Professional Liability Defense QUARTERLY

That's The Way: Conforming Your Multijurisdictional Practice to the Rules

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In March 2023, the Illinois State Bar Association (ISBA) issued Professional Conduct Advisory Opinion 23-01 related to the unauthorized practice of law that has ethics lawyers across the country fielding numerous questions. ISBA Opinion No. 23-01, issued March 2023, available at www.isba.org/ethics. If you have ever found yourself analyzing an ethical issue related to multijurisdictional practice and the unauthorized practice of law, you know there are multiple layers of analysis. First, you must consider the Rules of Professional Conduct which apply to the jurisdiction in which you are licensed. Mary F. Andreoni, ARDC Ethics Education Senior Counsel, "The Ethics of Working Remotely from Another Jurisdiction," December 21, 2020. You must also consider the application of the Rules of Profession Conduct, and if applicable the tribunal of the jurisdiction in which you are interacting and not licensed. This is where ISBA's Opinion 23-01 comes into play.

Illinois' ethics advisory opinions have no force of law or any relationship to the Illinois Supreme Court, which is the final arbiter of the meaning of the Rules of Professional Conduct. Also notable, is that Illinois does not have a unified bar and the ISBA is not the voice of the Illinois disciplinary authority. Attorney Registration & Discipline Commission (ARDC) is an agency of the Illinois Supreme Court, which pursuant to the Illinois Constitution, is the sole Illinois disciplinary authority. Nonetheless, the opinion is causing ethics partners to field a number of questions, in large part because of the following factual scenario that forms the predicate for the opinion:

> A non-Illinois lawyer (admitted only in Florida) has friends living in Chicago, Illinois. One of the Chicago friends contacted the non-Illinois lawyer seeking assistance regarding an employment matter. The Chicago friend's former employer has refused to pay earned wages and is refusing to provide a W-2 form. The non-Illinois lawyer is considering sending a demand letter to the former employer in an effort to resolve the matter for her friend. The demand letter would be signed by the non-Illinois lawyer in her capacity as a lawyer ("Esq."). The non-Illinois lawyer is willing to provide her legal services pro bono. In the event the matter cannot be resolved, and litigation is required, the non-Illinois lawyer is willing to apply for pro hac vice admission in Illinois or would refer the matter to an Illinois lawyer. ISBA Opinion 23-01 at 1-2.

Does a lawyer engage in the unauthorized practice of law by sending a demand letter in this situation or do the temporary safe harbor protections of Illinois' Rule 5.5(c) apply? There is little argument that the temporary practice safe harbor exception found in Rule 5.5(c)(1), permitting a lawyer to practice when the legal services are undertaken in association with a lawyer licensed in the jurisdiction, does not apply. *See also* Model Rules R. 5.5(c)(1) and Illinois cmt. 8. Likewise, there is no argument that the demand letter is a temporary practice is related to an arbitration, mediation, or other ADR proceeding. *See also* Model Rules 5.5(c)(3).

According to ISBA Op. 23-01, the safe harbor provision found in Rule 5.5(c)(2), enabling lawyers who reasonably expect to appear in a pending or potential proceeding through pro hac vice admission to conduct preliminary activities to prepare for the lawsuit is also inapplicable. *See also* Model Rules 5.5(c)(2) and ISBA Opinion 23-01 at 5. The Opinion declares that sending a demand letter "is not preliminary work associated with a pending or potential proceeding." ISBA Op. 23-01 at 5. The reasoning relies in part on precedent and analysis that the demand letter is intended to resolve the dispute, therefore if effective, the lawyer would not reasonably expect to be admitted pro hac vice or authorized to practice in Illinois because there would be no need. ISBA Op. 23-01 at 6.

The final catch-all safe temporary safe harbor exception found in Illinois Rule 5.5(c)(4) applies if the lawyer's services arise out of, or are reasonably related to, the state in which the lawyer is admitted to practice law. Illinois Rule of Professional Conduct Rule 5.5 (c)(4). Applying this exception to the hypothetical, ISBA Op 23-01 reasons that the lawyer's Florida practice is not reasonably related to a demand letter sent on behalf of an Illinois client to an Illinois employer involving an Illinois dispute. ISBA Op, 23-01 at 6-7. In analyzing its comment 14, defining "reasonably related," As an example, ISBA contrasted Minnesota's amendments to Rule 5.5(c)(4), clarifying reasonably related and adopting an exception that allows non-Minnesota lawyers to represent family members whether or not the representation is reasonably related to the lawyer's practice area. Rule 5.5(c)(4), Minnesota Rules of Professional Conduct.

Readers are cautioned that the questions posed do not involve representation of clients in litigation occurring in their state of admission.

Lawyers who represent corporate clients with a presence in Illinois, may ask, can I assist my corporate client with understanding or complying with an Illinois law?

To frame the issue generally, it is helpful to be aware of initial factors that impact the analysis. The first question to ask is does the client have a presence in their state as well as an Illinois presence? If yes, then there are arguments that Rule 5.5 may be inapplicable, because there may not be a basis for concluding the lawyer is "in" Illinois for Rule 5.5 purposes if advising a client present in the lawyer's home state. The practice of law in Illinois is regulated by the Attorney Act, 705 ILCS 205/0.01 *et seq.* and Illinois Supreme Court Rules, Article VII, Rules on Admission & Discipline of Attorneys. Neither specifically defines what constitutes the unlicensed practice of law, but "[w]hen examining acts or conduct to determine whether they constitute the practice of law, courts look to the character of the acts themselves. *Chicago Bar Association v. Quinlan & Tyson, Inc*., 34 Ill.2d 116, 214 N.E.2d 771 (1966). If the particular act requires legal skills or knowledge or more than ordinary business intelligence, it constitutes the practice of law. *Id*.; *In re Discipio*, 163 Ill.2d 515 (1994); *In re Yamaguchi*, 118 Ill.2d 417 (1987); *People ex rel. Illinois State Bar Association v. Schafer*, 404 Ill. 45 (1949)." ISBA Opinion 95-7, issued October 1995, available at https://www.isba.org/sites/default/files/ethicsopinions/95-07.pdf, see also, Tom Gaylord, Chapter 10, Avoiding the Unauthorized Practice of Law (2012), updated by Ariel Scotese (2021).

