Ball of Confusion: Practicing Law from Your Second Home in Another State

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Practicing law has been very, very good to you. Through lots of hard work over 40 years, you have built up a stable of good, steady clients, and have earned enough money to start thinking seriously about retirement. You have always lived and worked in the same Northern state—the only state in which you are admitted to practice. Nevertheless, despite global warming, the Northern winters seem to get longer and more depressing each year, so you've decided to spend the winter months in your second home near a beautiful golf course in a nice, warm Southern state. You still feel too young and healthy to retire completely, but you have little desire to go through the grueling process of getting admitted in the Southern state, including (Heaven forbid!) sitting for the Bar exam, unless someone says you must. Your longtime firm is willing to let you practice remotely from your second home, as long as doing so will not get you or the firm into trouble.

What are your options? Can you follow your heart and work from your second home? Or are you stuck with the brutal winters of your home state?

Defining the Problem

The problem, of course, is that practicing in the Southern state—no matter how circumscribed—might constitute the unauthorized practice of law (UPL). Every state and territory in the U.S. has a statute prohibiting UPL, and most if not all make it a criminal offense. When most lawyers think of UPL, they think of a fraudster who has never been licensed in *any* jurisdiction taking advantage of innocent people by practicing law without a license. But that is just one kind of UPL. The other kind is when a lawyer who has been licensed in one state practices in a state or territory where he or she has not been admitted. Both types of UPL are treated the same under most UPL statutes, as well as the Model Rules. *See* Model Rule 5.5(a) ("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").

This second kind of UPL—let's call it "interstate UPL," though it applies equally to lawyers admitted in other countries—is at issue when practicing from your second home. Interstate UPL did not receive much attention until 1997, when the California Supreme Court issued its landmark decision in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 17 Cal. 4th 119 (1998). There, the Court

found that a New York law firm engaged in UPL, and thus could not enforce its fee agreement, because the firm had its New York admitted lawyers come to California to represent a California client in preparing for a California arbitration based on a contract governed by California law. Most significantly, the Court found that lawyers can be found to have engaged in interstate UPL even if they hired local counsel and *even if they never set foot in the state*, but only made telephone calls or sent faxes or emails into the state.

This led to a great deal of handwringing, as lawyers who regularly practiced across state lines—particularly transactional lawyers who cannot obtain *pro hac vice* admission—worried that their actions would result in disciplinary or fee payment problems. This caused the ABA to spearhead a series of rules over the past 15 years that have allowed lawyers to practice across state lines more freely.

We will discuss these rules in their proper contexts later. But the problem of interstate UPL has still not ceased being a threat. Just earlier this year, the Minnesota Supreme Court, in *In re Charges of Unprofessional Conduct in Panel File No. 39302*, 884 N.W.2d 661 (Minn. 2016), disciplined a Colorado-admitted lawyer who agreed to represent his in-laws in a debt collection matter in Minnesota. Though he never set foot in the state, he negotiated by telephone and email, but was unable to get the matter settled. To add insult to injury, his opposing counsel—who had warned him about UPL when first contacted by him—filed an ethics complaint, and he ended up being subjected to private discipline. The reason, said the Court, was that the dispute "was not interjurisdictional: it involved only Minnesota residents and a debt arising from a judgment entered in a Minnesota court." *Id.* at 666. In short, as in *Birbrower*, the Court found that a lawyer can commit interstate UPL without ever setting foot in the state where the improper practice takes place.

Addressing Specific Scenarios

Now that we have defined the issue, we want to answer the questions you may ask when considering whether you should try to practice from your second home in a jurisdiction where you are not admitted to practice.

Q: Why don't I just get admitted? Can't I just waive in?

This may be an option, depending on the state in which your second home is located. In 2012, the ABA adopted a Model Rule on Admission by Motion, which allowed a lawyer in good standing in all U.S. jurisdictions (states, territories or the District of Columbia) in which they are admitted to practice, and not subject to any pending disciplinary complaints, to be admitted on motion (*i.e.*, without taking the state's Bar exam) in another jurisdiction as long as they can show that they had "engaged in the active practice of law" in one or more U.S. jurisdictions for three of the past five years. (Some states, including New York, require practice for five of the past seven years [*see* 22 NYCRR §520.10(a)(2)]; Arizona, one of those states, recently recommended shortening this period to conform to the ABA Model Rule.) While the vast majority of jurisdictions allow some form of admission on motion, there are still several which do not: for example, California, Louisiana, South Carolina and Florida, concerned about competition from "snowbird" lawyers, require anyone seeking admission to the Bar to take the state Bar exam,

no matter how many years they have practiced. In any event, obtaining Bar admission, whether by motion or through the more traditional process, can take several months—it generally will require a review of your character and fitness to practice—and thus requires a great deal of advance planning.

Q: If I'm an experienced lawyer, won't they let me practice in the state while my Bar admission is pending?

