Attorney Conduct: UPL & Others Ethical Challenges Raised by Multi-Jurisdictional Practice

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@ CBA

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) 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.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not do either of the following:

(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;

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

(c) A lawyer who is admitted in another United States jurisdiction, is in good standing in the jurisdiction in which the lawyer is admitted, and regularly practices law may provide legal services on a temporary basis in this jurisdiction if one or more of the following apply:

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

(2) the services are *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) the services are *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;

(4) the lawyer engages in negotiations, investigations, or other nonlitigation activities that arise out of or are *reasonably* related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted and in good standing in another United States jurisdiction may provide legal services in this jurisdiction through an office or other systematic and continuous presence in any of the following circumstances:

(1) the lawyer is registered in compliance with Gov. Bar R. VI, Section 6 and is providing services to the employer or its organizational affiliates for which the permission of a *tribunal* to appear *pro hac vice* is not required;

(2) the lawyer is providing services that the lawyer is authorized to provide by federal or Ohio law;

(3) the lawyer is registered in compliance with and is providing pro bono legal services as permitted by Gov. Bar R. VI, Section 6.

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Division (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed *pro se*.

[4] Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates division (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. For example, advertising in media specifically targeted to Ohio residents or initiating contact with Ohio residents for solicitation purposes could be viewed as a systematic and continuous presence. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1 and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice 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 under circumstances that do not create an unreasonable risk to the interests of their clients, the public, or the courts. Division (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the

conduct is or is not authorized. With the exception of divisions (d)(1) and (d)(2), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under division (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Divisions (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory, or commonwealth of the United States. The word "admitted" in division (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Division (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 provision to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] After registering with the Supreme Court Office of Attorney Services pursuant to Gov. Bar R. XII, lawyers not admitted to practice generally in this jurisdiction may be authorized by order of a tribunal to appear *pro hac vice* before the tribunal. Under division (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission *pro hac vice* before appearing before a tribunal, this rule requires the lawyer to obtain that authority. "Tribunal" is defined in Gov. Bar R. XII, Section 1(A), as "a court, legislative body, administrative agency, or other body acting in an adjudicative capacity."

[10] Division (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule 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.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a tribunal, division (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the tribunal. For example, subordinate

lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Division (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services 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. The lawyer, however, must obtain admission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Division (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within divisions (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Divisions (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.

[15] Division (d) identifies three circumstances in which a lawyer who is admitted to practice in another United States jurisdiction and in good standing may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in divisions (d)(1) through (d)(3), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] [RESERVED]

[17] If a lawyer employed by a nongovernmental entity establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, division (d)(1) requires the lawyer to comply with the registration requirements set forth in Gov. Bar R. VI, Section 3.

[18] Division (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or Ohio law, which includes statute, court rule, executive regulation, or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to divisions (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to divisions (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Divisions (c) and (d) do not authorize communications advertising legal services in Ohio by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in Ohio is governed by Rules 7.1 to 7.5.

Comparison to former Ohio Code of Professional Responsibility

No change in Ohio law or ethics rules is intended by adoption of Rule 5.5.

Rule 5.5(a) is analogous to DR 3-101.

Rules 5.5(b), (c), and (d) describe when a lawyer who is not admitted in Ohio may engage in activities within the scope of the practice of law in this state. The Ohio Code of Professional Responsibility contains no provisions comparable to these proposed rules; rather, the boundaries of permitted activities in Ohio by a lawyer admitted elsewhere are currently reflected in case law and the Supreme Court Rules for the Government of the Bar of Ohio.

Pro hac vice admission of an out-of-state lawyer to represent a client before a tribunal was formerly a matter within the sole discretion of the tribunal before which the out-of-state lawyer sought to appear, without any registration requirements. See Gov. Bar R. I, Section 9(H) and *Royal Indemnity Co. v. J.C. Penney Co.* (1986), 27 Ohio St.3d 31, 33. Effective January 1, 2011, however, out-of-state lawyers must register with the Supreme Court of Ohio Office of Attorney Services prior to being granted permission to appear *pro hac vice* by a tribunal. See Gov. Bar R. XII.

Comparison to ABA Model Rules of Professional Conduct

Rule 5.5(d)(1) substitutes a reference to the corporate registration requirement of Gov. Bar R. VI, Section 3 for the more general language used in the Model Rule. Comment [16] is stricken and Comment [17] is modified to conform to the change in division (d)(1).

Comment [4] is modified to warn lawyers that advertising or solicitation of Ohio residents may be considered a "systematic and continuous" presence, as that term is used in division (b).

Comments [9] and [11] are modified effective January 1, 2011, to recognize Gov. Bar R. XII, which also became effective on that date. Gov. Bar R. XII governs *pro hac vice* registration and defines "tribunal" for purposes of such registrations.

The Supreme Court of Ohio

Case No. 2018-0496

ORDER

In re: Application of Alice Auclair Jones

This cause came before the court upon the filing of a report by the Board of Commissioners on Character and Fitness. In this report, the board recommends that the applicant, Alice Auclair Jones, be disapproved.

On consideration thereof, it is ordered by the court that the applicant and the Admissions Committee of the Cincinnati Bar Association may file objections to the findings and recommendations of the board within 30 days after issuance of this order. It is further ordered that any objections be accompanied by the original and 18 copies of a brief in support of the objections. It is further ordered that the original and 18 copies of an answer brief may be filed within 15 days after any objections have been filed.

After a hearing on the objections or if no objections are filed within the prescribed time, the court shall enter such order as it may find proper.

It is further ordered that, in accordance with Gov.Bar R. I(13)(C), the record filed with this court by the board shall remain under seal until June 5, 2018, after which date the record shall become public unless this court, on motion by the applicant or sua sponte, orders that the record or portions of it remain confidential.

It is further ordered that all documents filed with this court in this case shall meet the filing requirements set forth in the Rules of Practice of the Supreme Court of Ohio, including requirements as to form, number, and timeliness of filings, and further that, unless clearly inapplicable, the Rules of Practice shall apply to these proceedings. All case documents are subject to Sup.R. 44 through 47 which govern access to court records. It is further ordered that service of briefs and other documents shall be made upon the applicant, the admissions committee, and all counsel of record.

Maureen O'Connor
Chief Justice

The Supreme Court of Ohio

BEFORE THE BOARD OF COMMISSIONERS

ON CHARACTER AND FITNESS OF

THE SUPREME COURT OF OHIO

In re: Application of
Alice Auclair Jones

Case No. 668

FINDINGS OF FACT AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON CHARACTER AND FITNESS OF THE SUPREME COURT OF OHIO

This matter is before the board pursuant to its *sua sponte* investigatory authority. Gov. Bar R. I, Sec. 10(B)(2)(e).

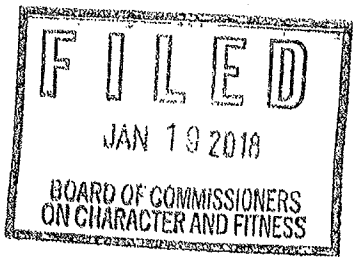
A duly appointed panel of three Commissioners on Character and Fitness was impaneled for the purpose of hearing testimony and receiving evidence in this matter. A hearing was held on April 27th, 2017. The panel filed its report with the board on January 19th, 2018.

Pursuant to Gov. Bar R. I, Sec. 12 (D), the board considered this matter on February 9th, 2018. By unanimous vote, the board adopts the panel report as attached, including its findings of fact and recommendation of disapproval.

Therefore, the Board of Commissioners on Character and Fitness recommends that the applicant be disapproved and that she does not possess the requisite character, fitness, and moral qualifications for admission to the practice of law in Ohio.

/s/ Todd C. Hicks
Todd C. Hicks, Chair, Board of
Commissioners on Character and Fitness for the
Supreme Court of Ohio

BEFORE THE BOARD OF COMMISSIONERS
ON CHARACTER AND FITNESS OF
THE SUPREME COURT OF OHIO



IN RE: APPLICATION OF)
ALICE AUCLAIR JONES)
) CASE NO. 668
)
)

REPORT AND RECOMMENDATION OF PANEL

This matter has a slightly different procedural posture so a brief history of the case is warranted. Initially, the applicant was referred to a panel because of a concern that she was engaging in activities that constituted the unauthorized practice of law. After an evidentiary hearing the panel concluded that Ms. Jones was in fact engaged in the unauthorized practice of law. Because she was currently committing an act specifically identified as a factor in Rule I for considering an applicant's character and fitness, despite previous indications from the Admissions Office that a problem may exist, the panel was reluctant to recommend that she possessed current character and fitness. However, the panel also wanted to afford the applicant an opportunity to cease her activities before making a recommendation concerning her character and fitness. The panel therefore recommended to the Board that it hold in abeyance or defer its consideration and decision on the applicant and provide Ms. Jones an opportunity to cease her

activities. The Board approved the panel's recommendation and an entry was issued providing the applicant a thirty-day period in which she could submit an affidavit averring that she was not engaging in activities that constituted the practice of law in Ohio.

The applicant chose not to file such an affidavit. Instead she filed an affidavit indicating that she was continuing – and intended to continue – her activities; she also filed a motion for reconsideration. Specifically, her affidavit states that she does not believe she is practicing law in Ohio because she is not practicing Ohio law. Rather she submits that she is practicing under her Kentucky license while living and working in Ohio and believes she may continue to do so while her motion to be admitted without examination is pending. In her motion for reconsideration, the applicant also argues that Rule 5.5 (c)(2)of the Rules of Professional Conduct permits her to practice law in Ohio pending a decision on her admission because her practice is temporary within the meaning of that rule.

The Board has remanded the matter back to the panel for a recommendation on applicant's motion and on whether she currently possesses the requisite character and fitness for admission to the bar of Ohio.

The panel will first consider applicant's motion for reconsideration. There is no provision in Rule I for reconsideration of a recommendation by the Board. The panel therefore recommends that the motion be denied. Moreover, the initial decision of the Board was simply to allow the applicant a period of time in which to cease her activities and she has already submitted her response to that; the Board held in abeyance a decision on her character and fitness so there is nothing for the Board to reconsider in that regard. In her motion, the applicant provides further argument why her practice is temporary and therefore permissible under 5.5. To

be fair to the applicant, the panel will consider her additional materials in making its recommendation to the Board on her current character and fitness.

As noted, Ms. Jones relies upon Rule 5.5. Specifically, she focuses on Rule 5.5(c)(2) and the crux of her argument is that because she is not practicing Ohio law and because her activities are temporary, they are permitted.

As recounted in the initial panel report, the facts of this matter are undisputed. The applicant is a 2009 graduate of the George Mason School of Law who is admitted in Kentucky. After practicing first as an Assistant Attorney for the Jefferson County Commonwealth's Attorney, she took a position in 2014 with a private law firm in Louisville, Kentucky that thereafter merged with an Ohio law firm. In late October 2015, Ms. Jones filed an application to be admitted without examination in Ohio. A few weeks later she moved for personal reasons to Cincinnati and transferred to the Cincinnati office of her law firm. Since her move to reside in Ohio she has maintained an office and a continuous and systematic presence in Ohio and has been practicing law.

