STATE BAR OF NEVADA
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 19
June 16, 1994

QUESTION - May a nonresident attorney who is admitted to the State Bar of Nevada maintain a general litigation practice without associating local counsel and satisfy the requirements of Nevada Supreme Court Rule 42(10) under the following situations:
1. Utilizes any space made available to the attorney by the Nevada client when the attorney is in Nevada, which space is not otherwise clearly designated as the attorney's law office;
2. Utilizes a clearly designated area within a client's place of business located in Nevada and arranges for one of the client's employees to act as a receptionist/secretary, as above, but does not have a separate telephone number, using, instead, the client's telephone number;
3. Utilizes as office space in Nevada a clearly designated area with a client's place of business located in Nevada, where the attorney places signs on the interior and the exterior of the building designating the location of the office, where the attorney has his/her own telephone number operating through the client's switchboard, and where the attorney arranges with one of the client's employees to act as receptionist/secretary to receive phone messages, accept mail, and service of legal documents, and where that employee forwards such telephone messages and documents to the out of state attorney.

ANSWER - The legitimate interests of the Nevada courts and Nevada clients which support SCR 42 cannot be served by a nonresident attorney who uses as an office in this state a space located within the confines of another client's business, which is staffed by persons who are not employed directly by the attorney, but by the client.

AUTHORITIES RELIED UPON
Nevada Supreme Court Rules 42 and 156; Supreme Court of New Hampshire v. Piper, 470 U.S. 274; 105 S. Ct. 1272; 84 L. Ed. 1d 205 (1985); Supreme Court of Virginia v.Friedman,. 587 U.S. 59; 108 S. Ct. 2260; 101 L. Ed. 2d 56 (1988); Barnard v. Thorstenn, 489 U.S. 546; 109 S. Ct. 1294; 103 L. Ed. 2d 559 (1989); Archer v. Ogden, 600 P.2d 1223 (Okla. 1979); Dyche v. Crawford, 327 P.2d 1047 (Kan. 1958); Taylor v. Taylor, 342 P.2d 192 Kan.1959); and Naimo v. Fleming, 95 Nev. 13; 558 P.2d 1025 (1979).

DISCUSSION
Nevada Supreme Court Rule (SCR) 42 generally regulates the practice of law in Nevada by attorneys not admitted in this state, and by attorneys who, though admitted and active members of the State Bar of Nevada, are not residents of Nevada. Specifically, SCR 42(10) provides:

10. An attorney admitted to practice in Nevada but who does not maintain an office in Nevada, on filing any pleadings in the courts in Nevada, either associate an attorney maintaining an office in Nevada, or designate an attorney maintaining an office in the county in Nevada wherein the pleading or paper is filed, upon whom all papers, process or pleadings required to be served upon an attorney may be so served. A post office box shall not constitute an office under this rule. The name and office address of such attorney so designated shall be endorsed upon the pleading or paper so filed, and service upon such attorney shall be deemed to be service upon the attorney filing the pleading or other paper.

The rule by its terms applies to attorneys who are engaged in litigation practice before the courts of the State of Nevada, since the triggering event requiring the consideration of whether or not to associate an attorney who has an office in Nevada is the filing of any pleadings in the courts of Nevada.

In considering the questions which have been posed, it is assumed that the nonresident attorney would engage in a general practice of law dealing with clients other than the Nevada client whose place of business the proposed office would be maintained.

The United States Supreme Court has considered the related issue of whether a state court may require those seeking admission to the bar to be residents of that state. The United States Supreme Court held in the case of Supreme Court of New Hampshire v. Piper, 470 U.S. 274; 105 S. Ct. 1271; 84 L. Ed.2d 205 (1985) that the right to practice law is protected by the privileges and immunities clause. However, the Court observed that:

"The clause does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) discrimination practiced against nonresidents bears a substantial relationship to the State's objective."

The Court ultimately decided that there was no reason advanced by the state of New Hampshire which justified the refusal of the state to admit non residents to the New Hampshire Bar, and specifically rejected the argument that nonresident members are less likely to become and remain familiar with local rules and procedures as justification for the discrimination against nonresident attorneys.

The Piper opinion suggested, however, that the argument that nonresident attorneys might be unavailable on short notice for court proceedings may have some merit, but could be handled in a manner less restrictive than barring admission to practice. In that regard, the Court observed:

There is ore merit to appellant's assertion that a nonresident member of the bar at times would be unavailable for court proceedings. In the course of litigation, pretrial hearings on various matters often are held on short notice. At times a court will need to confer immediately with counsel. Even the most conscientious lawyer residing in a distant State may find himself unable to appear in court for an unscheduled hearing or proceeding. Nevertheless, we do not believe that this time of problem justifies the exclusion of nonresidents from the state bar. …Furthermore, in those cases where the nonresident counsel will be unavailable on short notice, the State can protect its interest through less restrictive means. The trial court, by rule or as an exercise of discretion, may require any lawyer who resides at a great distance to retain a local attorney who will be available for unscheduled meetings and hearings.

