I. Summary of the Problem

Practicing law in a state in which you are not licensed raises both criminal and ethical issues. All states have Unauthorized Practice of Law statutes, which criminalize the practice of law in those states by those not licensed. These statutes apply both to the non-lawyer, as well as to the lawyer, who may be licensed elsewhere. Unfortunately, these statutes are not very clear as to what constitutes the unauthorized practice of law by an attorney who, though licensed elsewhere, may be engaged in a matter with a nexus to the jurisdiction.

A parallel provision in the ethical rules of all jurisdictions likewise made it an ethical violation to engage in the unauthorized practice of law. The original ABA Model Rule 5.5, a version of which was adopted by virtually all states, provided:

_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._

The practice of law “across” state lines has always been a problematic issue for the transactional attorney. The litigator typically has a bright-line to follow. He cannot appear in a court in a jurisdiction in which he is not licensed. Conversely, if he is granted permission to appear _pro hac vice_ under the jurisdiction’s procedures, he has a safe harbor within which to operate, at least as to the matter for which he has been temporarily admitted. By contrast, the transactional attorney has no _pro hac vice_ procedure to follow. The line between ethically assisting a client with issues in another state, and the unlawful practice of law, is often hard to discern.

The issue received much publicity after the decision in _Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County_, 949 P.2d 1 (Cal. 1998), which held that out-of-state lawyers engaged in the unauthorized practice of law when they handled a California arbitration for a California client under California law, and were therefore barred from recovering their fees. This led to several developments, including a special ABA committee to review and propose revisions to the Model Rules on multi-jurisdictional practice of law.
II. Model Rule 5.5 to the Rescue

In response to the dispute, the ABA created the Commission on Multijurisdictional Practice, which considered the issue with much input from the bar, resulting in the publication and adoption by the ABA House of Delegates of several reports (Report 201A-201J) covering regulation of multi-state practice, disciplinary enforcement, pro hac vice procedures, and other recommendations. The operative recommendation was the adoption of Model Rule 5.5. The ABA website contains a wealth of information on the Commission’s reports, current status of adoption of recommendations, and other relevant information.¹

Essentially, ABA Model Rule 5.5 prohibits the systematic practice of law in a jurisdiction in which you are not licensed, but allows the temporary practice of law in such states. It then defines what constitutes temporary practice and, as such, creates some safe harbors within which the practitioner can safely practice. The full text follows:

**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

¹ http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice.html
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.

Essentially, the Model Rule states a general rule, applicable to all practices, then creates five “safe harbors” and one “catch-all” exception:

- A safe harbor for temporary work associating with local counsel
- A safe harbor for temporary presence through pro hac vice court enrollment
- A safe harbor for temporary presence arbitration and ADR
- A safe harbor for in-house counsel
- A safe harbor for federal practices
- A catch-all for temporary services reasonably related to the attorney’s home state work.

A. State-by-State Adoption of Model Rule

Most states have adopted Model Rule 5.5 in whole, or with some variations. States with oil and gas production that have yet to adopt Model Rule 5.5 include Mississippi, Montana, and Texas. Nevertheless, even in those states, it is believed that the persuasive authority of the rule and cases behind it will be influential.

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2 For a quick reference of state-by-state adoption of Rule 5.5, visit the ABA website: [http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/quick_guide_5_5.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/quick_guide_5_5.authcheckdam.pdf)
B. Systematic versus Temporary Presence

The initial line drawn by the Model rule is the difference between systematic and continuous presence in the forum and temporary presence. The former is prohibited without a license in any situation – except for the in-house or federal practice exception. The comments do not clearly delineate the difference between the two and leave it intentionally vague and subject to the facts and circumstances.

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.

ABA Model Rule 5.5. Comment. Different states have imposed their own gloss on this provision, sometimes with slightly different language than the Model Rule.

