

# Is It Time to Revisit the Constitutionality of Unauthorized Practice of Law Rules?

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## Other Views:

- Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67 (2016), <http://ssrn.com/abstract=3097145>.
- Claudia E. Haupt, *The Limits of Professional Speech*, 128 YALE L.J.F. 185 (2018), <https://www.yalelawjournal.org/forum/limits-professional-speech>.
- Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238 (2016), <https://ssrn.com/abstract=2509458>.
- Robert Kry, *The Watchman for Truth: Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885 (2000), <https://digitalcommons.law.seattleu.edu/sulr/vol23/iss4/2/>.
- Michele Cotton, *Improving Access to Justice by Enforcing the Free Speech Clause*, 83 BROOK. L. REV. 111 (2017), <https://brooklynworks.brooklaw.edu/blr/vol83/iss1/14/>.

Every jurisdiction has a rule against the unauthorized practice of law. Rule 49 of the Rules of the District of Columbia Court of Appeals, for example, governs the unauthorized practice of law in the District of Columbia. Like virtually every other such rule in jurisdictions throughout the United States, it prohibits certain conduct by both non-lawyers and lawyers who are admitted to other bars, but not the D.C. Bar.

Two recent opinions—a concurrence joined by three judges of the Ohio Supreme Court and a United States Supreme Court opinion—have raised constitutional questions about regulations of the unauthorized practice of law. In this article, I briefly review the two cases and then identify aspects of unauthorized practice rules that might be subject to challenge in the future based on the analysis in these decisions.

## I. *IN RE JONES*

The more obviously relevant opinion is *In re Jones*, which the Ohio Supreme Court decided on October 17, 2018.<sup>1</sup> Alice Jones was licensed to practice law in Kentucky and applied for admission to the Ohio Bar in October 2015. The month after she applied for admission, she moved to Cincinnati and transferred to the Cincinnati office of her law firm.<sup>2</sup> From that office, she practiced law exclusively in matters related to proceedings or potential proceedings in Kentucky.<sup>3</sup> The Ohio Board of Commissioners on Character and Fitness concluded that Ms. Jones was engaging in the unauthorized practice of law in Ohio and thus violated Ohio's Rule of Professional Conduct 5.5.<sup>4</sup> It specifically rejected Jones's claim that she was not engaging in the practice of law in Ohio because her presence there was temporary.<sup>5</sup> It recommended that the Ohio Supreme Court disapprove of Jones's application for admission to the bar based on her violation of this rule and her failure to provide clear evidence of her character and fitness.<sup>6</sup>

1 2018 WL 5076017 (Ohio Oct. 17, 2018).

2 *Id.* at \*2.

3 *Id.*

4 *Id.* Ohio Rule of Professional Conduct 5.5(b) provides 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.”

5 *Jones*, 2018 WL 5076017, at \*2. Ohio Rule of Professional Conduct 5.5(c)(2) provides that an attorney admitted in another United States jurisdiction can provide legal services in Ohio on a temporary basis if the services are reasonably related to a proceeding or potential proceeding before a tribunal provided the lawyer was admitted before the tribunal. Other provisions of Rule 5.5(c) similarly provide that temporary legal services can be rendered in Ohio in negotiations, investigations, arbitration, mediation, and other non-litigation activity reasonably related to the lawyer's practice in another jurisdiction.

6 *Jones*, 2018 WL 5076017, at \*3.

The Ohio Supreme Court rejected the board's recommendation and approved Jones's application for admission. It concluded that her Kentucky legal work from an Ohio office, even for the several years that her application was pending, was the provision of temporary legal services permitted by the rules.

Three justices concurred, even though they agreed with the board that Jones's practice was not temporary because she had established an office.<sup>7</sup> The concurring justices found, however, that the prohibition on Jones's practicing Kentucky law from an Ohio office violated the Ohio and U.S. constitutions. They found that Ohio had no legitimate interest in regulating Jones's representation of Kentucky clients in Kentucky tribunals simply because she maintained an office in Ohio.<sup>8</sup> Ohio's only legitimate interests in regulating the unauthorized practice of law—supervising the administration of justice in the state and protecting the Ohio public—are not served “when applied to a lawyer who is not practicing Ohio law or appearing in Ohio courts.”<sup>9</sup> The concurring justices conceded that Ohio's prohibition on maintaining an Ohio office to conduct a law practice without admission to the Ohio Bar may have “made sense” in an earlier age when “a lawyer who worked in Ohio was almost always practicing Ohio law.”<sup>10</sup> But that age, they concluded, has passed. They pointed out that many people keep secondary offices in their homes (or vacation homes) that may be located in Ohio.<sup>11</sup>

