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FORUM ON THE CONSTRUCTION INDUSTRY

MULTIJURISDICTIONAL PRACTICE AND ABA MODEL RULE 5.5

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You are an attorney licensed only in State A, and one of your specialties is construction disputes. Your firm represents a Fortune 500 company with offices and operations throughout the nation. The client is the owner of a project under construction in State B, and a dispute has arisen between your client and the general contractor concerning delays and change orders. The construction contract calls for arbitration of any disputes in State B, but your firm's client would like a construction lawyer to try to resolve the dispute without going to arbitration, if possible. Your law firm has an office in State B, and although several lawyers in your firm's State B office specialize in real estate transactions and commercial litigation, none of them has handled a construction dispute. Can you handle the matter?

Under traditional state "unauthorized to practice" ("UPL") provisions, scenarios like this have become an increasing problem for attorneys and law firms whose clients transact business nationally. The days in which a client's legal matters were confined to a single state are long gone. Moreover, even for large law firms, it is usually impractical to have lawyers with construction law expertise in more than a few offices. Although client needs and legal practices have evolved dramatically as the law and nature of transactions have become more complex, lawyer regulation has been relatively slow to respond. Nevertheless, following the amendment of ABA Model Rule of Professional Conduct 5.5 ("Model Rule 5.5") in 2002, most states have implemented rules that bring the restrictions on multijurisdictional practice more in line with the practical realities of the legal marketplace.

I. Background

Restrictions on multijurisdictional practice, modeled on pre-amended Model Rule 5.5,[1] were long a staple of lawyer regulation. These restrictions typically prohibited lawyers from practicing law in states other than those in which they were licensed.[2] Historically, restrictions on multistate practice did not pose problems for the construction lawyer, as most engagements

were within the lawyer's own jurisdiction. However, as clients' businesses have become increasingly national and international in scope, so to has the practice of law. Consequently, lawyers have become increasingly fearful of violating state UPL provisions as they seek to fulfill their professional obligations in an efficient and effective manner. And with good reason. Lawyers who engage in the unauthorized practice of law may be subject to a host of sanctions,[3] including denial of fees,[4] disciplinary charges in their home state,[5] contempt of court,[6] and, in extreme cases, criminal charges.[7]

In an attempt to modernize outmoded UPL restrictions, in 2000 the ABA formed a Commission on Multijurisdictional Practice.[8] The Commission was to "make policy recommendations to govern the multijurisdictional practice of law that serve the public interest and take any other actions as may be necessary to carry out its jurisdictional mandate."[9] Pursuant to this mandate, the Commission issued a report titled *Client Representation in the 21st Century*.[10] In its report, the Commission recommended, among other things, that the ABA amend Model Rule 5.5 "to identify circumstances in which a lawyer who is admitted in a United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may practice law on a temporary basis in another jurisdiction."[11]

The Commission's recommendations concerning Model Rule 5.5 were officially adopted by the ABA House of Delegates on August 2, 2002.[12]

II. Amended Model Rule 5.5

Amended Model Rule 5.5 is a product of much study and deliberation.[13] Its provisions reflect the comments and testimony from various stakeholders.[14] Model Rule 5.5 now provides limited protection for attorneys who engage in services ancillary to prospective or pending litigation or arbitration in another state, who engage in transactional work that arises out of or is reasonably related to the lawyer's home-state practice, and who are employees of their clients:

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.[15]

III. Operation of Model Rule 5.5

While subsections (a) and (b) address the unauthorized practice of law generally, subsections (c) and (d) address the boundaries of multijurisdictional practice for in-house and outside counsel.

Subsection (c)(1) permits a lawyer to work on a discrete matter in another jurisdiction if the representation is undertaken in association with a lawyer who is admitted to practice in the jurisdiction who actively participates in the representation.[16] Practitioners must take care, however, to assure that the lawyer admitted to practice in the foreign jurisdiction shares "actual responsibility" for the representation and does not serve "merely as a conduit."[17] Accordingly, if you are outside counsel working on a construction contract in a foreign jurisdiction, you may do so provided you associate with local counsel who oversees your work to ensure it is performed competently and ethically.[18]

When a construction project in a foreign jurisdiction goes south, it is not uncommon for the contracting parties to retain lawyers in whom they have developed confidence, or with whom they have a prior relationship, to represent them.[19] If the matter involves litigation, it has long been the case that the parties' lawyers may appear in an out-of-state court on a *pro hac vice* basis. However, *pro hac vice* admission is not available prior to the filing of a lawsuit, and lawyers must often perform preliminary work, such as reviewing documents and interviewing witnesses, for which they cannot obtain *pro hac vice* admission. Under traditional regulations, a lawyer who engaged in these common pretrial activities ran the risk of being disciplined.

