BEFORE THE BOARD OF COMMISSIONERS
ON CHARACTER AND FITNESS OF
THE SUPREME COURT OF OHIO

In re: Application of
Alice Auclair Jones

Case No. 668

FINDINGS OF FACT AND
RECOMMENDATION OF THE BOARD OF
COMMISSIONERS ON CHARACTER AND
FITNESS OF THE SUPREME COURT OF
OHIO

This matter is before the board pursuant to its *sua sponte* investigatory authority. Gov. Bar R. I, Sec. 10(B)(2)(e).

A duly appointed panel of three Commissioners on Character and Fitness was impaneled for the purpose of hearing testimony and receiving evidence in this matter. A hearing was held on April 27th, 2017. The panel filed its report with the board on January 19th, 2018.

Pursuant to Gov. Bar R. I, Sec. 12 (D), the board considered this matter on February 9th, 2018. By unanimous vote, the board adopts the panel report as attached, including its findings of fact and recommendation of disapproval.

Therefore, the Board of Commissioners on Character and Fitness recommends that the applicant be disapproved and that she does not possess the requisite character, fitness, and moral qualifications for admission to the practice of law in Ohio.

/s/ Todd C. Hicks
Todd C. Hicks, Chair, Board of Commissioners on Character and Fitness for the Supreme Court of Ohio
REPORT AND RECOMMENDATION
OF PANEL

This matter has a slightly different procedural posture so a brief history of the case is warranted. Initially, the applicant was referred to a panel because of a concern that she was engaging in activities that constituted the unauthorized practice of law. After an evidentiary hearing the panel concluded that Ms. Jones was in fact engaged in the unauthorized practice of law. Because she was currently committing an act specifically identified as a factor in Rule I for considering an applicant’s character and fitness, despite previous indications from the Admissions Office that a problem may exist, the panel was reluctant to recommend that she possessed current character and fitness. However, the panel also wanted to afford the applicant an opportunity to cease her activities before making a recommendation concerning her character and fitness. The panel therefore recommended to the Board that it hold in abeyance or defer its consideration and decision on the applicant and provide Ms. Jones an opportunity to cease her
activities. The Board approved the panel’s recommendation and an entry was issued providing the applicant a thirty-day period in which she could submit an affidavit averring that she was not engaging in activities that constituted the practice of law in Ohio.

The applicant chose not to file such an affidavit. Instead she filed an affidavit indicating that she was continuing – and intended to continue – her activities; she also filed a motion for reconsideration. Specifically, her affidavit states that she does not believe she is practicing law in Ohio because she is not practicing Ohio law. Rather she submits that she is practicing under her Kentucky license while living and working in Ohio and believes she may continue to do so while her motion to be admitted without examination is pending. In her motion for reconsideration, the applicant also argues that Rule 5.5 (c)(2) of the Rules of Professional Conduct permits her to practice law in Ohio pending a decision on her admission because her practice is temporary within the meaning of that rule.

The Board has remanded the matter back to the panel for a recommendation on applicant’s motion and on whether she currently possesses the requisite character and fitness for admission to the bar of Ohio.

The panel will first consider applicant’s motion for reconsideration. There is no provision in Rule I for reconsideration of a recommendation by the Board. The panel therefore recommends that the motion be denied. Moreover, the initial decision of the Board was simply to allow the applicant a period of time in which to cease her activities and she has already submitted her response to that; the Board held in abeyance a decision on her character and fitness so there is nothing for the Board to reconsider in that regard. In her motion, the applicant provides further argument why her practice is temporary and therefore permissible under 5.5. To
be fair to the applicant, the panel will consider her additional materials in making its recommendation to the Board on her current character and fitness.

As noted, Ms. Jones relies upon Rule 5.5. Specifically, she focuses on Rule 5.5(c)(2) and the crux of her argument is that because she is not practicing Ohio law and because her activities are temporary, they are permitted.

As recounted in the initial panel report, the facts of this matter are undisputed. The applicant is a 2009 graduate of the George Mason School of Law who is admitted in Kentucky. After practicing first as an Assistant Attorney for the Jefferson County Commonwealth’s Attorney, she took a position in 2014 with a private law firm in Louisville, Kentucky that thereafter merged with an Ohio law firm. In late October 2015, Ms. Jones filed an application to be admitted without examination in Ohio. A few weeks later she moved for personal reasons to Cincinnati and transferred to the Cincinnati office of her law firm. Since her move to reside in Ohio she has maintained an office and a continuous and systematic presence in Ohio and has been practicing law.