The concurring justices concluded that, as applied to an attorney who is not practicing in Ohio courts or providing Ohio legal services, the Ohio rule on unauthorized practice violates the Ohio Constitution and the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>12</sup> The latter, they said, protects an individual's right “to pursue and continue in a chosen occupation free from unreasonable government interference,” and the Ohio rule violated that limitation on state regulation because “it does not bear a rational relationship to any discernable state interest.”<sup>13</sup>

## II. NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES v. BECERRA

Towards the end of the October 2017 Term, on June 26, 2018, the Supreme Court issued its opinion in *National Institute*

*of Family and Life Advocates v. Becerra (NIFLA)*.<sup>14</sup> In *NIFLA*, in relevant part, the Court considered a California law that required certain licensed facilities offering family-planning or pregnancy services to provide their patients with disclosures about the availability of other pregnancy-related services, including abortion. The plaintiffs provided pregnancy-related services but were opposed to abortion. The Court concluded that the law was likely unconstitutional as applied to the plaintiffs, and that, accordingly, the Ninth Circuit's judgment denying a preliminary injunction against its application to them should be vacated.<sup>15</sup>

The Court, in an opinion by Justice Clarence Thomas, characterized the law as a content-based regulation of speech that would usually be subject to strict scrutiny, but it discussed whether a lower level of scrutiny should be applied to the law because it was a regulation of “professional speech.”<sup>16</sup> The Court held that it had not “recognized ‘professional speech’ as a separate category of speech,”<sup>17</sup> although it did not foreclose the possibility that a reason might exist for treating content-based regulations of professional speech differently from content-based regulations of other kinds of speech.<sup>18</sup>

The Court noted that it had afforded less protection for what might be called professional speech in two circumstances, but that neither of those decisions turned on the fact that professionals were speaking.<sup>19</sup> First, the Court had applied more deferential review to laws requiring professionals to disclose factual, noncontroversial information in their “commercial speech.”<sup>20</sup> Second, it had permitted states to regulate professional conduct even where that conduct “incidentally involves speech.”<sup>21</sup> The *NIFLA* Court quickly dismissed the first category as irrelevant because the law at issue did not regulate commercial speech about the services that the licensed provider itself offered.<sup>22</sup> The Court described the second category as involving regulation of commercial activity that “incidentally” involves speech, and identified “longstanding torts for professional malpractice” as exemplars for such laws.<sup>23</sup> The case it relied most heavily upon to illustrate the category, though, was *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>24</sup> In *Casey*, the Court upheld a requirement that physicians about to perform abortions obtain “informed consent” by informing their patients about the nature of the abortion procedure, the health risks of abortion and childbirth, and the probable gestational

7 *Id.* at \*6 (DeWine, J., concurring).

8 *Id.* at \*8 (DeWine, J., concurring).

9 *Id.* at \*9 (DeWine, J., concurring). The concurring justices concluded that Jones and others in her position “are not . . . holding themselves out as lawyers to the Ohio public.” *Id.* Implicit in that finding is that Jones either did not use letterhead with an Ohio address or used such letterhead but with a disclaimer that she did not practice in Ohio or that the use of such a letterhead, even without a disclaimer, would not constitute holding herself out as a lawyer. As noted below, D.C. Rule 49 considers the maintenance of an office in the District of Columbia under similar circumstances (say, the practice of law in Virginia courts) as unauthorized practice in D.C. regardless of any disclaimers on letterhead or other business documents.

10 *Jones*, 2018 WL 5076017, at \*9.

11 *Id.*

12 *Id.*

13 *Id.* at \*8, \*9 (DeWine, J., concurring).

14 138 S. Ct. 2361 (2018).

15 *Id.* at 2376.

16 *Id.* at 2371-76.

17 *Id.* at 2371. *See also id.* at 2372 (“This Court's precedents do not recognize such a tradition for a category called ‘professional speech.’”).

18 *Id.* at 2375.

19 *Id.* at 2372.

20 *Id.*

21 *Id.*

22 *Id.* at 2372.