Together, with very few restrictions, subsections (c)(1) and (c)(2) of the Model Rule authorize these common litigation activities.

Under subsection (c)(2), a lawyer may render services in a state where the lawyer is not presently admitted to practice, but only if, "(a) the lawyer's services are in anticipation of litigation reasonably expected to be filed in a state where the lawyer is admitted or expects to be admitted *pro hac vice*, or (b) the lawyer's services are ancillary to pending litigation in which the lawyer lawfully appears, either because the lawyer is licensed in the jurisdiction where the litigation takes place or because the lawyer has been or reasonably expects to be admitted *pro hac vice* to participate in the litigation."[20] A lawyer is still required to comply with existing *pro hac vice* provisions.[21] As with paragraph (c)(1), the provision also covers supporting work by lawyers who do not appear before the court and are not admitted *pro hac vice*.[22]

Of particular importance to construction lawyers, Model Rule 5.5 authorizes a variety of multijurisdictional activities undertaken in connection with anticipated or actual ADR proceedings. Today's construction lawyers are often asked to handle matters involving possible mediation or arbitration in states in which they are not licensed. In fact, it is common for parties to mediate or arbitrate in a state unconnected to the parties or the dispute, simply because the site is neutral.[23] Subsection (c)(3) of the Model Rule acknowledges this reality and authorizes lawyers to render temporary services in a foreign jurisdiction as long as their services "are in or reasonably related to a pending or potential . . . [ADR] . . . proceeding," "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."[24]

Like litigators, transactional lawyers are often asked to leave their home state to gather information, provide advice, engage in negotiations, or perform other tasks related to a

representation.[25] Moreover, transactional lawyers whose practices focus on federal law are routinely retained by clients outside their home states.[26] Under the old regime, transactional lawyers who engaged in these routine activities risked sanction. The Model Rule, on the other hand, permits multijurisdictional transactional activities as long as they "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."[27] An out-of-state negotiation on behalf of an in-state client is but one example of activity permitted by the rule, regardless of whether the matter has any connection to a jurisdiction in which the lawyer is licensed.[28]

Subsection (d)(1) addresses the multijurisdictional practice of in-house counsel. Despite ostensibly strict traditional state UPL provisions, it has become increasingly commonplace for in-house lawyers to provide legal services to their employers in jurisdictions in which the lawyer is not licensed to practice.[29] Subsection (d)(1) legitimizes this long-standing practice. Among other things, it permits in-house lawyers to provide advice to their employer and facilitate transactions on the employer's behalf in jurisdictions in which the lawyer does not have an office.[30]

Finally, subsection (d)(2) provides that, when authorized by federal or other law, a lawyer may undertake legal work in a state in which the lawyer is not licensed.[31] For example, a jurisdiction may have in effect a rule that authorizes practice by foreign legal consultants.[32]

IV. Pitfalls and Remaining Uncertainty Associated with the Model Rule

Although the Rule itself appears well drafted and is fairly comprehensive, it contains some pitfalls and ambiguity. First, in many jurisdictions, adoption of the Rule itself, without more, may not provide out-of-state lawyers with the necessary authorization.[33] State legislative reform is necessary, as some states have yet to adopt statutes consistent with the Rule.[34] Georgia

and New Mexico are examples.[35] Thus, before engaging in multijurisdictional practice within a particular state, one should consult the state's rules and statutes.