The Supreme Court has not directly addressed the issue of whether Rule 5.5 permits an attorney licensed in another jurisdiction to practice pending admission in Ohio so long as the attorney does not practice Ohio law. The panel believes that it — and the Board — should try to follow the meaning and intent of the language of the rule. As discussed below, the panel concludes that the rule does not authorize an attorney licensed in another jurisdiction to practice pending admission in Ohio. To conclude otherwise appears to expand the language in a manner that is not within the authority of the Board and, if it is to be done, may only be done by the Supreme Court.
The general rule in Ohio is that the “rendering of legal services for another by any person not admitted to practice in Ohio under Rule I of the Supreme Court Rules for the Government of the Bar” is the unauthorized practice of law. See Rule VII, Section 2 of the Supreme Court Rules for the Government of the Bar. Rule VII, however, sets forth six specific exceptions to the general prohibition, thus permitting an individual not admitted to render legal services in Ohio (certification as a legal intern under Gov. Bar R. II; corporate status under Gov. Bar R. VI; certification to practice in legal services, public defender and law school programs under Gov. Bar R. IX; registration as a foreign legal consultant; permission through pro hac vice; and compliance with Rule 5.5 of the Ohio Rules of Professional Conduct).

The starting point for any analysis is the rule itself. To determine whether Rule 5.5 permits an attorney admitted in another jurisdiction to practice law in Ohio so long as it is not Ohio law must begin with the language of the rule. Like Rule VII, Rule 5.5 starts out with a general prohibition that “a lawyer who is not admitted to practice in this jurisdiction” shall not, 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.” Rule 5.5(b). Several points are worth noting with respect to this language. First, it is a prohibition against lawyers so it recognizes that merely being admitted in another jurisdiction does not entitle one to practice in Ohio if not admitted in Ohio. Second, the language of systematic and continuous seemingly provides the context in which the word “temporary” used later in the rule can be interpreted. After the general prohibition of section b, section c of the rule then sets forth what legal services may properly be rendered by a lawyer not admitted here. Ms. Jones primarily relies upon 5.5(c)(2) which provides:

(c) A lawyer who is admitted in another United States jurisdiction is in good standing in the jurisdiction in which the lawyer is admitted,
and regularly practices law may provide legal services on a temporary basis in this jurisdiction if one or more of the following apply:

(2) the services are 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;

The introductory section makes clear that before an attorney can invoke any of the provisions for rendering services in Ohio, the attorney must be admitted in another U.S. jurisdiction, be in good standing in that jurisdiction, and regularly practicing law there. There is at the very least a reasonable question whether the applicant satisfies the requirement that she regularly be practicing law in the jurisdiction in which she is admitted in that she is admittedly living and working in Ohio; this is the jurisdiction in which she has her office and in which she has a systematic and continuous presence. Contrary to the applicant’s contention that Rule 5.5 allows an out of state attorney to move to Ohio (thus establishing a systematic and continuous presence) and practice here until they are admitted, the language of section c appears to permit the rendering of legal services by attorneys admitted to, and regularly practicing in, another jurisdiction who need to provide services in Ohio arising out of that practice. Applicant has not come to Ohio to render services because her practice in Kentucky reasonably requires her to do so. She has moved to Ohio for admittedly personal reasons unrelated to her practice in Kentucky.

Applicant’s contention that her practice here is permissible because she is not practicing Ohio law is also questionable. The rule speaks of the practice of law, not simply the practice of Ohio law. The practice of Ohio law, according to applicant, seems to mean issues or cases arising under Ohio law. This appears to conflate the practice of law with the particular
type of law an attorney may practice. That is, an individual who is admitted to the practice of law in a particular jurisdiction is permitted to advice clients and address issues arising under any state or federal law. The particular common or statutory law that is the subject of the legal services being rendered does not determine whether a lawyer is practicing law. Whether an attorney is handling a matter involving Ohio law or the law of another jurisdiction, the attorney is in either case practicing law. Applicant is merely contending that while in Ohio she is not dealing with matters that arise under Ohio law; but that does not mean that she is not practicing law in Ohio while not admitted to do so.

Applicant’s second primary argument is that her practice is temporary as that term is used in Rule 5.5 and thus permissible. In construing the word temporary, applicant rests upon the opinion of a Professor Emeritus of Linguistics at The Ohio State University, Professor Craig Roberts. Professor Roberts relies upon the Oxford English Dictionary definition of temporary and its antonym, permanent. While the dictionary definition of a word is useful, a word’s interpretation must be considered, at least in some respect, within the context in which it is used. The panel will first address the definitions proffered by Professor Roberts and then discuss the use of the term within the context of Rule 5.5.

