ISBA Professional Conduct Advisory Opinion

Opinion 23 – 01

March 2023

SUBJECT: Unauthorized Practice of Law

DIGEST: A lawyer not admitted to practice law in Illinois may not engage in the practice of law in Illinois unless one of the exceptions set forth in Rule 5.5 applies.

REFERENCES: Ill. Sup. Ct. R. Prof'l Conduct, R 5.5

In re Maurice James Salem, 2016PR00043; M.R.029649

In re Charges of Unprofessional Conduct in Panel File No. 39302, 884 N.W.2d 661 (Minn. 2016)
Minn. Rules of Prof'l Conduct 5.5
Florida Bar Advisory Opinion: Out of State Attorney Working Remotely from Florida Home, No. SC20-1220 (May 20, 2021)
Antonacci v. Seyfarth Shaw, LLP, 2015 IL App (1st) 142372
Clark v. Gannett Co., 2018 IL App (1st) 172041
Ill. Sup. Ct. R. 707
Morrison v. West, 30 So. 3d 561 (Fla. 4th DCA 2010)
State ex rel. Indiana Supreme Court Disciplinary Comm's v. Farmer, 978 N.E.2d 409, 414 (Ind. 2012)
Attorney Grievance Commission of Maryland v. Jude Ambe, Misc. Docket AG No. 6, Sept. Term 2011
ISBA Opinion No. 02-04

FACTS

A non-Illinois lawyer (admitted only in Florida) has friends living in Chicago, Illinois. One of the Chicago friends contacted the non-Illinois lawyer seeking assistance regarding an employment matter. The Chicago friend's former employer has refused to pay earned wages and is refusing to provide a W-2 form. The non-Illinois lawyer is considering sending a demand letter to the former employer in an effort to resolve the matter for her friend. The demand letter would

be signed by the non-Illinois lawyer in her capacity as a lawyer ("Esq."). The non-Illinois lawyer is willing to provide her legal services pro bono. In the event the matter cannot be resolved, and litigation is required, the non-Illinois lawyer is willing to apply for pro hac vice admission in Illinois or would refer the matter to an Illinois lawyer.

QUESTION

May a lawyer not admitted to practice law in Illinois engage in correspondence regarding an Illinois dispute when the correspondence constitutes the practice of law in Illinois?

OPINION

The unauthorized practice of law is governed by Rule 5.5 of the Illinois Rules of Professional Conduct. Ill. Sup. Ct. R. Prof'l Conduct, R 5.5.

The unauthorized practice of law is not restricted to non-lawyers engaged in the practice of law. Lawyers admitted to jurisdictions other than Illinois can be disciplined for the unauthorized practice of law in Illinois. See *In re Maurice James Salem*, 2016PR00043; M.R.029649 (non-Illinois lawyer suspended for 90 days and until further order of the Court because New York lawyer appeared in Illinois court proceeding and represented himself as an Illinois lawyer).

The unauthorized practice of law is not limited to a lawyer's physical presence in a courtroom outside of their jurisdiction. In a matter of first impression in the state of Minnesota, the Supreme Court of Minnesota addressed a similar issue as the inquiry submitted to this Committee and determined that an out-of-state lawyer (admitted in Colorado) engaged in the unauthorized practice of law when he attempted to negotiate a debt settlement on behalf of his in-laws in relation to a judgment obtained against the in-laws by their condominium association. *In re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016). Affirming the finding that the Colorado lawyer engaged in the unauthorized practice of law for engaging in post-judgment settlement negotiations on behalf of his in-laws, the Supreme Court of Minnesota privately admonished the Colorado lawyer for the unauthorized practice of law. *Id*.

In admonishing the lawyer, the Minnesota Supreme Court rejected the Colorado lawyer's argument that he did not practice law *in* Minnesota (essentially a lack of physical presence argument). The Colorado lawyer argued that a lawyer practices *in* a jurisdiction in one of three ways: (1) by being physically present in the jurisdiction; (2) by establishing an office or other systematic and continuous presence in the jurisdiction; or (3) by entering an appearance in a matter through the filing of documents with a tribunal. The Colorado lawyer argued that email communication directed to a jurisdiction in which the lawyer is not admitted to practice does not fall within the definition of practicing law *in* a jurisdiction. In the alternative, the Colorado lawyer argued that an exception applied. In a divided opinion, the Minnesota court rejected the argument that an exception applied because the matter was post-judgment and therefore not likely to lead to litigation in which the Colorado lawyer would seek pro hac vice admission and

further rejected the argument that the matter was related to the Colorado lawyer's home state practice.