Also, under the main provision of the Rule, an out-of-state lawyer may engage only in services provided on a "temporary basis" within the jurisdiction.[36] Thus, an out-of-state lawyer may not establish an office "or other systematic and continuous presence" in the state without obtaining a state license.[37] The potential pitfall for practitioners is that the line of distinction is unclear: "There is no single test to determine whether a lawyer's services are provided on a 'temporary basis' . . . and may therefore be permissible under paragraph (c)."[38] As the comment to the Rule indicates, "[s]ervices 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."[39] This ambiguity requires that practitioners use their discretion in determining whether the multijurisdictional services they provide are sufficiently "temporary."

Unless they are undertaken in association with local counsel, the Rule also limits multijurisdictional ADR and transactional services to those that "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."[40] The comment takes an expansive view of this requirement.[41] For example, "[t]he 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."[42] More importantly, for lawyers specializing in construction law, the comment recognizes that services are reasonably related to a lawyer's practice if "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."[43] For instance, construction contracts

are often predicated upon forms, such as those promulgated by the American Institute of Architects and ConsensusDocs, and although the body of law affecting construction contracting and disputes is not identical from state to state, many of the laws, such as those relating to construction liens, condominiums, and land sales practices, are based on uniform acts.[44] Moreover, the procedures governing ADR have been promulgated by national organizations such as the American Arbitration Association and JAMS.[45]

In short, some ambiguity remains. As the ABA Report notes, the Model Rule "leaves room for individual opinion and judicial interpretation."[46] That said, the current (2008) edition of the *ABA Annotated Model Rules of Professional Conduct* is devoid of any annotations construing or applying the provisions of the new Model Rule 5.5.

Importantly, as of May 15, 2009, only twelve states have adopted a rule identical to the Model Rule.[47] Twenty-eight states, including the District of Columbia, have adopted a rule similar to the Model Rule.[48] Nine states have taken some action toward adoption of some form of the rule.[49] Meanwhile, Kansas has chosen to maintain old Model Rule 5.5 and Montana has yet to take any action.[50]

V. State Variations on Model Rule 5.5

Because only twelve states have adopted a rule identical to Model Rule 5.5, practitioners should carefully review the relevant rules before engaging in multijurisdictional practice. For example, Arizona has adopted a rule nearly identical to the Model Rule but that includes an additional provision requiring lawyers engaged in multijurisdictional practice in the state to (1) advise clients that they are not licensed to practice law in Arizona and (2) acquire the client's informed consent to the representation.[51] California's rules, although substantively similar to the Model Rule, require an attorney who practices law temporarily in California to indicate to clients or potential clients that the attorney is not a member of the California bar.[52] Connecticut's rule is

similar to the Model Rule but it is predicated upon reciprocity; requires notification to Statewide Bar Counsel, payment of an administrative fee, and registration.[53] Connecticut's rule further provides that the transactional services permitted under (c)(4) must be "substantially related the services provided to an existing client."[54] Nevada's rule includes a provision that requires out of state attorneys to pay a $150 fee, register, and file an annual report that includes, among other information, "the nature of the client(s) (individual or business entity) for whom the lawyer has provided services that are subject to this rule and the number and general nature of the transactions performed for each client during the previous twelve (12)-month period."[55] New Jersey's provision authorizing transactional practice is more limited than the Model Rule. It requires that the transactional work "arise[] directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice," and that the New Jersey practice "is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client."[56] New Mexico requires out-of-state attorneys who engage in transactions involving issues specific to New Mexico law to associate with counsel admitted to practice in New Mexico.[57]

VI. Conclusion

Traditional UPL regulations, which had failed to keep pace with the evolving practice of law, increasingly forced lawyers to resort to "sneaking around in the legal profession" [58] in order to provide their clients with efficient and effective service. By amending Model Rule 5.5, the ABA sought to better align the regulation of lawyers with the realities of the current legal marketplace. Toward this end, the amended Model Rule provides significant protection to lawyers who engage in multijurisdictional practice, such as the lawyer presented with the predicament set forth at the outset of this section. Under subsection (c)(1), the broadest protection is clearly afforded to lawyers who associate with an actively involved local counsel.

But the Rule also offers safety for lawyers who do not work with local counsel, including lawyers handling matters that may result in litigation or arbitration in foreign jurisdictions, provided the work is within their area of expertise. In every case, of course, practitioners should review the state's rules of professional responsibility and any relevant statutes before handling a multijurisdictional matter.

