

## NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

No. 11-06

### QUESTIONS PRESENTED

1. Can an out of state attorney represent a party in Nebraska arbitration?
2. If Rule § 505.5(c)(3) allows representation in certain instances, is the requisite relationship between the case in Colorado and the Nebraska arbitration present in this instance?
3. If such practice is unauthorized generally or in this instance, may an out of state counsel represent a party at arbitration under the appropriate supervision of a Nebraska attorney and what procedures need to be followed?

### THE APPLICABLE RULE AND COMMENTS

#### RULE § 3-505.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

- (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.
- (b) A lawyer who is not admitted to practice in this jurisdiction shall not:
- (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
  - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.
- (c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
- (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
  - (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
  - (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
  - (4) 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.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

#### Comment

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] 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. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the [Model Court Rule on Provision of Legal Services Following Determination of Major Disaster].

## DISCUSSION

An out of state lawyer admitted in another jurisdiction can participate in an arbitration in Nebraska, if that arbitration reasonably relates to the lawyer's practice in another jurisdiction. *Pro hac vice* admission is not necessary unless the arbitration is, "in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require." (Comment 12 to Rule 3-505.5(c)(3)). While appearance in an arbitration may be the practice of law in Nebraska, I do not believe that it is the unauthorized practice of law for a lawyer admitted in another jurisdiction as set out below. Thus, *pro hac vice* admission would not be necessary for arbitration matters reasonably related to that lawyers practice in another jurisdiction.

Referring to Model Rule 5.5, the ABA/BNA Lawyers' Manual on Professional Conduct provides:

### Alternative Dispute Resolution

Subsection (c)(3) provides that lawyers may enter other states and provide services there if the services are reasonably related to an alternative dispute resolution matter arising out of the lawyer's home-state practice. See Cal. Code Civ. P. §1282.4 (post-Birbrower statute specifying procedure that allows nonresident lawyers licensed elsewhere to appear in California arbitration proceedings); New Jersey UPL Op. 28 (1994) (out-of-state attorney participating in arbitration proceedings under American Arbitration Association rules not engaged in unauthorized practice of law). (at 21:2110).

### 'Reasonably Related' to Home State Practice

The "safe harbor" that is perhaps of most interest to lawyers comes in subparagraph (c)(4), which allows an out-of-state lawyer to engage in any nonlitigation practice in another state on a temporary basis when that activity arises out of or is "reasonably related" to the lawyer's current practice.

The rule does not define "reasonably related" but suggests in the comments that a matter is reasonably related if: (1) there is an ongoing relationship with a client; (2) the client has "substantial contacts" with the jurisdiction where the lawyer is admitted; or (3) the lawyer has developed a recognized expertise in matters involving a particular body of federal, foreign, or otherwise nationally uniform law. See, e.g., *Estate of Condon*, 76 Cal. Rptr.2d 922, 14 Law. Man. Prof. Conduct 376 (Cal. Ct. App. 1998) (Colorado firm did not run afoul of California's unauthorized practice statute when it advised Colorado resident on California probate of will it had drafted for client's mother); *Lindsey v. Ogden*, 406 N.E.2d 701, 708 (Mass. App. Ct. 1980) (New York lawyer did not engage in unauthorized practice by coming to Massachusetts to oversee execution of will by Massachusetts client

whose estate lawyer had planned in his New York office); *In re Waring's Estate*, 221 A.2d 193 (N.J. 1966) (New York firm that had long association with now-deceased New Jersey resident and his family did not engage in unauthorized practice when performing work for client's estate in view of long-term relationship with client and multistate connections and interests involved); *In re Estate of Cooper*, 746 N.W.2d 653, 24 Law. Man. Prof. Conduct 180 (Neb. 2008) (under Rule 5.5(c)(4) exception for temporary activity arising out of lawyer's home-state practice, Tennessee lawyer did not violate Nebraska's unauthorized practice rules by filing demand for notice in Nebraska probate proceeding on behalf of her Tennessee client). Cf. Ohio Supreme Court Ethics Op. 2002-4, 18 Law. Man. Prof. Conduct 425 (2002) (attorney not licensed in Ohio may enter state to take depositions if they are incidental to litigation occurring elsewhere).