23 *Id.* at 2373.

24 505 U.S. 833 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.).

age of the unborn child.<sup>25</sup> The *NIFLA* Court concluded that the California law before it was not an informed consent law like the one in *Casey* because it required the provision of information about other services, not those offered by the licensed provider.<sup>26</sup> The Court concluded that these precedents did not establish a professional speech doctrine that would subject content-based laws like California's to a lower burden of scrutiny based on the fact that the law regulated the speech of professionals.

The notion that regulation of professional speech is treated with greater deference under the First Amendment than regulations of other kinds of speech traces back to Justice Byron White's concurring opinion in *Lowe v. Securities and Exchange Commission*.<sup>27</sup> Justice White believed that a professional's speech would always be only "incidental" to his or her conduct in providing professional services, and that therefore a regulation of that speech would have only an "incidental impact on speech."<sup>28</sup> He emphasized that the regulation of professional speech would be limited to speech where an attorney-client or similar relationship exists.<sup>29</sup> Prior to *NIFLA*, a number of lower courts had relied upon Justice White's *Lowe* concurrence to conclude that the regulation of professional speech was not subject to heightened First Amendment scrutiny.<sup>30</sup> The validity of those cases, and the authority of Justice White's *Lowe* concurrence, is now in doubt.

In *NIFLA*, the Court expressed great concerns about the application of a "professional speech" doctrine, noting that the category itself was not well-defined, that lower courts had applied the doctrine to any speech involving personalized services and a state license, and that constitutional deference to regulations of such speech "gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement."<sup>31</sup>

The Court chose not to determine whether intermediate or strict scrutiny applied to the California law because it concluded that it could not survive even the former. California asserted that its interest was in providing low-income women with information about state-sponsored services, but the Court concluded that the law had too many exceptions of various kinds to be sufficiently drawn to achieve that goal, and that California

had not demonstrated that a public-relations campaign could not achieve the interest.<sup>32</sup>

### III. UNAUTHORIZED PRACTICE OF LAW RULES REVISITED

Rule 49 of the Rules of the District of Columbia Court of Appeals provides that "no person may engage in the practice of law in the District of Columbia . . . unless enrolled as an active member of the D.C. Bar."<sup>33</sup> The "practice of law" is "providing professional legal advice or services where there is a client relationship of trust or reliance."<sup>34</sup> "One is presumed to be practicing law" when one does various enumerated acts, including "preparing or expressing legal opinions."<sup>35</sup> The rule defines "[i]n the District of Columbia" as "conduct in, or conduct from an office or location within, the District of Columbia."<sup>36</sup>

The Commentary to Rule 49 identifies four "general purposes" for the rule: (1) to protect members of the public from unqualified representation, (2) to ensure that people who hold themselves out to perform or perform the services of lawyers are subject to the D.C. Bar's disciplinary system, (3) to maintain the efficiency and integrity of the administration of justice and the system of regulation of practicing lawyers, and (4) to ensure that the activities of the D.C. Bar (including its system of regulating lawyers) is supported financially by those exercising the privilege of membership in the D.C. Bar.<sup>37</sup>

Various activities, listed in Rule 49(c), are "permitted as exceptions" to the general rule against the practice of law by individuals who are not active members of the D.C. Bar. Among these are providing legal services before special courts or agencies of the U.S. or D.C., providing legal services related to proceedings in federal court, and providing legal services in D.C. on an incidental or temporary basis.<sup>38</sup> If the person has an office in the District of Columbia, these activities are generally permitted only if the person gives prominent notice of the limitations of his or her practice in all business documents.<sup>39</sup>

There is no exception, however, for an individual who simply practices in another state from an office in the District of Columbia.<sup>40</sup> Regardless of the disclaimers made on business

25 *NIFLA*, 138 S. Ct. at 2373 (quoting *Casey*, 505 U.S. at 881).

26 *Id.* at 2373-74.

27 472 U.S. 181, 211-26 (1985) (White, J. concurring).

28 *Id.* at 232. Justice White analogized the regulation of professional speech to the regulation of words of "offer and acceptance" under contract law. *Id.*

29 *Id.*

30 *Serafine v. Branaman*, 810 F.3d 354, 359 & n.2 (5th Cir. 2016) ("The Supreme Court has never formally endorsed the professional speech doctrine, though some circuits have embraced it based on Justice White's concurrence in [*Lowe*]."). *Cf. NIFLA*, 138 S. Ct. at 2371 (listing two of the three cases cited by the Fifth Circuit's *Serafine* decision without mentioning Justice White's concurrence).