The only clear line is that establishment of a physical office in a state in which one is not licensed violates the rule. The prohibition is fairly clear for a solo practice. In a multi-office law firm, this rule may be violated if the host state office is actively managed solely by out-of-state attorneys, even if staffed with local subordinate attorneys. See Florida Bar v. Savitt, 363 So. 2d 559 (Fla. 1978) (disciplinary stipulation regarding New York firm that opened a Florida office, but was managed solely by New York partners). Physical presence in another state, however, is not necessary to establish a prohibited presence. “Virtual presence” by advertising, solicitation, or other activity may also constitute a presence. See Fla. Bar v. Rapoport, 845 So. 2d 874 (Fla. 2003). Problems can also arise in cross-border practices, where the lawyer might live and work in one jurisdiction, but maintains her physical office in another jurisdiction. See Kennedy v. Bar Association, 316 Md. 646, 561 A.2d 200 (1989) (D.C. lawyer not permitted to maintain office in Maryland advising on federal and D.C. law).

Two particular concerns seem to invite most attention from state bars. First, a number of states have adopted numerical limitations on pro hac vice appearances. Second, there is particular concern when the presence of the out-of-state lawyer involves solicitation and competition for local clients. Compare Spivak v. Sachs, 16 N.Y.2d 163, 263 N.Y.S.2d 953 (1965) (California lawyer sanctioned for interceding on behalf of New York client dissatisfied with her New York lawyer handling her New York divorce) with Fought & Co. v. Steel Engineering & Erection, Inc., 951 P.2d 487 (Haw. 1998) (Oregon law firm allowed to represent its Oregon client in connection with proceeding in Hawaii) and with Condon v. McHenry (Estate of Condon), 76 Cal. Rptr. 2d 922 (Ct. App. 1998) (distinguishing Birbrower, and allowing Colorado counsel to represent Colorado client in California probate matter). In sum, the physical location of the client and the physical location of the attorney’s work seem to be the most two important factors in determining “presence” and whether that presence is systematic or continuous. Interestingly, the particular state’s law that is involved is sometimes mentioned, but seems a rather irrelevant factor.
C. Safe Harbor 1: Association with Local Counsel

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter

Association with local counsel has long been seen as an appropriate solution to the potential risk of practicing unlawful in another jurisdiction. Model Rule 5.5(c)(1) expressly incorporates this as a solution to allow the temporary practice by an attorney in a jurisdiction in which he is not licensed.

Note that, in litigation, the local counsel provision of the Model Rule does not supplant whatever local requirements may be imposed in the pro hac vice rules of the host court. For example, some local court rules require that, in addition to taking active responsibility, the local counsel appear at all hearings, or sign the pleadings. Conversely, some local pro hac vice rules do not require association with local counsel to temporarily enroll in a court proceeding, and, under Model Rule 5.5 (c)(2), such a practice would be permissible.

For local counsel, be wary of the rule that it is unethical to both practice in a jurisdiction without authorization or “assist another in doing so”. Thus, local counsel who only serves as a name or mail drop can also be sanctioned for the unauthorized work of the lead attorney.

D. Safe Harbor 2: Pro Hac Vice Applications

(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

Model Rule 5.5(c)(2) provides the traditional rule that a pro hac vice enrollment will satisfy the rule against unauthorized practice in another jurisdiction. However, the Model Rule expands on and clarifies this principle in some important respects.

Pre-litigation and ancillary activities: The rule allows attorneys to commence work in the host jurisdiction before being enrolled post hac vice if they “reasonably expect” to be enrolled. This proviso recognizes the need for pre-litigation or pre-appearance activities, such as meeting with clients, interviewing witnesses, etc. It is important to note, however, that compliance with the ethical rule still requires compliance with the court rules on pro hac vice admission. For example, many courts require that pro hac vice admission be granted before the attorney can make an appearance or file a pleading.

Assisting Attorneys: The rule specifically allows assisting attorneys to work in the host state temporarily even if they are not (and do not anticipate) enrolling pro hac vice. This proviso allows associates and co-counsel to assist and participate (but not formally appear) in a litigation action in a host state without violating the ethical rules.

The Litigation Can Be Anywhere: This point is an often overlooked or misunderstood component of the rule. Rule 5.5(c)(2) allows you to practice temporarily in the host state as long as that practice is related to a pending or potential proceeding in any jurisdiction. For example,
if you are a Texas licensed lawyer, appearing pro hac in a lawsuit pending in Oklahoma, concerning a dispute over a North Dakota unit operation, you are authorized to take depositions, interview witnesses, and conduct other legal activities in North Dakota. See ABA Model Rule 5.5(c)(2) Comment (acknowledging right to take depositions in state if related to litigation in another state in which attorney is authorized to appear).

