Popular Threads on Solosez

Unauthorized Practice

A relative who resides in a state where I am not licensed requests that I prepare a will for her. She intended to go to Office Max and pick up a will kit. I cannot convince her to go to a local attorney, so it is either me or the will kit. My estate software allows me to tailor a will under any state law. I would rather prepare it for her rather than rely on store bought, but I do have ethical concerns. Can I simply prepare the language and just have her execute it locally according to state law?

Depends -- would you like to explain your actions to the malpractice carrier if the whole thing explodes down the line? Would your relative like to buy an insurance policy to pay for your malpractice defense when your insurer denies coverage?

No??? Then the answer is no, you may not practice law outside of your jurisdiction.

Sasha Golden, Needham, Massachusetts

Check with your local bar association or the state supreme court committee that handles such matters. You should probably get an answer over the phone. Multijurisdictional practice is somewhat unsettled at this time. My practice is predominately federal, but I do check from time to time.

William B. Richards, New Albany, Ohio

If a client merely consults an attorney on a question of state law, where the consultation takes place in a state where the attorney is licensed to practice but concerns laws of a state where the attorney is not licensed to practice and the attorney answers the consultation request is that extra jurisdictional practice?

It doesn't seem obvious to me that it is. I suspect it is, somewhat ironically, a question of the state of the law in the given state.

F. Joseph Gormley, Annapolis, Maryland

Above and beyond the unauthorized practice question I would add that I never allow anyone to sign a Will I have drafted unless I witness it. I think it is our duty, as practitioners, to make sure the person signing the document is competent and that the document is properly executed. The proper execution issue brings into play the laws of the State she resides in and thereby exacerbates the unauthorized practice of law issue. I would highly recommend you pass.

William Bates

No! Don't touch this one with a ten foot or other length pole...your

license is on the line. Explain to the relative that you are licensed to practice only in (list states) and not where she resides. Emphasize that rules for wills vary from state to state, and that the validity of wills can be highly technical. Advise the person to call a local or county bar association for a referral to someone competent, or you do THAT for the person. Lynn F. Miller

Regarding helping out of state relatives with wills, I have "suggested" will language for my sister. I didn't write it up as a start-to-finish will, but I provided paragraphs of content that she really wanted.

Then, my sister went to her in-state attorney and explained she had content she'd like reviewed and made part of her new will. She paid lower atty fees, since the drafting time was reduced, but more importantly, she got the language she wanted in a will that was prepared and finalized by her local attorney.

If you are not charging a fee, but trying to help a relative, I would think this approach is safe. Am I mistaken?

Conversely, if a local attorney wrote a relative's will, I would think you could also review a draft of that will and make suggestions for your relative to raise with the local attorney.

Are there still potential dangers with these approaches?

Marie Clear, Bartlett, Illinois

I still don't get this.

Granted, I am not an estates and trusts guy, but suppose a client, for example, asks me about states that have Illinois brick repealers. I am not authorized to practice in all such states. If I write that client a memo analyzing the state of the law in each such state am I engaging in unauthorized practice? Do I really need local counsel to sign off on the analysis for each state? I just don't see it.

F. Joseph Gormley

FEDERAL COURT GROUNDS 'SNOWBIRD' LAW PRACTICE

Lawyer With No Florida License Wants to Advise on N.Y. Issues From a Miami Office

BY STEPHANIE FRANCIS WARD

If you're not a member of the Florida Bar, you shouldn't advertise there that you practice law, even if it is to offer services for legal matters in a state where you are licensed to practice, according to a recent U.S. district court ruling.

A lawyer familiar with multijurisdictional practice laws describes this as a "no-brainer," and colleagues agree. However, some say the MJP issue, and how one defines a "temporary" practice in a state where one is not licensed, may be ripe for litigation and change.

The Aug. 8 order dismisses a civil rights action brought by Morris Ronald Gould, who has resided in Florida for more than 29 years. Gould is not a Florida Bar member, but he is licensed to practice law in New York. He wants to advertise in Florida his ability to advise about " New York legal matters," according to the order. The proposed advertisement includes a Miami address and phone number.

Gould says he brought the claim in the U.S. District Court for the Southern District of Florida against the Florida Bar's executive director and bar counsel because he did not want to be charged with the unauthorized practice of law, a third-degree felony in the state. His complaint argues that restriction of his proposed advertisements would violate his free speech rights. In addition, Gould argues that under the state's multijurisdictional practice law, he is allowed to engage in this sort of limited practice. Gould v. Harkness, No. 04-23178-CV-MORENO.