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[1] The pre-amended version of Model Rule 5.5 provided simply that "A lawyer shall not:

> (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
>
> (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."

ABA MODEL RULES OF PROF'L CONDUCT R. 5.5 (2000), available at http://www.law.cornell.edu/ethics/aba/2001/ABA_CODE.HTM#Rule_5.5 (last visited June 26, 2009).

[2] *See* ABA CTR. FOR PROF'L RESPONSIBILITY, CLIENT REPRESENTATION IN THE 21ST CENTURY, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 1, 3 (2002), http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.pdf [hereinafter *ABA* REPORT].

[3] *See, e.g.*, Paul M. Lurie & Carl F. Ingwalson, *Arbitration and the Unauthorized Practice of Law*, 27 THE CONSTRUCTION LAWYER 14, 14 (2007).

[4] *See id*. n.2 (citing Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1 (Cal. 1998) (denying fees to New York attorneys who engaged in unauthorized practice of law in connection with representation of their clients at an arbitration in California). *See also* Teresa Stanton Collett, *Foreward* (to Symposium issue dedicated to Multijurisdictional Practice), 36 S. TEX. L. REV. 657, 658 (1995) ("the most common sanction is to deny the lawyer practicing without local authorization any right to recover fees from a client").

[5] *See id.* n.3 (citing In re Carter, 426 S.E.2d 897, 898–99 (Ga. 1993) (lawyer disciplined in home state for representing client in Alabama proceeding without being admitted to practice there).

[6] *See id.* n.4 (citing United States v. Kozel, 908 F.2d 205, 208 (7th Cir. 1990) (affirming sanctions and finding of contempt of court for violation of local rule prohibiting unauthorized practice of law).

[7] *See id.* n.5 (citing GA. CODE ANN. § 15-19-56(a) (2005); VA. CODE ANN. § 54.1-3904 (2005).

[8] *See* ABA REPORT, *supra* note 2, at 1.

[9] *Id*.

[10] *See id.* at 2.

[11] *Id.* at 4.

[12] *See* ABA Center For Professional Responsibility – Commission on Multijurisdictional Practice, http://www.abanet.org/cpr/mjp/ (last visited June 25, 2009).

[13] *See* ABA REPORT, *supra* note 2, at 2.

[14] *See id.*

[15] ABA MODEL RULES OF PROF'L CONDUCT R. 5.5 (2008) [hereinafter ABA MODEL RULE].

[16] *See Id*. R. 5.5(c)(1).

[17] ABA REPORT, *supra* note 2, at 24.

[18] *See id*.

[19] See *id.* at 10.

[20] *Id.* at 25.

[21] *See id*.

[22] *See* ABA MODEL RULE 5.5(c)(2).

[23] *See* ABA REPORT, *supra* note 2, at 10.

[24] ABA MODEL RULE 5.5(c)(3).

[25] *See* ABA REPORT, *supra* note 2, at 10.

[26] *See id*.

[27] *See* ABA MODEL RULE 5.5(c)(4).

[28] *See* ABA REPORT, supra note 2, at 28.

[29] *See id*. at 30.

[30] *See id*.

[31] *See id*. at 31.

[32] *See id*.

[33] *See id.* at 23.

[34] *See id.*

[35] Both Georgia and New Mexico have adopted a rule similar to Model Rule 5.5. *See* STATE BAR OF GEORGIA, MODEL RULES OF PROF'L CONDUCT R. 5.5, available at http://www.gabar.org/handbook/part_iv_after_january_1_2001_-_georgia_rules_of_professional_conduct/rule_55_unauthorized_practice_of_law_multijurisdictional_practice_of_law/ (last visited June 26, 2009); NEW MEXICO RULES OF PROF'L CONDUCT R. 16-505.E(4), available at http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0 (last visited July 8, 2009). The legislatures of these states, however, have yet to modernize their statutory UPL provisions. *See* GA. CODE ANN. § 15-19-51 (2006) (prohibiting broadly defined "unauthorized practice of law"); N.M. STAT. § 36-2-27 (2008) (same).

[36] *See* ABA MODEL RULE 5.5(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 . . . .").

