



ISBA Professional Conduct Advisory Opinion

Opinion No. 12-17
July 2012

Subject: Advertising and Solicitation; Arbitration and Mediation;
Multijurisdictional Practice; and Unauthorized Practice of Law

Digest: Representation of a party in a grievance arbitration in Illinois may be considered the practice of law, however, a lawyer licensed in another state may serve as representative of a party at a grievance arbitration without being admitted to practice in Illinois so long as the representation is in accordance with Illinois Rules of professional Conduct RPC 5.5(b) and (c). With regard to advertising, nothing in the Rules specifically authorizes lawyers admitted in jurisdictions other than Illinois to advertise in Illinois, therefore, whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

References: Illinois Rules of Professional Conduct, Rules 5.5, 7.1, 7.2, 7.3, 7.5, 8.5
ABA Model Rule 5.5

68 Ill. Adm. Code 1110.90

83 Ill. Adm. Code 200.90

50 Ill. Adm. Code 8100.2112

Colmar, Ltd. v. Freemantlemedia North America, Inc., 344 Ill. App. 3d 977 (2003).

NISHA, LLC v. Tribuilt Const. Group, LLC., 2012 Ark. 130, 2012 Ark LEXIS 157 (2012).

People ex rel. Chicago Bar Assoc. v. Goodman, 366 Ill. 346, 8 N.E. 2d 941 (1937).

People ex rel. Illinois State Bar Assoc. v. Schafer, 404 Ill. 45, 87 N.E. 2d 773 (1949).

In re Yamaguchi, 118 Ill.2d 417, 515 N.E. 2d 1235 (1987).

FACTS

A lawyer licensed in a jurisdiction other than Illinois seeks to represent employers in union grievance arbitration proceedings in Illinois. The grievance arbitration proceedings usually arise from collective bargaining agreements to settle contract disputes by use of third-party arbitrators. The arbitrators are not judges and frequently are not lawyers. The arbitration takes place at a hearing where the formal rules of evidence do not apply. The collective bargaining agreements provide that either party may choose a representative, who may or may not be a lawyer, to present their arguments.

QUESTIONS

1. Is representation of a party in a grievance arbitration in Illinois considered the practice of law?
2. May a lawyer licensed in another state serve as representative of a party at a grievance arbitration without being admitted to practice in Illinois?
3. Does the text of the following advertisement violate the Illinois Rules of Professional Conduct?

Grievance Arbitration
John Doe, J.D., Ph.D.
Representing Management
1/800/555-5555

4. Might the advertisement appear in a professional or trade journal in Illinois?
5. Might the advertisement be mailed directly to an employer in Illinois?

OPINION

I. Is representation of a party in a grievance arbitration in Illinois considered the practice of law?

The Illinois Supreme Court has held, consistent with the generally held principle, that the practice of law involves more than the representation of parties in litigation and includes the giving of advice or the rendering of any services requiring the use of legal skill or knowledge. *People ex rel. Illinois State Bar Assoc. v. Schafer*, 404 Ill. 45, 87 N.E. 2d 773, 776 (1949); *See also, In re Yamaguchi*, 118 Ill.2d 417, 515 N.E. 2d 1235 (1987). The Court has also held that the representation of parties in contested workers' compensation matters

before an arbitrator of the Illinois Industrial Commission constituted the practice of law. *People ex rel. Chicago Bar Assoc. v. Goodman*, 366 Ill. 346, 8 N.E. 2d 941, (1937). The respondent in *Goodman* had argued that he was not practicing law because he was representing parties before an administrative agency rather than a court. The Supreme Court responded that the "character of the act done, and not the place where it is committed" is the decisive factor. *Goodman*, 8 N.E. 2d at 947.