The Supreme Court has not directly addressed the issue of whether Rule 5.5 permits an attorney licensed in another jurisdiction to practice pending admission in Ohio so long as the attorney does not practice Ohio law. The panel believes that it – and the Board – should try to follow the meaning and intent of the language of the rule. As discussed below, the panel concludes that the rule does not authorize an attorney licensed in another jurisdiction to practice pending admission in Ohio. To conclude otherwise appears to expand the language in a manner that is not within the authority of the Board and, if it is to be done, may only be done by the Supreme Court.

The general rule in Ohio is that the "rendering of legal services for another by any person not admitted to practice in Ohio under Rule I of the Supreme Court Rules for the Government of the Bar" is the unauthorized practice of law. See Rule VII, Section 2 of the Supreme Court Rules for the Government of the Bar. Rule VII, however, sets forth six specific exceptions to the general prohibition, thus permitting an individual not admitted to render legal services in Ohio (certification as a legal intern under Gov. Bar R. II; corporate status under Gov. Bar R. VI; certification to practice in legal services, public defender and law school programs under Gov. Bar R. IX; registration as a foreign legal consultant; permission through pro hac vice; and compliance with Rule 5.5 of the Ohio Rules of Professional Conduct).

The starting point for any analysis is the rule itself. To determine whether Rule 5.5 permits an attorney admitted in another jurisdiction to practice law in Ohio so long as it is not Ohio law must begin with the language of the rule. Like Rule VII, Rule 5.5 starts out with a general prohibition that "a lawyer who is not admitted to practice in this jurisdiction" shall not, 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." Rule 5.5(b). Several points are worth noting with respect to this language. First, it is a prohibition against lawyers so it recognizes that merely being admitted in another jurisdiction does not entitle one to practice in Ohio if not admitted in Ohio. Second, the language of systematic and continuous seemingly provides the context in which the word "temporary" used later in the rule can be interpreted. After the general prohibition of section b, section c of the rule then sets forth what legal services may properly be rendered by a lawyer not admitted here. Ms. Jones primarily relies upon 5.5(c)(2) which provides:

> (c) A lawyer who is admitted in another United States jurisdiction is in good standing in the jurisdiction in which the lawyer is admitted,

> and regularly practices law may provide legal services on a temporary basis in this jurisdiction if one or more of the following apply:
>
> > (2) the services are 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;

The introductory section makes clear that before an attorney can invoke any of the provisions for rendering services in Ohio, the attorney must be admitted in another U.S. jurisdiction, be in good standing in that jurisdiction, and regularly practicing law there. There is at the very least a reasonable question whether the applicant satisfies the requirement that she regularly be practicing law in the jurisdiction in which she is admitted in that she is admittedly living and working in Ohio; this is the jurisdiction in which she has her office and in which she has a systematic and continuous presence. Contrary to the applicant's contention that Rule 5.5 allows an out of state attorney to move to Ohio (thus establishing a systematic and continuous presence) and practice here until they are admitted, the language of section c appears to permit the rendering of legal services by attorneys admitted to, and regularly practicing in, another jurisdiction who need to provide services in Ohio arising out of that practice. Applicant has not come to Ohio to render services because her practice in Kentucky reasonably requires her to do so. She has moved to Ohio for admittedly personal reasons unrelated to her practice in Kentucky.

Applicant's contention that her practice here is permissible because she is not practicing Ohio law is also questionable. The rule speaks of the practice of law, not simply the practice of Ohio law. The practice of Ohio law, according to applicant, seems to mean issues or cases arising under Ohio law. This appears to conflate the practice of law with the particular

type of law an attorney may practice. That is, an individual who is admitted to the practice of law in a particular jurisdiction is permitted to advice clients and address issues arising under any state or federal law. The particular common or statutory law that is the subject of the legal services being rendered does not determine whether a lawyer is practicing law. Whether an attorney is handling a matter involving Ohio law or the law of another jurisdiction, the attorney is in either case practicing law. Applicant is merely contending that while in Ohio she is not dealing with matters that arise under Ohio law; but that does not mean that she is not practicing law in Ohio while not admitted to do so.

Applicant's second primary argument is that her practice is temporary as that term is used in Rule 5.5 and thus permissible. In construing the word temporary, applicant rests upon the opinion of a Professor Emeritus of Linguistics at The Ohio State University, Professor Craig Roberts. Professor Roberts relies upon the *Oxford English Dictionary* definition of temporary and its antonym, permanent. While the dictionary definition of a word is useful, a word's interpretation must be considered, at least in some respect, within the context in which it is used. The panel will first address the definitions proffered by Professor Roberts and then discuss the use of the term within the context of Rule 5.5.

"Temporary" is defined, according to the Oxford Dictionary, as "lasting for a limited time; existing or valid for a time (only); not permanent; transient; made to supply a passing need. This is in contrast to "permanent" defined to mean "continuing or designed to continue or last indefinitely without change; abiding, enduring, lasting persistent. Opposed to temporary." The various definitional phrases for each of these words appear to express slightly different ideas. For example, if one focuses on the phrase "made to supply a passing need" one could easily conclude that the applicant's practice is not temporary since she is not meeting a

passing need, but has permanently moved to Ohio. Moreover, in putting "permanent" in context, Professor Roberts states "I take it that permanence is judged relative to some scale – in this case, the scale is eternity." Such abstractions do not seem particularly helpful in the context of determining the meaning of the term in Rule 5.5. As observed earlier, the panel thinks that the better method for understanding the term and applying it is to contrast it with the earlier reference in the rule to establishing an office or a systematic and continuous presence. If a lawyer has established an office and a continuous and systematic presence, then it can reasonably be concluded that the services being rendered by the lawyer are not temporary.

Applicant's contention that Rule 5.5 permits a lawyer to practice pending admission is contradicted by other provisions of the Ohio rules for the Government of the Bar. Gov. Bar R. I, Section 9 addresses admission without examination, the provision pursuant to which the applicant seeks admission. Section 9 (H) specifically states that "an applicant under this section shall not engage in the practice of law in Ohio prior to the presentation of the applicant to the Court. . . ." A similar prohibition is set forth in Rule VI of the Rules for the Government of the Bar concerning the registration of attorneys. Section 6 (A) (2) of the rule provides that an attorney admitted in another jurisdiction but not Ohio and employed by an Ohio law firm is exempted from the registration requirement. However, the section also specifically prohibits the attorney from practicing law until admitted in Ohio: "Until the attorney is admitted to the practice of law in Ohio, the attorney may not practice law in Ohio. . . ." Not only do these provisions seem to directly refute applicant's contention that Rule 5.5 allows her to practice law so long as it is not Ohio law, but more importantly they directly prohibit her from practicing in Ohio.

Finally, there is at least circumstantial support for the conclusion that Rule 5.5 does not allow practice pending admission. This is supplied by the proposal of the American Bar Association for a model rule entitled Practice Pending Admission. According to the Report of the ABA Commission on Ethics 20/20, the proposed rule is intended to recognize that in today's more mobile society a lawyer licensed in one jurisdiction may need to move to another and to allow a lawyer the ability to practice while going through admission procedures so as to avoid the risk of the unauthorized practice of law. If Rule 5.5, also based on an ABA model rule permitted practice pending admission, such a new model rule would not seem necessary.[1]

Based upon its review of the pertinent authorities, the panel concludes that the applicant is engaged in the unauthorized practice of law, a factor to be considered under Rule 1 in determining character and fitness. As the Supreme Court noted in *In re Application of Swendiman*, 2016-Ohio-2813 ¶14, "commission of an act constituting the unauthorized practice of law is one factor to be considered in determining whether an applicant possesses the requisite character, fitness, and moral qualifications to practice law in Ohio." The critical question is what weight to be accorded this factor. In making this judgment, the panel finds it important that, from the time she filed her application and made it known she was moving to Ohio and was going to continue to practice, she was advised that there may be an issue. The Admissions Office does not advise an applicant that their activities constitute the unauthorized practice of law, but it does alert an applicant that there may be a problem so that the applicant will look at the pertinent rules. There is no evidence that the applicant did this. Despite the clear

[1] Also pertinent here is an Order entered by the late Chief Justice Moyer following the Katrina hurricane disaster. Because of the disruption in the practice of law in the affected areas, the Order temporarily suspended applicable provisions of the Rules for the Government of the Bar and provided that lawyers in three states could come to Ohio and continue their practice from Ohio. Arguably, such an order would not have been necessary if the lawyers could have come to Ohio and practiced law so long as it was not Ohio law.

prohibitions in Rule 1, Section 9 (H) and Rule VI, Section (A) (2), the applicant simply interpreted Rule 5.5 in a manner that allowed her to practice. The prohibition in Section 9 (H) is particularly telling because this is the rule upon which the applicant relies to seek admission without having to take the Ohio bar examination. Of perhaps lesser weight, but still an issue for the panel, is the opportunity afforded the applicant to reconsider her position. This she declined to do so that her unauthorized activities are currently ongoing. Again, the Court in *Swendiman* provides guidance. The Court stated: "In providing weight and significance to the applicant's prior conduct, we consider the age of the applicant at the time of the conduct, the recency of the conduct, and the reliability of the information concerning the conduct." *Id.* The applicant is a mature adult, the conduct is current and ongoing, and the information about her activities is reliable since she is admittedly practicing law, albeit not matters involving Ohio law. Under these circumstances, the panel concludes that the applicant has failed to prove by clear and convincing evidence that she possesses the character, fitness, and moral qualifications for admission to the practice of law in Ohio.

John C. Fairweather, panel member

Hon. Denise L. Moody, panel member

Suzanne K. Richards, panel chair

SLIP OPINION NO. 2018-OHIO-4182

IN RE APPLICATION OF JONES.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *In re Application of Jones,* Slip Opinion No. 2018-Ohio-4182.]

Attorneys—Character and fitness—Prof.Cond.R. 5.5—A lawyer admitted to practice law in another jurisdiction who provides legal services exclusively in that jurisdiction from Ohio pending resolution of an application for admission to Ohio bar without examination and who otherwise complies with Prof.Cond.R. 5.5(c) is providing legal services on temporary basis and therefore has not engaged in unauthorized practice of law—Application for admission without examination approved.

(No. 2018-0496—Submitted July 17, 2018—Decided October 17, 2018.)

ON REPORT by the Board of Commissioners on Character and Fitness of the Supreme Court, No. 668.

SYLLABUS OF THE COURT

A lawyer admitted to practice law in another jurisdiction who provides legal services exclusively in that jurisdiction from an office in Ohio pending resolution of an application for admission to the Ohio bar without

examination and who otherwise complies with the provisions of Prof.Cond.R. 5.5(c) is providing legal services on a temporary basis and therefore has not engaged in the unauthorized practice of law.

O'DONNELL, J.

{¶ 1} Alice Auclair Jones is licensed to practice law in Kentucky and applied for admission to the practice of law in Ohio without examination. The Board of Commissioners on Character and Fitness found that after Jones filed her application, she engaged in the unauthorized practice of law by practicing Kentucky law from an Ohio office and failed to prove she has the requisite character, fitness, and moral qualifications to practice law in Ohio; therefore, it recommends that we disapprove her application. Jones objects to the findings and the recommendation.