31 *Id.* at 2375.

32 *Id.* at 2375-76.

33 D.C. Ct. App. R. 49(a).

34 D.C. Ct. App. R. 49(b)(2).

35 D.C. Ct. App. R. 49(b)(2)(B).

36 D.C. Ct. App. R. 49(b)(3).

37 Commentary to D.C. Ct. App. R. 49.

38 D.C. Ct. App. R. 49(c)(2), 49(c)(3), 49(c)(5), and 49(c)(13).

39 *E.g.*, D.C. Ct. App. R. 49(c)(2), 49(c)(3), and 49(c)(5). *See also* Dist. Colum. Ct. App. Committee on Unauthorized Practice of Law, Opinion 11-02 (June 10, 2002).

40 Thus, for attorneys with offices in the District and admitted to the Maryland Bar and the bar of the District of Maryland, Rule 49 distinguishes between those who represent only clients in the federal court and those who also (or exclusively) represent clients in state court in Maryland (or draft wills or negotiate contracts for Maryland clients). The comments to the rule do not explain why this distinction is made. It is likely based on a concern that a charge of unauthorized practice based on conduct that a federal court has authorized might

documents, an attorney with an office in D.C., who is a member of the bar of Maryland or Virginia (but not D.C.), and whose practice consists exclusively of representing residents of those states in the courts of those states or concerning transactions in those states, is practicing law in the District of Columbia and violating Rule 49(a). Such violations are also likely to be deemed violations of the rules of professional conduct by the state bars where the practitioners are admitted.<sup>41</sup>

Rule 49 is not unique in this respect. In *Attorney Grievance Commission v. Harris-Smith*,<sup>42</sup> the Court of Appeals of Maryland sanctioned an attorney, suspending her for thirty days, because she had an office in Maryland but was not admitted to the Maryland Bar. It imposed this sanction despite the fact that she limited her practice to federal bankruptcy matters and was admitted in the federal District of Maryland.<sup>43</sup> Indeed, Maryland suspended her from practice even though she was not admitted to the Maryland Bar.<sup>44</sup>

Similarly, admission to practice before the federal district court in the District of Columbia (D.D.C.) is generally limited to members of the D.C. Bar and “attorneys who are active members

in good standing of the Bar of any state in which they maintain their principal law office.”<sup>45</sup> Ms. Jones from *In re Jones*, who had an office in Ohio but practiced in Kentucky, would be ineligible for admission. Similar distinctions appear to be made with respect to participation by non-member attorneys in the D.D.C.<sup>46</sup>

The concurrence from *In re Jones* and the Supreme Court’s decision in *NIFLA* are both relevant to unauthorized practice rules like Rule 49, but in different ways. Precedents can offer factual similarities, similar reasoning, or binding authority. *In re Jones* is strong on the first element and modest on the second; concurrences from state supreme courts, of course, are not at all binding. *NIFLA*, on the other hand, is as strong as you can get on the third element, but the facts are not directly related to the unauthorized practice of law. It does, however, call into question some of the basic underlying justification for the rules against certain kinds of such unauthorized practice, particularly the provision of advice about legal matters.

#### *A. Do Jurisdictions Have a Legitimate Interest in Regulating Local Lawyers Practicing in Other States?*

The *Jones* concurrence asks: in today’s world, what is the point of precluding people from working remotely?<sup>47</sup> The concurring justices could not find a justification that met rational basis scrutiny. What interest does Ohio have, they asked, in preventing someone from using an office in Ohio if her legal practice only affects another state? Neither consumers of legal services in Ohio nor the conduct of Ohio courts was at issue, and the concurring justices could not identify any other interest that Ohio had in regulating conduct like Jones’s.