Importantly, one should take care to also comply with the specific local rules on pro hac vice applications, which may impose practice limitations beyond those imposed by the Model Rule. For example, some states place numerical limitations on pro hac vice applications and frown upon multiple or repeated applications. See ABA Center for Prof’l Responsibility CPR Policy Implementation Comm., Comparison of ABA Model Rule for Pro Hac Vice Admission with State Variations and Amendments Since August 2002 (May 14, 2009). Montana, for example, only allows two enrollments per lifetime.

E. Safe Harbor 3: Arbitration and ADR Proceedings

(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;

Model Rule 5.5(c)(3) solves the dilemma presented in the Birbrower case. Most states have no procedure for pro hac vice admission in connection with an arbitration, mediation, or other ADR (except in connection with a pending lawsuit), and the AAA and other ADR organizations have no licensing or admission requirements that address these issues. The Model Rule addresses this problem by allowing the temporary practice in the host state in connection with such proceedings. Not all states have adopted this provision verbatim, and some have eliminated it (leaving it subject to the catch-all requirements), or require that the ADR proceeding be reasonably related to the attorney’s work in his home state.

F. The Catch-All – Activities Reasonably Related to The Lawyer’s Practice in Her Home State

(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.

For much of our arguable “out-of-state” practice – and for most transactional activities (for which pro hac vice enrollment is not an option) – this is the rule that encapsulates the reason why we are not engaging in the unauthorized practice of law. Paragraph (4) articulates what many lawyers assumed as a matter of common sense or common practice. The ABA Commission received many comments on the need for multi-jurisdictional practice necessitated by the realities of modern practice. In particular, the Commission was sensitive to the reality of client-attorney relationships – attorneys often desire to “follow” their client’s business into multiple states, and clients form trust and confidence in counsel and often want their advice and counsel wherever that may take them. The Commission also recognized that many attorneys

The comments to the Model Rule provide a lengthy discussion of the factors and considerations that would establish a reasonable relationship between the attorney’s activities in the host state and her home state practice:

Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer’s client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer’s work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client’s activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer’s recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

In sum, the commentary and caselaw appear to point to three key factors in establishing a reasonable relationship to the lawyer’s home state practice:

- **Location of client** – is the client located in the lawyer’s home state or only in the host state?

- **“Where”** are the services principally performed – is the lawyer mostly working out of his office, or is working on the ground in the host state?

- **Prior relationship** with the client – did the lawyer already have a relationship with the client in his home state or was he newly hired for this work in the host state?

- **Multi-state transaction** – is this a matter that has activity across multiple states.

- **Specialized/Uniform Practice** – is the lawyer hired because the legal issues involve a specialized or uniform area of the law for which the lawyer has national competence? In the oil and gas area, this factor has particular relevance as many of the specific practice areas – such as environmental regulation, federal land, midstream, JOA and service contracts have nationwide standards and practices. On the other hand, certain practices, such as land titles, are fairly unique to each state and may counsel against a multi-state practice.
• **Which State’s Law is Being Applied?** Relevant but not dispositive under the Model Rule. However, some states have varied the Model Rule to make this factor more important or dispositive

Although there is not a lot of clarity among reported cases and disciplinary decisions, the commentary suggests that the most important factor is the relationship with the client in the home state. Some bars have adopted variations on this rule to address this specific concern – particularly the solicitation of “new” clients in the host state. More allowance is thus given the attorney who has a pre-existing relationship with a client in her home state.

Interestingly, the issue of which state’s law governs is not seen as a critical or dispositive issue in most states (although a few states specifically impose limitations on temporary practice in their jurisdiction if the activity principally involves the host state’s law). Many attorneys automatically assume that if their local client asks them to handle a matter that will involve another state’s law, then a question of unauthorized practice is raised. In most scenarios, however, working on a matter for a local client in your home state that involves another state’s law does not implicate any concerns of unauthorized practice of law.