Illinois courts have not directly addressed whether representing a party in an arbitration constitutes the practice of law, however, the Illinois Appellate Court has determined that an out-of-state lawyer representing a party in an arbitration is not necessarily engaged in the unauthorized practice of law. *Colmar, Ltd. v. Freemantlemedia North America, Inc.*, 344 Ill. App. 3d 977 (2003) (finding arbitration award was not void because party was represented by attorney not authorized to practice law in Illinois); compare, *NISHA, LLC v. Tribuilt Const. Group, LLC*, 2012 Ark. 130, 2012 Ark LEXIS 157 (2012)(a non-lawyer appearing in a representative capacity in an arbitration engages in the unauthorized practice of law.) In light of *Colmar* and the revisions to Rule 5.5 discussed below, we need not determine whether representing a party in an arbitration constitutes the practice of law, and can instead directly address the question of whether an out-of-state attorney can represent a party in an arbitration¹.

II. May a lawyer licensed in another state serve as representative of a party at a grievance arbitration without being admitted to practice in Illinois?

By statute, 705 ILCS 205/1, no person is permitted to practice law in Illinois without an Illinois license. Certain exceptions have been recognized to this general rule. For example, a lawyer may obtain permission to participate in a particular cause pursuant to Supreme Court Rule 707. Further, in its Opinion No. 92-6 the Committee concluded that principles of federal preemption would permit

¹ Regardless of whether representing a party in a grievance arbitration constitutes the practice of law, there is significant authority to support the proposition that any attorney acting in that capacity must still adhere to the Illinois Rules of Professional Conduct even if non-lawyers may also appear. See, e.g., 68 Ill. Adm. Code 1110.90 (attorneys appearing in a representative capacity in administrative hearings before the Department of Financial and Professional Regulation must conform their conduct to the Illinois Rules of Professional Conduct even though non-lawyers may also appear in a representative capacity); 83 Ill. Adm. Code 200.90 (all persons, lawyer and non-lawyer, appearing in proceedings before the Illinois Commerce Commission shall conform to the standards of conduct of attorneys before the courts of Illinois as set forth in the Illinois Rules of Professional Conduct); 50 Ill. Adm. Code 8100.2112 (attorneys appearing in a representative capacity in administrative hearings under the Title Insurance Act before the Department of Financial and Professional Regulation must conform their conduct to the Illinois Rules of Professional Conduct even though non-lawyers may also appear in a representative capacity.)

a lawyer from another jurisdiction to practice in the federal courts in Illinois even though the lawyer did not have an Illinois license. This exception was codified in Illinois Rule 5.5(d) which mirrors ABA Model Rule 5.5 (d) and provides, in relevant part:

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:

* * *

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

Comment [18] to Rule 5.5 further defines “other law” as including statute, court rule, executive regulation or judicial precedent.

Rule 5.5(c) goes even further and allows a lawyer admitted in another United States jurisdiction who is not disbarred or suspended from practice in any jurisdiction to 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** (emphasis supplied), 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.

Subsection (c)(3) would seem to directly address the second question of this inquiry and the Committee concludes that it would allow an attorney licensed in another United States jurisdiction who is not disbarred or suspended to provide legal services in connection with the grievance arbitration, so long as the services

are: 1) temporary; 2) are reasonably related to the lawyer's practice in another jurisdiction; and 3) are not in a forum which requires pro hac vice admission.

In determining whether the services are temporary, Comment [5] specifies that this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here other than under the two circumstances enumerated in Rule 5.5(d), i.e. the services are being provided to the lawyer's employer or its organizational affiliates, or are services the lawyer is authorized to provide by federal or other law. (Note that Comment 4 states that systematic and continuous presence is not limited to instances where the lawyer is physically present in this jurisdiction.) Comment [6] states that, although there is no single test to determine whether a lawyer's services are provided on a "temporary basis," services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

Second, Comment 14 to Rule 5.5 gives further guidance on the factors to consider in determining whether the services are reasonably related to the lawyer's practice. Specifically, when the client has been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted; when the matter, although involving other jurisdictions, may have a significant connection with that jurisdiction; when 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 also arise when the client's activities or the legal issues involve multiple jurisdictions. 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. Because the inquirer did not provide information on the nature of his/her practice, the committee declines to opine on whether or not this aspect of the analysis is satisfied.