The Piper decision has been upheld by the United States Supreme Court on two subsequent occasions, in the case of Supreme Court of Virginia v. Friedman, 487 U.S. 59; 108 S. Ct. 2260; 101 L. Ed. 2d 56 (1988); and in Barnard v. Thorstenn, 489 U.S.546; 109 S. Ct. 1294; 103 L. Ed. 2d 559 (1989). Like Piper; both of these later cases also dealt with court rules that prohibited non residents from admission to practice law. In both cases, the Court recognized the legitimate state concern that nonresident attorneys may be unavailable to appear before the courts on short notice, and suggested and supported the solution of requiring the non resident attorneys to associate local counsel. In Virginia v. Friedman, surpra, the association of local counsel requirement of the Virginia bar was cited as the mechanism by which the courts could assure that nonresident attorneys would be present as required by the courts of that state, and to assure that nonresident attorneys would have a significant interest

in respecting the bar and promoting its interests. The U.S. Supreme Court observed in that case as follows:

The question, however, is whether lawyers who are admitted in other States and seek admission in Virginia are less likely to respect the bar and further its interests solely because they are nonresidents. We cannot say this is the case. …She [Friedman] earns her living working as an attorney inVirginia, and it is of scant relevance that her residence is located in the neighboring state of Maryland. It is indisputable that she has a substantial stake in the practice of the law in Virginia. Indeed,despite appellants' suggestion at oral argument that Friedman's case is "atypical," ….the same will likely be true of all nonresident attorneys who are admitted on motion to the Virginia bar, in light of the State's requirement

that attorneys so admitted show their intention to maintain an office and a regular practice in the State [citations omitted]. This requirement goes a long way toward ensuring that such attorney will have an interest in the practice of law in Virginia that is at least comparable to the interest we ascribed in Piper to applicants admitted upon examination. …Virginia already requires pursuant to the full-time practice restriction of Rule 1A:1, that attorneys admitted on motion maintain an office for the practice of law in Virginia. As the Court of Appeals noted, the requirement that applicant maintain an office in Virginia facilitates compliance with the full-time practice requirement in nearly the identical manner that the residency restriction does, rendering the latter restriction largely redundant [citation omitted]. The office requirement furnishes an alternative to the residency requirement that is not only less restrictive, but also a fully adequate to protect whatever interest the State might have in the full-time practice restriction.

The U.S. Supreme Court observed in Barnard v. Thorstenn,supra that the requirement that out of state lawyers associate local counsel would satisfy the concern that the court's calendars would be delayed and burdened by attempting to accommodate nonresidents' travel schedules. The Court noted in Barnard that any burden to accommodate nonresidents' travel schedules can be relieved by requiring them to associate with local counsel, stating:

Although that observation is not applicable here, we went on to hold in Piper that, for lawyers who reside a great distance from New Hampshire, the State could protect its interest by requiring

the lawyer to retain a local attorney who will be available for unscheduled meetings and hearings [citations omitted]. The same solution is available to the Virgin Islands. The exclusion of nonresidents from the bar is not substantially related to the District Courts' interest in assuring that counsel will be available on short notice for unscheduled proceedings.

Thus the U.S. Supreme Court has suggested two possible legitimate justification for requiring the association of local counsel by nonresident members of the Nevada Bar, those being to assure that attorneys representing clients in litigation matters in this state are readily accessible to the courts, and that such attorneys are committed to the best interests of the state bar in which they are practicing, though not residing.

Turning now to those legitimate justifications for SCR 42, the question is whether any of the three alternatives posed in this opinion satisfies those legitimate concerns, and satisfies the requirement of "maintaining an office in the county of Nevada where the pleading or paper is filed."

SCR 42 requires something more than a mail stop as an office, but does not specify the nature of the "office" specifically contemplated, except that such office must be available for the service of papers, process and pleadings upon the attorney, which in Nevada may include delivery to the attorney in person as well as by mail. In order to answer the questions raised, it is necessary to review the functions of an attorney's office with reference to the clients which the attorney serves, the Nevada Courts, and opposing counsel.

The Supreme Court of Kansas has considered the issue of whether Kansas attorneys who maintain their regular practice in bordering state Missouri may practice law in Kansas, with out associating local Kansas counsel. The Kansas Rules of Professional Conduct do not include an exception for nonresident Kansas attorneys who maintain an office in Kansas. Discussion in those cases of the reason for requiring association with Kansas attorneys who do maintain an office in that state are helpful to an understanding of the reasons for such requirements. In Dyche v. Crawford, 327 P.2d 1047 (Kan. 1958), an attorney admitted to practice both in Kansas and Missouri who reside in Kansas, but practice law primarily in Missouri and maintained his office in Missouri, was allowed nevertheless to take cases in Kansas. The Court found that his regular presence at his home in Kansas provided ample opportunity for the courts and opposing counsel to contact him as necessary. The dissenting opinion, however, provided a more detailed expression of the reason for the rule, which was stated as follows:

But, where the language is uncertain in meaning it is necessary to resort to ascertainment of the legislative intent behind its enactment. Here, I believe, the intent is obvious. It is to protect the interests of those in need of legal representation. In Felton v. Rubow [citation omitted] it was held: "A nonresident attorney, unfamiliar with our statutes and the jurisdiction of our courts, may sacrifice his client's interests by not complying with our statute respecting appearance in the courts of this state by a nonresident attorney.***"

The Kansas Supreme Court reconsidered its application of this rule in the later case of Taylor v. Taylor, 342 P.2d 192 (Kan. 1959), in which the court upheld the dismissal of an action filed by an attorney licensed in both Missouri and Kansas, who in fact had an office in Kansas, but regularly practiced in Missouri, for failure to associate local Kansas counsel.