[37] *See id.* R. 5.5(b)(1).

[38] ABA MODEL RULE 5.5 cmt.

[39] *Id.*

[40] *See* ABA MODEL RULE 5.5(c)(1), (3), (4).

[41] *See* ABA MODEL RULE 5.5 cmt.

[42] *Id*.

[43] *Id*.

[44] The National Conference of Commissioners on Uniform State Laws "promote[s] the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable." National Conference of Commissioners on Uniform State Laws, Introduction, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11 (last visited July 8, 2009). Many states choose to adopt these uniform acts. For example, Alaska, Florida, Hawaii, Montana, Kansas, New Hampshire, Rhode Island, South Carolina, and New Hampshire have statutes modeled after the Uniform Land Sales Practices Act. *See* Jere L. Loyd, Comment, *State Securities Regulation of Interstate Land Sales*, 10 URB. L. ANN. 271, 271 (1975).

[45] *See* American Arbitration Association – Resource Center – Construction, http://www.aaauonline.org/referenceCenter.aspx?cid=3 (last visited July 8, 2009); JAMS Engineering and Construction Arbitration Rules and Procedures, http://www.jamsadr.com/rules/ construction_arbitration_rules.asp (last visited July 8, 2009).

[46] ABA REPORT, *supra* note 2, at 23.

[47] These 12 states are: Alaska, Arkansas, Indiana, Iowa, Maryland, Massachusetts, Nebraska, New Hampshire, Oregon, Rhode Island, Utah, and Washington. *See* ABA, *State Implementation of Model Rule 5.5 (Multijurisdictional Practice of Law)* (May 15, 2009), http://www.abanet.org/cpr/mjp/quick-guide_5.5.pdf (last visited June 25, 2009).

[48] These 28 states are: Alabama, Arizona, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Idaho, Kentucky, Louisiana, Maine, Minnesota, Missouri, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Virginia, Wisconsin, and Wyoming. *See id.*

[49] Illinois, Michigan, and Tennessee have a recommendation pending before their highest court to adopt a rule identical to the model rule. Mississippi and Vermont have multijurisdictional practice committees that have recommended adoption of a rule identical to the model rule. Hawaii, New York, Texas, and West Virginia have created committees to study the ABA multijurisdictional practice recommendations. *See id.*

[50] *See id.*

[51] *See* ARIZONA ETHICS RULES R. 5.5(e)–(g), available at http://www.myazbar.org/ethics/rules.cfm.

[52] *See* CALIFORNIA RULES OF COURT R. 9.47(b)(3), 9.48(b)(3), available at http://www.courtinfo.ca.gov/ rules/documents/pdfFiles/title_9.pdf ("For an attorney to practice law under this rule, the attorney must . . . [i]ndicate on any Web site or other advertisement that is accessible in California either that the attorney is not a member of the State Bar of California or that the attorney is admitted to practice law only in the states listed.").

[53] *See* CONNECTICUT RULES OF PROF'L CONDUCT R. 5.5(c), (f), available at http://www.jud.ct.gov/ Publications/ PracticeBook/ PB1.pdf.

[54] *See id.* R. 5.5(c)(4).

[55] *See* NEVADA RULES OF PROF'L CONDUCT R. 5.5A, available at http://leg.state.nv.us/CourtRules/RPC.html. The requirement does not apply, however, to "work performed by a lawyer in connection with any action pending before a court of this state, any action pending before an administrative agency or governmental body, or any arbitration, mediation, alternative dispute resolution proceeding, whether authorized by the court, law, rule, or private agreement." *Id.* R. 5.5A(a)(2).

[56] *See* NEW JERSEY RULES OF PROF'L CONDUCT R. 5.5(b)(3)(iv), available at http://www.law.cornell.edu/ethics/nj/code/NJ_CODE.HTM#Rule_5.5.

[57] *See* NEW MEXICO RULES OF PROF'L CONDUCT R. 16-505.E(4), available at http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0 ("In transactions involving issues specific to New Mexico law, the lawyer temporarily practicing in New Mexico shall associate with counsel admitted to practice in New Mexico.").

[58] Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. Tex. L. Rev. 665, 665 (1995).