{¶ 2} The issues presented are whether Jones violated Prof.Cond.R. 5.5(c), which permits a lawyer to "provide legal services on a temporary basis in this jurisdiction" under certain circumstances, and whether this court should approve her application. We conclude that a lawyer admitted to practice law in another jurisdiction who provides legal services exclusively in that jurisdiction from an office in Ohio pending resolution of an application for admission to the Ohio bar without examination and who otherwise complies with the provisions of Prof.Cond.R. 5.5(c) is providing legal services on a temporary basis and therefore has not engaged in the unauthorized practice of law. Because Jones complied with the rule, we conclude she did not engage in the unauthorized practice of law and has the requisite character, fitness, and moral qualifications to practice law in Ohio, and we approve her application pursuant to Gov.Bar R. I(9)(F)(1).

Background

{¶ 3} Jones graduated from George Mason University School of Law, was admitted to practice law in Kentucky in 2009, and is a member in good standing of the Kentucky bar. She initially practiced as an assistant commonwealth attorney in

Jefferson County, Kentucky, and in 2014, took a position with Huddleston Bolen, L.L.P., a law firm in Louisville, Kentucky, that subsequently merged with Dinsmore & Shohl, L.L.P.

{¶ 4} On October 26, 2015, Jones applied for admission to the Ohio bar without examination pursuant to Gov.Bar R. I(9). In November 2015, she moved to Cincinnati, Ohio, for personal reasons and transferred to the Cincinnati office of Dinsmore & Shohl, where she practiced law exclusively in matters related to pending or potential proceedings before tribunals in Kentucky. She also maintained an office at the firm's Louisville location and frequently went to Kentucky for depositions and hearings.

{¶ 5} The admissions committee of the Cincinnati Bar Association recommended approval of her character, fitness, and moral qualifications to practice law. However, due to a concern that Jones was engaging in the unauthorized practice of law, the Board of Commissioners on Character and Fitness invoked its sua sponte investigatory authority conferred by Gov.Bar R. I(10)(B)(2)(e) and appointed a panel to conduct a hearing on the matter.

{¶ 6} At the hearing, Jones argued that Prof.Cond.R. 5.5(d)(2) permitted her to establish an office in Ohio if she provided legal services she was authorized to provide by Ohio law and that Prof.Cond.R. 5.5(c) authorized her to provide legal services in Ohio on a temporary basis. Jones testified that in her view, the services she is providing from Ohio during the pendency of her application are temporary because if she is not admitted, she will have to "find a place to practice in the state of Kentucky," and if she is admitted, she will "integrate into the Cincinnati, Ohio, office" and her "practice will change."

{¶ 7} The panel found Prof.Cond.R. 5.5(c) did not apply because it "does not appear that Ms. Jones meets the requirement that she regularly be practicing law in Kentucky since by her own testimony she has lived and worked in Ohio since 2015" and the panel did "not believe that her practice of law has been temporary as

contemplated by" that rule. Thus, the panel found she was currently engaged in the unauthorized practice of law in Ohio. Although Jones "otherwise [had] no issues that would affect her character and fitness," the panel was "disturbed" by the ongoing nature of her conduct and recommended that the board hold the matter in abeyance and give Jones 30 days to cease the practice of law in Ohio and provide an affidavit representing that she is engaging only in services that could be rendered by a law clerk or paralegal.

{¶ 8} The board found Jones was currently engaged in the unauthorized practice of law and followed the panel's recommendation, but Jones did not cease her practice in Ohio and instead moved for reconsideration and filed an affidavit indicating she would continue to practice in Ohio during the pendency of her application.

{¶ 9} The panel recommended the board deny the motion for reconsideration, again rejecting the claim that Jones's services were temporary for purposes of Prof.Cond.R. 5.5(c). It explained that the term "temporary" should be contrasted with "the earlier reference in the rule to establishing an office or a systematic and continuous presence. If a lawyer has established an office and a continuous and systematic presence, then it can reasonably be concluded that the services being rendered by the lawyer are not temporary." To support this interpretation, the panel relied on Gov.Bar R. I(9)(H) and a proposal of the American Bar Association for a model rule on practice pending admission. It found that Jones "has maintained an office and a continuous and systematic presence in Ohio and has been practicing law," was engaged in the unauthorized practice of law, and had "failed to prove by clear and convincing evidence that she possesses the character, fitness, and moral qualifications for admission to the practice of law in Ohio."

{¶ 10} The board adopted the panel's report and recommends that we disapprove Jones's application for admission without examination.

Objections to Board Recommendation

{¶ 11} Jones has filed objections to the board's findings and recommendation. She asserts the term "temporary" "is readily and correctly understood as the opposite of 'permanent' " and she complied with Prof.Cond.R. 5.5(c)(2), which she claims permits a lawyer to "provide legal services in Ohio during the temporary period in which the lawyer's application to be admitted by reciprocity to the Ohio Bar is pending" if the lawyer satisfies the other requirements of the rule. She maintains the panel's emphasis on her establishing an office or other systematic and continuous presence in Ohio is misplaced because Prof.Cond.R. 5.5(c)(2) permits such conduct for a temporary period and that alternatively, her practice "cannot reasonably be interpreted as a 'systematic and continuous' Ohio presence." In addition, Jones asserts that "a resolution against her * * * clashes with" the Due Process Clause and the Privileges and Immunities Clause of the United States Constitution.

{¶ 12} The Cincinnati Bar Association supports her position.

Issue

{¶ 13} The issue presented is whether Jones provided legal services on a "temporary basis" in Ohio for purposes of Prof.Cond.R. 5.5(c).

Law and Analysis

{¶ 14} Gov.Bar R. I(11)(D)(1) specifies that an applicant for admission to the Ohio bar must prove by clear and convincing evidence that he or she "possesses the requisite character, fitness, and moral qualifications for admission to the practice of law." And the "[c]ommission of an act constituting the unauthorized practice of law" is one factor to be considered in evaluating an applicant's character, fitness, and moral qualifications. Gov.Bar R. I(11)(D)(3)(c).

{¶ 15} Gov.Bar R. I(9)(H) generally prohibits applicants for admission without examination from engaging "in the practice of law in Ohio prior to the presentation of the applicant to the Court pursuant to division (G) of this section."

However, Gov.Bar R. VII(2)(A)(1)(f) specifically excepts from the definition of the unauthorized practice of law "[r]endering legal services in accordance with Rule 5.5 of the Ohio Rules of Professional Conduct."

{¶ 16} Prof.Cond.R. 5.5(b)(1) prohibits "[a] lawyer who is not admitted to practice in this jurisdiction" from establishing "an office or other systematic and continuous presence in this jurisdiction for the practice of law," "except as authorized by these rules or other law." Prof.Cond.R. 5.5(d)(2) provides that "[a] lawyer admitted and in good standing in another United States jurisdiction may provide legal services in this jurisdiction through an office or other systematic and continuous presence" if "the lawyer is providing services that the lawyer is authorized to provide by * * * Ohio law."

{¶ 17} Prof.Cond.R. 5.5(c)(2) authorizes a lawyer to "provide legal services on a temporary basis in this jurisdiction" if (1) the lawyer "is admitted in another United States jurisdiction," (2) the lawyer "is in good standing in the jurisdiction in which the lawyer is admitted," (3) the lawyer "regularly practices law," (4) "the services are *reasonably* related to a pending or potential proceeding before a *tribunal* in this or another jurisdiction," and (5) "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." (Italics sic.)

{¶ 18} "Temporary" means "[l]asting for a time only; existing or continuing for a limited (usu. short) time; transitory." *Black's Law Dictionary* 1693 (10th Ed.2014); *accord Webster's Third New International Dictionary* 2353 (2002).

{¶ 19} Comment 6 to Prof.Cond.R. 5.5 notes:

> There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under division (c). Services may be

> "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, *or for an extended period of time*, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

(Emphasis added.)

{¶ 20} A lawyer who applies for admission without examination to the Ohio bar in accordance with Gov.Bar R. I(9) and thereafter provides legal services from Ohio in the jurisdiction where that applicant is already admitted to practice law pending the resolution of that application is providing services on a temporary basis because those services are transitory and will continue only until the application is resolved.

{¶ 21} Here, the record establishes that Jones satisfied the requirements of Prof.Cond.R. 5.5(c)(2). She is a lawyer who is admitted in Kentucky, is in good standing in that jurisdiction, regularly practices law, and is providing legal services from an office in Ohio, and those services are reasonably related to pending or potential proceedings before tribunals in Kentucky, where she is authorized by law to appear in such proceedings. Although Jones began practicing Kentucky law from Ohio more than two years ago, after she had applied for admission prior to moving to Ohio, her practice from Ohio pending her application is on a temporary basis because the continuation of her practice depends on the resolution of her application.

{¶ 22} This case stands in contrast to *In re Egan*, 151 Ohio St.3d 525, 2017-Ohio-8651, 90 N.E.3d 912, in which Shannon O'Connell Egan, an attorney admitted to the Kentucky bar, established offices in Cincinnati, Ohio, from which she practiced Kentucky law for more than ten years. Although this court concluded she "engaged in the unauthorized practice of law in this state for an extended period of time," *id.* at ¶ 12, Egan practiced in Ohio for six years before filing the first of

two applications for admission to the Ohio bar without examination and she admitted that her practice was not temporary for purposes of Prof.Cond.R. 5.5(c).

Conclusion

{¶ 23} A lawyer who resides in Ohio and who practices only the law of an out of state jurisdiction from an office in Ohio and appears only before tribunals in a foreign jurisdiction pending the resolution of an application for admission without examination to the Ohio bar is providing services on a temporary basis for purposes of Prof.Cond.R. 5.5(c). Because Jones satisfied the requirements of Prof.Cond.R. 5.5(c)(2) by practicing Kentucky law from an office in Ohio pending the resolution of her application, she has not engaged in the unauthorized practice of law and therefore she does possess the requisite character, fitness, and moral qualifications to practice law in this state. Accordingly, we conclude that Jones did not engage in the unauthorized practice of law. We approve her application for admission without examination.

Judgment accordingly.

O'CONNOR, C.J., and FRENCH, and FISCHER, JJ., concur.

DEWINE, J., concurs in judgment only, with an opinion joined by KENNEDY and DEGENARO, JJ.

DEWINE, J., concurring in judgment only.

{¶ 24} Does an out-of-state attorney who practices law exclusively in the courts of the state where she is licensed engage in the unauthorized practice of law because she happens to work out of an office in Ohio? Prof.Cond.R. 5.5, a rule promulgated by this court, seems to say that the answer is yes. But in my view, the rule—as applied in the situation before us and others like it—runs afoul of constitutional guarantees.

{¶ 25} The majority reaches the correct result in approving Alice Auclair Jones's application for admission without examination. Majority opinion at ¶ 23.

It does so by concluding that the Board of Commissioners on Character and Fitness misread the rule. *Id.* at ¶ 20. But as I see it, the problem is not that the board misread the rule; I'm convinced that the board's reading is correct. The problem is that as applied here, the rule is irrational and arbitrary and cannot constitutionally be enforced. I therefore concur in the court's judgment approving Jones's application, but I do so because I find the rule to be unconstitutional when applied to Jones and others like her.

I. The majority incorrectly reads the unauthorized-practice-of-law provisions of the Rules of Professional Conduct

{¶ 26} The Ohio Constitution grants this court original jurisdiction over the "[a]dmission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law." Article IV, Section 2(B)(1)(g), Ohio Constitution. Pursuant to that authority, we have promulgated sets of rules and established boards to oversee the implementation of those rules on our behalf. This case involves the construction of one such set of rules—the Rules of Professional Conduct—and a recommendation from one of our boards—the Board of Commissioners on Character and Fitness.

