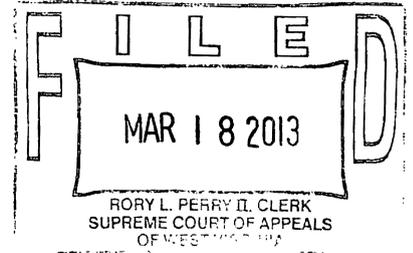


IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
NO. 12-1410



STATE EX OF WEST VIRGINIA REL. OLEN L. YORK, III,

Petitioner,

v.

**WEST VIRGINIA OFFICE OF DISCIPLINARY COUNSEL, and
WEST VIRGINIA LAWYER DISCIPLINARY BOARD,**

Respondents.

**PETITIONER'S REPLY TO RESPONDENTS'
SUPPLEMENTAL BRIEF TO PETITIONER'S PETITION
FOR A WRIT OF PROHIBITION**

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I.

Introduction

To the Honorable Justices of the

West Virginia Supreme Court of Appeals:

In the supplemental brief filed by Respondents West Virginia Office of Disciplinary Counsel and West Virginia Lawyer Disciplinary Board, Respondents repeat some of their general arguments regarding jurisdiction and cite some out-of-state cases. Petitioner Olen L. York, III, respectfully submits the supplemental arguments and additional cases cited do not resolve the fundamental problem facing Respondents in this case—they simply do not have any jurisdiction to prosecute ethics

charges against Petitioner because he is not a member of the West Virginia State Bar and he does not practice law in any West Virginia courts.

II.

Reply to factual issues

Before addressing the supplemental arguments, Petitioner respectfully submits two factual issues should be noted. First, subsequent to the initial filing of the **JOINT APPENDIX** in this case, Petitioner supplemented the record with a copy of the December 6, 2012 letter from the Office of Enrollment and Discipline of the United States Patent and Trademark Office (USPTO). This letter is an inquiry by the lawyer disciplinary office of the USPTO, relating to the charges issued by Respondents as well as asking additional USPTO related questions. Because Petitioner is admitted to practice before the USPTO, Petitioner does not dispute the jurisdiction of that office to investigate the issues raised by Respondents in the September 24, 2012 **STATEMENT OF CHARGES**. At the time this brief was filed, Petitioner had filed an extensive response to the inquiry and no further action has been taken by the USPTO.

Second, throughout its briefs, Respondents make a lot of very general statements regarding the need to protect citizens of West Virginia, who may be clients of lawyers not licensed to practice law by the West Virginia State Bar, but who are admitted to practice law in other states or by federal courts or agencies. Some of the cases cited by Respondents, where a lawyer not licensed in a particular state misrepresented to the public that he or she was licensed to practice in the courts of that state, clearly present situations where Respondents would have jurisdiction because those cases are consistent with the bright line rule adopted by this Court in Syllabus Point 2 of *Lawyer Disciplinary Board v. Allen*, 198 W.Va. 18, 479 S.E.2d 317 (1996), recognizing Respondents'

jurisdiction over out of state lawyers who either practice law in a West Virginia court or in a matter that may be filed in a West Virginia court.

In the present case, the charges alleged against Petitioner arise from a dispute between two lawyers over money that is still owed by the complainant, Robert R. Walters, to Petitioner. None of the allegations made by Respondents reflects any effort by Petitioner either to file a case for a client in West Virginia or to deny a client any funds owed to the client.

III.

Reply to supplemental arguments

Respondents seek to have this Court provide the broadest possible interpretation of the language in Rule 1 of the West Virginia Rules of Lawyer Disciplinary Procedure, which provides Respondents have jurisdiction over “any individual admitted to the practice of law in another jurisdiction **who engaged in the practice of law in West Virginia.**” (Emphasis added). Although Respondents cite *Allen* for the proposition this Court has the exclusive authority to define, regulate and control the practice of law in West Virginia, a proposition Petitioner clearly does not dispute, Respondents fail to address this Court’s holding in Syllabus Point 2 of *Allen* as limiting Respondents’ jurisdiction to actions that either were or could be filed in a West Virginia court. Remaining consistent with this bright line rule would eliminate questions regarding Respondents’ jurisdiction over lawyers, who are not admitted to the West Virginia State Bar, but who engage in some activities in this State which are considered to be the practice of law.

In addition to Rule 1 and *Allen*, which address Respondents’ jurisdiction, Rule 8.5 of the West Virginia Rules of Professional Conduct, entitled “Jurisdiction,” provides, “A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although

engaged in practice elsewhere.” Thus, when a lawyer admitted to practice law in West Virginia engages in the practice of law in another jurisdiction, the lawyer still can be charged with violating the West Virginia Rules of Professional Conduct.

