FRANKFURT KURNIT KLEIN & SELZ PC

Nicole Hyland
(212) 826-5552
nhyland@fkks.com

Constitutional Challenge to Non-Lawyer Ownership of New York Law Firms Lives . . . For Now

The Second Circuit has revived Jacoby & Meyers's lawsuit challenging the constitutionality of Rule 5.4 of the NY Rules of Professional Conduct, which prohibits non-lawyer ownership of law firms. The district court had dismissed the lawsuit on the ground that multiple state laws –notably N.Y. Jud. Law § 495 and N.Y. LLC Law § 201 – independently prohibit non-lawyer equity investment in law firms and, thus, any decision invalidating Rule 5.4 would be merely advisory. At oral argument, the Second Circuit Panel, consisting of Judges Lynch, Walker and Gleeson, appeared to paint the parties into a corner, first eliciting a representation from Jacoby & Meyers that it decided not to challenge the New York statutes out of concern that the district court might abstain from deciding the case (under *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941)) on the ground that the state laws are unclear as to whether they prohibit non-lawyer ownership of law firms. The Panel then got the defendants to concede that, if the plaintiff amended its Complaint to challenge the state laws, the defendants would be collaterally estopped from arguing those laws are unclear, since they had argued below and on appeal that the laws *unambiguously* prohibited non-lawyer ownership of law firms (indeed, that was the basis for their successful motion to dismiss). Having brokered these dual admissions, the Second Circuit concluded that it no longer needed to decide the "interesting theoretical issues" raised by the appeal, because Jacoby & Meyers may now include the New York statutes in its lawsuit, free from any concern that the district court will exercise a *Pullman* abstention. Accordingly, the Second Circuit remanded the case to the district court with instructions to vacate the judgment and grant leave to amend.

This judicial transaction, while brilliantly executed, raises some troubling questions. First, now that the dismissal order will be vacated, are the defendants still collaterally estopped from taking a contrary position concerning the ambiguity of the state statues? Second, even though the parties may agree that the statutes are unambiguous, does that preclude the district court from deciding otherwise? Although Second Circuit notes that both the parties "and the district court" agree that the statutes are clear, could the district court revisit that issue and determine that at least some of the NY statutes are ambiguous? Indeed, according to the New York Law Journal, Judge Kaplan, who issued the district court decision, suggested at some point

he was open to a *Pullman* abstention. The Second Circuit appears to equate Judge Kaplan's ruling on the standing issue with a holding that the New York statutes on the subject of non-lawyer ownership are unambiguous. I'm not sure his decision goes that far. Third, as the Second Circuit observes, amending the complaint would bring in additional defendants, who arguably have the right to take a different position on the *Pullman* abstention. The opinion attempts to preempt this concern by noting that any new defendants, like the current ones, would be represented by the New York Attorney General, the implication being that the new defendants would take the same position on the clarity of the state statutes. But that is not necessarily the case. Had Jacoby & Meyers challenged the New York statutes to begin with, the defendants presumably would not have argued that a ruling on Rule 5.4, alone, would be advisory. Accordingly, they would not have had to argue the state statutes are unambiguous and would be free to advocate for a *Pullman* abstention.

In the end, these questions may all be academic, since the defendants probably won't change their position on the statutory interpretation. On a more substantive note, it seems unlikely that New York's long-standing prohibitions against non-lawyer ownership of law firms will be struck down, since the Supreme Court traditionally defers to states on lawyer regulation. So, while this decision hands Jacoby & Meyers a temporary victory, non-lawyer ownership of New York law firms remains a distant goal. In fact, the New York State Bar recently reaffirmed its opposition to non-lawyer ownership at its recent House of Delegates meeting.

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