

Is Writing Health Directives for All 50 States URL?

Hi all,

I see a strong need for health care workers (and everyone else) to get health directives, living wills, etc. I am a CA attorney (living in Las Vegas) focusing on estate planning- every time I have tried to find out on my own if I could write estate plans for those residing outside of CA, I got a lot of mixed messages and figured the answer was “no.”

My dumb question: Can I write health care/advance directives for anyone in the US, or just CA residents? I want to avoid the unauthorized practice of law, but I ask this now because I own a program that creates plans for all 50 states, and I'd like to really be as helpful as I can right now. Again, I've always assumed the answer is “no.” If the answer is “no,” is there any sort of workaround?

When a question about whether I am permitted to do something, I contact the Virginia Bar's ethics hotline. Be aware too that if the work involves a second jurisdiction, that you may also want to check the ethics rules in that second jurisdiction too.

Deborah Matthews, Virginia

Can you? Probably, so long as you are not advertising to client's outside of your jurisdiction you are not availing yourself of the other jurisdictions' laws (caveat I am simplifying that)

Should you do this is likely the better question. Are you prepared to research the laws in multiple states to make sure you are correctly identifying each and every potential problem? How complicated of a document are you willing to work on to achieve that?

I've done a few documents for family members that complied with their home states and I did the research and looked at older documents they had done.

Further, if I screwed up the documents, it is a no harm no foul situation since it would all fall onto me to make decisions/inherit anyways.

Erin M. Schmidt, Ohio

If I were you, I'd be less concerned about writing documents for residents of states other than California and more concerned with whether I was violating Nevada's UPL rules by practicing law in Nevada without being licensed there.

Speaking very broadly, most states' UPL rules have historically addressed two things: (a) representing a client in the state's courts (or sometimes other tribunals), and (b) engaging in the "practice of law" while physically present in the state. Note that I did not list there anything about preparing a document governed by the law of another state, not did I list preparing a document governed by the law of the state while not physically present in the state.

Some of this *may* be changing because of the prevalence of "remote practice" (sometimes known as "virtual practice"), but personally, I wouldn't bet my license on it (especially considering the requirement to report to the states in which I am licensed any accusations that I have violated the licensing laws of another state).

Of course, your mileage may vary.

Brian H. Cole, California

Yup I missed the whole living in Las Vegas part

You cannot do ANY legal work in Nevada, even for CA residents unless you are licensed in Nevada. You live in Nevada, you have availed yourself of its laws. You are governed by their legal rules requiring being barred.

You cannot do ANY legal work there. Not even work from home for a firm in CA doing CA work unless it is work NOT covered by state law (example SSA or other federal work)

There are, of course, caveats to that. For example, it was not considered UPL for me to take a phone call or work on a client's case while on vacation or visiting another state as it is related back to my work in my licensed state and I am not in the other state for the purpose of doing legal work

Erin M. Schmidt

Thanks all, I called the CA ethics line per Deb's suggestion and got the same advice. Trying times for sure.

Thanks again,

Ashley Tribulato, California

I think in California you are okay as they allow document preparation by non-lawyers, I would limit it to Health care Directives and maybe statutory power of attorney forms.

Martha Jo Patterson, California

I am somewhat of an expert in that area because I practice Elder Law and I teach some health care workers in Pennsylvania, and I give presentations on Advance Healthcare Directives.

In Pennsylvania, we have our own statutory form. It is well known and accepted by doctors, judges. It is a part of the statute.

We have statutes that set out due diligence requirements of agents acting with a form. There are about 84 statutes in the laws that govern the documents.

Our laws are quite different from our neighboring state, New Jersey.

There is so much diversity in the state statutes because by the time the "Uniform Law Commission" came up with a model law, the states had already passed their own laws.

Bob Gasparro, Pennsylvania

In analyzing these types of questions, be careful not to conflate competence (or the presence/absence of malpractice) with UPL. While they may have a slight relationship to one another, they are generally independent.

It is very possible to commit UPL competently, and to commit malpractice while not committing UPL.

Brian H. Cole

I get the part where I cannot perform legal work in a state where I am not licensed to practice law even if it is for clients in the state I am licensed at.

However, assuming the following scenario:

Client lives and works in State B. But client is still registered in State A and also sees herself as a resident of State A.

Client contacts attorney in State A for estate planning purposes while still in State B.

Could attorney, who is licensed in State A, doing business in State A, help client even though client lives and works in State B.

While client is still registered in State A and considers herself as a State A resident, I am having a tough time to see any benefit in client to ask a State A attorney to draft these documents. I do not believe that the DPOA or advanced healthcare directives would work in State B.

And because client lives and works in State B it would be better, in my opinion, to have an attorney from State B to draft these documents.

What do you think?

Thank you and you all stay safe and healthy!