G. The Safe Harbor for In-House Counsel

(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;

Part (d) of the Model Rule creates two broad exceptions that are not limited to temporary practices. Of course, for in-house attorneys in national companies that may move about, the in-house exception is very important. This exception has existed by rule in various forms in many states prior to the adoption of the Model Rule.

The Rule has three specific requirements: (a) that the lawyer be admitted in at least one U.S. jurisdiction, ³ (b) that services be provided to the employer (including its affiliates) and (c) that the services do not require pro hac vice admission.

It may seem self-evident, but in-house counsel should be diligent to maintain at least once license active and in good standing. Failure to do so can give rise to a number of problems, in addition to ethical problems. See e.g., **Gucci America, Inc. v. Guess?, Inc.,** 2011 U.S. Dist. LEXIS 15 (S.D.N.Y. January 3, 2011) (in-house lawyer had gone on inactive status in his licensed state, risking loss of the attorney-client privilege to his work).

³ A more recent proposed version of the rule would expand this to allow in-house practice by attorneys licensed in foreign countries and a number of states have adopted specific rules dealing with the in-house practice of foreign law consultants. A few states have expanded Rule 5.5 to allow the temporary practice in their jurisdiction by any attorney without distinction as to whether licensed in the U.S. or a foreign country.
Also, one should note that the Model Rule does not exempt in-house counsel from *pro hac vice* requirements. In-house counsel should take care not to appear (or be including on the pleadings in litigation filings) unless they are licensed in the host state or court, or have been admitted *pro hac vice*.

1. **Registration for In-House Counsel**

In addition to the Model Rule, many states have registration or other requirements imposed on in-house counsel. Texas, for example, has a registration requirement with limitations on certain types of practices and activities in which non-licensed in-house counsel may engage:

- Represent only employer (and affiliates)
- Register with Texas Board of Legal Examiners
- Cannot appear in court
- Cannot prepare any legal instrument affecting title to real estate
- “Landman” work, however, is not considered legal services.

*See Texas Board Legal Examiners Policy Statement on In-House Counsel.*

The ABA has approved a Model Rule for Registration of In-House Counsel, which has been adopted in various forms by many states. For a complete state-by-state analysis of in-house counsel registration rules, the ABA website provides a handy guide.4

2. **Pro Bono work by In-House Counsel licensed in other states**

An issue addressed in the ABA Model Rule for Registration, and the specific rules of a number of states, is the ability of in-house counsel, otherwise authorized to practice only for their employer, to participate in local pro-bono work. Under Model Rule 5.5, there is no clear path for an in-house counsel, not licensed in his state of residence, to practice pro bono activities in that state. The Model Rule for Registration and certain state rules address this issue. The ABA table cited in footnote 4 identifies those states that have adopted pro bono rules for in-house counsel.

H. The Safe Harbor for Federal Practices

(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:

... 

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

4 [http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/in_house_comp.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/in_house_comp.authcheckdam.pdf)
The final “safe harbor” is for any attorney practicing in federal courts or other federal tribunals that have their own rules for admission. Even before the Model Rule, most jurisdictions recognized that federal courts could establish their own rules for admission and practice that superseded local state rules. *See In re Poole*, 222 F.3d 618 (9th Cir. 2000) (attorney admitted to Arizona bankruptcy court allowed to collect fee even though not admitted in Arizona – “practice before federal courts is not governed by state court rules”); *State Bar of Wisconsin v. Keller*, 123 N.W.2d 905 (Wis. 1963) (out-of-state lawyer, licensed by the Interstate Commerce Commission, could render legal services in Wisconsin in matters before the ICC or incident to such matters); *Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379 (1963) (Florida could not prohibit unlicensed attorneys from practicing federal patent work).

The specific court rules of each tribunal should be consulted. Some federal districts, for example, limit registration to residents or to attorneys licensed with the local state bar, or require association with local counsel. Other federal districts, North Dakota for example, allow out-of-state attorneys to enroll and practice before them without going through *pro hac vice* procedures, associating with local counsel, or becoming licensed with the North Dakota state bar.

