

**Upton
& Hatfield** ^{LLP}
ATTORNEYS AT LAW

Concord Office
10 Centre Street
PO Box 1090
Concord, NH
03302-1090
603-224-7791
1-800-640-7790
Fax 603-224-0320

Please respond to the Concord office

September 29, 2003

Attorneys At Law
Robert Upton, II
Gary B. Richardson
John F. Teague
Russell F. Hilliard
James F. Raymond
Barton L. Mayer
Charles W. Grau
Bridget C. Ferns
David P. Slawsky
Heather M. Burns
Lauren Simon Irwin
Joyce E. Smithey

Eileen Fox, Clerk
New Hampshire Supreme Court
One Noble Drive
Concord, NH 03301

Re: Case No. ADM-2003-0060, In the Matter of Unnamed Applicant

Dear Clerk Fox:

I write on behalf of the New Hampshire Bar Association in response to the Court's Order requesting comment with respect to the above matter.

The Board of Governors, at its meeting on September 18, 2003, discussed this issue, and voted to advise the Court that it does not consider the activity of the unnamed applicant, given the particular circumstances, to constitute the unauthorized practice of law.

The Board had in mind Model Rules of Professional Conduct 5.5(c, d), which, although not adopted in New Hampshire, as representing an appropriate view of the issue.

We appreciate the opportunity to provide this input, and please let me know if the Court needs anything further.

Very truly yours,

Russell F. Hilliard
rhilliard@upton-hatfield.com

RFH/kmc

cc: Peter W. Heed, Attorney General
Jeannine L. McCoy, Executive Director ✓

North Conway Office
23 Seavey Street
PO Box 2242
North Conway, NH
03860
603-356-3332
Fax 603-356-3932

www.upton-hatfield.com
mail@upton-hatfield.com

Of Counsel
Frederic K. Upton
Kimberly Kirkland

Hillsborough Office
8 School Street
PO Box 13
Hillsborough, NH
03244
603-464-5578
1-800-640-7790
Fax 603-464-3269

Attorneys At Law
Douglas S. Hatfield
Margaret-Ann Moran
Thomas T. Barry*
Matthew H. Upton
*Also Admitted In Virginia

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2003 TERM

SEPTEMBER SESSION

Docket No. Adm 2003-0060

In the Matter of Unnamed Applicant

MEMORANDUM OF THE ATTORNEY GENERAL IN THE
MATTER OF UNNAMED APPLICANT

INTRODUCTION

This Court received a petition and motion for admission without examination pursuant to Supreme Court Rule 42(10) from unnamed applicant ("applicant"). Upon review of the petition and motion, the Court directed the applicant to file a memorandum addressing whether the applicant's legal work as in-house counsel constitute the unauthorized practice of law in New Hampshire.

The applicant filed a memorandum with the Court asserting that the legal work performed as in-house counsel under the facts and circumstances described does not constitute the unauthorized practice of law in New Hampshire. By order of July 2, 2003, this Court invited the Attorney General and the New Hampshire Bar Association to address the legal issue presented by Applicant's Petition.

QUESTION PRESENTED

Whether the legal work of a foreign-licensed attorney who serves as in-house general counsel for an Illinois corporation but is located and works from the

administrative offices of a New Hampshire subsidiary of the Illinois corporation is engaging in the unauthorized practice of law in New Hampshire.

DISCUSSION

There exists in New Hampshire, a strong public policy against the unauthorized practice of law. *State v. Settle*, 124 N.H. 832, 835 (1984) (citing *Bilodeau v. Antal*, 123 N.H. 39, 43 (1983)). The purpose is to protect the public who would suffer from the effects of unethical counsel, maintain confidence in the bar, preserve the integrity of the legal system and prevent the unauthorized practice of law. *See Tocci's case*, 140 N.H. 68, 71 (1995) (citing *Budnitz Case*, 139 N.H. 489, 492 (1995)); *Knox Leasing v. Turner*, 132 N.H. 68, 72 (1989). This Court has found that statutory provisions, court rules, case law and the Code of Professional Responsibility must be read together to assess whether a person is engaging in the unauthorized practice of law. *Bilodeau*, 123 N.H. at 42. No single factor is determinative of whether someone is engaged in the unauthorized practice. *Id.* at 45. Such determination must be made on a case-by-case basis. *Id.* *See also Appeal Campaign for Ratepayers' Rights (N.H. Public Utilities Commission)*, 137 N.H. 707, 715 (1993). The question presented by Unnamed Applicant's Petition is an issue of first impression for this Court.

THE PARTICULAR FACTS AND CIRCUMSTANCES OF THIS CASE WEIGH AGAINST FINDING THAT THE APPLICANT'S LEGAL WORK AS IN-HOUSE COUNSEL CONSTITUTES THE UNAUTHORIZED PRACTICE OF LAW.