The Supreme Court of Oklahoma in Archer v. Ogden, 600 P.2d 1223 (Okla. 1979), reviewed a rule similar to SCR 42(10), with the exception of the fact that the Oklahoma rule specifies that the "office" which must be maintained is a "continuously operating law office." Although it was determined that the nonresident attorney had violated the rule by failing to maintain a law office in the state before attempting to appear before the Oklahoma courts, the rule was held unconstitutional, as having been enacted by the legislature rather than the Supreme Court.

In Naimo v. Fleming, 95 Nev. 13, 558 P.2d 1025 (1979), the only Nevada case discussion SCR 42(10), the Court considered the application of SCR 42(10) in dismissing a complaint filed by out of state counsel where local counsel had not been associated. Unfortunately, the Court did not discuss the policies underlying the rule, or what type of office would satisfy the requirements of the rule.

The primary legitimate justification (according to Piper, supra, its progeny, and the Kansas and Oklahoma cases cited above) to either maintain an office in Nevada or associate local counsel is to assure that the attorney will be accessible to the courts and able to appear on short notice. The first alternative suggested, that of the non resident attorney utilizing space made available by a client in Nevada whenever the attorney visits this state, does not satisfy this legitimate concern. The attorney would have virtually nothing more than a place to sit in Nevada during irregular visits, with no guarantee that pleadings could be served upon the attorney in this state or that the courts could contact the attorney on short notice to require appearances in this state or that the courts could contact the attorney on short notice to require appearances in this state. Thus, the first alternative appears even less satisfactory than a mail drop.

With respect to the second and third alternatives, it is assumed in the light of current technological advancements, that the ability to transmit information to out of state attorneys via telephone, telefax and one day mail service would allow the transmission of information to an attorney residing outside of the state of Nevada as quickly and easily as to an attorney within the state. Nevertheless, although a secretary/receptionist is capable of transmitting messages, the purposes of SCR 42 still cannot be satisfied by an attorney who only irregularly appears in Nevada. The physical replacement of an empty office inside the state, with a telephone line and someone to answer it and receive the mail is an improvement over the post office box only in that the mail and telephone messages may be regularly picked up and transmitted. This type of office does not assure that the non resident attorney would be available to the courts and counsel as may be required in a particular case.1

The further question is whether these functions alone characterize a law office which is fully responsive to clients and the courts. A law office should be an extension of the attorney in the performance of legal services for clients. In that regard, SRC 156 mandates that law office personnel must maintain the confidentiality of clients, and are typically employed for the exclusive purpose of assisting the attorney in providing services to the clients of the firm.2 Where a secretary/receptionist is primarily employed (and presumably compensated) by a non-attorney, his or her loyalties will, logically, reside primarily with the non-attorney employer in terms of the carrying out of the daily job responsibilities. Moreover, since the secretary/receptionist would conceivably be taking telephone calls and receiving communications from clients, that individual would be privy to confidential communications with perhaps no understanding of

the obligation to maintain the confidentiality of clients. Such an individual would have no strong inducement to maintain confidentiality since the secretary/receptionist's primary employment is not within the law firm, but as a secretary for non-lawyers. The second and third alternatives suggested raise a legitimate concern about confidentiality of client communications where sensitive documents may be received by employees of another client, as well as the lack of commitment of the secretary/receptionist provided by the other client to the attorney and his practice in this state. Moreover, in the case of the second alternative, it is conceivable that courts and counsel, as well as clients, would be confused by the fact that telephones were answered by employees of a business seemingly unrelated to the lawyer's practice.

1 With reference to the ability to appear promptly as required by the courts,we note that Nevada resident attorneys residing in remote areas of this state may in some cases have a more difficult time than out of state lawyers in making such appearances, and yet are not required to retain local counsel. Nevertheless, that is but one of the justifications for SCR 42(10), the other being the commitment to service and respect for the state bar by such nonresident attorneys, according to Friedman, supra.

2 SCR 156 (1) states:
1. A lawyer shall not reveal information relating to representation of client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in subsections 2 and 3.

CONCLUSION
The legitimate interests of the Nevada courts and Nevada clients which support SCR 42 cannot be served by a nonresident attorney who uses an office in this state a space located within the confines of another client's business, which is staffed by persons who are not employed directly by the attorney, but by the client.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to SCR 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.