“Temporary” is defined, according to the Oxford Dictionary, as “lasting for a limited time; existing or valid for a time (only); not permanent; transient; made to supply a passing need. This is in contrast to “permanent” defined to mean “continuing or designed to continue or last indefinitely without change; abiding, enduring, lasting persistent. Opposed to temporary.” The various definitional phrases for each of these words appear to express slightly different ideas. For example, if one focuses on the phrase “made to supply a passing need” one could easily conclude that the applicant’s practice is not temporary since she is not meeting a
passing need, but has permanently moved to Ohio. Moreover, in putting “permanent” in context, Professor Roberts states “I take it that permanence is judged relative to some scale – in this case, the scale is eternity.” Such abstractions do not seem particularly helpful in the context of determining the meaning of the term in Rule 5.5. As observed earlier, the panel thinks that the better method for understanding the term and applying it is to contrast it with the earlier reference in the rule to establishing an office or a systematic and continuous presence. If a lawyer has established an office and a continuous and systematic presence, then it can reasonably be concluded that the services being rendered by the lawyer are not temporary.

Applicant’s contention that Rule 5.5 permits a lawyer to practice pending admission is contradicted by other provisions of the Ohio rules for the Government of the Bar. Gov. Bar R. I, Section 9 addresses admission without examination, the provision pursuant to which the applicant seeks admission. Section 9 (H) specifically states that “an applicant under this section shall not engage in the practice of law in Ohio prior to the presentation of the applicant to the Court. . . .” A similar prohibition is set forth in Rule VI of the Rules for the Government of the Bar concerning the registration of attorneys. Section 6 (A) (2) of the rule provides that an attorney admitted in another jurisdiction but not Ohio and employed by an Ohio law firm is exempted from the registration requirement. However, the section also specifically prohibits the attorney from practicing law until admitted in Ohio: “Until the attorney is admitted to the practice of law in Ohio, the attorney may not practice law in Ohio. . . .” Not only do these provisions seem to directly refute applicant’s contention that Rule 5.5 allows her to practice law so long as it is not Ohio law, but more importantly they directly prohibit her from practicing in Ohio.
Finally, there is at least circumstantial support for the conclusion that Rule 5.5 does not allow practice pending admission. This is supplied by the proposal of the American Bar Association for a model rule entitled Practice Pending Admission. According to the Report of the ABA Commission on Ethics 20/20, the proposed rule is intended to recognize that in today’s more mobile society a lawyer licensed in one jurisdiction may need to move to another and to allow a lawyer the ability to practice while going through admission procedures so as to avoid the risk of the unauthorized practice of law. If Rule 5.5, also based on an ABA model rule permitted practice pending admission, such a new model rule would not seem necessary.¹

Based upon its review of the pertinent authorities, the panel concludes that the applicant is engaged in the unauthorized practice of law, a factor to be considered under Rule 1 in determining character and fitness. As the Supreme Court noted in *In re Application of Swendiman*, 2016-Ohio-2813 ¶14, “commission of an act constituting the unauthorized practice of law is one factor to be considered in determining whether an applicant possesses the requisite character, fitness, and moral qualifications to practice law in Ohio.” The critical question is what weight to be accorded this factor. In making this judgment, the panel finds it important that, from the time she filed her application and made it known she was moving to Ohio and was going to continue to practice, she was advised that there may be an issue. The Admissions Office does not advise an applicant that their activities constitute the unauthorized practice of law, but it does alert an applicant that there may be a problem so that the applicant will look at the pertinent rules. There is no evidence that the applicant did this. Despite the clear

¹ Also pertinent here is an Order entered by the late Chief Justice Moyer following the Katrina hurricane disaster. Because of the disruption in the practice of law in the affected areas, the Order temporarily suspended applicable provisions of the Rules for the Government of the Bar and provided that lawyers in three states could come to Ohio and continue their practice from Ohio. Arguably, such an order would not have been necessary if the lawyers could have come to Ohio and practiced law so long as it was not Ohio law.
prohibitions in Rule 1, Section 9 (H) and Rule VI, Section (A) (2), the applicant simply interpreted Rule 5.5 in a manner that allowed her to practice. The prohibition in Section 9 (H) is particularly telling because this is the rule upon which the applicant relies to seek admission without having to take the Ohio bar examination. Of perhaps lesser weight, but still an issue for the panel, is the opportunity afforded the applicant to reconsider her position. This she declined to do so that her unauthorized activities are currently ongoing. Again, the Court in Swendiman provides guidance. The Court stated: “In providing weight and significance to the applicant’s prior conduct, we consider the age of the applicant at the time of the conduct, the recency of the conduct, and the reliability of the information concerning the conduct.” Id. The applicant is a mature adult, the conduct is current and ongoing, and the information about her activities is reliable since she is admittedly practicing law, albeit not matters involving Ohio law. Under these circumstances, the panel concludes that the applicant has failed to prove by clear and convincing evidence that she possesses the character, fitness, and moral qualifications for admission to the practice of law in Ohio.

John C. Fairweather, panel member

Hon. Denise L. Moody, panel member

Suzanne K. Richards, panel chair