 406, 407-08 (1970) (holding that an individual was engaged in the practice of law within the meaning of the Rules Governing Admission to the Bar in effect at that time even though he represented a single, governmental client and work that could be performed by nonlawyers consumed more than two-thirds of his time).

Finally, reliance on an employer or supervisor's resolution of the issue will not necessarily provide a defense to a charge of engaging or assisting in the unauthorized practice of law. "The duty to be knowledgeable about and compliant with bar admission and practice requirements is a personal one. An applicant for admission cannot have his past errors excused by simply pointing to another member of his firm, albeit a managing partner, upon whose word he relied." *In re Jackman*, 761 A.2d at 1109. In addition, "[w]e are not persuaded that an attorney's employer . . . can create an 'arguable question of professional duty' . . . by the simple mechanism of unilaterally declaring that a particular rule of conduct is burdensome and should not apply to its employees." *In re Howes*, 1997-NMSC-024, ¶ 21, 123 N.M. 311, 940 P.2d 159. Unless and until the New Mexico Supreme Court amends the rules governing admission to practice in this state, the existing rules must be followed.