Crossing State Lines -- the Ethics of Multi-Jurisdictional Practice

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• 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.
Original – Model Rule 5.5

Translation:

- Don’t do in another state
- What you’re are not suppose to do there
- Or help someone else do that to
Comment:

Rule 5.05 ... leaves the definition [of unauthorized practice] to judicial development.
**Original – Model Rule 5.5**


- California attorney represented New York client in New York divorce
- Unauthorized practice
- Barred from collecting fee
Original – Model Rule 5.5

Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County, 949 P.2d 1 (Cal. 1998)

• New York lawyer represented California client in California arbitration

• Unauthorized practice

• Barred from collecting fee
Revised ABA Model Rule 5.5

**Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice Of Law**

(a) 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.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

1. 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; or
2. Hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

1. Are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
2. Are in or 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;
3. Are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
4. Are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

1. Are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or
2. Are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.
Revised Model Rule 5.5

To summarize:

• States the obvious – can’t establish office or “systematic and continuous” presence or hold one’s self out to the public as licensed

• Can practice in “safe harbors” for certain temporary, in-house, and federal practices
Revised Model Rule 5.5

<table>
<thead>
<tr>
<th>CAN’T DO</th>
<th>CAN DO</th>
</tr>
</thead>
<tbody>
<tr>
<td>ESTABLISH OFFICE OR</td>
<td>CERTAIN TEMPORARY</td>
</tr>
<tr>
<td>CONTINUING PRESENCE</td>
<td>IN-HOUSE OR FEDERAL</td>
</tr>
<tr>
<td></td>
<td>PRACTICES</td>
</tr>
</tbody>
</table>
Continuous Presence

What is an office?

• Satellite office staffed by local lawyers?

• Work in out-of-state office, but practice limited to home state?

• Reside in one state, work in another?
  – Bona Fide Office rules

• Virtual offices?

• Semi-retired?
Continuous Presence

“Systematic and Continuous” Conduct?

• *International Shoe v. Washington*

• Rule 5.5 Comment: There is no single test to determine whether a lawyer’s services are provided on a “temporary basis” in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be “temporary” even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.
Continuous Presence

**Systematic and Continuous** What are disciplinary committees and courts looking for?

- Competing with local attorneys for clients
- Advertising, solicitation, and virtual presence
- Continuing physical presence
- Practice involving host state’s law (somewhat)
Temporary Presence

May provide “on a temporary basis” +

1. Associate with local counsel
2. Permitted litigation activities
3. Permitted arbitration practices
4. Related to your home practice
Local Counsel

- Must be actively engaged
- Must be temporary
Pro Hac Vice Litigation

• MR 5.5(c)(2): *are in or 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*
Pro Hac Vice Litigation

• Pre-litigation and ancillary activities
• Assisting attorneys don’t need to be admitted pro hac vice
• Litigation anywhere authorizes work everywhere
Do you need local counsel anywhere?
Pro Hac Vice Litigation

• Ethical rules are not substitute for local pro hac vice rules

• Be wary of numerical limitations on pro hac admissions
Arbitration and ADR

• reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding
  – if the services arise out of or are reasonably related to the lawyer’s home state practice
  – are not services for which the forum requires pro hac vice admission

• many states have modified this part of the model rule
Rule 5.5(c)(4) – Catch-All

• Temporary legal activities that ... arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.

• Covers transactional & non-litigation matters
Rule 5.5(c)(4) – Catch-All

• What is “reasonably related” to your home practice?
  – Location of client – most important
  – Prior relationship with client
  – “Where” services performed
  – Multi-state transactions
  – Expertise in specialized/uniform law
  – Which state’s law governs?

• Read ABA comments
• Double-check host state’s rule (some variations)
• Not a lot of caselaw/ethics opinion guidance
In House Counsel

• **Legal services that are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission**
  
  – Covers work for all affiliates
  
  – Does not cover litigation in host state
  
  – Must be admitted in good standing in at least one state
In House Counsel

• Local Registration Requirements (See ABA site)

• Tex. Board of Legal Examiners Policy Stmt:
  – Represent only employer
  – Register with state
  – Can’t appear in court
  – Can’t prepare any legal instrument affecting title to real estate
  – “Landman” work not legal services
In House Counsel – Special Issues

• One-client rule
  – Pro bono exceptions – some states

• Residency requirements
  – Ethics rules allow practice everywhere but not registration rules
  – May have to resort to other “temporary” exceptions and safe harbors

• Pro hac vice rules – different in each state
  – Most states reserve pro hac vice for out-of-state residents
  – In-house counsel in Texas cannot get admitted pro hac vice in Texas
Federal practices

• are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction
  – Cover court and administrative practices
  – Federal admission rules trump state rules
  – But, be cautious about continuous presence in host state. *In re Desilets*, 291 F.3d 925 (6th Cir. 2002).
Areas that raise questions

Real Estate:

• A number of cases (mostly involving brokers and other non-lawyers) make clear that preparation of land instruments is the practice of law.

• Some state rules specifically prohibit out-of-state lawyers from preparing real estate instruments: e.g. Texas Government Code 83.001 (non-Texas lawyer may not collect a fee for preparing documents affecting title to real property – except mineral leases and deeds)
## Areas that raise questions

### Depositions:

<table>
<thead>
<tr>
<th>Deposition Location</th>
<th>Deposition in Home State</th>
<th>Deposition Out-of-State</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Lawsuit location</strong></td>
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<td></td>
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<td>Lawsuit Out-of-State (and no <em>pro hac vice admission</em>)</td>
<td>Unclear – may be OK ethically but can cause problems in court</td>
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<tr>
<td>Lawsuit Out-of-State (but admitted <em>pro hac vice</em>)</td>
<td>OK – permitted by pro hac vice rule and arguably not multijurisdictional practice</td>
<td>OK – permitted by pro hac vice rule and Rule 5.5(c)(2)</td>
</tr>
<tr>
<td>Lawsuit in Home State</td>
<td>OK – Not multijurisdictional practice</td>
<td>OK – Permitted by Rule 5.5(c)(2)</td>
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Areas that raise questions

What about Texas (which hasn’t adopted Model Rule)?

• If you are Texas lawyer – you are ok (look to law of other states)

• If you are visiting Texas -- ???
Areas that raise questions

What will happen to me?

• Loss of fees & malpractice risk
• Disqualification, sanctions, striking of pleadings
• Ethical sanctions in home state
• *Dual enforcement* rules becoming more prominent
• Disqualification from future bar applications
Areas that raise questions

Can I offer an opinion on another State’s law?

• Yes

• More an issue of Competency
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