Conversely, an out-of-state lawyer may be able to practice the law of their licensure state from another state. A Florida Bar Advisory Opinion concluded that a non-Florida lawyer may practice the law of their home state while physically present in Florida without violating Florida's unauthorized practice of law rules. The Florida Bar Advisory Opinion noted that the non-Florida lawyer was not practicing Florida law or providing legal services for Florida residents. Nor was he or his law firm holding out to the public as having a Florida presence. All indicia pointed to his practice of law as being in New Jersey, not in Florida. The Florida Standing Committee concluded that the non-Florida lawyer did not have a presence in Florida for the practice of law despite being physically present in Florida and was not engaged in the unauthorized practice of law. See Florida Bar Advisory Opinion: Out of State Attorney Working Remotely from Florida Home, No. SC20-1220 (May 20, 2021).

In Opinion No. 02-04, this Committee found that a lawyer licensed to practice law in both State X and Illinois may negotiate, from their office in State X, their clients' claims for medical matters (treated in Illinois) following an automobile accident in State Y without associating with a lawyer from State Y. (Opinion No. 02-04 analyzed the 1990 version of Rule 5.5.) Opinion No. 02-04 involved an Illinois lawyer representing Illinois clients. Opinion No. 02-4 concluded that the lawyer would not engage in the unauthorized practice of law by negotiating their clients' medical claims from his office in State X (where the lawyer is licensed) and need not associate with a lawyer in State Y to negotiate the medical claims arising from Illinois (where the lawyer was also admitted). The automobile accident occurred in a state where the lawyer was not licensed, but the clients received medical treatment in Illinois which was a jurisdiction in which the lawyer was admitted to practice. Opinion No. 02-04 correctly found that an Illinois lawyer is not required to be physically located in Illinois to negotiate their clients' Illinois medical bills and did not engage in the unauthorized practice of law.

To answer the question of whether a non-Illinois lawyer may practice Illinois law by sending a demand letter to Illinois, an analysis under Rule 5.5 must be conducted.

A. <u>Rule 5.5 analysis.</u>

Rule 5.5 concerns Unauthorized Practice of Law; Multijurisdictional Practice of Law.

Rule 5.5 restricts a non-Illinois lawyer's ability to practice law in Illinois but also recognizes that lawyers may have multijurisdictional practices.

Rule 5.5 (a) states: "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." However, Rule 5.5 provides exceptions which allow lawyers not admitted to practice law in Illinois to provide legal services on a temporary basis.

Rule 5.5(c) states that a lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

Rule 5.5(c)(1):

Rule 5.5(c)(1) provides that a lawyer admitted in another U.S. jurisdiction may provide legal services on a temporary basis in Illinois if the services are undertaken in association with a lawyer who is admitted to practice in Illinois and who actively participates in the matter. Comment 8 to Rule 5.5 explains: "Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client."

ISBA Opinion No. 14-04 concluded that a non-Illinois lawyer with extensive experience in mass tort litigation may send advertisements to Illinois residents. The opinion noted that when representing claimants in a state other than his state of licensure, the non-Illinois lawyer retains local counsel.

In *Antonacci v. Seyfarth Shaw, LLP*, the appellate court determined that the active participation by an Illinois lawyer satisfied the exception. 2015 IL App (1st) 142372, ¶ 27 ("At the time Mr. Antonacci allegedly provided the advice, he was licensed in Washington D.C. and working on a project assigned to him by Ms. Ponder, who is presumably licensed in Illinois. Ms. Ponder actively participated in the project. As such, Mr. Antonacci engaged in no wrongdoing…")

However, in *Clark v. Gannett Co.*, 2018 IL App (1st) 172041, ¶¶ 81 – 83, the court found that alleged association (adopting the language "mere conduit") was not adequate and referred the matter to ARDC for investigation.

Because the non-Illinois lawyer in this fact pattern does not propose to associate with an Illinois lawyer to draft the demand letter, she does not meet the exception set forth in Rule 5.5(c)(1).

Rule 5.5(c)(2):

Rule 5.5(c)(2) provides that a lawyer admitted in another United States jurisdiction may provide legal services on a temporary basis in Illinois that are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized.

Comment No. 9 to Rule 5.5 recognizes that lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. See also Ill. Sup. Ct. R. 707; the Local Rules of a Federal District Court sitting within Illinois; and/or any applicable rule or statute which may authorize an out-of-state lawyer to practice law.

Comment No. 10 to Rule 5.5 explains that a lawyer rendering services in Illinois on a temporary basis does not violate Rule 5.5 when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. "Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction." Ill. Sup. Ct. R. Prof'l Conduct, R 5.5, Comment No. 10. See *State ex rel. Indiana Supreme Court Disciplinary Comm's v. Farmer*, 978 N.E.2d 409, 414 (Ind. 2012) for discussion regarding a reasonable belief that admission would be permitted and visits to client in Indiana by Ohio lawyer did not constitute the unauthorized practice of law.