The Commentary to Rule 49 suggests other purposes.<sup>48</sup> For example, it suggests that the D.C. Bar has interests in subjecting those acting (or holding themselves out) as D.C. attorneys to the D.C. Bar disciplinary system, maintaining the system of regulating the practice of lawyers, and ensuring that those exercising the

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violate the Supremacy Clause. See *Sperry v. Florida*, 373 U.S. 379 (1963) (holding that Florida could not preclude a non-lawyer registered by the U.S. Patent Office as a patent agent authorized to represent clients before the Patent Office from preparing legal documents and rendering legal opinions regarding patents by characterizing it as the unauthorized practice of law). See also Dist. Colum. Ct. App. Committee on Unauthorized Practice, Opinion 17-06, 3 (July 21, 2006) (describing Third Circuit opinion, *Surrick v. Killion*, 449 F.3d 520 (3d Cir. 2006), holding that Supremacy Clause permitted attorney suspended from practice in Pennsylvania to practice in federal district court in Pennsylvania where he was still admitted); William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 Bus. Law. 1501, 1544 (2001) (“[I]t is clear that federal courts have inherent authority to admit lawyers to practice before them and that disbarment, suspension, or discipline of lawyers so admitted is governed exclusively by federal law. Under the same logic as in *Sperry*, a state may not condition or obstruct the exercise of a federally conferred right to practice . . .”).

41 Rule 5.5(a) of the ABA Model Rules of Professional Conduct states: “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.” See also Attorney Grievance Commission of Maryland v. Walker-Turner, 372 Md. 85 (2002) (holding that a member of the bar of Maryland violated Maryland Rule of Professional Conduct 5.5(a) by practicing from offices in the District of Columbia in violation of Rule 49, and suspending that attorney for thirty days). Rule 49 provides that the Committee on Unauthorized Practice in the District of Columbia may “refer cases” to “other appropriate authorities,” presumably including agencies supervising the conduct of bar members in other states. D.C. Ct. App. R. 49(d)(12)(D).

42 356 Md. 72 (1999).

43 The Court concluded that Harris-Smith’s practice was not strictly limited to bankruptcy matters because she had introductory meetings with clients in which she analyzed their legal problems. *Id.* at 83-84. Compare Barker, *supra* note 40, at 1539-40 (arguing that prescreening clients by an attorney authorized to appear before a federal agency would be analogous to a federal court determining its own jurisdiction, and should be permitted); *id.* at 1545 (“[A] federally admitted lawyer should have the right to evaluate a prospective client’s problem to determine whether federal jurisdiction can be invoked in a court where the lawyer is admitted and, if so, whether other courses, e.g., arbitration, state-court litigation, are preferable.”).

44 *Harris-Smith*, 356 Md. at 92.

45 D.D.C. Loc. R. 83.8. It is unclear why the rule uses the word “any” (as opposed to “the”) since an attorney presumably will not have more than one “principal law office.”

46 D.D.C. Loc. R. 83.2(c) (providing that non-members of the bar may submit papers joined by member of the D.D.C. bar, but excepting non-members “who engage[] in the practice of law from an office located in the District of Columbia.”). Attorneys with an office in the District of Columbia must be members of the D.C. and the federal court bars. Thus, members of the D.C. bar who work in D.C. (but are not D.D.C. members) cannot file papers joined with federal bar members in the D.D.C. So, too, those with D.C. offices who are not D.C. bar members, but whose practice falls under one of the exceptions in Rule 49(c).

Curiously, the local rules do not prohibit such individuals from being admitted pro hac vice (as opposed to merely filing papers without such admission, which is the focus of Local Rule 83.2(c)). The local rules require that a motion seeking pro hac vice admission for an attorney must state in the motion whether the attorney is a member of the D.C. bar or has an application pending. D.D.C. Loc. R. 83.2(d). But the rule does not require denial of the motion if the applicant is not a member or potential member.

47 *Jones*, 2018 WL 5076017, at \*5 (DeWine, J., concurring) (“We might say—as we do of many employees in today’s world—that [Jones] was working remotely.”).

48 See *supra* note 37 and accompanying text.

privileges of membership in the D.C. Bar support financially the activities of the D.C. Bar.<sup>49</sup> But these purposes simply assume the conclusion that the D.C. Bar has an interest in attorneys with offices in the District regardless of what those attorneys do. The stated purposes do not answer the question why discipline should not be meted out by, and financial support for a bar given to, the state in which the attorneys' practice is focused, rather than where their offices are located.

