



Moving “House”?

Mind the Gap

By Cassidy E. Chivers

Your significant other got a job in another state, and you are both thrilled that your firm also has an office in the same city. However, the new job starts next week, so you find an apartment, get packing, and move to your new digs. Your firm finds you an office, and the following Monday, you show up to continue with your same job at the same firm, just in a different state. Seamless, right? Not quite.

You need a license to practice in your new home state. Admission standards vary from jurisdiction to jurisdiction. In some states, it is relatively painless to “waive in” from other states, and in others, you need to sit for the full bar exam, and submit an extensive moral character application. In all states, however, there is usually a lag time between seeking and gaining admission to the bar. If you are already in your new state, you need to mind that gap. Otherwise, you risk engaging in the unauthorized practice of law.

American Bar Association Model Rule of Professional Conduct 5.5(a) provides that a “lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.” Likewise, a lawyer not admitted in the jurisdiction “shall not... establish an office or other systematic and continuous presence in [the] jurisdiction for the practice of law” and “hold out to the public or otherwise represent that the lawyer is admitted to practice” in the jurisdiction. Model Rules of Prof’l Conduct R. 5.5(b). Model Rule 5.5(c) permits the *temporary* practice of law by a lawyer licensed in another jurisdiction; however, establishing a residence in the new state typically does not qualify as “temporary.” Thus, the critical question is what can a lawyer do while he or she is awaiting admission to the bar of his or her new home state? In other words, when does the lawyer cross the line into the unauthorized practice of law?

As comment 2 to Model Rule 5.5 explains, “[t]he definition of the practice of law is established by law and

varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.” Generally, the practice of law is construed broadly. An often-quoted definition can be found in a seminal California Supreme Court decision, *Birbrower, Montalbano, Condon & Frank v. Superior Court*: “the practice of law... in a larger sense... includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be pending in a court.” 17 Cal.4th 119, 142 (Cal. 1998).

Most states permit unlicensed law clerks, such as recent law school graduates awaiting their bar results and admission to practice, to perform services that are preparatory in nature under the supervision of a licensed lawyer.

Such work may include research, investigation of details, the assemblage of data or other necessary information, and other work that assists the attorney in carrying out the legal representation of a client. All work must be supervised by an attorney and must become or be merged into the work of the attorney, so that it becomes the attorney’s work product.

In re Carlos, 227 B.R. 535, 538–39 (Bkrtcy. C.D. Cal. 1998). At least one state bar has applied this rationale to licensed attorneys who move to another state and become employed before they gain admission to the state’s bar. In Arizona State Bar Ethics Opinion 96-06, the Committee on the Rules of Professional Conduct addressed the issue as a matter of supervision under Arizona’s Rule 5.3 (Responsibilities Regarding Non-lawyer Assistants). There, an out-of-state attorney was working for an Arizona attorney while waiting for Arizona bar exam results. The bar noted that an out-of-state attorney is essentially a “nonattorney” and reviewed activities that law students can perform while waiting for bar results: interview witnesses, draft documents, research, answer calendar calls with no argument, and attend closings. The nonlawyer may not take depositions or argue motions. However, the Arizona Bar recognized that the attorney at issue already was admitted in one jurisdiction and was subject to rules of professional responsibility. Therefore, “as long as the non-admitted foreign lawyer makes appropriate disclosures and is supervised by a member of the Arizona State Bar, that



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individual may assist [the licensed lawyer] in the functions noted above such as drafting document, researching, sending correspondence, and meeting with clients/witnesses.”

Arizona State Bar Ethics Opinion 96-06 represents a conservative, common sense approach to minding the admission gap. However, as is often the case with law firms that have a nationwide and indeed international presence, lawyers may move from one state to another, and one office to another, but continue to work for the same clients on the same matters. Especially in transactional practices, a lawyer licensed in, for example, New York can advise his or her New York clients from anywhere. However, by establishing a permanent residence and firm office outside of New York, say in California, the lawyer still risks violating California and New York rules relating to the unauthorized practice of law. While the policy underlying unauthorized practice of law rules is to protect in-state residents from “incompetent and unscrupulous” out-of-state lawyers, (*Estate of Condon & Frank, P.C. v. Superior Court*, 65 Cal. App. 4th 1138 (Cal. Ct. App. 1998)), “it is unresolved whether an out-of-state lawyer engages in the unauthorized practice of law when rendering substantial or continuous legal services in California for a non-California client or rendering ongoing legal services for multiple non-California clients.” Unauthorized Practice of Law, Cal. Practice Guide Prof. Resp. ¶ 1:180.12. Moreover, a lengthy and substantial remote practice after establishing permanent residence in another state could raise red flags with the state bar once the lawyer does seek admission. The best practice is for the lawyer to work under the supervision of a California-licensed lawyer until the lawyer is properly admitted to the bar in the state where he or she now lives and works.

Finally, the lawyer and the law firm must be mindful of advertising rules. Generally, attorney advertising cannot be false, misleading, or deceptive. See Model Rules of Prof'l Conduct R. 7.1. When a lawyer moves to an office in a state in which he or she is not yet licensed, the firm must be careful not to represent or imply that the lawyer's association with the office means that he or she is licensed to practice law there. For example, the firm's website or letterhead

should not list the lawyer among the lawyers practicing in a particular office without clarifying where he or she is licensed or the status of his or her admission to the state bar. A clear disclosure such as “admitted only in X state” is advisable. **FD**