The proposed activity described above does not appear to fit within the exception of Rule 5.5(c)(2). The non-Illinois lawyer's stated goal is to resolve (conclude) the matter by the demand letter. Although the non-Illinois lawyer states that she will either seek admission or refer the matter to an Illinois lawyer if the demand letter is not successful, because the goal is to avoid litigation, it may be argued that the exception set forth in Rule 5.5(c)(2) does not apply because the demand letter is not preliminary work associated with a pending or potential proceeding. The Committee does not believe that the mere sending of correspondence into Illinois by a non-Illinois lawyer is a violation of Rule 5.5. Instead, it is the fact that the non-Illinois lawyer seeks to resolve the Illinois matter by way of the demand letter, which does not appear to be preliminary

activity as described in Comment No. 10 and does not appear to satisfy any exception to Rule 5.5(c)(2) because the activity (demand letter) will not lead to *pro hac* admission. Successful early resolution (because of the demand letter) may lead to accusations of the unauthorized practice of law.

For example, in a Florida fee dispute regarding the unauthorized practice of law, a lawyer licensed to practice in North Carolina but not Florida argued that he anticipated securing a Florida lawyer but simply did not do so before the matter settled in mediation. The Florida court rejected the argument and found that the North Carolina lawyer engaged in the unauthorized practice of law in Florida, denied the North Carolina lawyer a fee and described the lawyer's representation as "illegal activities". *Morrison v. West*, 30 So. 3d 561 (Fla. 4th DCA 2010).

In *Attorney Grievance Commission of Maryland v. Jude Ambe,* Misc. Docket AG No. 6, Sept. Term 2011, it was determined that sending demand letters in an effort to settle tort claims in a jurisdiction in which the lawyer was not authorized to practice state law violated Rule 5.5. The respondent was admitted to practice in New York but had a Maryland office in which he was authorized to practice federal immigration law (not Maryland state law). The respondent drafted, or had drafted under his name, demand letters seeking to settle Maryland state law claims arising from tort claims that "could be filed in court." It was determined that the demand letters violated Maryland Rule 5.5.

In the facts presented to this Committee, the sending of a demand letter does not fall within the exception of Rule 5.5(c)(2) because the demand letter is intended to resolve the dispute and is not preliminary activity. Regardless of whether the lawyer may be capable of being admitted pro hac vice, sending a demand letter is not preliminary activity because if the demand letter is effective, the lawyer does not reasonably expect to be authorized to practice in Illinois on a pro hac vice basis.

Rule 5.5(c)(3) and Rule 5.5(c)(4):

Finally, there is no indication in the facts presented to the Committee that either exception set forth in Rule 5.5(c)(3) or (c)(4) applies.

Exception 5.5(c)(3) requires a "potential arbitration, mediation, or other alternative dispute resolution proceeding". (Emphasis added.) Here, there is no indication of a potential for arbitration, mediation or other alternative resolution proceeding.

Exception 5.5(c)(4) requires that the circumstances "are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." There is no indication that the non-Illinois lawyer's practice is reasonably related to the subject matter of the demand letter.

Comment No. 14 to Illinois Rule 5.5 seeks to explain what "reasonably related" means:

> Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law.

It is worth nothing that following *In re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016) (discussed above), Minnesota amended its version of Rule 5.5(c)(4) to clarify what is meant by "reasonably related". The Minnesota Supreme Court also adopted an exception that allows a non-Minnesota lawyer to represent family members, whether or not such representation is reasonably related to the lawyer's practice area. Minn. Rules of Prof'l Conduct 5.5(c)(4). The Minnesota version of Rule 5.5(c)(4) specifically applies to "a family member". There is no exception in Minnesota for friends. Illinois does not have an exception for family or other relationships. The fact that the non-Illinois lawyer is willing to help a friend on a pro bono basis does not affect the analysis of the issue of whether the performance of legal services constitutes the unauthorized practice of law in Illinois. The relationship between the individual seeking representation and the non-Illinois lawyer has no impact on the analysis of whether representation constitutes the unauthorized practice of law.

CONCLUSION

The Committee recognizes that there are circumstances when a non-Illinois lawyer's demand letter may fall within an exception to Rule 5.5(c). However, under the facts presented in this inquiry, it does not appear that an exception to Rule 5.5(c) applies. For a non-Illinois lawyer to send a demand letter to Illinois, one of the exceptions set forth in Rule 5.5(c) must apply.