The only specific rule addressing the actions of lawyers not admitted to practice law in this State is Rule 5.5, prohibiting the unauthorized practice of law. As noted in the original **PETITION**, because Petitioner is admitted to practice before the USPTO, he is authorized to take whatever actions are necessary to represent his clients, even if those actions occur in West Virginia and could be considered to fall within the broad definition of the practice of law. Consequently, Respondents never charged Petitioner with violating Rule 5.5 because he is authorized to take the actions necessary to represent his patent clients.

The new cases cited by Respondents either do not provide Respondents with any additional authority regarding their claim of jurisdiction or are supportive of Petitioner’s arguments or are distinguishable on their facts and the law applicable in that jurisdiction. Most of the cases cited by Respondents involve unauthorized practice of law charges, which are not at issue in the present case. In *Kennedy v. Bar Association of Montgomery County, Inc.*, 216 Md. 646, 561 A.2d 200 (1989), the disciplinary counsel of the Maryland Bar filed an injunction against a lawyer, not licensed to practice law by the Maryland Bar, pursuant to Maryland’s prohibition against the unauthorized practice of law. Under the facts, where this lawyer actually had appeared numerous times in Maryland courts, without being admitted under Maryland’s *pro hac vice* rule, the Maryland Court of Appeals upheld the unauthorized practice of law injunction. Interestingly, the Maryland Court of Appeals noted the injunction should be modified to permit this lawyer to present the lower court with a plan whereby he would practice law in federal or other non-Maryland courts out of his Maryland office.

In *Mahoning County Bar Association v. Harpman*, 62 Ohio Misc.2d 573, 608 N.E.2d 872 (1993), a county bar association filed unauthorized practice of law charges against an individual, who was not a lawyer licensed in any state, but who was admitted as a “patent attorney” before the USPTO, which historically had a practice of permitting nonlawyers to practice and use the term “patent attorney.” In going through the facts, the Ohio Board of Commissioners on the Unauthorized Practice of Law concluded the actions this nonlawyer took specifically in connection with the USPTO did not constitute the unauthorized practice of law. However, various letters sent expressing legal opinions on behalf of clients relating to bids and other business issues clearly constituted the unauthorized practice of law.

In *Attorney Grievance Commission of Maryland v. Barneys*, 370 Md. 566, 805 A.2d 1040 (2002), a lawyer, who was not admitted to the Maryland Bar, but whose application for admission was pending, was charged with the unauthorized practice of law for appearing in numerous Maryland courts, without seeking *pro hac vice* admission, and misrepresenting to clients he could practice law in Maryland courts. Under these egregious facts, the Maryland Court of Appeals held disbarment was appropriate.

In *Discipline of Droz*, 123 Nev. 163, 160 P.3d 881 (2007), a disbarred Utah lawyer was found to have violated Nevada’s rules against the unauthorized practice of law when he opened up an office in Nevada, accepted Nevada clients, and misrepresented that he was licensed to practice law in Nevada. In *In the Matter of Tonwe*, 929 A.2d 774 (2007), a lawyer, who previously had entered into a statement of voluntary compliance with a cease and desist order involving her unauthorized practice of law in Delaware and who had been disbarred in three other jurisdictions, continued to represent Delaware clients, mostly involved in automobile accidents.

The remaining cases cited by Respondents are not based upon unauthorized practice of law charges, but still did not support Respondents' claim of jurisdiction in the present case. In *Attorney Grievance Commission of Maryland v. Kimmel*, 405 Md. 647, 955 A.2d 269 (2008), disciplinary action was taken against two out of state lawyers, who had a law office in Maryland staffed with an inexperienced Maryland lawyer. Issues were raised with respect to the supervision of that office and failure to communicate properly with clients once the Maryland associate abruptly resigned her position and later was disbarred. Significantly, because these out of state lawyers actually had an office in Maryland representing Maryland citizens in Maryland courts, these lawyers did not have any objection to the jurisdiction of the Maryland disciplinary counsel.

In *Kentucky Bar Association v. Shane*, 553 S.W.2d 467 (Ky. 1977), an Ohio lawyer, who was not licensed in Kentucky, listed himself as co-counsel for one of the defendants in a Kentucky case, wrote a letter to the plaintiff's counsel, and then proceeded to mail a copy of this same letter to the plaintiff directly. The Ohio bar issued a private reprimand as a result of this violation. The Kentucky Bar asked for and received a public reprimand. Clearly, this lawyer improperly had listed himself as a lawyer in a Kentucky case and in that context, violated the ethical rule prohibiting direct contact with a party known to be represented by counsel.

