

Is This Practicing Law in a Different State?

A June 2010 discussion on SoloSez, the email listserv for general practice, solo and small firm lawyers

So I'm admitted to practice law in a midwest state and my potential client resides in MD. He wants me to represent him in drafting an exclusivity agreement w/ a company in asia.

He is initially planning on setting up shop in MD but plans to expand this business all across the US.

His exclusive license to distribute this product is for the entire country not just MD.

If I draft this agreement, is this practicing law in MD? or can I draft this agreement w/ a law license from a different state?

I think you're OK. Just make sure the client knows where you are licensed.

Trippe S. Fried, District of Columbia

If you're not physically located in a state, you're not practicing in it.

Kevin W. Grierson, Virginia

Kevin & Stephanie-

Whose turn is it to answer?

Brian H. Cole, California

I've heard of, but not yet seen, a recent CA case where a client was sued by its NY lawyers for the fee for working on an agreement. CA court denied the NY firm its fees as it was not licensed to practice there.

I know, it's hearsay until I actually find the case. But it comes from a reliable source.

Roger Traversa, Pennsylvania

Not true according to the various discipline commissions. Ohio for example has ruled if you get a client over the Internet for something in your state you are still bound by their rules.

To me the issue is whose law is the product to be used under? If the contract you prepare says its is to be governed under MD law than there is possibly a problem.

Bob Moss, Illinois

I just had a similar situation. Client (that I knew previously) calls me from AZ and asks me to review a sale of business K. I called the CA bar ethics hotline to check into this issue they said. 1) If a client is sitting in my Office in CA, I can advise him on any law anywhere so long as I am competent. (this is based on some CA caselaw) 2) CA lets lawyers from other jurisdiction practice transactional law in CA (Multi-jurisdictional practice RULE 9.48)

So Im OK with the CA bar.

The issue is does AZ considers this practicing law in AZ without a license?

Comments? Anyone know if AZ has a similar transactional law rule?

Kevin Welch, California

I think you just raised the point I'm about to make: It's generally the state that you're not licensed to practice that prosecutes non-licensees for UPL.

Dan X. Nguyen

As usual, I am going to chime in, in agreement with Brian. The unauthorized practice of law has to do with *where* the lawyer is located and practicing law, not where the client is or what law governs the matter in question. I can, for instance, sit in Minnesota and represent a lender making a loan to a borrower in Iowa. Or I can represent a borrower incorporated under the laws of WI and render an opinion letter as to whether the security interest governed by the WI UCC is properly perfected, even though I am not licensed in either Iowa or Wisconsin. I would not be practicing law without a license.

The caveat I always like to add to this comment is that there might be a malpractice issue to consider. Just because a lawyer is not licensed in a state does not mean the lawyer gets a "pass" on a matter governed by that state's law. I would be held to the same standard of care and knowledge as

a lawyer licensed and practicing in that state.

Regards,

Stephanie

Stephanie Hill, Minnesota

Where you are located has nothing to do with where you are practicing law.... I can be practicing law in the District of Columbia but I don't live there. I can be drafting a will for a family member in Illinois even though I don't live there (nor am licensed there-which would be the UPL).

Each state has a slightly different rule of what is "practicing law." In this case, I would look at Maryland's definition. For whatever reason, it seems that contract drafting seems to float in a grey area....

In my opinion (without researching Maryland law), I would associate with a Maryland licensed attorney to review your work to make sure everything is compliant with Maryland law. I would also disclose in writing to your client that you are not licensed in Maryland but will be supervised by an attorney who is.

Cari B. Rincker, New York

Where you are located has EVERYTHING to do with where you are practicing

law, because only the state that you are located in has jurisdiction over you for UPL. The California case (which is something of an outlier) was NOT a UPL case, but a case in which the CA court refused to allow a suit for fees to go forward.

If anyone has seen any case in which a lawyer who is physically located in one state and practicing in that state was prosecuted for UPL in another state in which he or she had not set foot to practice law, I'd love to see it. But frankly I don't think it exists.

Kevin W. Grierson

I recall a case where Florida went after - and got - a Georgia lawyer who prepared a deed in Georgia for Florida real estate and tried to have it recorded in Florida.

Deborah G. Matthews, Virginia

That seems perfectly reasonable to me. And it's exactly why I think UPL can nab attorneys who do work for clients residing in a different state.

UPL is a criminal offense. Crimes don't always require physical presence in the prosecuting jurisdiction. There are plenty of computer and telephone crimes that can be prosecuted when the defendant remotely does something in another jurisdiction.

Why is UPL any different? If the goal is for a state to protect it's citizens from unlicensed practitioners, it shouldn't matter if those unlicensed people are physically in the state or not. All that should matter is if the unlicensed person has done enough to tie his activities to the prosecuting state.

Maybe I'm missing something.

Andrew Flusche, Virginia

I can't find the Florida case involving the Georgia lawyer, but the "hook" for Florida jurisdiction might have been the attempt to record a document in Florida--the document was sent into the state for recording. Still, that seems a bit of a stretch to me.