{¶ 27} It is undisputed that Jones practiced law exclusively in matters related to pending or potential proceedings before tribunals in Kentucky. She did not hold herself out to be an Ohio attorney. She did not practice in Ohio courts. And she did not advertise for business in Ohio. In short, she conducted her practice like any other Kentucky attorney, but she happened to be working out of an office located in Ohio while doing so. We might say—as we do of many employees in today's world—that she was working remotely.

{¶ 28} Confronted with these facts, the board concluded that Jones had engaged in the unauthorized practice of law in violation of Prof.Cond.R. 5.5(b). Under the rule, unless authorized by the professional-conduct rules or other law, a lawyer who is not admitted to practice in Ohio "shall not * * * establish an office

or other systematic and continuous presence in this jurisdiction for the practice of law." Prof.Cond.R. 5.5(b)(1).

{¶ 29} Jones conceded that she had established an office and a continuous *physical* presence in Ohio, but she maintained that her practice was authorized because she was providing services on a "temporary basis" as authorized by Prof.Cond.R. 5.5(c), which states:

> A lawyer who is admitted in another United States jurisdiction, is in good standing in the jurisdiction in which the lawyer is admitted, and regularly practices law may provide legal services on a temporary basis in this jurisdiction if * * *:
>
> * * *
>
> (2) the services are *reasonably* related to a pending or potential proceeding before a *tribunal* in * * * another jurisdiction, if the lawyer * * * is authorized by law or order to appear in such proceeding * * *.

(Italics sic.) The board rejected Jones's argument, finding that her practice was not temporary. As a consequence, it recommended that her application for admission without examination be denied.

{¶ 30} The majority determines that Jones falls within the Prof.Cond.R. 5.5(c)(2) exception because she was providing services on a temporary basis in Ohio. Majority opinion at ¶ 21. But as much as the majority strains to find otherwise, the provision does not apply. The provision does not define "temporary," but its meaning becomes clear when read in the context of the entire rule. Prof.Cond.R. 5.5(b) begins with language of exclusion, stating that a lawyer not admitted to practice in Ohio may not "establish an office or other systematic and continuous presence in the jurisdiction for the practice of law." Prof.Cond.R.

5.5(b)(1). It then sets up two categories of exceptions: subsection (c) applies to attorneys whose out-of-state practice requires them to come into Ohio to perform work on their cases on a temporary basis, and subsection (d) prescribes when an out-of-state lawyer can practice in Ohio "through an office or other systematic and continuous presence."[1] Thus, practicing on a "temporary basis" in subsection (c) is juxtaposed with practicing "through an office" in subsection (d). It is clear, then, that an attorney who sets up an office in Ohio is not providing services on a "temporary basis" within the meaning of the rule.

{¶ 31} The comments to the rule support this reading. Regarding subsection (c), the comments explain that the provision "does not authorize a lawyer to establish an office * * * in this jurisdiction without being admitted to practice generally here." Prof.Cond.R. 5.5, Comment 5. Similarly, "a lawyer who is admitted to practice law in another jurisdiction and who establishes an office * * * in this jurisdiction must become admitted to practice law generally in this jurisdiction," except as permitted in subsection (d). Prof.Cond.R. 5.5, Comment 15.

{¶ 32} Because she established an office in Ohio, Jones's practice was not temporary within the meaning of Prof.Cond.R. 5.5(c). Thus, her arrangement was not authorized by our rules. The question remains, however, whether disapproving Jones's application under these circumstances would violate her constitutional rights.

II. This case presents issues under the federal and state Constitutions

{¶ 33} In addition to her argument regarding the construction of Prof.Cond.R. 5.5, Jones asserts that disapproval of her application would violate

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[1] The services that may be provided "through an office or other systematic and continuous presence" without admission to the Ohio bar are limited to services provided to an employer or its organizational affiliates for which a tribunal's permission to appear pro hac vice is not required, services that the lawyer is authorized to provide by federal or Ohio law, and certain pro bono services. Prof.Cond.R. 5.5(d).

the Due Process and Privileges or Immunities Clauses of the Fourteenth Amendment to the United States Constitution as well as the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution.

{¶ 34} Missing from Jones's argument is any claimed violation of the Ohio Constitution. Ordinarily, we will not consider a constitutional claim that has not been raised. But this case presents a circumstance that is different from the usual. Here, we are confronted not with a challenge to a legislative enactment, as is typically the case, but with a challenge to rules promulgated by this court under the authority granted to us by the Ohio Constitution. "This court may no more disregard or infringe upon the constitutional rights of our citizens in the exercise of its regulatory functions than may any other branch of government." *Shimko v. Lobe*, 103 Ohio St.3d 59, 2004-Ohio-4202, 813 N.E.2d 669, ¶ 27. Because it is our own rule that is at issue, we are obligated in the first instance to ensure that the rule comports with constitutional guarantees. Thus, in addition to the federal constitutional claims raised by Jones, I consider whether our rule as applied to Jones comports with the Ohio Constitution.

{¶ 35} In reviewing the constitutionality of our rules, we use the same standards applied to any other constitutional challenge. Our rules "must comply with the state and federal constitutions like any other rules and may be tested in any court of competent jurisdiction." *Christensen v. Bd. of Commrs. on Grievances & Discipline*, 61 Ohio St.3d 534, 537, 575 N.E.2d 790 (1991).

A. The Ohio and federal Constitutions protect one's right to pursue a chosen profession free from arbitrary and unreasonable governmental restraints

{¶ 36} The Ohio Constitution recognizes that all people possess "certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." Article I, Section 1, Ohio Constitution. This concept dates back to the founding days of our state. While the language was introduced in its

current form in 1851 with the enactment of our modern constitution, Ohio's first constitution contained substantially similar language: "[A]ll men are born equally free and independent, and have certain natural, inherent and unalienable rights; amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety * * *." Article VIII, Section 1, Ohio Constitution of 1802.

{¶ 37} This court has long held that the liberty and property rights guaranteed by Article I, Section 1 encompass a right to pursue one's chosen profession:

> The word "liberty," as used in the first section of the Bill of Rights, does not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare.

Palmer v. Tingle, 55 Ohio St. 423, 441, 45 N.E. 313 (1896). Thus, we have affirmed that "[t]he right to labor, to contract, to do business or to engage in any of the common occupations of life is one of the inalienable rights of the citizen." *Sanning v. Cincinnati*, 81 Ohio St. 142, 156, 90 N.E. 125 (1909); *see also Cincinnati v. Correll*, 141 Ohio St. 535, 49 N.E.2d 412 (1943); *Frecker v. Dayton*, 153 Ohio St. 14, 90 N.E.2d 851 (1950).

{¶ 38} Historically, we have understood that "[t]he rights guaranteed by Article I of the Constitution are not unrestricted rights but are subject to limitation or abrogation to such extent as may be necessary to promote the health, safety, morals or general welfare of society as a whole." *Correll* at 538. Thus, we have held that a statute proscribing fortune-telling was not "an unreasonable, arbitrary,

and oppressive exercise of the police power," *Davis v. State*, 118 Ohio St. 25, 28, 160 N.E. 473 (1928), because "fortune-telling and similar crafts are fraudulent practices, and therefore not within the protection afforded to a lawful business," *id.* at 31. On the other hand, we have determined that a municipal regulation limiting the hours during which one could operate a barber shop was an impermissible exercise of the police power because "[w]hether the patrons of a barber shop get a hair cut, shave, shine, or any other service rendered in a barber shop between the hours of 8:00 o'clock a.m. and 8:00 o'clock p.m. or at some other time of the day or night * * * can have no possible relation to the safety, morals or general welfare of the public." *Correll* at 540-541.

{¶ 39} Most recently, we have stated the test for "reviewing legislation that impacts the rights guaranteed by Section 1, Article I" as follows: "[T]he legislation will be upheld if it bears a real and substantial relation to the public health, safety, morals, or general welfare, and if the legislation is not arbitrary or unreasonable." *State v. Williams*, 88 Ohio St.3d 513, 524, 728 N.E.2d 342 (2000), citing *Benjamin v. Columbus*, 167 Ohio St. 103, 110, 146 N.E.2d 854 (1957). The same standards apply to rules promulgated by this court. *See Christensen*, 61 Ohio St.3d 534, 575 N.E.2d 790.

{¶ 40} The Fourteenth Amendment to the federal Constitution also has been held to protect the right of an individual to pursue and continue in a chosen occupation free from unreasonable government interference. *Dent v. West Virginia*, 129 U.S. 114, 121-122, 9 S.Ct. 231, 32 L.Ed. 623 (1889); *Allgeyer v. Louisiana*, 165 U.S. 578, 589, 17 S.Ct. 427, 41 L.Ed. 832 (1897); *Truax v. Raich*, 239 U.S. 33, 38-41, 36 S.Ct. 7, 60 L.Ed. 131 (1915). The state may set standards and regulate professions with the aim of protecting the public from "the consequences of ignorance and incapacity, as well as of deception and fraud." *Dent* at 122. But the state "cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or

Equal Protection Clause of the Fourteenth Amendment." *Schware v. New Mexico Bd. of Bar Examiners*, 353 U.S. 232, 238-239, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), citing *Dent*. Rational-basis review applies to such claims. As the court explained in *Schware*, professional qualifications imposed by the state on the practice of law "must have a rational connection with the applicant's fitness or capacity to practice law." *Id.* at 239.

B. Ohio does not have any legitimate government interest in regulating an attorney who does not practice in Ohio courts or provide Ohio legal services

{¶ 41} Under both the Fourteenth Amendment to the United States Constitution and Article I, Section 1 of the Ohio Constitution, 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.

{¶ 42} Two state interests generally have been identified as supporting attorney-regulation schemes. First, a state's interest in regulating attorneys arises from the role that lawyers serve in administering justice through the state's court system. As the United States Supreme Court has explained, "[the] interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' " *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975).

{¶ 43} The other state interest in regulating attorneys is the protection of the public. Our unauthorized-practice-of-law regulations flow from the notion that such rules are "generally necessary to protect the public against incompetence, divided loyalties, and other attendant evils that are often associated with unskilled representation." *Cleveland Bar Assn. v. CompManagement, Inc.*, 104 Ohio St.3d 168, 2004-Ohio-6506, 818 N.E.2d 1181, ¶ 40; *see also Middlesex Cty. Ethics Commt. v. Garden State Bar Assn.*, 457 U.S. 423, 434-435, 102 S.Ct. 2515, 73

L.Ed.2d 116 (1982). That sentiment is reiterated in the Ohio Rules of Professional Conduct; "limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons," Prof.Cond.R. 5.5, Comment 2. Likewise, the provisions of Prof.Cond.R. 5.5(c) are meant to protect "the interests of clients and the public." Prof.Cond.R. 5.5, Comment 8.

{¶ 44} 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 lawyers 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.

{¶ 45} The problem is that unless a specific exception applies, Prof.Cond.R. 5.5(b)(1) holds one to be engaged in the "unauthorized practice of law" and subject to legal sanction therefor simply because one has established an office or a systematic and continuous presence in the state. The rule deems such a lawyer to have engaged in the unauthorized practice of law regardless of whether her practice touches on the Ohio public or Ohio courts. In an earlier age, perhaps such a rule made sense. Before the advent of the Internet, electronic communication, and the like, a lawyer who worked in Ohio was almost always practicing Ohio law. But today that is hardly the case. Any number of lawyers, for any number of reasons, may choose to do their work from Ohio. Yet that does not give Ohio a right to prohibit their conduct.

