

Some UPL Questions

I'm interested to hear what your opinions are on the following questions regarding the unauthorized practice of law. These don't apply to anything I'm doing, but I'm curious since this isn't a topic that I'm an expert on.

Let's say that an attorney is licensed in State A only. Hypotheticals...

- 1) Attorney drafts a contract for a company in State B, which will govern a transaction taking place only in State A.
- 2) Same as #1, but the contract states "The laws of State B will govern the interpretation of this contract."
- 3) Attorney drafts a contract for a company in State B, which will govern a transaction that may take place in either State A or State B, or could cross jurisdictional lines at any moment.
- 4) Attorney drafts a contract for a company in State B for a matter that takes place only in State B.

Let me know what you think, cause this has been a puzzler for me.

So long as the attorney is sitting and working within a state they are licensed in they are fine.

Just because you are licensed in state A does not mean you cannot represent someone who lives or is located in State B. It also does not mean that you cannot deal with state b laws. Your license does not limit you to only representing people from state a or laws of state a. Licensing limits you based on your geographical location (ie were you normally work, for example if you go out of state to visit relatives or for vacation, you can still do your work and take calls etc), not substantive.

Now, the question of CAN you is different then SHOULD you. For example, it is probably not a good idea to do #4 and probably not #2 unless your very familiar with the laws of state b.\

Erin M. Schmidt, Ohio

That's what I was thinking too. I was discussing this topic with someone who thought that advising someone in State B of their legal responsibilities under State B law was essentially practicing in State B. This threw me for a loop.

Michael Jack Kaczynski

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Unless lawyer is practicing from State B even though license only in A, none of the above is UPL.

Kevin W. Grierson, Virginia

Malpractice, maybe. UPL, no. This has been discussed extensively-you might want to search for UPL in the archives.

Kevin W. Grierson

It is my understanding the inquiry is slightly more complicated. The ABA has a Commission on the Multijurisdictional practice of law, which did a 50 state survey and issued a report about 10 years ago on this topic. It is on the ABA website. Look it up and then look up the various states involved. Certain states follow the model you outline above. Certain states have notoriously more strict rules.

The thing to consider is that you can, by violating, for example, California's rules on this issue, theoretically be brought up for sanction and/or disbarment by the California Bar. Not licensed by California? Sorry -- that does not put you in the clear. If California sanctions you for the unauthorized practice of law, the ethics of whatever state you ARE admitted to require you to disclose this to your own bar. Not to mention your malpractice carrier.

The point is that if you do a cross border transactions you have to know not only what the Model Rules consider acceptable, but also what your own bar state (or states if you are admitted to more than one) considers acceptable, and also what is acceptable in the bar you are not admitted to but has jurisdiction over the state in which your client resides.

I had to do a lot of research on this issue when I opened my firm, which works with international cross-border transactions. Thus I have clients from all over the country and world, and the applicable law may vary widely. We often have local counsel for local law issues, but I still deal with multijurisdictional issues on an every day basis.

There is an ALI CLE on this topic on July 10th entitled something like "If it's Tuesday, this must be Omaha." I am planning to listen in to see what the new issues are in the area. The law and the world have really changed in the last 10 years... But you know how slow our rules of professional conduct change.

Michelle Rozovics, Illinois

The thing to consider is that you can, by violating, for example, California's rules on this issue, theoretically be brought up for sanction and/or disbarment by the California Bar. Not licensed by California? Sorry -- that does not put you in the clear.

It does unless you are subject to California's long arm statute, which requires a minimum contacts with the forum analysis as to whether or not they have personal jurisdiction over you. Otherwise, they can pound sand. D.A. "Duke" Drouillard, Nebraska

It will remain a puzzler, due to state variances in approach to UPL and enforcement. To my view, the first issue is clearly okay and the last one generally not. Others are arguably okay, but some states would take issue with it. Additionally, many would take issue with my views so you will get no consensus.

Personally, I analyze it carefully if I am engaged but do not have to deal with the issues regularly, largely due to the size of Texas. Here at least there are additional latitudes for someone acting as in-house counsel, working on behalf of their employer. In such case, no issues with any of the scenarios would exist.

Darrell G. Stewart, Texas

There are lots of ways this can come up.