RSA 311:7, the cases cited *supra*, New Hampshire Rule of Professional Conduct 5.5, Supreme Court Rule 33, Superior Court Rule 18 and to a lesser degree

Supreme Court Rule 42(10)¹ address the unauthorized practice of law in New Hampshire.

RSA 311:7 provides that no person shall be permitted to commonly practice as an attorney in court unless admitted by the court and taken the oath as prescribed in RSA 311:6. This Court has interpreted that provision to apply in a court of law and administrative agency adjudicatory proceedings. *Appeal of Campaign for Ratepayers' Rights*, 137 N.H. at 715. In making that finding, this Court noted that whether or not one is engaged in the practice of law depends on the character of the acts performed and not the place (forum) where he or she performs them. *Id.* In *Tocci's case*, 140 N.H. at 68, this Court found that filing pleadings and drafting letters on behalf of clients and representing oneself to others as a practicing attorney in this state constitutes the common practice of law.

According to the facts as set forth in the Memorandum ("Memo"), the applicant provides legal services to the Illinois Corporation and its affiliated subsidiaries.² The duties listed by the applicant at pp. 2-3 of the Memo indicate that, although physically based in New Hampshire, the applicant travels to the corporation's headquarters and subsidiaries frequently and the legal work performed

¹ The purpose of Supreme Court Rule 42 is to set forth the parameters under which an applicant may be admitted to practice law in New Hampshire without taking and passing New Hampshire bar exam. Because this rule does not purport to define the practice of law for the purpose of unauthorized practice, the inclusion of "services as corporate counsel" in the description of "active practice of law" is not determinative of the question presented by this case.

² The corporation owns all of the subsidiaries. Memo at 1.

is primarily directed to the Board of Directors and the Chief Operating Officer of the corporation in Illinois. The legal work includes advising the corporation on a variety of corporate legal matters such as environmental, labor, employment, mergers and acquisitions, real estate, intellectual property and other business and transactional matters. The applicant also supervises another in-house lawyer and a paralegal. Although not absolutely clear from the Memo, presumably these people are located in Illinois. The legal services provided outside of Illinois such as pursuing acquisitions and conducting environmental management of manufacturing facilities are not carried out in New Hampshire. Memo at p. 3. Applicant expressly states that if any court appearance becomes necessary a motion for admission *pro hac vice* would be sought. Memo at p. 7.

The applicant's status as a licensed attorney in a foreign jurisdiction demonstrates that the applicant meets the standards of competence and fitness in that jurisdiction. Although New Hampshire theoretically may be stricter in its standards, admission in another jurisdiction provides some protection to the corporate client. The applicant would be subject to discipline in the licensing jurisdiction. Since there is one client located primarily in Illinois, members of the New Hampshire public are not necessarily at risk especially since the applicant appears to provide little or no legal services in New Hampshire.³

³ Applicant's memo does not explicitly specify what legal services are provided to the New Hampshire subsidiary in New Hampshire nor does the memo make clear where the attorney and paralegal supervised by the applicant are located.

In sum, this Court has ruled that no single factor is determinative of whether someone is engaged in the unauthorized practice of law and any such determination will be made on a case-by-case basis. *Bilodeau*, 123 N.H. at 42. In the instant case, the applicant is licensed to practice in another jurisdiction. Applicant does legal work for this one Illinois corporate client. Applicant has not, according to his/her Memo, filed pleadings or appeared in any court nor does it appear that applicant held himself/herself out to the public as a licensed practicing attorney in New Hampshire. A single factor, physical presence in the administrative office of a subsidiary of the Illinois corporation which is located in New Hampshire, should not be determinative in this case and the applicant should not be deemed to have engaged in the unauthorized practice of law in New Hampshire.

In addition, New Hampshire law addressing unauthorized practice is focused primarily on court appearances and filings. *See* RSA 311:7. The case law involves the conduct of unlicensed, non-lawyers or, in *Tocci's case*, a suspended attorney. *See Tocci*, 140 N.H. at 68. There is no New Hampshire law directly addressing the unauthorized practice of law and foreign licensed in-house counsel. Because the law is not settled and this Court has previously indicated that it might carve out limited exceptions to the general prohibition of RSA 311:7,⁴ the applicant could not reasonably be on notice that the legal work performed for the Illinois corporation could be construed as unauthorized practice in New Hampshire. Under these

⁴ *See* RSA 503:11 (Representation of Corporations and Other Business Organizations); *State v. Settle*, 129 N.H. 171, 179 (1987); *Bilodeau*, 123 N.H. at 45 (court reaffirmed the right of law enforcement officers to prosecute criminal cases on behalf of the State).

circumstances, it would be unfair to sanction the applicant and negatively affect his/her opportunity to become a member of the New Hampshire bar under Supreme Court Rule 42.