{¶ 46} Indeed, imagine what would happen if the rule were strictly enforced. Are we to ban lawyers from setting up a secondary office inside their homes so that they can access their files remotely simply because their homes

happen to be in Ohio and their practices in another state? What about a New York attorney who maintains an Ohio vacation home on Lake Erie and is there for several months of the year? Certainly such an attorney has a continuous and systematic presence in Ohio, but are we really going to say that she has engaged in the unauthorized practice of law because she does New York legal work at her vacation home?

{¶ 47} I would conclude that as applied to an out-of-state attorney who is not practicing in Ohio courts or providing Ohio legal services, Prof.Cond.R. 5.5(b)(1) violates Article I, Section 1 of the Ohio Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[2] As applied to such an attorney, the rule violates Article I, Section 1 both because it does not "bear[] a real and substantial relation to the public health, safety, morals, or general welfare" and because it is "arbitrary" and "unreasonable," *Williams*, 88 Ohio St.3d at 524, 728 N.E.2d 342. Similarly, applying the rule to such an attorney violates the Fourteenth Amendment because it does not bear a rational relationship to any discernable state interest. *See Washington v. Glucksberg*, 521 U.S. 702, 728, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 491, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

III. Jones's application should be granted

{¶ 48} The board recommended denial of Jones's application for the sole reason that she had engaged in the unauthorized practice of law in violation of Gov.Bar R. VII(2)(A). Because I find the rule relied upon by the board to be unconstitutional when applied to Jones and others who are similarly situated, and

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[2] Because of my conclusion that the rule as applied to Jones violates Article I, Section 1 of the Ohio Constitution and the Due Process Clause of the Fourteenth Amendment, it is not necessary to consider her arguments that it also violates the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution and the Privileges or Immunities Clause of the Fourteenth Amendment to the United States Constitution.

because there was no other basis for the board's recommendation, I concur in the court's judgment approving Jones's application.

KENNEDY and DEGENARO, JJ., concur in the foregoing opinion.

Bieser, Greer & Landis, L.L.P., and David C. Greer, for applicant.

Taft, Stettinius & Hollister, L.L.P., Brian G. Dershaw, and Justin D. Flamm, for the Cincinnati Bar Association.

Dinsmore & Shohl, L.L.P., Brian S. Sullivan, Mark A. Vander Laan, and Heidi W. Dorn, for amicus curiae Dinsmore & Shohl, L.L.P., in support of applicant.

Frost Brown Todd, L.L.C., and Matthew C. Blickensderfer, in support of none of the parties for amicus curiae Frost Brown Todd, L.L.C.

Thompson Hine, L.L.P., Thomas L. Feher, Frank R. DeSantis, and Karen E. Rubin, in support of none of the parties for amicus curiae Thompson Hine, L.L.P.

Bricker & Eckler, L.L.P., and Randolph C. Wiseman, in support of none of the parties for amicus curiae Bricker & Eckler, L.L.P.

Squire Patton Boggs, L.L.P., and Pierre H. Bergeron, in support of none of the parties for amicus curiae Squire Patton Boggs, L.L.P.

Porter, Wright, Morris & Arthur, L.L.P., Robert W. Trafford, and Charles C. Warner, in support of none of the parties for amicus curiae Porter, Wright, Morris & Arthur, L.L.P.

Keating, Muething & Klekamp, P.L.L., and James R. Matthews, in support of none of the parties for amicus curiae Keating, Muething & Klekamp, P.L.L.

UPL Hypotheticals

I. *In re Application of Swendiman*, 146 Ohio St.3d 444, 2016-Ohio-2813, 57 N.E.3d 1155 (2016).

A. Synopsis

An attorney was licensed in Indiana, Connecticut (inactive), and the District of Columbia. He worked in non-legal capacity in Ohio at Fifth Third. He left Fifth Third and sought to reactivate his practice by becoming of counsel part-time to an Ohio law firm while working at his own investment company. Six months after joining the firm, he applied for admission to the Ohio bar without examination. He then stopped his investment business and began working full time at the firm while his application was pending.

A panel of the Board of Commissioners on Character and Fitness conducted a sua sponte investigation due to concerns of UPL. The panel found that because of the attorney's extensive experience in investment advising and contacts with institutional clients around the country, he was responsible for establishing client relationships and serving as a resource to the Cincinnati firm's securities group.

The attorney argued that he was allowed under Prof.Cond.R. 5.5(d)(2) to engage in his practice. Prof.Cond.R. 5.5(d)(2) provides that a lawyer admitted and in good standing in another U.S. jurisdiction may provide legal services in this jurisdiction "if the lawyer is providing services that the lawyer is authorized to provide by federal or Ohio law." The attorney argued that, because he was advising clients regarding federal law only and because he was licensed in D.C., where filings for the SEC and other federal agencies are made, he was authorized to render those services in Ohio.

However, the panel found that cases in which a lawyer's practice of law has been deemed to be authorized by federal law, such authorization occurred when the lawyer's practice had been specifically authorized by a separate federal admissions authority (e.g. practicing in from of a U.S. Bankruptcy Court in Ohio, although not licensed in Ohio, after being admitted by the bankruptcy court to practice in it). The panel found the attorney's reliance on Prof.Cond.R. 5.5(d)(2) misplaced and concluded he engaged in UPL. The Ohio Supreme Court found that, at minimum, the attorney failed to present sufficient evidence to establish that he was authorized by Ohio or federal law to provide the legal services he rendered to Ohio clients.

B. Hypothetical

An attorney was licensed in Indiana, Connecticut (inactive), and the District of Columbia. He worked in non-legal capacity in Ohio at Fifth Third. He left Fifth Third and sought to reactivate his practice by becoming of counsel part-time to an Ohio law firm while working at his own investment company. Six months after joining the firm, he applied for admission to the Ohio bar without examination. He then stopped his investment business and began working full time at the firm while his application was pending. At the firm the attorney is responsible for establishing client relationships and serving as a resource to the Cincinnati firm's securities group due to his extensive experience in investment advising and the contacts he has with institutional clients around the country. The attorney only advises clients regarding federal law, and, as noted, he was licensed in D.C., where filings for the SEC and other federal agencies are made.

Has the attorney engaged in the unauthorized practice of law?

II. *Cleveland Bar Assn. v. Reed*, 94 Ohio St.3d 139, 2002-Ohio-322, 761 N.E.2d 9 (2002).

A. Synopsis

An Ohio attorney was reprimanded for assisting attorney licensed in Pennsylvania with practicing law in Ohio. Prior to the case, the Pennsylvania attorney was found to have been engaged in UPL.

The Ohio attorney leased office space to the Pennsylvania attorney. When the Pennsylvania attorney could not settle a case, he referred it to the Ohio attorney to litigate. The Ohio attorney had a letter from the Cleveland Bar Association stating that this activity was not UPL. The Ohio attorney also included the Pennsylvania attorney in his letterhead, which stated "(Lic. In PA only) after his name, and included the Pennsylvania attorney's name in an ad for the firm published in the Yellow Pages, creating the impression that the Pennsylvania attorney was associated with the Ohio attorney. Further, when the Pennsylvania attorney referred a case to the Ohio attorney, they split the legal fee.

A panel of the Board of Commissioners on Grievances and Discipline concluded that the Ohio attorney's conduct amounted to aiding a nonlawyer in UPL, sharing a legal fee with a nonlawyer, and engaging in conduct prejudicial to the administration of justice. The Ohio Supreme Court adopted the panel's findings, conclusions, and recommendations, and publicly reprimanded the Ohio attorney.

B. Hypothetical

An Ohio attorney leased office space to the Pennsylvania attorney. When the Pennsylvania attorney could not settle a case, he referred it to the Ohio attorney to litigate. The Ohio attorney had a letter from the Cleveland Bar Association stating that this activity

was not UPL. When the Pennsylvania attorney referred a case to the Ohio attorney, they split the legal fee.

The Ohio attorney included the Pennsylvania attorney in his letterhead, which stated "(Lic. In PA only)" after his name, and included the Pennsylvania attorney's name in an ad for the firm published in the Yellow Pages. The Pennsylvania attorney is later found to have committed UPL.

Did the Ohio attorney's conduct aid a nonlawyer attorney in the unauthorized practice of law?

III. *In re Desilets*, 291 F.3d 925 (6th Cir. 2002).

A. Synopsis

An attorney was licensed to practice in Texas. He later applied for the Michigan bar, which was denied. Subsequently, he applied to the bar of the U.S. District Court for the Western District of Michigan and was admitted. The attorney had two offices, one of which was in his home in Wisconsin, where he had also been denied admission to the bar. He had another in Michigan, where his practice there was limited to bankruptcy matters in federal court.

The State Bar of Michigan began proceedings against the attorney for UPL. The parties entered into a stipulated injunction prohibiting the attorney from engaging in UPL. The bankruptcy court then fined the attorney and required him to return attorney fees for engaging in UPL, while referring the matter for en banc consideration in the bankruptcy court. The en banc panel indefinitely suspended the attorney from the bankruptcy court, and the district court affirmed. The attorney appealed to the Sixth Circuit Court of Appeals.

The local rule for the district court provided that "[a] person who is duly admitted to practice in a court of a state, and who is in active status and in good standing, may apply for admission to the bar of this Court * * *." The Sixth Circuit framed the issue involved as whether the applicable law authorizing an attorney to practice before the bankruptcy court consists solely of the federal rules for admission to the federal bar, or also includes the state rules for admission to the state bar, even when not referenced in the federal rules.

The court held that federal courts maintain the right to control the membership of the federal bar pursuant to 28 U.S.C. § 2071 and 28 U.S.C. § 1654. Thus, both federal courts and state bars have the ability to regulate attorneys. And when state licensing laws purport to prohibit lawyers from doing that which federal law expressly entitles them to do, the state law must give way.

The attorney's Michigan bankruptcy practice did not run afoul of the local rules because the local rules for the district court allowed its admitted attorneys to "practice in this Court" and defined "practice in this Court" to include counseling clients in actions or proceedings for compensation. Further, the attorney did not violate the local rule because it only required attorneys to be duly admitted to practice in a court of record of a state, and the attorney was licensed in Texas. The court noted that the same analysis and result is reached when applied to lawyers practicing in large New York or Florida firms, who happen to do most of their legal work in Michigan's bankruptcy courts.

B. Hypothetical

An attorney was licensed to practice in Texas. He later applied for the Michigan bar, which was denied. Subsequently, he applied to the bar of the U.S. District Court for

the Western District of Michigan, and was admitted. The attorney had two offices, one of which was in his home in Wisconsin, where he had also been denied admission to the bar. He had another in Michigan, where his practice was limited to bankruptcy matters in federal court, including counseling clients in actions or proceedings for compensation.

Was the attorney engaged in the unauthorized practice of law in Michigan?

