Opinion No. 65-19

February 4, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Roy C. Hill, Assistant Attorney General

TO: Patrick F. Hanagan, District Attorney, Fifth Judicial District, Roswell, New Mexico

QUESTION

STATEMENT OF FACTS

An attorney, acting on behalf of a client, who is not a resident of New Mexico and is not licensed to practice law in New Mexico and who does not associate himself with a New Mexico attorney is probating estates in the Probate Courts of New Mexico. Most, if not all, of the proceedings are conducted by mail even to the extent of sending orders to the Probate Judge for signature.

QUESTION

Does this constitute practicing law contrary to the laws of New Mexico?

CONCLUSION

Yes.

OPINION

*{*32}* ANALYSIS

Section 18-1-26, N.M.S.A., 1953 Compilation (P.S.) provides in pertinent part as follows:

"No person shall practice law in any of the courts of this state, except court of justice of the peace, nor shall any person commence, conduct or defend any action or proceeding in any of said courts unless he be an actual and bona fide resident of the state of New Mexico, and unless he shall have first obtained a temporary license as herein provided or shall have been granted a certificate of admission to the bar under the provisions of this chapter . . . Provided, however, that nothing in this act shall be construed to prohibit persons residing beyond the limits of this state, otherwise qualified, from assisting residents counsel in commencing, conducting or otherwise participating in any action or proceeding . . ."

It cannot be questioned that Probate Courts are included within the prohibition of this section. Prior to 1957, the year when the section, as presently written, was enacted,

Probate Courts, in addition to justice of the peace courts, were included within the exception. Therefore, the real question is whether or not the fact set out *{*33}* above describe practicing law.

In two prior opinions by this office the question of what constitutes the practice of law has been considered. In neither of them was the factual situation the same as the one presented here. However, in these opinions we do find the definitions previously relied on and from these we conclude that the facts set out above describe practicing law. In Opinion No. 58-200, dated September 30, 1958, these definitions were set out:

"Practicing as an attorney or counselor at law, according to the laws and customs of our courts, is the giving or advice or rendition of any sort of service by any person, firm or corporation when the giving of such advice or rendition of such service requires the use of any degree of legal knowledge of skill." **People v. People's Stock Yards State Bank,** 344 Ill. 462, 176 N.E. 901 (1931).

"We are of the opinion that the practice of law was not confined to practice in the courts of this state, but was of larger scope, including the preparation of pleadings and other papers incident to any action or special proceeding in any court or other judicial body, conveyancing, the preparation of all legal instruments of all kinds whereby a legal right is secured, the rendering of opinions as to the validity or invalidity of the title to real or personnel property, the giving of any legal advice, and any action taken for others in any matters connected with the law." **Barr v. Cardell,** 173 Iowa 18, 155 N.W. 312 (1915).

"Persons acting professionally in legal formalities, negotiations or proceedings by the warrants or authority of their clients may be regarded as attorneys at law within the meaning of that designation as employed in this country." **State v. Wells,** 191 S.C. 468, 5 S.E.2d 181 (1939).

In Opinion No. 60-173, dated September 26, 1960, the following definition was used:

". . . is the doing or performing of services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity with the adopted rules of procedure; but is not confined to performing services in an action or proceeding pending in courts of justice, and, in a larger sense, it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court. To 'practice law' is to carry on the business of an attorney at law; to do or practice that which an attorney or counselor at law is authorized to do and practice; to exercise the calling or profession of the law, usually for the purpose of gaining a livelihood, or at least for gain; to make it one's business to act for, and by the warrant of, others in legal formalities, negotiations, or proceedings . . ." 7 C.J.S. Attorney and Client, Sec. 3.

The factual situation presented with your question clearly falls within the quoted definitions of practicing law. This would be true even if all the proceedings were

conducted by mail. The practice would still be in a court in New Mexico by an unauthorized person.

In addition to the above citations I will mention that the Supreme Court of Minnesota in **In Re Otterness,** 181 Minn. 254, 232 N.W. 318 (1930) held that conducting proceedings in the probate courts of that state constituted practicing law. The court pointed out that probate courts were courts of record with exclusive original jurisdiction over the estates of decreased persons and *{*34}* persons under guardianship. Probate courts in New Mexico are courts of record, Art. VI, Sec. 23, Constitution of New Mexico, with concurrent jurisdiction with the district courts in probate matters. **In ReHickok's Will,** 61 N.M. 204, 297 P.2d 866.