

Ethics Advisory Opinion Committee
Opinion No. 19-03
Issued: May 14, 2019

ISSUE

1. If an individual licensed as an active attorney in another state and in good standing in that state establishes a home in Utah and practices law for clients from the state where the attorney is licensed, neither soliciting Utah clients nor establishing a public office in Utah, does the attorney violate the ethical prohibition against the unauthorized practice of law?

OPINION

2. The Utah Rules of Professional Conduct do not prohibit an out-of-state attorney from representing clients from the state where the attorney is licensed even if the out-of-state attorney does so from his private location in Utah. However, in order to avoid engaging in the unauthorized practice of law, the out-of-state attorney who lives in Utah must not establish a public office in Utah or solicit Utah business.

BACKGROUND

3. Today, given electronic means of communication and legal research, attorneys can practice law “virtually” from any location. This can make it possible for attorneys licensed in other states to reside in Utah, but maintain a practice for clients from the states where they are licensed. For example:

- An attorney from New York may decide to semi-retire in St. George, Utah, but wish to continue providing some legal services for his established New York clients.

- An attorney from California may relocate to Utah for family reasons (*e.g.*, a spouse has a job in Utah, a parent is ill and needs care) and wish to continue to handle matters for her California clients.

ANALYSIS

4. Rule 5.5 of the Utah Rules of Professional Conduct (the “**URPC**”), which is based upon the Model Rules of Professional Conduct, defines the “unauthorized practice of law,” and Rule 14-802 of the Utah Supreme Court Rules of Professional Practice defines the “practice of law.” In the question posed, the Ethics Advisory Opinion Committee (the “**EAO**C”) takes it as given that the out-of-state lawyer’s activities consist of the “practice of law.”

5. Rule 5.5(a) of the Utah Rules of Professional Conduct provides that a “lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.” Rule 5.5(b) provides:

A lawyer who is not admitted to practice in this jurisdiction shall not:

(b)(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(b)(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

URPC 5.5(b).

6. THE LAW OF LAWYERING explains the meaning and relationship of these two sections:

Rule 5.5(b) . . . elaborates on the prohibition against unauthorized practice of law contained in Rule 5.5(a) as it concerns out-of-state lawyers. Rule 5.5(b)(1) broadly prohibits a lawyer from establishing an office or other ‘systemic and continuous presence’ for practicing law in a jurisdiction in which the lawyer is not licensed.

Geoffrey C. Hazard, Jr., W. William Hodes, Peter R. Jarvis, *THE LAW OF LAWYERING* § 49.02, at 49-7 (4th ed. 2018).

7. With that as our touchstone, it seems clear that the out-of-state attorney who lives in Utah but continues to handle cases for clients from the state where the attorney is licensed has not established an office or “‘other systemic and continuous presence’ for practicing law in [Utah] a jurisdiction in which the lawyer is not licensed” and is not in violation of Rule 5.5 of the Utah Rules of Professional Conduct.

8. While one could argue that living in Utah while practicing law for out-of-state clients does literally “establish a systematic and continuous presence in this jurisdiction for the practice of law,” and that it does not have to be “for the practice of law IN UTAH,” that reading finds no support in case law or commentary.

9. In *In re: Discipline of Jardine*, Utah attorney Nathan Jardine had been suspended from the practice of law in Utah for eighteen months. 2015 UT 51, ¶ 1, 353 P.3d 154. He sought reinstatement, but the Office of Professional Conduct argued against reinstatement because he had violated Rule 14-525(e)(1) of the Supreme Court Rules of Professional Practice by engaging in the unauthorized practice of law while he was suspended. 2015 UT 51, ¶¶ 6, 20. The disciplinary order allowed Mr. Jardine “with the consent of the client after full disclosure, [to] wind up or complete any matters pending on the date of entry of the order,” but “Mr. Jardine never informed [the client] that he was suspended, nor did he wind up his participation in the matter.” *Id.* ¶¶ 8-9 (quotation omitted). Instead, he continued to advise the client and sent a demand letter on the client’s behalf, giving his Utah address but indicating California licensure. *Id.* ¶ 9. Mr. Jardine argued that he did not engage in the unauthorized practice of law because this matter was for an Alaska resident and the resulting case was filed in an Idaho court. *Id.* ¶ 22.