Again, the ABA took the lead on this in 2012, adopting a Model Rule for Practice Pending Admission. This would allow you to practice in a state for up to one year following your submission to state regulators of proof that you have applied for admission in that state. The Model Rule requires lawyers to show they are in good standing in their home jurisdiction, that they have no pending complaints against them, that they will be supervised by local counsel, and that they have applied for bar admission within 45 days of establishing "an office or other systematic and continuous presence for practicing law in the state." Only eight states have adopted a version of this rule applicable to all lawyers, while approximately 20 others have limited it to military personnel and their spouses, who often have to move on short notice. Many states are continuing to study practice pending admission, but some—including New York—have rejected it outright because of the concern that it circumvents the authority of state Bar Examiners and does not require a sufficient character and fitness check. Even where practice pending admission is available, it is just a temporary solution: you must successfully complete the admissions process within the designated time frame or lose your eligibility to practice.

Q: Hey, I really don't want to go to all this trouble of getting admitted. Isn't there a rule that allows me to practice temporarily where my second home is located?

This brings us to the most important result of *Birbrower*: the ABA's adoption of the temporary practice rule contained in Model Rule 5.5(c). With New York's recent adoption of a court rule on the subject, 47 states now permit temporary practice along the lines suggested in the Model Rule. That Rule continues to prohibit interstate MJP, but creates four safe harbors that allows lawyers to "provide legal services on a temporary basis" in a jurisdiction where they are not admitted: (i) when they associate with local counsel who actively participates in the matter; (ii) when they are assisting or participating in an actual or potential legal proceeding, generally by obtaining *pro hac vice* admission; (iii) when they are participating in an arbitration or mediation; and (iv) where the legal services in the second state "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."

This fourth safe-harbor covers a great deal, allowing transactional lawyers in particular a lot of leeway to practice across state lines. But when considering practice from your second home, you should take care not to treat Model Rule 5.5(c) or its local equivalent too cavalierly. For example, some states, such as Florida, prohibit you from opening a permanent law office, or from offering legal services to local residents you had not previously represented (a bad idea whether the rules specifically prohibit it or not). *See, e.g.*, *Gould v. Harkness*, 470 F.Supp.2d 1357 (S.D. Fla. 2006) (New York licensed lawyer may not advertise in Florida for prospective clients who might need help with New York legal matters or federal administrative practice). Others require you to state on correspondence that you are not admitted to

practice in that state. Still others, like Connecticut, permit temporary practice only if your home jurisdiction does. No matter which state you are in, you should avoid hanging a shingle outside your second home, setting up a storefront legal office nearby, or listing yourself in a local telephone book. These are signs that you are looking to go beyond "temporary practice," and Bar prosecutors will not be amused.

Moreover, the requirements of Model Rule 5.5(c)(iv) must be taken seriously. This is another lesson from the recent Minnesota case discussed earlier. The lawyer argued that his work for his in-laws was "reasonably related" to his practice in Colorado. The Minnesota Supreme Court did not buy it. Citing Comment 14 to Minnesota's version of Rule 5.5 (which is identical to the Model Rule comment, but not found in New York), the Court noted that the work has to have *something* to do with the lawyer's work in his home state, *i.e.*, the client may be a resident of that state, or have hired the lawyer to work in the foreign state before, or the lawyer has a national practice in a specialized area, or the client's activities are multijurisdictional. 884 N.W.2d at 668. None of these applied to the lawyer's in-laws.

On this point, however, I want to end on a more hopeful note. If all you do in your second home is work for your former home state clients, applying only home state law, and do not attempt to solicit local clients, it is dubious that state disciplinary authorities will care.

But once again, in New York there is a special caveat. Under N.Y. Jud. Law §470, a lawyer admitted to practice in New York who is not a New York resident must still maintain an "office for the transaction of law business … within the state." The New York Court of Appeals made clear that this must be an actual, physical law office; a mail drop will not do. *Schoenefeld v. State*, 25 N.Y.3d 22, 25 (2015). The Second Circuit recently rejected a challenge to the constitutionality of this statute under the Privileges & Immunities clause. *Schoenefeld v. Schneiderman*, 821 F.3d 273 (2d Cir. 2016). While this outmoded statute may someday be amended, until then New York lawyers practicing New York law in another jurisdiction still must arrange to maintain a physical office in New York.

Q: What if I am an in-house lawyer? Does that change anything?

Yes, it does, especially if you are locating to a state that has adopted a version of the ABA's Model In-house Counsel Registration rule. This allows an in-house lawyer admitted in another jurisdiction—even a foreign country—to register with state authorities and be admitted to practice in the second state on a limited basis. The lawyer may represent only his or her employer and may not appear in court, except if performing pro bono services.

New York was one of the first jurisdictions to adopt such a rule. 22 NYCRR §522.1 *et seq*. Nevertheless, in-house lawyers moving to New York must act quickly: they have just 90 days to register. 22 NYCRR §522.7(a). It is astonishing the number of New York in-house lawyers admitted only in other states who have missed this deadline, and equally astonishing the difficulty of setting this straight with New York Character and Fitness authorities. Still, the lawyer must fix the problem: the alternative is to try to fly under the radar, practicing illegally, and make it impossible to later become admitted here because of the inability to comply with the "five out of seven" rule discussed earlier.

In short, as a lawyer, you are permitted a lot more mobility now than when *Birbrower* was decided. But you still must learn the rules of the jurisdiction where your second home is located to ensure that you do not engage in interstate UPL. Close adherence to those Rules, and the self-discipline to not establish a permanent law office or solicit local clients, should allow you to work from your second home without resistance from local or home state disciplinary authorities.