The Court has received an “informal” *amicus curiae* document from the American Corporation Counsel Association (“ACCA”). That document describes a national trend of states reviewing and modifying the laws and rules governing the unauthorized practice of law as it applies to foreign-licensed attorneys. This trend appears to arise from the changing nature of modern law practice and concerns about the regulation of multi-jurisdictional law practice. The ACCA letter references the American Bar Association Report of the Commission on Multi-Jurisdictional Practice and proposed changes to the Rules of Professional Conduct. The status of foreign licensed in-house counsel who advises a single client and does not appear in court or in administrative proceedings is one specific area that is addressed by the Commission. The ACCA also notes that the New Hampshire Bar Association’s Ethics Committee is currently reviewing the New Hampshire Rules of Professional Conduct.

The ACCA suggests that the Court stay its consideration of this case until the New Hampshire Bar Ethics Committee issues its recommendations regarding unauthorized practice and the multi-jurisdictional practice of law. Although the Attorney General takes no position regarding such a stay, that outcome would not resolve the Applicant’s status and might be unsatisfactory and unfair to the Applicant who has asked this Court to rule on his/her Motion. Since the Bar’s Ethics

Committee has no deadline, the applicant's status could remain uncertain for an extended period of time.

To the extent, however, that this Court is inclined to go beyond the specific facts of this case and make a broader ruling regarding legal ethics, unauthorized practice, and the multi-jurisdictional practice of law in general, the Attorney General respectfully recommends that the Court first provide other interested parties with a full and fair opportunity to be heard on these very important issues.

The New Hampshire Bar Association, in its September 29, 2003 submission to the Court on this matter references with approval Model Rule of Professional Conduct 5.5 (c) (d). While the proposed Model Rules should be part of any discussion regarding the unauthorized practice of law, there are additional issues to be considered.⁵ For example, some states have carved out an exception to otherwise applicable restrictions on the practice of law by out-of-state lawyers in order to facilitate the multi-jurisdictional practice of law. Some states have required certain lawyers, who are not required to be licensed but who have an office or other systematic presence in the jurisdiction, to register with the state licensing authority. Other states have made some or all unlicensed lawyers subject to the disciplinary authority of the state, assessment for client protection fund and continuing legal education requirements. In addition to the ABA's Commission Report and Recommendations, there is emerging case law and there are statutory changes in a

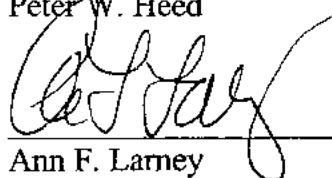
⁵ In the "Discussion" section of the American Bar Association Report of the Commission On Multi-Jurisdictional Practice, it is noted that the proposed rule 5.5(d) would permit foreign-licensed lawyers to provide legal services to a corporate or government entity. See Report at p. 26. www.abanet.org.

number of jurisdictions that address the multi-jurisdictional practice of law. These recent developments in the law will inform the discussion in New Hampshire and should be fully analyzed and discussed prior to any broad ruling on the issues of unauthorized practice and the multi-jurisdictional practice of law.

Respectfully submitted,

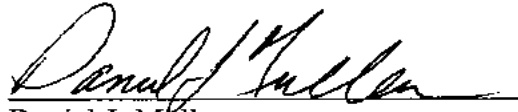
ATTORNEY GENERAL

Peter W. Heed



Ann F. Larney

Associate Attorney General



Daniel J. Mullen

Associate Attorney General

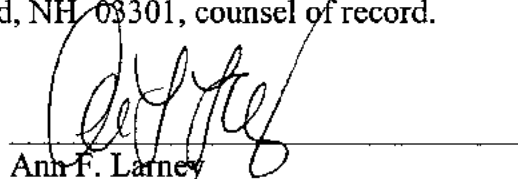
33 Capitol Street

Concord, N.H. 03301-6397

(603) 271-3650

October 1, 2003

I hereby certify that a copy of the foregoing was mailed, postage prepaid, this day to Russell F. Hilliard, President, New Hampshire Bar Association, 112 Pleasant Street, Concord, NH 03301 and at Upton & Hatfield, 10 Centre Street, P.O. Box 1090, Concord, NH 03302-1090 and Richard Y. Uchida, Vice President, New Hampshire Bar Association, 112 Pleasant Street, Concord, NH 03301 and at Hebert & Uchida, 244 North Main Street, Concord, NH 03301, counsel of record.



Ann F. Larney