In 2017, the D.C. Circuit discerned another interest underlying unauthorized practice rules, at least for those who appear in federal court. In *National Association for the Advancement of Multijurisdiction Practice v. Howell (NAAMJP)*,<sup>50</sup> the plaintiff challenged the "principal office" rule of the D.D.C., which (in relevant part) limits bar membership to D.C. Bar members and those who are active members of the bar of the state in which they have their principal office.<sup>51</sup> This "Principal Office Provision" was rational, the Court held, because the federal district court had an interest in making sure that attorneys who practice in its court "are subject to supervision by the state to which their practice is most geographically proximate."<sup>52</sup> With respect to Alice Jones, for example, the court would say that the D.D.C. has an interest in making sure that Ohio, and not Kentucky, could supervise Ms. Jones's practice. Why exactly a federal district court would care about which *other* courts could discipline an attorney for *other* conduct—a federal district court, of course, can adequately police the conduct of attorneys in its own court—was not exactly clear.<sup>53</sup> Nor is it clear why that federal court would prefer the "geographically proximate" jurisdiction over the one where the attorney performs all of his or her services for citizens of that jurisdiction. It is especially befuddling because the rule authorizes admission of D.C. Bar members regardless of where they live or work, so it assumes a bar can supervise attorneys with offices outside its jurisdiction.

In any event, an interest sufficient to justify denial of admission to a specific court might not be sufficient to justify precluding someone from providing legal advice or doing anything that might constitute the practice of law throughout a jurisdiction.<sup>54</sup> The *In re Jones* concurring justices, after all, relied on the right to pursue a chosen profession to conclude that Ohio's unauthorized practice rule was unconstitutional.<sup>55</sup> Thus, even if

the D.C. Circuit's reasoning were convincing, it is not clear that it would justify precluding someone from being admitted into a state bar.

The concurring justices in *In re Jones* have a strong case. A state should not be able to force an attorney to join its bar and pay dues just because that attorney works out of some location in that jurisdiction—whether an office, a home, or even a public place—if the attorney has no other contact with the jurisdiction.<sup>56</sup>

#### *B. Do Regulations of the Provision of Legal Advice Have to Satisfy Strict Scrutiny?*

*NIFLA* may present the more serious threat to unauthorized practice rules because it questions the very premise of the application of such rules to a central part of the practice of law: the provision of legal advice. The premise of unauthorized practice rules is that providing advice about legal matters to an individual is:

- (1) conduct and not speech, or at least that the speech element is just incidental to the conduct, or
- (2) professional speech, where judicial review under the First Amendment is more deferential.<sup>57</sup>

*NIFLA* casts grave doubt on both of these possibilities. It notes that certain lower courts have recognized professional speech as a separate category, defining it as speech by individuals who provide personalized services to clients based on their expert knowledge and judgment and who are subject to a generally applicable licensing scheme.<sup>58</sup> But the Court asserts that any lower level of scrutiny for professional speech in its own cases had nothing to do with the fact that professionals were speaking. Rather, although the Court has upheld regulations of professional conduct that incidentally involved speech, it does not automatically assume that regulations that apply to professionals are always regulations of conduct. In *NIFLA* itself, the plaintiffs provided advice on pregnancy-related procedures and conducted some procedures themselves, and the law required them to provide additional information on other procedures (including abortion) that were available in California. This notice requirement, the Court held, "is not a[] . . . regulation of professional conduct."<sup>59</sup> Rather, it "regulates speech as speech."<sup>60</sup> The mere fact that the plaintiffs were licensed professionals did not render all of their advice regulable conduct.

<sup>49</sup> *Id.*

<sup>50</sup> 851 F.3d 12 (D.C. Cir. 2017).

<sup>51</sup> D.D.C. Loc. R. 83.8(a). *See supra* notes 45-46 and accompanying text.

<sup>52</sup> *NAAMJP*, 851 F.3d at 18.

<sup>53</sup> Kentucky apparently has no requirement that a member of the bar either live or work in Kentucky. *Compare* Schoenefeld v. Schneiderman, 821 F.3d 273 (2d Cir. 2016) (upholding NY Jud. Law § 470, which requires non-resident bar members to have an office in New York).

<sup>54</sup> *Compare* *Leis v. Flynt*, 439 U.S. 438 (1979) (holding that there was no Fourteenth Amendment property interest in being admitted pro hac vice).

<sup>55</sup> *Jones*, 2018 WL 5076017, at \*8 (DeWine, J., concurring) ("The Fourteenth Amendment to the federal Constitution also has been held to protect the right of an individual to pursue and continue in a chosen occupation free from unreasonable government interference.").