Alexandra Kleinfeldt, Florida

DPOA and Healthcare directives are state specific. I do not know of a more useless document than a health care directive that the provider won't recognize and usually by that time the "client" is beyond being able to execute a new document. Have the client seek legal counsel in the state where the documents are most likely to be used.

John Martin Miles, Georgia

John, thank you.

That is what I thought. It doesn't help her if she has the documents from State A and something happens in State B and the documents are not recognized.

Alexandra Kleinfeldt

As I said before, don't conflate competence (or malpractice) with UPL.

In effect, your question is which lawyer (or a lawyer in which state) would be best to advise this particular client about estate-planning documents. Secondly, you are asking (it seems) what forms of various estate-planning documents (such as a will, trust, or DPOA) would be best for this particular client.

That is an entirely different set of issues from whether any particular lawyer is engaged in UPL. If the lawyer in your scenario is licensed in State A, has no offices outside of State A, never appears in court outside State A, and does not solicit clients outside of State A, I have great difficulty conceiving how the lawyer would be committing UPL. The client in your scenario contacted the lawyer at the lawyer's office in State A—that is not UPL.

You seem to think that the lawyer should have advised the client that it would make more sense for the client to speak to a lawyer in State B about preparing the appropriate documents. That may well be, but it does not convert the lawyer's actions into UPL (whether it is malpractice or not I cannot say).

Brian H. Cole

I guess that I have a difficult time in categorizing the client's needs.

The client is requesting assistance with estate planning and advanced directives. Client considers herself to be a resident of State A and is registered in State A. Client provides addresses and asset information for State A.

If we stop right there, I think we all can agree that there is no issue.

But, considering that client tells attorney that she lives and works in State B changes the entire matter.

I assume that there are attorneys out there who would just be drafting the documents, take the client's money and that's it.

Which, in my opinion violates the rules of professional conduct and ethics rules. I agree that this is no UPL.

But it most likely opens the door to a malpractice claim in my opinion.

Wouldn't you agree that a person should have advanced directives for the jurisdiction in which said person lives and works?

If a person lives in State Y but has to cross the border to State Z every day for work, I would go with State Y. But would suggest to additionally get advice for State Z.

I appreciate your thoughts Brian.

Stay safe.

Alexandra Kleinfeldt

I won't review the laws of each jurisdiction, discussing the issue with an attorney in the neighboring jurisdiction and see if there is a document which will satisfy the requirements of both states or to have two directives. The cost of a second directive is less than the costs incurred to defend the document in state Y.

John Martin Miles

I concur that it is not UPL.

I don't know enough about the substantive laws relating to estate planning to comment on what documents are appropriate.

But I don't understand why you think this would "violate [] the rules of professional conduct and ethics rules"—perhaps because I don't understand the substantive law. What specific rules of professional conduct and ethics rules do you think are violated?

What if the situation were this:

- Client says she is working on a short-term project in State B, and has rented a house there for the duration of the project because that is more appealing than living in a hotel room for the length of the project.

- Whenever possible (such as long weekends), Client returns to State A, where she maintains what she considers her permanent residence.

- At the end of the project, Client intends to return to State A, and to live there indefinitely.

- Lawyer explains to Client the potential that some accident could befall Client while Client is physically present in State B, and that documents prepared in accordance with State A law might not be fully effective in State B to carry out Client's intentions.

- Client nonetheless instructs Lawyer to prepare documents in accordance with State A law, because that is where the bulk of Client's assets are located, and where Client intends to live as soon as the current project is finished.

As I said, I don't know the applicable substantive law, but it doesn't strike me that Lawyer would be violating any Rules of Professional Conduct or ethics rules under those circumstances. And, assuming that Lawyer competently prepares estate documents (in accordance with the laws of State A), I don't see how that is malpractice.

Of course, I am sure that one could modify those facts and generate a problem, but I haven't seen it yet. After all, I understand "citizenship" of a state is a function of two things: physical presence in a state and intention to remain there indefinitely. In my hypothetical, Client established citizenship in State A before temporarily moving to State B for purposes of a short-term project. Client may be physically present in State B, but she has no intention of staying there indefinitely, and she has maintained her connections to State A (including intention to remain there). I think this comes up frequently in the context of members of the military, who consider themselves citizens of the state where they plan to return, even though they may be temporarily at a "duty station" in another state.

Brian H. Cole

My point of a violation was if the attorney knows about the living situation of client and is aware that the documents the attorney is drafting will most likely not be valid in State B and does not inform client accordingly. Attorneys have the role of advisors and this is something an attorney would need to advise the client about. If the client has been informed and still wants to move

forward with attorney drafting the documents for State A then the attorney has done everything needed.

In regard for your situation, you are correct. It all comes back to what did attorney tell client. As long as client can make an informed decision based on attorney's advice it is all good.

I appreciate the thought exchange.

Happy Easter to all!

Alexandra Kleinfeldt