As for the California case mentioned earlier, it was *Birbrower, Montalbano, Condon & Frank, P.C., et al., v. Superior Court*, 70 Cal. Rptr. 2d 304

(1998), and that case turned on the enforceability of a legal services agreement from an out of state law firm for services actually performed in California, when no one in the out-of-state firm was licensed in CA. The Cal. Supremes said in that case:

"Contrary to the Court of Appeal, however, *we do not believe the Legislature intended section 6125 to apply to those services an out-of-state firm renders in its home state. *We therefore conclude that, to the extent defendant law firm Birbrower, Montalbano, Condon & Frank, P.C. (Birbrower), practiced law in California without a license, it engaged in the unauthorized practice of law in this state. (§ 6125.) We also conclude that Birbrower's fee agreement with real party in interest ESQ Business Services, Inc. (ESQ), is invalid to the extent it authorizes payment for the substantial legal services Birbrower performed in California. If, however, Birbrower can show it generated fees under its agreement for limited services it performed in New York, and it earned those fees under the otherwise invalid fee agreement, it may, on remand, present to the trial court evidence justifying its recovery of fees for those New York services."

In other words, work performed by the New York firm in New York for the California company was not UPL.

If anyone has the case cite to the Ga. case that Deborah mentions I'd love

to see it.

Kevin W. Grierson

There must be something else going on in that fact pattern as well. I hardly imagine that if you wanted to create a contract between a NJ resident and an IL resident that you would need both sides to be represented by dual-licensed counsel in order to avoid UPL.

Vincent Kan, Illinois

In the end if you do a no no all of the states you are licensed in will report to each other. I'm licensed in KY and FL.

If I am in TN or GA doing a contract for a KY buyer and a FL seller, that cannot be malpractice.

But if I'm in KY or FL writing a contract b/w GA and TN buyer and seller. I suppose that would be UPL and I would be prosecuted by the state I'm in and they would report to the other state I'm licensed in. I think.

You could be the best atty in the world but if you come to FL, practice law, and don't have a FL license they will be on you. The longer you have been a atty the more expensive it is to sit for the FL bar and you have to sit for the bar here. They will try to find a way to exclude you from admission even if you pay \$2k-\$3k and have a perfect score on the FL bar exam. IF you ever think you want to be licensed in FL start soon.

Royce Brent Bishop, Florida

Great Discussion!

One more question about my situation (CA attorney in CA contacted by AZ resident asking me to review a sale of business K in AZ) I feel the CA bar lets me advise a client in my office on any law anywhere in which I feel competent. (my interpretation of how CA sees the issue) As I said before, I think the issue is the client was in AZ and contacted me and whether AZ considers this UPL.

Academic Question: Lets say AZ bar does consider it UPL. If AZ resident initiates contact. Calls me, emails K to me. Calls me agains we discuss then pays me. Does AZ even have jurisdiction over me?

Kevin M. Welch, California

Perhaps. If you are giving advice on Arizona law and you are not licensed in Arizona, I could see the Arizona authorities contending you are engaging in the unauthorized practice of law in Arizona.

I am presently handling successions (probate) matters for clients in Tennessee, Oregon, California, and Texas, and am discussing matters with a couple of people in Florida. I've handled estates for clients in Iowa, Wisconsin, Illinois, Alabama, North Carolina, South

Carolina and Texas, among other states. All contact is by telephone, mail and e-mail, but the estates are all in Louisiana and Texas (where I am also licensed).

The way I've been reading some of these messages is that the potential is for me to be accused of UPL because the client is in these other states, but the matter at hand is in Louisiana or Texas, and I am not licensed to practice law in their jurisdictions.

The person who was convicted of UPL in Florida for preparing a deed in Georgia, with clients in Georgia, and attempting to record it in Florida seems odd to me. I'd be very interested to find out what is really behind that case, if it was recalled correctly. It seems unlikely the issue was as simple as the attempt to record a deed in Florida.

What would Florida do if I prepared a deed in Louisiana for a Louisiana client covering Florida property and told them to have it recorded in Florida? Would they be committing UPL? Can only attorneys licensed in Florida record deeds in Florida counties?

Mark E. Peneguy, Louisiana

Keep in mind that Florida is (er, at least from everything I've ever heard) is very protectionist.

Brandon D. Ross

I'm always a little surprised at how little we really know about UPL issues...

Beyond that, the real issue is always this: what law will control the agreement? Then ask whether you know that law well enough to avoid any issues or quirks.

Brandon D. Ross

It's a amazing to me how much "heat" this topic always generates, and how little "light."

On the side of this not being UPL, Kevin, Stephanie, and I have cited cases, ethics rules, ethics opinions, reports of the ABA Commission on Multi-Jurisdictional Practice, and so on, all saying that what is discussed is not UPL (n.b.: none of us is saying this may not be malpractice, which is an entirely different issue).

On the other side, we get urban legends ("I head about a case from the State of _____ that said this is not okay"), paranoia ("I've always heard that the State of _____ is a real bear about UPL, and

I sure wouldn't want to get cross-ways with them") and plain-old fear ("UPL is a criminal violation; is it worth getting in trouble to help some client?").

We all know that BigLaw is practicing nationwide. Are solos just going to concede that right to them?

If someone can cite to an actual case or an ethics opinion saying that any of this is an issue, then I'm all ears. Otherwise, I think this whole topic is way overblown. It's not UPL, folks.

Brian H. Cole, California