In its motion to dismiss, the defense argued Gould's proposed advertisements concern unlawful activity and are misleading. Also, the defense argued that while Gould can appear before a federal administrative agency such as immigration court, there is no state or federal law that would allow a nonlicensed lawyer to engage in a permanent, general federal practice.

"The real issue was one of misleading the public," says Barry Richard, a Tallahassee lawyer who represents the defense. "We said that we didn't care what he said he wanted to do; he was holding himself out as being able to practice law in Florida."

Gould has filed an appeal with the 11th U.S. Circuit Court of Appeals, based in Atlanta. Florida allows lawyers from other countries and in-house counsel to practice without taking the state bar exam, he says, so why can't he provide legal representation involving areas such as New York litigation and real property law?

Gould also practices immigration law in Florida, and notes he doesn't have to be a Florida Bar member to do so under the federal Administrative Procedure Act.

The Florida Bar does not have reciprocity with other states, and Gould says he has no intention of taking the bar exam there. Instead, he plans to take his case all the way to the U.S. Supreme Court, if necessary.

"I only want to practice in what I call a niche market," he says. "Hundreds of thousands of people have moved here from New York. I save them money because they don't have to fly to New York to see a lawyer, and they don't have to pay a lawyer extra money to come here."

The Florida Bar sees it differently, as do many lawyers who study multijurisdictional practice issues.

"If you're telling the public 'I'm practicing in Florida, and you can reach me there,' at that time, you've crossed the line," says Wayne J. Positan, a Roseland, N.J., lawyer who chaired the ABA Commission on Multijurisdictional Practice. "I think that's pretty much a no-brainer."

Stephen Gillers agrees. A professor at New York University School of Law, he chairs the ABA Center for Professional Responsibility's Joint Committee on Lawyer Regulation.

"Even though lawyers from one state can temporarily enter another state to assist on client matters, they can't cross a very clear line-they can't have an office in a state in which they are not admitted," Gillers says. "It's not the law you plan to practice, it's where you plan to practice law."

Lawyers interviewed say they do not know of any state that would allow Gould's plan. In the District of Columbia, lawyers licensed elsewhere can conduct a federal practice as long as it is clear they are not D.C. bar members and their practice is limited to federal court.

"The reason we take the bar exam is because we want to practice law, and unless we pass the bar exam, we can't practice," says Randolph Braccialarghe, a Fort Lauderdale, Fla., legal ethics professor. He also is a member of the Florida Bar Professional Ethics Committee.

If Gould obtained clients in New York and worked on their matters in Florida, Braccialarghe says, that wouldn't be a problem. He also notes that a lawyer licensed in Florida can provide legal advice about New York law even though he or she is not a member of the New York bar.

Consequently, he wonders if Gould's proposal is such a bad thing. Braccialarghe teaches at Nova Southeastern University's Shepard Broad Law Center, which is located in Fort Lauderdale.

"Say he lives in a high-density area where people don't travel well," Braccialarghe says. "If our goal is to help the public, I think there's an argument for that."

Rule 4-5.5 of the Florida Rules of Professional Conduct, which governs multijurisdictional practice and what constitutes the unauthorized practice of law, does allow lawyers not licensed there to provide legal services on a "temporary basis." It is based on Rule 5.5 of the ABA Model Rules of Professional Conduct.

Gould argues his proposed Florida practice could be considered temporary, which the court rejected on the basis that he travels to New York about 90 days a year. And the order notes he's lived in Florida for more than two decades.

The definition of "temporary," says San Francisco lawyer Mark Tuft, is usually where lawyers try to stretch multijurisdictional practice restraints. Tuft serves as vice chair of the State Bar of California's Commission for the Revision of the Rules of Professional Conduct.

The court "was absolutely right," says Tuft, who provides ethics counsel to lawyers and law firms. "This is a New York lawyer who is going to establish an office, and that's not what was intended by 'temporary' practice."

But according to Tuft, multijurisdictional rules, including the temporary practice issue, have not been litigated by a higher court. Also, he says,

legal advertising hasn't been addressed in a long time. He mentions Shapero v. Kentucky Bar Association, 486 U.S. 466, a 1988 Supreme Court case in which the court found that a state bar association cannot stop a lawyer from sending mail advertisements to individuals who are known to require specific legal services.