IV. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 17 Cal. 4th 119, 949 P.2d 1 (Cal. 1998)

A. Summary

New York attorneys ("Attorneys") were engaged by a California client ("California Client") to pursue contract claims against another California-based company. Attorneys and California Client executed the engagement letter and fee arrangement at Attorneys' New York office. While representing California Client, Attorneys traveled to and from California on several occasions. During these meetings, Attorneys met with California Client and its accountants, and discussed the proposed strategy for resolving the contract dispute. During one trip, Attorneys met with the opposing party and demanded that the opposing party pay California Client $15M to settle the dispute; during another trip, Attorneys interviewed potential arbitrators. California Client eventually settled the dispute and the matter never went to arbitration. But before the settlement, Attorneys and California Client modified their contingency fee arrangement. The modification resulted in the arrangement being fixed fee, providing that California Client would pay Attorneys over $1M.

A year later, California Client sued Attorneys for malpractice. Attorneys filed a counterclaim for attorneys' fees for the work it performed in both California and New York. California Client moved for summary judgment on Attorneys' counterclaims, alleging that

by practicing law without a license in California and failing to associate local counsel while doing so, Attorneys violated the California laws regarding unauthorized practice which rendered the fee agreement unenforceable. The trial court agreed, reasoning that "the law is clear that no one may recover compensation for services as an attorney in this state unless he or she was a member of the state bar at the time those services were performed." The trial court left open the question of whether Attorneys may recover fees for services performed for California Client in New York, however. Attorneys appealed.

The California Supreme Court affirmed the lower court's ruling. In so doing, the Court examined what it meant to "practice law in California." The Court noted that while there was a wealth of guidance on the meaning of the phrase "practicing law," there was none on the phrase "in California." The Supreme Court held that:

> "In our view, the practice of law 'in California' entailed sufficient contact with the California client to render the nature of the legal services a clear legal representation. . . . The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, ***or created a continuing relationship with the California client that included legal duties and obligations.***"

The Supreme Court noted that its definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state—physical presence is just one of many factors to examine. The Court then explained that, "one may practice law in the state in violation of [California law] although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or more modern technological means."

The Supreme Court held that Attorneys clearly practiced law in California. It further held that the fee agreement between Attorneys and California Client became illegal when

Attorneys engaged in the unauthorized practice of law in California. The Court noted that Attorneys may be able to recover some of the fees they generated providing services to California Client from New York, so long as that work did not amount to "the practice of law in California." The Court remanded the case to the trial court to make this determination.

B. Hypothetical

Ohio Attorneys are engaged by California Client to pursue breach of contract claims against another California company. The contract at issue includes a mandatory arbitration provision and selects California as the governing law. Ohio Attorneys meet with the California Client several times—once in Ohio, and five times in California. Ohio Attorneys also meet with the adverse party when they visit California Client in California. Ohio Attorneys interview potential arbitrators, and plan to engage local counsel to assist them in the arbitration. Before the matter goes forward in arbitration, however, Ohio Attorneys negotiate a settlement.

Did Ohio Attorneys engage in the unauthorized practice of law in California?

*BONUS: Does it matter if California Client ***knew*** that Ohio Attorneys were not licensed to practice in California?

V. *In re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661 (Minn.2016)

A. Synopsis

A Colorado attorney was contacted by his mother- and father-in-law, both Minnesota residents, to obtain assistance regarding a judgment entered against them in a conciliation court in Minnesota for $2,368.13 in favor of their condominium association.

The in-laws wanted assistance in negotiating with the condominium association regarding payment of the outstanding judgment.

The Colorado attorney sent an email to the condominium association's counsel, D.R., informing him that the Colorado attorney was representing his in-laws. The Colorado attorney instructed D.R. to direct all further communications regarding the judgment to him. D.R. questioned whether the Colorado attorney was licensed to practice in Minnesota. The Colorado attorney replied that he was not, but that if he needed to file suit in Minnesota he would hire local counsel. The Colorado attorney and D.R. exchanged multiple emails over several months regarding the in-laws' assets and ability to pay and whether the judgment would have priority in a foreclosure sale. The Colorado attorney sent D.R. a settlement offer. D.R. asserted that the Colorado attorney was engaging in the unauthorized practice of law because the Colorado attorney was not licensed in Minnesota. D.R. filed an ethical complaint against the Colorado attorney soon thereafter.

The Panel found that clear and convincing evidence demonstrated a violation of Minn.R.Prof. Conduct 5.5(a); the Colorado attorney" is not licensed in Minnesota…He is licensed in Colorado…He was—although maybe not paid, he certainly has held out the fact that he represented clients, which regardless of whether they're related or not, he did represent them, admitted to representing them in a purely Minnesota case."

The Colorado attorney appealed. He asserted that he did not violate Rule 5.5(a) because he did not practice law *in* Minnesota. The Minnesota Supreme Court disagreed and held that the Panel's finding that the Colorado attorney had practiced law in Minnesota was supported by the evidence. "Appellant had a clear, ongoing attorney-

client relationship with his Minnesota clients, and his contacts with Minnesota were not fortuitous or attenuated."

The Colorado attorney argued that even if he had practiced law in Minnesota in violation of Minn.R.Prof. Conduct 5.5(a), his conduct was permitted under one of the exceptions in Minn.R.Prof. Conduct 5.5(c), which allows a lawyer admitted in another jurisdiction to provide legal services on a temporary basis in Minnesota. The Colorado attorney argued that his conduct was authorized under Rule 5.5(c)(2) because he reasonably believed that he would be able to associate with local counsel and be admitted pro hac vice if necessary. Also, he argued his conduct was authorized under Rule 5.5(c)(3) or (4) because his in-laws reached out to him for assistance on a matter within his expertise—the matter "arose out of [his] law practice." The Minnesota Supreme Court rejected both arguments.

The Court found that Rule 5.5(c)(2) "requires more than an attorney's speculation that the attorney can find local counsel and be admitted to practice pro hac vice." The Supreme Court recognized that the Colorado attorney did not take steps to secure local counsel or investigate the possibility of pro hac vice admission. Thus, the Supreme Court rejected his claim that his conduct was authorized by Rule 5.5.(c)(2). The Supreme Court also found that the Colorado attorney's conduct was not authorized under Rule 5.5 (c)(3) or (4) because the representation of his in-laws did not "arise out of" or "reasonably relate" to his Colorado practice.

Three Justices dissented from the per curiam opinion. Writing for the dissent, Justice Anderson concluded that the Colorado attorney's "assistance with a small judgment-collection negotiation for his parents-on-law, including emails to D.R., were

'reasonably related' to [his] practice in Colorado, which satisfies Rule 5.5(c)(4)." The Justice supported his position with ABA recommendations regarding Rule 5.5(c)(4) and public policy arguments.

B. Hypothetical

Ohio attorney is engaged by Minnesota client to negotiate a settlement for a Minnesota judgment. Ohio attorney emails with the opposing party's counsel to negotiate a settlement and proposes an settlement agreement.

a. Without other facts, did the Ohio attorney engage in the unauthorized practice of law in Minnesota?
b. If the Ohio attorney contacted one Minnesota attorney in the area, did the Ohio attorney engage in the unauthorized practice of law in Minnesota?
c. If the Ohio attorney specializes in debt collection and foreclosure, and the settlement is related to debt collection and foreclosure, did the Ohio attorney engage in the unauthorized practice of law in Minnesota?

VI. *In re Egan*, 151 Ohio St.3d 525, 2017-Ohio-8651, 90 N.E.3d 912

A. Synopsis

A Kentucky attorney had accepted a position at a Cincinnati law office in 2002 and practiced Kentucky law from that law office. The Kentucky attorney left that law office and joined a Cincinnati law firm in 2013. The Cincinnati law firm moved the Kentucky attorney's office to the firm's Kentucky office—although the Kentucky attorney continued to work in the Cincinnati office some of the time. The Kentucky attorney applied for admission to practice law in Ohio. The Board of Commissioners on Character and Fitness recommended that the Ohio Supreme Court disprove her application at that time because

she had engaged in the unauthorized practice of law by establishing law offices in Cincinnati, Ohio, from which she practiced Kentucky law for more than ten years. The Ohio Supreme agreed with the Board and disapproved of her application but permitted her to reapply to take the bar exam at a later date.

The Ohio Supreme Court recognized that Prof.Cond.R. 5.5, which governs the multijurisdictional practice of law in Ohio, provides certain exceptions for lawyers "establish an office or other systematic and continuous presence in this jurisdiction for the practice of law." Prof.Cond.R. 5.5(b)(1). The Court found, and the Kentucky attorney admitted, that the Kentucky attorney's practice was not temporary within the meaning of Prof.Cond.R. 5.5(c). The Court also found that the Kentucky attorney had not proven any of the three circumstances permitted by Prof.Cond.R.(d)(1) through (3) to be authorized to provide legal services in Ohio through an office or other systematic and continuous presence. Thus, the Court found that the Kentucky attorney's conduct constituted the unauthorized practice of law.

B. Hypothetical

A Michigan attorney is hired by an Ohio firm in March. The Michigan attorney immediately moves to Ohio and begins working in the firm's Toledo office, but only practices Michigan law. Five months later, in August, the Michigan attorney applies to take the Ohio bar exam in February.

a. In light of *In re application of Jones* and *In re Egan*, has the Michigan attorney engaged in the unauthorized practice of law in Ohio?

Where We Are
In Location and Law

By Edwin W. Patterson III

The Minnesota Supreme Court disciplined a Colorado attorney who was not admitted to practice in Minnesota.[1] Why should this concern us? Because 10 years ago, the Ohio Supreme Court adopted a version of the ABA Model Rules of Professional Conduct, including Prof. Cond. Rule 5.5 ("Unauthorized Practice of Law; Multijurisdictional Practice of Law"). Minnesota's Rule 5.5 isn't identical to Ohio's, but it's close enough to be worrisome.

The Minnesota court held that "engaging in email communications with people in Minnesota may constitute the unauthorized practice of law in Minnesota, in violation of Minn. R. Prof. Conduct 5.5 (a), even if the lawyer is not physically present in Minnesota."[2] The disciplined attorney was not authorized to practice in Minnesota but briefly represented a Minnesota couple by attempting to negotiate, via email, the satisfaction of a Minnesota judgment.[3]

The appellant was licensed in Colorado since 1986, where he maintained an office and practiced environmental law, in addition to about seven years in personal injury and some debt collection. His mother-in-law and father-in-law lived in Minnesota. They contacted the appellant for help regarding a judgment for about $2,400 entered against them in Minnesota in favor of their condominium association. D.R., a Minnesota-based lawyer who represented the condominium association, had initiated collection efforts on the judgment.

The appellant sent an email to D.R., stating that he was representing his in-laws and instructing D.R. to direct all future communications to him. Over the next four months, the appellant and D.R. exchanged approximately two dozen emails. In his first response to the appellant, D.R. asked whether the appellant was licensed to practice law in Minnesota. The appellant replied that he was not licensed in Minnesota, but would hire local counsel if he needed to file suit there. Subsequent emails discussed the in-laws' assets and ability to pay; the appellant attached financial disclosure forms and made a settlement offer. D.R. asserted that the appellant was engaging in the unauthorized practice of law because he was not licensed in Minnesota. After D.R. filed a complaint with the Office of Lawyers Professional Responsibility, the appellant did not respond to subsequent emails and had no further involvement in the condominium case.