To bear on the particular question, a lawyer should review Illinois Rule of Professional Conduct Rule 5.5(c). If the lawyer can associate with one who is licensed to practice in Illinois, then that would likely fall within the safe harbor protections of Rule 5.5(c)(1).

It does not appear that Rule 5.5(c)(2) applies as the hypothetical does not seem to involve any current or potential litigation and seems only to concern the giving of advice on Illinois law. Likewise, Rule 5.5(c)(3) does not seem to apply

because this does not appear to relate to the lawyer's practice in another jurisdiction or relate to an arbitration, mediation, or other alternative dispute resolution proceeding.

ISBA Opinion 20-08 gives some additional color as the conclusion of that opinion was that a new associate not yet licensed in Illinois could assist on matters involving Illinois law because they were under the supervision of Illinois lawyers. ISBA Opinion 20-08, issued October 2020, available at https://www.isba.org/sites/default/files/ethicsopinions/Opinion%2020-08.pdf.

It would seem that a lawyer not licensed to practice in Illinois would not be able to provide the requested advice unless the lawyer associated with a lawyer licensed to practice in Illinois. An exception might be if the advice "arise[s] out of or [is] reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is licensed to practice." Illinois Rule of Professional Conduct 5.5(c)(4). One should be careful not to read that exception too broadly or risk running afoul of the Rule. As articulated in ISBA Opinion 23-01 a review of Comment 14 to Rule 5.5, which defines "reasonably related" might be of assistance (more on that below).

If I am a practice area expert and I am contacted about a matter in Illinois, can I advise?

Here again, the location of the client is important. The most prudent course would be to associate with an Illinois licensed attorney either in one's firm or in another firm. The exception in Rule 5.5(c)(2) might apply if there is pending or potential litigation and there is an anticipation that the work will lead to litigation in which the lawyer expects to be admitted to practice in that matter. As articulated in ISBA Opinion 23-01, there must actually be an expectation that the litigation will commence. ISBA Op. 23-01 at 5.

Comment 14 to Rule 5.5 specifically references subject matter expertise in the context of reasonably relatedness as included in Rules 5.5(c)(3) and (c)(4) stating "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." Accordingly, depending on the nature of the matter and so long as it does not relate to Illinois law, the out of state lawyer may be able to render the requested advice.

What if I am requested to send a demand letter?

Exception 5.5(c)(4) requires that the circumstances "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." Comment No. 14 to Illinois Rule 5.5 seeks to explain what "reasonably related" means: Paragraphs (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. If these factors are met, the demand will be permissible.

Likewise, if a lawyer determines that the demand letter falls within the safe harbor of Rule 5.5(c)(2), then the lawyer must be sure not to hold oneself out as being licensed in Illinois or having an office there. American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 495 and Illinois Rule of Professional Conduct Rule 5.5(b)(2).

Can I represent a client in a state or local government action in Illinois like discrimination or a government audit? Is the analysis different if the client is based in a state where I am licensed and has operations outside of a state where I am licensed? What if an attorney is asked because they have substantial experience in a particular area of law, would Rule 5.5(c)(4) apply?

The answer will depend on whether the conduct relates to activities in Illinois or not. The question seems to posit a hypothetical where the conduct is centered in Illinois as it is a state or local entity that is bringing the action. Given that, and that it is likely to involve the application of Illinois law, and if the lawyer expects to be able to be authorized to practice in the proceeding, then the exception of Rule 5.5(c)(2) may apply and the out of state lawyer may assist with the matter. As a practical matter though, an attorney seeking such admission will likely need to associate with an Illinois attorney to sponsor the admission. Supreme Court Rule 707(d)(8).

The locus of the client in the attorney's home state likely does not aid the analysis as the exception of Rule 5.5(c)(3) only applies to alternative dispute resolution procedures, which do not seem implicated by the hypothetical.

Rule 5.5(c)(4) likely also not apply as quoted above this matter does not seem to relate to a "body of federal, nationally uniform, foreign, or international law" as the claim is being brought by an Illinois state or local entity and thus is under state law or local ordinance.

This does not mean that the out of state lawyer cannot be involved, and indeed principally handle the matter, it just means that the out of state lawyer should associate with an Illinois licensed attorney and gain admission before the Illinois tribunal.

Final thoughts

Illinois' interpretation of Rule 5.5 and in particular Rule 5.5 (c)(4), may be considered restrictive, particularly when demands are frequently preliminary to other litigation. Remote work initiated by the pandemic along with guidance offered by the ABA in Opinion 495, has allowed attorneys to feel more accessible to clients beyond their jurisdiction. However, Illinois and jurisdictions with similar interpretations of Rule 5.5, provide an important reminder that when engaging in multijurisdictional practice attorneys must understand how jurisdictions they are interacting with interpret and define Rule 5.5.

A modified version of this article was originally published on July 3, 2023, in Minnesota Lawyer.

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