<sup>56</sup> D.C. Ct. App. R. 49 states that "no person may engage in the practice of law in the District of Columbia . . . unless enrolled as an active member of the D.C. Bar" and defines "In the District of Columbia" as "conduct in, or conduct from an office or location within, the District of Columbia." D.C. Ct. App. R. 49(a), 49(b)(3). Thus, unless it falls within the "incidental and temporary practice" exception of D.C. Ct. App. R. 49(c)(13), work out of a home (or a library or a restaurant) in D.C. constitutes the practice of law in D.C.

<sup>57</sup> *See, e.g.*, Michele Cotton, *Improving Access to Justice by Enforcing the Free Speech Clause*, 83 *BROOK. L. REV.* 111, 114-30 (2017).

<sup>58</sup> *NIFLA*, 138 S. Ct. at 2371.

<sup>59</sup> *Id.* at 2373.

<sup>60</sup> *Id.* at 2374.

It would be hard to distinguish the pregnancy-related advice and services at issue in *NIFLA* from legal advice and services regulated under Rule 49 and other unauthorized practice prohibitions. Legal advice is presented in the form of speech; there is no more reason to treat it as conduct than the pregnancy-related advice at issue in *NIFLA*. Moreover, a prohibition on “legal advice” is a regulation based on content: we determine whether the prohibition has been violated by looking at the content of the speech and determining whether it is legal advice. And while the state might have an important interest in protecting consumers from advice that does not meet professional standards under certain circumstances, it may be difficult to defend a total prohibition on legal advice from particular individuals as the most narrowly-tailored means of protecting that interest. A tort remedy for malpractice or a requirement of full disclosure of qualifications would more precisely protect that interest without unnecessarily restricting non-harmful speech.

Indeed, the rules of professional conduct specifically permit licensed attorneys to take representations in subject matters where they may not yet be particularly learned.<sup>61</sup> Hence, the protection of consumers from incompetent legal advice cannot justify a rule precluding a lawyer from providing legal advice to clients in a state where the lawyer is admitted from an office in a jurisdiction where he is not. Indeed, it is hard to justify a rule prohibiting that attorney from providing legal advice to individuals in the jurisdiction where he is not admitted about the law where he is admitted, or even counseling individuals about the law in a jurisdiction where he is not admitted, provided that proper disclosures are made about the attorney’s qualifications. Advice, *NIFLA* tell us, is speech, and content-based prohibitions on speech must meet heightened scrutiny.

#### IV. CONCLUDING THOUGHTS

Reading through the rules regarding the scope of unauthorized practice and the justifications used to support them, one cannot help but get the feeling that they owe their continued existence to tradition and inertia, and that they have not kept up with the times.<sup>62</sup> What could possibly justify a rule prohibiting an attorney admitted in Maryland from working out of a home office in D.C. to represent clients in Maryland? In the age of electronic communication, why would a state need to have attorneys admitted to its bar maintain a physical office in its jurisdiction in order to serve them with process?<sup>63</sup> A cynic might think that the rules primarily serve the purposes of restricting

competition in the legal profession and lining the coffers of bar associations.<sup>64</sup> *NIFLA* and *Jones* have shed some light (or, perhaps, shadows) on the basic principles upholding restrictions on legal practice. It might be time for us to reconsider these restrictions in light of them.

61 See D.C. Rule of Prof. Cond. 1.1, cmt. 2 (“A lawyer can provide adequate representation in a wholly novel field through necessary study.”). See also David McGowan, *Two Ironies of UPL Laws*, 20 CHAPMAN L. REV. 225, 226 (2017) (“Passing the bar exam does not entail practical competence in any particular field.”); *id.* at 244 (“A licensed lawyer who accepts a matter and plans to learn by doing does not violate any UPL restriction, while an experienced legal assistant who is competent to handle the matter would.”).

62 *Jones*, 2018 WL 5076017, at \*9 (DeWine, J., concurring) (“In an earlier age, perhaps such a rule made sense. Before the advent of the Internet, electronic communication, and the like, a lawyer who worked in Ohio was almost always practicing Ohio law.”).

63 See *supra* note 53.

64 See, e.g., Leslie C. Levin, *The Monopoly Myth and Other Tales About the Superiority Of Lawyers*, 82 FORD. L. REV. 2611 (2014).