In *Iowa Supreme Court Attorney Disciplinary Board v. Carpenter*, 781 N.W.2d 263, 266 (Iowa 2010), the lawyer was licensed to practice law in Minnesota, but was permitted to practice law in Iowa under a specific rule permitting such lawyers to provide legal services in Iowa "that the lawyer is authorized to provide by federal law or other law of this jurisdiction." In an earlier proceeding, this lawyer was suspended from practicing law in Iowa for depression, pursuant to a rule providing the Iowa Bar has jurisdiction to discipline a lawyer practicing in Iowa, pursuant to the

specific rule permitting such practice authorized by federal law or other law of this jurisdiction. Thus, in Iowa, the rules provided the Iowa Bar has jurisdiction to discipline out of state lawyers who are practicing law in Iowa, pursuant to the rules cited above.

In contrast, there are no equivalent rules in West Virginia comparable to the governing rules in Iowa. While it is possible this Court may be in the process of adopting similar rules as well as ABA Model Rule 5.5, for purposes of this case, the rules in effect at the time of the events alleged in the underlying **STATEMENT OF CHARGES** are controlling.

The attempt by Respondents to assert jurisdiction over Petitioner based on Petitioner's authorized practice of law before the USPTO, where some of the actions and legal services he provided in connection with his patent cases occurred in West Virginia, goes far beyond the bright line rule established in *Allen* and threatens to be in violation of the Supremacy Clause to the extent such jurisdiction interferes with his USPTO practice.

In *West Virginia State Bar v. Earley*, 144 W.Va. 504, 519-20, 109 S.E.2d 420, 431 (1959), this Court, in the context of disapproving the use of lay people representing claimants in workers' compensation claims, made the following observations regarding the difficulties in defining what constitutes the practice of law:

The courts in numerous decisions in different jurisdictions have undertaken to define and designate what constitutes the practice of law; but it is generally recognized that it is extremely difficult, perhaps impossible, to formulate a precise and completely comprehensive definition of the practice of law or to prescribe limits to the scope of that activity. *Bump v. District Court of Polk County*, 232 Iowa 623, 5 N.W.2d 914; *Clark v. Austin*, 340 Mo. 467, 101 S.W.2d 977; *State ex rel. Johnson v. Childe*, 147 Neb. 527, 23 N.W.2d 720; *State ex rel. Johnson v. Childe*, 139 Neb. 91, 295 N.W. 381; *Auerbacher v. Wood*, 142 N.J.Eq. 484, 59 A.2d 863; *Shortz v. Farrell*, 327 Pa. 81, 193 A. 20. It is clear, however, that a licensed attorney at law in the practice of his profession generally engages in

three principal types of professional activity. These types are legal advice and instructions to clients to inform them of their rights and obligations; preparation for clients of documents requiring knowledge of legal principles which is not possessed by an ordinary layman; and appearance for clients before public tribunals, which possess the power and authority to determine rights of life, liberty and property according to law, in order to assist in the proper interpretation and enforcement of law.

See also In the Matter of the Application of R.G.S., 312 Md. 626, 541 A.2d 977 (1988)(Has an interesting discussion on how “practice of law” may be defined differently for purposes of unauthorized practice of law versus qualification for admission to the bar).

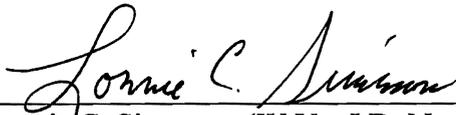
If the Court interprets the phrase in Rule 1 of the West Virginia Rules of Lawyer Disciplinary Procedure “engaged in the practice of law in West Virginia,” as broadly as Respondents seek, potentially there would not be any limit to Respondents’ jurisdiction. Respondents theoretically could discipline: any out of state lawyer taking the deposition of a witness in this State, in connection with a case pending outside of West Virginia; all of the lawyers in this State, who are licensed to practice law in federal courts or federal agencies, but who have chosen not to become a member of the West Virginia State Bar; out of state transactional lawyers, who may come to this State in connection with a business transaction; and out of state lawyers, who are vacationing in this State, but who foolishly use part of their leisure time researching or writing briefs or consulting with clients.

The bright line rule this Court adopted in *Allen* makes a lot of practical sense, in light of the lack of any other clear guidance in either the West Virginia Rules of Lawyer Disciplinary Procedure or the West Virginia Rules of Professional Conduct. Consequently, Petitioner respectfully submits

under the existing rules and case law, Respondents lack jurisdiction to discipline Petitioner under the facts alleged in this case.

STATE EX REL. OLEN L. YORK, III, Petitioner,

–By Counsel–



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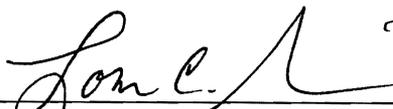
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CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that a copy of the foregoing **PETITIONER'S REPLY TO RESPONDENTS' SUPPLEMENTAL BRIEF TO PETITIONER'S PETITION FOR A WRIT OF PROHIBITION** was served on counsel of record on the 18th day of March, 2013, through the United States Postal Service, postage prepaid, to the following:

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