The director of the Office of Professional Responsibility issued a private admonition to the appellant for engaging in the unauthorized practice of law in Minnesota. The appellant demanded that this matter be presented to a panel of the Lawyers Professional Responsibility Board, which was done. The panel affirmed the director's admonition. The appellant then filed a notice of appeal in the Supreme Court of Minnesota, contesting the determination that his conduct violated Minn. R. Prof. Conduct 5.5.

The court began its analysis by noting that Rule 5.5(a) states, in relevant part, "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction…" The appellant, however, contended that he did not violate Rule 5.5 because he did not practice law *in* Minnesota. The court noted that Rule 5.5 does not define what it means to practice law *in* a jurisdiction. Then: "Certainly, physical presence is one way to practice law *in* a jurisdiction. But, as we set forth below, it is not the only way."[4]

Because the issue of whether an attorney practices law in a jurisdiction without being physically present there was a matter of first impression in Minnesota, the court looked elsewhere. It found the reasoning in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal.4th 119 (1998) to be persuasive. To

say that *Birbrower* was a seminal case is a gross understatement. It was seismic. It sent shock waves through the national bar which reverberate even today.

Birbrower addressed California Business and Professions Code §6125 which provides: "No person shall practice law in California unless the person is an active member of the State Bar." In *Birbrower,* the Supreme Court of California considered whether a New York law firm, none of whose members were licensed to practice law in California during the representation in question, violated §6125 when it performed legal services in California for a California-based client under a fee agreement stipulating that California law would govern. Birbrower attorneys traveled to California several times, where they gave advice to representatives of their corporate client, met with representatives of the opposing party, made a settlement demand, and filed a demand for arbitration with the San Francisco office of the American Arbitration Association. Birbrower's client eventually settled the matter without arbitration. The client subsequently sued Birbrower for legal malpractice, and the firm filed a counterclaim, including a claim for attorney fees which exceeded $1 million for work it performed in both California and New York.

Ultimately, the California Supreme Court concluded that the Birbrower firm had engaged in the unauthorized practice of law in California. With respect to the more than $1 million in fees, the Court held: "We agree with the Court of Appeal to the extent it barred Birbrower from recovering fees generated under the fee agreement for the unauthorized legal services it performed in California."[5] Thus, the aforementioned shock waves.

The California Court noted that the State Bar Act, of which §6125 is a part, did not define the term "practice law" and did not define the meaning of "in California."[6] The Court said the following about what constituted the practice of law in the state:

> In our view, the practice of law 'in California' entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer's activities in the state. Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law 'in California.' The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.[7]

This language, it has been noted, is "remarkably reminiscent of the personal jurisdiction doctrine that defines presence within a state for due process purposes."[8]

Unfortunately for our lawyer helping his Minnesotan in-laws, *Birbower* provided persuasive authority to support the Minnesota Court's conclusion that the panel had not clearly erred by finding that the appellant had practiced law *in* Minnesota. It noted that he had contacted D.R., a Minnesota lawyer, and stated that he represented Minnesota clients in a legal dispute which was not interjurisdictional — it involved only Minnesota residents and a judgment entered by a Minnesota court. The appellant had advised his Minnesota clients on Minnesota law and attempted to negotiate a settlement with a Minnesota attorney. Therefore, the appellant's "contacts with Minnesota were not fortuitous or attenuated."[9]

The Minnesota court next addressed the appellant's argument that even if he had practiced law in Minnesota in violation of Minn. R. Prof. Conduct 5.5(a), his conduct was permitted under one of the exceptions in Rule 5.5(c). On this point, the seven Minnesota justices split, and delivered a four-three decision. In many cases, it might be reasonable to question the precedential value of such a decision. But this split may be viewed as a warning to the rest of us, going forward. The three justices who dissented agreed with the appellant's argument that his "temporary provision of legal assistance to his parents-in-law regarding the negotiation of a small collection matter in Minnesota" was "reasonably related"[10] to his practice of law in Colorado. The majority disagreed: "Rule 5.5 (c) is an exception to the general prohibition on the unauthorized practice of law. By interpreting the exception to apply to expertise in any subject matter, the dissent allows the exception to swallow the general rule."[11]

In the end, the answer to the question of whether an attorney engages in the practice of law in one jurisdiction by sending emails from another jurisdiction depends upon which jurisdiction you ask. The evolving law on this point is not consistent. Thus, regardless of where your feet are planted on the ground, in these situations ask yourself, "Where is my work intended to have legal effect?"

Patterson is General Counsel for the CBA.

1 In re Charges of Unprofessional Conduct in Panel File No. 39302, 884 N.W.2d 661 (Minn. 2016).

2 *Id.* at 663.

3 The Minnesota decision doesn't name the parties; the Colorado attorney is referred to as "Appellant," and the Minnesota attorney who filed the ethics complaint against Appellant is referred to as "D.R."

4 *Id.* At 665.

5 17 Cal.4th 119, 135.

6 17 Cal.4th 119, 127-128.

7 17 Cal.4th 119, 128.

8 Cynthia Fountaine, Have License, Will Travel: An Analysis of the New ABA Multijurisdictional Practice Rules, 81 W.U.L.Q. 737, 741 (2003).

9 884 N.W.2d 661, 666.

10 See Ohio Prof. Cond. Rule 5.5 (c) and Comment 14 thereto.

11 884 N.W.2d 661, 669 at fn. 4.

Tips for a Multijurisdictional Practice

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Tip #1: Know the Law

Familiarize yourself with the jurisdiction's ethical, substantive, and procedural rules.

Model Rules of Professional Conduct 5.5, 8.5, 7.1, 7.5 are the most applicable to issues associated with a multijurisdictional practice. Keep in mind that the ethical rules (and numbers) may vary from jurisdiction to jurisdiction (depending on if the state bar has adopted specific Model Rules); however, the Model Rules of Professional Conduct are a good starting point to dive into the ethical issues associated with multijurisdictional practice.

Model Rule 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) 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.

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

  (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

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

(c) 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 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.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d),

(i) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority, or,

(ii) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

- Almost all of the states have made slight changes to their versions of Rule 5.5. While some of the changes do not substantially change the interpretation of the rule, it is imperative to look at the specific rule in the jurisdiction you will be practicing in:

Same as Model Rule 5.5	Different from Model Rule 5.5
AR, IA	AL, AK, AZ, CA, CO, CT, DE, FL, GA, HI, ID, IL, IN, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WI, WY, District of Columbia.

For a document explaining the variations in each state go to the following link: https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/recommendations.authcheckdam.pdf

Model Rule 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline

if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

- As an example, Ohio attorneys are subject to discipline for any misconduct no matter where it takes place. Non-Ohio attorneys are subject to discipline for conduct occurring in Ohio.

Model Rule 7.1: COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

- Obviously, do not misrepresent where you are licensed.

Model Rule 7.5 (b): FIRM NAMES AND LETTERHEADS

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

- The key takeaway from rule 7.5(b) is for firms with multiple offices in multiple jurisdictions. Make sure you disclose the jurisdictional limitations of lawyers associated with your firm. You should do so on your website and preferably in emails too.

When in doubt, consult with internal ethics counsel or the ethics hotline regarding practicing in another jurisdiction.

- **CBA Bar Counsel: (513) 381-8213**
- Or visit the following link for a list of the current ethics hotline numbers:
    - https://www.cincybar.org/About-Us/Lawyer-Resources/Ethics-Help-Lawyer-Assistance

RULES OF THE BAR

Be sure to familiarize yourself with the definition of the unauthorized practice of law of the state you will be practicing in to ensure you are in compliance. Below is Ohio's rule as an example.

Ohio - Gov Bar R. VII(2)(A) defines the unauthorized practice of law in Ohio:

(A) The unauthorized practice of law is:

(1) The rendering of legal services for another by any person not admitted to practice in Ohio under Rule I of the Supreme Court Rules for the Government of the Bar unless the person is:

(a) Certified as a legal intern under Gov. Bar R. II and rendering legal services in compliance with that rule;

(b) Granted corporate status under Gov. Bar R. VI and rendering legal services in compliance with that rule;

(c) Certified to temporarily practice law in legal services, public defender, and law school programs under Gov. Bar R. IX and rendering legal services in compliance with that rule;

(d) Registered as a foreign legal consultant under Gov. Bar R. XI and rendering legal services in compliance with that rule;

(e) Granted permission to appear pro hac vice by a tribunal in a proceeding in accordance with Gov. Bar R. XII and rendering legal services in that proceeding;

(f) Rendering legal services in accordance with Rule 5.5 of the Ohio Rules of Professional Conduct (titled "Unauthorized practice of law; multijurisdictional practice of law").

(2) The rendering of legal services for another by any person:

(a) Disbarred from the practice of law in Ohio under Gov. Bar R. V;

(b) Designated as resigned or resigned with disciplinary action pending under former Gov. Bar R. V (prior to September 1, 2007);

(c) Designated as retired or resigned with disciplinary action pending under Gov. Bar R. VI.

(3) The rendering of legal services for another by any person admitted to the practice of law in Ohio under Gov. Bar R. I while the person is:

(a) Suspended from the practice of law under Gov. Bar R. V;

(b) Registered as an inactive attorney under Gov. Bar R. VI;

(c) Summarily suspended from the practice of law under Gov. Bar R. VI for failure to register;
(d) Suspended from the practice of law under Gov. Bar R. X for failure to satisfy continuing legal education requirements;
(e) Registered as retired under former Gov. Bar R. VI (prior to September 1, 2007).

(4) Holding out to the public or otherwise representing oneself as authorized to practice law in Ohio by a person not authorized to practice law by the Supreme Court Rules for the Government of the Bar or Prof. Cond. R. 5.5.

For purposes of this section, "holding out" includes conduct prohibited by divisions (A)(1) and (2) and (B)(1) of section 4705.07 of the Revised Code.

SUBSTANTIVE AND PROCEDURAL LAWS

- It goes without saying if you are engaging in multijurisdictional practice make sure you look up the applicable procedural rules and substantive law. Under the Model Rules of Professional Conduct, Rule 1.1(c) holds that "Competent representation requires the legal knowledge . . . reasonably necessary for the representation." Thus, even when practicing another jurisdiction you must meet your duty of competence.
- Although many states have modeled their civil rules on the Federal Rules of Civil Procedure they often have differences. You should also check local court rules and individual judges standing orders. Most can be found simply by searching the court's website your proceeding is in.
- In that same vein, you also should be aware that different states will use different terminology for similar procedural devices. For example, in Pennsylvania, affirmative defenses are called a "New Matter."
- If you cannot find case law on an issue or need assistance with navigating the rules then seek advice from local counsel. They very likely have experience with the issue you are encountering and can provide valuable assistance.

Tip #2: Retain Local Counsel

When to hire local counsel:

- Out-of-State Litigation
- Legal work directed to another jurisdiction (i.e. a real estate transaction in Texas or a cross-border M&A deal).
- Regional quirks/Local bias.

- Other unique circumstances (*i.e.,* the jurors will all have an accent you don't have or correct pronunciation of local place names ex: "Reading Road").

Hiring Local Counsel - Who to hire?

- Look for counsel who have experience with the matters involved. An attorney well versed in M&A deals or in medical malpractice defense, for example, will provide better value and insight and improve your representation of the client than a local counsel without relevant experience.
- Do your due diligence on any potential local counsel. Google them; search for them on the state's disciplinary board; and otherwise ensure you know who you are hiring.
- Don't forget to run a conflicts check with whomever you decide to hire!