Nevertheless, the Utah Supreme Court found that Mr. Jardine engaged in the unauthorized practice of law in Utah, in violation of his disciplinary order, reasoning: “The disciplinary order expressly prohibited Mr. Jardine from ‘performing *any* legal services for others’ or ‘giving legal advice to others’ within the State of Utah.” *Id.* (emphasis added). All of the work Mr. Jardine performed for the Alaska client was performed in Mr. Jardine’s Utah office, Mr. Jardine’s text messages were made from Utah, and Mr. Jardine’s demand letter listed his Utah address. *Id.*

10. *In re Jardine* does not control the question posed. Not only did the Utah Supreme Court analyze the “unauthorized practice of law” in the context of a suspended Utah attorney violating a disciplinary order that forbid him from performing *any* legal services whatsoever for others, but Mr. Jardine was continuing his legal work out of a Utah office and using a Utah business address. The question posed here to the EAOC deals with attorneys in good standing in other states who simply establish a residence in Utah and continue to provide legal work to out-of-state clients from their private Utah residence.

11. We can find no case where an attorney has been disciplined for practicing law out of a private residence for out-of-state clients located in the state where the attorney is licensed. Indeed, the United States Supreme Court held in *New Hampshire v. Piper*, 470 U.S. 274 (1985), that a New Hampshire Supreme Court rule limiting bar admission to New Hampshire residents violated the rights of a Vermont resident seeking admission under the Privileges and Immunities Clause of the U.S. Constitution. *Id.* at 275-76, 288. Thus, there can be no prohibition on an attorney living in one state and being a member of the bar of the another state and practicing law in that other state.

12. Rather, the concern is that an attorney not establish an office or public presence in a jurisdiction where the attorney is not admitted, and that concern is based upon the need to

protect the interests of potential clients in that jurisdiction. In *Gould v. Harkness*, 470 F. Supp. 2d 1357 (S.D. Fla. 2006), a New York attorney sought to establish an office and advertise his presence in Florida, but advertise “New York Legal Matters Only” or “Federal Administrative Practice.” *Id.* at 1358. The case concerned whether his First Amendment right to freedom of commercial speech under the United States Constitution was violated by the Florida Bar’s prohibition on such advertisements. *Id.* at 1358-59. The *Gould* court held that the Florida Bar was entitled to prohibit such advertisements in order to protect the interests of the public—the residents of Florida. *Id.* at 1364.

13. Similarly, in *In re Estate of Condon*, 76 Cal. Rptr. 2d 933 (Cal. Ct. App. 1998), the court approved payment of attorney fees to a Colorado attorney who handled a California probate matter for a co-executor who lived in Colorado. *Id.* at 924. The *Condon* court held that the unauthorized practice of law statute “does not proscribe an award of attorney fees to an out-of-state attorney for services rendered on behalf of an out-of-state client regardless of whether the attorney is either physically or virtually present within the state of California.” *Id.* at 926.

Here, too, the *Condon* court highlighted concern for in-state California clients:

In the real world of 1998 we do not live or do business in isolation within strict geopolitical boundaries. Social interaction and the conduct of business transcends state and national boundaries; it is truly global. A tension is thus created between the right of a party to have counsel of his or her choice and the right of each geopolitical entity to control the activities of those who practice law within its borders. In resolving the issue ... it is useful to look to the reason underlying the proscription [of the unauthorized practice of law....] [T]he rationale is to protect California citizens from incompetent attorneys....

Id. at 927.