The court has changed since then, Tuft says, and if Gould frames the issue correctly, his case could be heard by the Supreme Court.

"I think there's going to be pressure and test cases pushing the envelope," Tuft says. "I don't think the current MJP formulation will withstand the test of time. It will change. How it will change, no one knows."

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I have to say that the requirement that lawyers who practice in a particular state be barred only in that state are rather provincial in these transient and technologic times. Here's a guy who wanted to make a niche as an NY lawyer serving clients with NY problems in Florida. He did not hold himself out as a Florida attorney nor did he give Florida advice. Moreover, as courts become electronic, this NY lawyer can now handle many filings from Florida.

Moreover, this guy's practice benefits consumers. Why should a person who's relocated to Florida have to trek up to NY to handle legal matters or deal with a lawyer solely by phone when there's someone available for face to face meetings. If it were up to me, I'd abolish all of these residency practice requirements.

Carolyn Elefant

I agree and I think he's got a pretty good test case.

On the other hand, this might give me grounds to shut down a couple of competitors who live in the states but practice here. 

[Although why you would want to do that, rather than living here and practicing there, is beyond me!]

Andy Simpson, U.S. Virgin Islands

Just how far off is this state? Getting the relative to come for a visit and execute the will while she is there dodges the issue and produces a valid will.

With all due respect to other responders, even if it would be deemed a technical violation, I can't imagine your disciplinary authorities (or those in her state) don't have bigger fish to fry than going after someone who drafts a will for a relative for free to keep them from filling out a form they bought, perhaps incorrectly. Of course if it is a multi-million dollar estate and she is disinheriting children, I withdraw that previous sentence, as who knows how it might come down. 

Jim Calloway Director, Oklahoma Bar Association Management

Assistance Program

Client wants me to draft a Power of Attorney for another person. POA is to me mailed to individual for execution in Federal Prison in another state. POA concerns Florida property.

Something doesn't sit right with me, drafting a doc in Florida and having an individual in another state sign it, even though all property is in Florida.

Anonymous

UPL doesn't bother me as much (but I don't know local rules there) as much as idea of drafting POA to be signed by a third party. I generally don't draft POAs until and unless I've spoken with the person to be signing and bestowing the power, particularly if the "client" will be recipient of the power.

You should probably also be familiar with the applicable laws governing prisoner asset transfers. In many places, jurisdictions, if not the penal institution, will have claims to or want part of prisoner assets to cover fines, costs, court-ordered restitution, costs of incarceration, etc. You would need to know what the policies are for that penitentiary.

Moreover, you probably should avoid corresponding with the prisoner about his assets, so as not to inadvertently disclose their existence to the authorities. I suspect that someone needs to sit with the prisoner face to face to discuss the contents and import of the POA, and it would help if that person could also satisfy all notary requirements for the document (if there's a need for a witness, may need to bring along a law clerk or associate, assuming can bring another person into the interview room -- and, that assumes that the prisoner qualifies for face to face attorney meetings, not no-contact visits, where any documents will need to pass through the deputy's hands).

Barry L. Lippitt, Southfield, Michigan

Random thoughts-- 1. Imprisonment in another state does not (by itself) change the prisoner's domicile, or so the consensus runs on the question of diversity jurisdiction. Absent a change of domicile, you are preparing a Florida doc for a Florida domiciliary, respecting property with a situs in Florida. Thus no UPL. 2. If the POA concerns Florida *real* property, the validity and effect of its execution would be judged by Florida law. It might be UPL for a non-Florida lawyer to draft the doc, but would not be on your part, regardless of domicile. 3. If domicile has changed, any POA respecting personal property would have to be prepared by an atty licensed in the new domicile, since the legal situs of the personalty would now be in the new domicile. However, since the physical location of the personalty is in Florida, the POA would have to satisfy Florida law, and I see no problem with drafting a Florida POA, and finding a lawyer in the other state to conform it to that state's law. This is only my opinion, but perhaps it will provoke other answers. Bob

J. Robert Thompson, Lilburn, Georgia

Here's another question: Aren't prisoners under a disability at law? Can

they validly execute a POA without the assistance of their own attorney/GAL to begin with?

Just tossing in my monkey wrench to see what happens....

Mary L. C. Daniel, Winchester, Virginia

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