Third, Comment 12 relates specifically to subsection (c)(3) and notes that the lawyer must still obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require. Assuming the arbitration at issue in this inquiry is not court-annexed, this requirement would be satisfied.

Finally, Comment 4 provides that a lawyer who is not licensed in this jurisdiction but undertakes to provide legal services here in accordance with the relevant provisions of Rule 5.5 discussed above, must not hold out to the public or otherwise represent that the lawyer is admitted to practice in this jurisdiction. *See also* Rule 7.1. In addition, Comment 20 cautions that, in some circumstances such as when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction, a lawyer practicing under these

provisions may be required to inform the client that the lawyer is not licensed to practice law in this jurisdiction.

It is worth noting that Comment 19 provides that any lawyer who provides legal services in accordance with the relevant provisions of Rule 5.5 discussed above, is subject to the disciplinary authority of this jurisdiction. *See* Rule 8.5(a).

III. Issues related to advertising

With respect to the proposed advertisement, the Committee initially notes that Comment 21 to Rule 5.5 specifically states that Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions, but instead directs lawyers to the provisions of Rules 7.1 to 7.5 for guidance in determining what types of communications are appropriate.

Illinois Rule 7.1 provides generally that a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. Rule 7.5(b) provides that firm letterheads and identification of affiliated lawyers from different jurisdictions shall make clear the jurisdictional limitations of lawyers not licensed to practice in the jurisdiction where the office is located.

Any advertisements or solicitations directed to potential Illinois clients would be misleading if the lawyer's jurisdictional limitation were not disclosed clearly. Therefore the text of the proposed advertisement as stated would violate the Illinois Rules in that regard. The Committee expresses no opinion as to any other aspect of the text of the proposed advertisement.

The inquirer also asks whether the proposed advertisement could appear in a professional or trade journal in Illinois and whether it could be mailed directly to Illinois employers. Rule 7.2 provides that appropriate advertising may be conducted through any public media. If the proposed advertisement otherwise complies with the Illinois Rules, then its appearance in a trade or professional journal would not violate the Rules.

With regard to the final question of whether the advertisement could be mailed directly to an employer in Illinois, under Rule 7.3, direct solicitation of potential clients, which includes written, recorded or electronic communication addressed to specific recipients, is permitted under certain circumstances providing that such communications include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication. The general requirements of Rule 7.1 also apply to any materials used in direct mail solicitation.

The Committee expresses no opinion as to when a non-Illinois lawyer's advertisements in Illinois constitute such a continuous and systematic presence

that renders the lawyers' Illinois activities no longer temporary and therefore in violation of Rule 5.5.

CONCLUSION

Although it is undetermined whether representing a party in a grievance arbitration constitutes the practice of law in Illinois, the committee concludes that Rule 5.5 provides that an attorney licensed in another United States jurisdiction who is not disbarred or suspended may provide legal services in connection with the grievance arbitration, so long as the services are: 1) temporary; 2) are reasonably related to the lawyer's practice in another jurisdiction; and 3) are not in a forum which requires pro hac vice admission.

The Committee further concludes that attorneys not licensed in Illinois may advertise their services by direct mail and/or professional trade journals in Illinois so long as the advertisements conform to Rules 7.1 through 7.5 of the Illinois Rules of Professional Conduct, paying careful attention to making proper disclosures as to where the attorney is licensed so as not to be misleading, and keeping in mind whether such advertisements would constitute a continuous and systematic presence in Illinois in violation of Rule 5.5.

Professional Conduct Advisory Opinions are provided by the ISBA as an educational service to the public and the legal profession and are not intended as legal advice. The opinions are not binding on the courts or disciplinary agencies, but they are often considered by them in assessing lawyer conduct.

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