Hiring local counsel--where to find them?

- Obtain referrals from colleagues
- Local bar associations
- Other Sources--Martindale-Hubbell; Case law (look for attorneys appearing as counsel of record on published decisions in your area of law); other professional associations (i.e. National Association of Railroad Trial Lawyers, National Association of Subrogation Professionals, etc.).

Defining the role of local counsel

- The retention agreement between lead counsel and local counsel must adequately define (or limit) the role of local counsel. This serves both the purpose of defining the scope of the representation, but also assuring that the client is not paying for duplicated work. But be cautious, the agreement must comply with the ethical rules for attorney-client relationships and other applicable laws such as fee splitting. Such requirements include obtaining informed consent from a client to any limitations of a given representation under Model Rule 1.2(c). The ABA addressed this issue in a 2015 blog post titled "Ethics Opinion Provides Guidance for Local Counsel Representation" which discussed a 2015 ethics opinion from the New York City Bar ASsociation. The blog post can be found here: https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2015/ethics-opinion-provides-guidance-for-local-counsel-representation/

See also, Formal Opinion 2015-4: Duties of Local Counsel, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON PROFESSIONAL ETHICS, June 10, 2015.

- If you're serving as local counsel, be sure to consult local rules and ethical rules to ensure you understand your legal and ethical obligations. Some Courts have held that even if a retention agreement limits the role of a local counsel, the local counsel cannot contract away his ethical obligations. See, e.g. *Curb Records v. Adams & Reese L L P*, 203 F.3d 828 (5th Cir. 1999).
- Even if your local counsel is serving in a limited capacity, it still is good practice to consult them early and often regarding the representation. This may avoid issue later on that could have been dodged had a conversation been had about your strategy in defending the lawsuit or your views on how to structure a deal. Such conversations may give rise to quirks of practicing in the particular jurisdiction you are in that must be considered. They may tell you, for example, that Judge X strongly dislikes motions to compel which would change how you approach discovery disputes.

Tip #3 (Litigation)-Pro Hac Vice Admission

What is Pro Hac Vice ("PHV") Admissions?

- In latin, *pro hac vice* translates to "for this occasion," or "for this turn." It is a form of temporary admission to the bar of a state where you are not licensed for the purposes of a single matter.

Rules and Process for gaining PHV admission

- Each state defines the requirements and procedures for obtaining PHV admission. To determine what is required, consult the rules of the state you wish to gain admission.
- All states require that you associate with an attorney admitted to the bar of the jurisdiction to obtain PHV admission.
- Federal court requirements vary for PHV admission. In some cases, the difference in costs to gain full admission versus PHV admission is marginal. But, some districts, such as the Southern District of Ohio, only allow attorneys licensed in the state where the court sits to be admitted to practice in that district.

Limitations (numerical; activities)

- Some states limit the number of times an attorney can obtain PHV admission in a given year. In Ohio, attorneys are limited to three PHV admission per year. Examples of other states with limitations are Alabama (5) and Florida (3). Other states, like California and Pennsylvania, have no numerical limit, but courts are given discretion to deny a PHV admission. *See*, Pa.R.C.P. 1012.1(e); Cal. R. 9.40(b).
- In addition to numerical limits, you should familiarize yourself with the limitations of what PHV counsel are permitted to do as some states will limit the role of PHV counsel. For example, in Pennsylvania, even after being granted PHV admission, the sponsoring attorney is still required to be the attorney of record and sign all filings. Going a step further, you should consult the local rules of the court your are in as some courts and sometimes even individual judges have requirements for the permissible actions of PHV counsel.

Costs

- The cost of gaining admission PHV vary from state to state. The fees also vary in terms of whether they are on an annual basis--such as Alaska--or on a per case basis--such as Pennsylvania.
- In Ohio, if you are PHV counsel on a matter for longer than a year, you will need to renew your PHV registration, though it does not count toward the three admission limit to continue a matter into the next calendar year. Gov. R. XII(2)(A)(6).
- How frequently you will need to get PHV admission should cause you to consider whether you try to gain admission to the bar. For example, if you have hit the PHV cap or if you are going to be representing a client more than a few times, it is worthwhile to consider obtaining admission by motion. This will be discussed in more detail below.

Resources:

- The Legal Information Institute at Cornell University has an overview of PHV admission from its history to its modern usage. The entry can be found here: https://www.law.cornell.edu/wex/pro_hac_vice
- The ABA has compiled a chart with some basic information regarding admission pro hac vice in all 50 states. However, the information is limited and one should consult the relevant state rules to gain a full understanding of the process for PHV admission. The document can be found here (current as of 12/8/2016):

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/prohac_admin_rules.pdf

Tip #4: Consider Getting Admitted to the Bar

Costs (PHV vs. Local Counsel vs. admission)

- Consider the costs of getting admitted pro hac vice, hiring local counsel, or applying for admission to the state's bar.
    - If you or your firm are likely to practice in a certain state frequently or you will eventually "max out" your PHV admissions, it might be practical to consider admission to the state's bar
    - In light of the fees for PHV admission: $1,350 for admission by motion (per PA Board of Bar Examiners, as of 11/2018) vs. $375 per case for PHV admission (per PA IOLTA Board, as of 11/2018). Obtaining PHV admission four times in Pennsylvania will exceed the fees necessary to obtain admission on motion
- Who bears the cost? Your firm or the client? Make sure this is clearly worked out in a fee agreement or otherwise.
- Link: "The Pros and Cons of Multiple Bar Admissions": http://www.fedbar.org/Divisions/Law-Student-Division/The-Law-Student-Lounge/March-2017/The-Pros-and-Cons-of-Multiple-Bar-Admissions.aspx

Uniform Bar Exam, easing the burden of multijurisdictional practice

- Thirty-three jurisdictions (and growing--Texas being the most recent) are now adopting the Uniform Bar Exam for attorney admissions. However, this excludes California and Florida, the #2 and #3 jurisdictions with the largest number of bar-takers
- In August 2018, the Ohio Supreme Court adopted the UBE, beginning with the July 2020 bar exam:
    - http://www.courtnewsohio.gov/happening/2018/UBE_081418.asp#.W-85YlVKiUk
- Quote from Chief Justice Maureen O'Connor: "Increasingly lawyers in Ohio have clients in other states, states along our borders and even across the nation. Our admissions systems have to recognize the growing demand that attorneys be admitted in multiple states without imposing monumental costs on young lawyers seeking to practice across state line"
- How it works: Attorneys who take the bar exam in a UBE jurisdiction may transfer that score to any other state that also uses the UBE. Attorneys are admitted into that state so long as they meet the incoming jurisdiction's cutoff scores (Ohio will recognize UBE scores from other UBE states for 5

years post-examination), pass state character and fitness requirements, pass the MPRE, and pay applicable fees. States also can limit how long a UBE score remains transferrable.
    - Some states also have a state law supplement to the UBE. Ohio is currently considering whether there will be an Ohio specific component
- More information on the UBE:
    - https://www.law.com/2018/06/27/uniform-bar-exam-gains-major-traction-across-the-country/?slreturn=20181016163226
    - http://www.nationaljurist.com/national-jurist-magazine/more-states-are-adopting-ube-giving-lawyers-greater-mobility
    - http://www.supremecourt.ohio.gov/AttySvcs/admissions/UBE/faq.asp

Corporate counsel: Possibility of a limited license/ corporate counsel status registration

- For example, in Ohio, an attorney registered for corporate counsel status may perform legal services in Ohio solely for a nongovernmental employer as long as the attorney is an employee of the nongovernmental employer. A corporate attorney may not practice before any court or agency in Ohio on behalf of his or her employer or any person except himself or herself, unless granted leave of the court or agency. An attorney who is admitted to the practice of law in another state, the District of Columbia, or a U.S. territory, but not in Ohio, and who is employed by a nongovernmental employer and, as a result of that employment has a systematic and continuous presence in Ohio as permitted in Prof. Cond. R. 5.5(d)(1), shall register for corporate counsel status by submitting a Certificate of Registration, a Corporate Counsel Questionnaire, an Affidavit of Employer, and the applicable registration fee.
- More information: http://www.supremecourt.ohio.gov/AttySvcs/AttyReg/corporatestatus.asp

Maintaining the license.

- Make sure to maintain all CLE requirements in all jurisdictions where you receive admission. Consider the practicalities of CLE compliance (cost, number of hours, and whether you must attend in-person) before deciding whether or not to seek admission to a specific jurisdiction's bar

Tip #5: Practical Considerations

One of the biggest challenges of a multijurisdictional practice are the logistics . Practicing law simply gets harder when you have to travel for any significant court event. This adds both expense and logistical complications to any representation.

Costs

- Practicing outside your home jurisdiction adds obvious costs to the representation. This includes the costs of travel, paying local counsel, PHV admission fees, and other items such as postage.
- At the outset of any representation in another state, you should discuss with your client these additional costs to set expectations for the overall cost of the representation. You should discuss your authority to incur certain costs with or without the client's consultation. For example, will the client want to approve any local counsel before you hire them or will you have full authority to decide whether and whom to hire? All such agreements should be reflected in the engagement letter with the client.

Appearing In Person

- As a corollary to costs, it is important to discuss, understand, and plan for the occasions when you, as lead counsel, want to or have to appear in person. As discussed above, there may be occasions where you have to appear in person, such as when a judge's rules require it. There may be other times when you feel for strategic or tactical reasons you need to appear in person. One example is appearing in person at depositions. Taking a deposition by phone may work perfectly well technically, but you sacrifice the ability to read the deponent's body language and to detect nervousness or evasiveness. Even though it may add to the expense of the case, it may be better for the defense or prosecution of a case to be physically present for a deposition. These decisions should be cleared with the client in advance.

Challenges with Filings

- E-Filing
    - The existence or nonexistence of e-filing wherever your matter is pending is an important consideration. This may sound like a small issue, whether e-filing is available (and what system is used) must be considered. Even in situations where you are in your home state, but

outside your home county, the availability of e-filing is an important consideration.
    - If e-filing is not available, you must make sure to reflect this in all internal deadlines for drafting pleadings, motions, or other papers. If the clerk must receive the document by X date, you will likely need to send it out at least several days in advance, even if you are sending it overnight. You should never underestimate the ability of any parcel carrier to deliver something late or not at all.
    - In addition, even if e-filing is available you should take care to make sure someone knows how to use it. If your local counsel is filing everything then this may not be an issue, but if you are handling all filings then familiarity with the system is critical. It may mean the difference between filing something properly or filing something improperly and having it rejected by the clerk and missing a key deadline.

Coordinating with Local Counsel

- If your local counsel will be assisting with reviewing filings you will also need to build this into your internal deadlines. It is a good practice to send a filing to a local counsel for review at least one week prior to the deadline, or more depending on the complexity of the filing. This will hopefully ensure your local counsel has sufficient time to review. Be respectful of your local counsel's time and try not to send things at the last minute unless it cannot be avoided.
- It is wise to have a local counsel review your filings if only to ensure that the document is appropriately formatted according to the local rules of the court you are in. You should be familiar with these rules as well, but your familiarity will likely not be comparable to that of an attorney practicing in the jurisdiction. Moreover, there may be some unspoken preferences that your local counsel may know but that are not reflected in the local rules.