For example, I frequently got asked whether or not Missouri or IL would be better to file for divorce, child support etc. Or you might have an IL resident owning property in IL and MO and wants you to write a lease agreement that works in both states etc (and may want a choice of law clause in it). Or you could be drafting a contract for a Missouri client to be used in IL.

The point of which is that you are not required to be licensed in state A to work with or apply state A laws. Licensing is a form of regulation. It regulates who, in that state, can do the substantive work, but NOT what the substantive work is.

As Duke point out you need sufficient contacts with Sate B in order for State B to have the jurisdiction to apply it's regulations to you. California has no right to attempt to regulate what a lawyer in Missouri, who has no contact with CA (except the occasional client who might live there).

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The analysis is different if, for example the lawyer sitting in Missouri starts advertising in IL, then you would have sufficient contact to allow IL to regulate the attorney.

If I write a contract in MO for a CA client stating CA law will apply and I have never advertised in CA (ie the client contacted me) nor aimed my advertising at CA residents, CA has no jurisdiction to regulate me as I am NOT practicing in their state.

On the other hand, it's probably not good for my malpractice chances..

Erin M. Schmidt

Some of the sanction cases have indicated that websites which can be seen by the target audiences in their state are enough to establish minimum contacts.

I am not randomly spouting off on this topic. I researched it. Granted, that was probably three years ago or so, but I spent A LOT of time researching this issue.

Ohio, Texas and California have the toughest rules. The most important thing to be careful of is a physical presence in the state. This is true. I recall one case where someone drafted an agreement with an arb clause that applied California law and was to take place in California. Not a problem. Then the lawyer went to California to sign the agreement. Nope. UPL. They tried to say since she did not do the arb itself no UPL. But the bar said stepping foot into the state to sign the agreement is enough.

So if you are never going to visit your client then ok. What if you are? Is it UPL? Depends on state and what you were doing there.

Again there is a webinar on this topic this week. I am attending. Will let you know if i learn anything new. I am sure i will

Michelle Rozovics

I'd be interested in seeing some of those opinions that you've researched. Do you have links to them?

Kevin W. Grierson

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I am in the midst of a crazy week but will try to get them together in the next two weeks or so. Also with the new CLE I am listening to on the 10th I expect i will have some new info to pass along

Michelle Rozovics

Many years ago I had a similar discussion with a Massachusetts attorney (not licensed in the client's home state) who drafted a Will for a couple domiciled out-of-state (for what it's worth, within easy driving distance of Massachusetts). The attorney opined that because the out-of-state couple owned some land in Massachusetts, the Will could be drafted and executed in Massachusetts under Massachusetts probate law. The attorney felt that land ownership (business ownership or some other major endeavor) would make Massachusetts a valid jurisdiction for drafting, execution, and choice of law. The attorney saw the situation akin to when a Will exists and the couple relocated to a new jurisdiction that they did not have to obtain a new Will because of the relocation of domicile.

At the time, and perhaps now, the execution requirements were different in the two states (e.g., number of witnesses required). I believe the Will needed to be drafted and executed under the probate law of the state in which the couple held domicile at the time of the execution. Is this correct? It simply would make no sense to risk the downside of the Will being invalidated. There was no emergency and the matter had sat for months before settled.

On the UPL side, and to Erin's comment regarding sufficient contacts, although this attorney was no licensed in the client's home state, he too resided in that state, owned property in that state, and had performed closings in that state (which did not require a law license to perform closings).

Directly to the UPL issue, can an attorney licensed in jurisdiction A draft and execute (in jurisdiction A) a Will for a client who is domiciled in jurisdiction B if the attorney is not licensed in jurisdiction B?

On the practical side, does it even make good business sense? In this case we have a Will, a low profit-margin service particularly in this age when laws change so frequently. If it is not UPL, at what profit-margin does it begin to make business sense? No doubt this is a loaded question dependent upon client relationship, subject matter, expertise, etc.

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Finally, for those who are licensed in multiple jurisdictions, how difficult is it to stay current in those jurisdictions? Does it require you to limit your practice? I cannot envision a multi-jurisdictional general practice, doe it possible?

William M. Driscoll, Massachusetts

Many states, if your not actively practicing in that state, require you only to fulfill the requirements (CLE's etc) of the state your currently admitted to and working in

Which reminds me that I need to log in and submit my blank CLE form to Missouri

Erin M. Schmidt