According to the MJP Commission report, Model Rule 5.5(c)(4) is drawn from Section 3(3) of the American Law Institute's Restatement (Third) of the Law Governing Lawyers (2000), which states that a lawyer may provide legal services within a jurisdiction where the lawyer is not admitted "to the extent that the lawyer's services arise out of or are otherwise reasonably related to the lawyer's practice" elsewhere.

Comment e to Section 3 of the Restatement offers further guidance. It lists several factors to consider concerning the propriety of extrajurisdictional law practice, such as "whether either the activities of the client involve multiple jurisdictions or the legal issues involved are primarily either multistate or federal in nature." It also advises that the "customary practices of lawyers who engage in interstate law practice" are an appropriate measure of the reasonableness of a lawyer's activities out of state.

21:2111

*In re Estate of Cooper*, 275 Neb. 297, 307-09, 746 N.W.2d 653, 661-62 (2008), discussed the extra territorial practice of law as follows:

For its second assignment of error, First Tennessee claims that the county court erred as a matter of law when it concluded \*308 that the demand for notice filed on behalf of First Tennessee by one of First Tennessee's lawyers, who is not admitted in Nebraska, constituted the unauthorized practice of law. First Tennessee argues in effect that the county court misconstrued rule 5.5(c)(4) of the Nebraska Rules of Professional Conduct governing the unauthorized practice of law when the court concluded that Wright's filing of the demand for notice violated the unauthorized practice of law statute, § 7-101. We agree with First Tennessee that the county court erred.

We note that the conduct complained of involves an attorney and occurred after September 1, 2005, and thus is governed by the Nebraska Rules of Professional Conduct. As noted above, rule 5.5(c) permits a lawyer who is licensed to practice in another state but has not been admitted to practice in Nebraska to nonetheless on a

temporary basis perform certain legal actions in this jurisdiction, so long as those actions arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. Rule 5.5(c) describes activities that although performed by a lawyer not licensed to practice in this state, nonetheless do not violate § 7-101.

We have not had occasion to construe rule 5.5(c)(4). However, we find guidance in the comments that follow the rule. Comment [5] states in part:

There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts.

Comment [13] states:

Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide \*\*662 certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted.... These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

\*309 Finally, comment [14] states as follows:

Paragraph ... (c)(4) require[s] 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.

We consider the factors listed in the comment quoted immediately above. The record reflects that First Tennessee is a Tennessee banking corporation, with its principal place of business in Memphis, Tennessee, the same city and state where Wright, the Tennessee lawyer who filed the demand for notice, maintains her law practice. First Tennessee is a client of Wright. The request for notice sought to have copies of all filings made in the underlying estate case mailed to Wright in the same state where she offices and First Tennessee has its principal place of business. The risk involved to either the client, the public, or the courts was de minimis. The filing of the request for notice was effectively an administrative matter and did not in and of itself involve either rendering a legal opinion to First Tennessee or engaging in a legal contest on behalf of First Tennessee in Nebraska. Given these facts, we conclude that the county court erred as a matter of law when it determined that Wright's filing of the demand for notice constituted the unauthorized practice of law under either rule 5.5(c) or § 7-101 and ordered the demand struck. We reverse such order.

## Pro Hac Vice

Rule 3-106 provides for pro hac vice admission for those "having professional business in the courts of this state.."

Comment [12} to Rule 3-505.5 provides:

Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

### CONCLUSION

An out of state lawyer admitted in another jurisdiction can participate in an arbitration in Nebraska, if that arbitration reasonably relates to the lawyer's practice in another jurisdiction. Pro hac vice admission is not necessary to participate in arbitration, unless it is, "in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require." (Comment 12 to Rule 3-505.5(c)(3)). While appearance in an arbitration may be the practice of law in Nebraska, it is not the unauthorized practice of law for a lawyer admitted in another jurisdiction for matters reasonably related to that lawyers practice in that other jurisdiction. Thus, *pro hac vice* admission would not be necessary for arbitration unless it is by court annexed arbitration, or if some other rule or law applies for matters reasonably related to that lawyer's practice in another jurisdiction.