14. An interesting Ohio Supreme Court case further supports this Opinion that an out-of-state attorney practicing law for clients from the state where he is licensed should not be seen to violate Rule 5.5 of the Utah Rules of Professional Conduct’s prohibition on the unauthorized

practice of law. In *In re Application of Jones*, 2018 WL 5076017 (Ohio Oct. 17, 2018), Alice Jones was admitted to the Kentucky bar and practiced law in Kentucky for six years. *Id.* at *1-2. Her Kentucky firm merged with a firm having an office in Cincinnati, Ohio. *Id.* at *1. For personal reasons, Ms. Jones moved to Cincinnati and transferred to her firm's Cincinnati office. *Id.* at *2. She applied for admission to the Ohio bar the month before she moved. *Id.* While awaiting the Ohio Bar's decision, she practiced law exclusively on matters related to pending or potential proceedings in Kentucky. *Id.* Nevertheless, the Board of Commissioners on Character and Fitness chose to investigate Ms. Jones for the unauthorized practice of law and voted to deny her admission to the Ohio Bar. *Id.*

15. The Ohio Supreme Court unanimously reversed this decision. *Id.* at *4. A majority of the *Jones* court held that Ms. Jones' activities did not run afoul of the unauthorized practice of law provision because Rule 5.5(c)(2) of the Ohio Rules of Professional Conduct permitted her to provide legal services on a "temporary basis" while she awaited admission to the Ohio bar. *Id.* at *3. However, three of the seven Ohio Supreme Court justices concurred on a different basis. *Id.* at *5 (DeWine, J., concurring). They found that denial of Jones' application on these facts would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution as well as the Ohio Constitution's related provisions. *Id.* at *9 (DeWine, J., concurring). Both constitutions protected one's right to pursue her profession, subject to governmental regulation only to the extent necessary to promote the health, safety, morals, or general welfare of society, provided the legislation is not arbitrary or unreasonable. *Id.* at *7-8 (DeWine, J., concurring). The concurring opinion noted that "the constitutional question here turns on identifying Ohio's interest in prohibiting Jones from representing her Kentucky clients while working in a Cincinnati office. The short answer is that there is none." *Id.* at *8 (DeWine,

J., concurring). Two state interests supported attorney regulation—attorneys’ roles in administering justice through the state’s court system and “the protection of the public.” *Id.*

(DeWine, J., concurring).

But when applied to a lawyer who is not practicing Ohio law or appearing in Ohio courts, Prof.Cond.R. 5.5(b) serves no state interest. Plainly, as applied to such a lawyer, the rule does not further the state’s interest in protecting the integrity of our court system. Jones, and others like her, are not practicing in Ohio courts. Nor does application of the rule to such lawyer serve the state’s interest in protecting the Ohio public. Jones and others in her situation are not providing services to or holding themselves out as lawyers to the Ohio public. Jones’s conduct as a lawyer is regulated by the state of Kentucky—the state in whose forums she appears.

Id. at *9 (DeWine, J., concurring). The three concurring Ohio Supreme Court justices concluded that Rule 5.5(b) of the Ohio Rules of Professional Conduct, as interpreted by the Ohio Board of Commissioners, would be unconstitutional when applied to Jones and others similarly situated.

Id. (DeWine, J., concurring).

16. The question posed here is just as clear as the question before the Ohio Supreme Court: what interest does the Utah State Bar have in regulating an out-of-state lawyer’s practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same—none.

17. Finally, a perusal of various other authorities uncovers no case in which an attorney was disciplined for living in a state where he was not licensed while continuing to practice law for clients from the state where he was licensed. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 *Jurisdictional Scope of the Practice of Law by a Lawyer* (2000); ROY D. SIMON, SIMON’S NY RULES OF PROF. COND. § 5.5:6 (Dec. 2018); and *What Constitutes “Unauthorized Practice of Law” by Out-of-State Counsel*, 83 A.L.R. 5th 497 (2000).

CONCLUSION

18. Accordingly, the EAOC interprets Rule 5.5(b) of the Utah Rules of Professional Conduct in a way consistent with the Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment to the United States Constitution; the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution; Article 1, Section 7 of the Due Process Clause and Article 1, Section 24 of the Uniform Operation of the Laws Clause of the Utah Constitution; and all commentators and all persuasive authority in support of permitting an out-of-state attorney to establish a private residence in Utah and to practice law from that residence for clients from the state where the attorney is licensed.