III. Other Issues

A. Enforcement and Consequences

Violation of the ethical rules concerning multijurisdictional practice may give rise to a number of potential consequences. Conceivable, yet rare, are criminal prosecutions. *See Unauthorized Practice: Georgia Law Firm Lawyers Are Indicted for Unauthorized Practice in North Carolina, 20 Laws. Man. on Prof. Conduct (ABA/BNA) 203 (2004)*. Most common, are sanctions by courts in the host state, such as disqualification and sanctions. *Rozmus v. Rozmus*, 595 N.W.2d 893 (Neb. 1999) (trial court granted motion to disqualify party’s lawyers because they were engaged in the unauthorized practice of law). Some of the initial cases that gave rise to the concerns that lead to the creation of the ABA Commission involved fee disputes and forfeiture of fees on account of unauthorized practice. *E.g., Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County*, 949 P.2d 1 (Cal. 1998). The attorney’s unauthorized practice may also have consequences to the client, such as loss of the attorney client privilege or dismissal of claims or striking of pleadings. *See Mitchell v. Progressive Ins. Co.*, 965 So. 2d 679 (Miss. 2007) (striking complaint filed by out-of-state counsel and finding that statute of limitations was not tolled).

Caution should be taken by the attorney who plans to apply to another state’s bar, but “begins” his practice in that state prior to the official admission. The unauthorized practice in that state’s jurisdiction may be a disqualifying event that precludes admission. Some states specifically ask, in their application, for the applicant to identify any proceedings or other matters previously handling by the attorney in that state.

Traditionally, it was thought that only the bar of the home state of the attorney (which had licensed the attorney) had jurisdiction to enforce ethical rules on unauthorized practice. Indeed, the Rule is written from that perspective – making it unethical in one’s home state to practice without authorization in another state.
ABA Model Rule 8.5 adopts a dual enforcement and choice of law procedure for multi-state practices, allowing enforcement of the disciplinary rules in both the attorney’s home state and in the host state in which he might practice:

Maintaining The Integrity of the Profession
Rule 8.5 Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer’s conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer’s conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.

Most State have adopted this Rule or a variation of it. However, Texas has not.

B. Disclosure Requirements

Comments to the Model Rule indicate that the attorney engaged in a multijurisdictional practice may be required to disclose to the client that he is not licensed in the host state. A few states, including North Dakota, make this disclosure mandatory in all instances.
C. Depositions

Depositions always raise thorny issues and create much confusion. Can I take a deposition in another state for a case pending in my home state? Can I appear as local counsel for a local deposition to be taken in a case pending in another state? Who can appear at the deposition? The answers can be worked out through application of the pending rules, but sometimes a simple matrix provides the clearest answer.

<table>
<thead>
<tr>
<th>Location of Lawsuit</th>
<th>Deposition in Home State</th>
<th>Deposition Out-of-State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lawsuit Out-of-State (and no pro hac vice admission)</td>
<td>Unclear – may be OK ethically but cause problems in court</td>
<td>Prohibited – Unauthorized Practice of Law</td>
</tr>
<tr>
<td>Lawsuit Out-of-State (but admitted pro hac vice)</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>
</tr>
</tbody>
</table>

One uncertainty is appearing in a deposition in one’s home state in a case pending in another state in which the attorney has not enrolled. Common practice appears to accept such an appearance. The author’s opinion is that the ethical consequences are principally a function of the capacity in which the attorney is appearing. If the attorney is appearing on behalf of a party in the lawsuit (such as taking or defending the deposition), the appearance is arguably an appearance in the pending case such that the attorney will be deemed to be practicing in the other jurisdiction and without authorization of the pro hac vice rules of the relevant court. At a minimum, the participation of an attorney on behalf of a party without authorization risks having the testimony stricken or disqualified by the court. On the other hand, it is believed that an appearance by an attorney for a non-party (such as an attorney for non-party witness) or as an observer only does not risk an ethical violation.

D. Fees and Taxes

A few states, in connection with multijurisdictional practice, require registration and payment of fees. At least one state, South Dakota, requires obtaining a sales tax license and collecting sales tax on in-state work.
IV. Do Not Forget Competency!

Model Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

At the end of the day, often the ethical quandary in multijurisdictional practice is competency. Any attorney practicing in other states must be knowledgeable and competent in the other potential application of the other state’s law and procedure. Often, the question asked is “can I handle this matter in this other state?” when the real question is “should I handle this matter?”