

# The MJP Maze: Avoiding the Unauthorized Practice of Law

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## INTRODUCTION

Historically, the rules of each state governing the practice of law barred lawyers licensed in other states from offering legal services under penalty of prosecution for the unauthorized practice of law (UPL). One exception was *pro hac vice* admissions by court order in litigation, but even these admissions usually were accompanied by retention of a local lawyer. As more and more lawyers crossed state lines to serve clients' needs, the uncertainty associated with the reach of UPL statutes--especially given that disgorgement or nonrecovery of fees or disqualification may follow a finding of the UPL--generated loud calls for help. The American Bar Association responded with the formation of a Commission on Multijurisdictional Practice (MJP).<sup>1</sup> On August 12, 2002, the House of Delegates of the ABA amended the Model Rules of Professional Conduct to incorporate the recommendations of the MJP Commission.<sup>2</sup> The MJP Commission affirmed the principle of state judicial regulation of the practice of law,<sup>3</sup> but recommended changes in the Model Rules to facilitate multijurisdictional practice in settings that "serve the interests of clients and the public and do not create an unreasonable regulatory risk."<sup>4</sup>

What are those settings? Have the states agreed with the MJP Commission's assessment of them? Can lawyers be assured of avoiding an unauthorized practice of law claim by abiding by the changes in the Model Rules? This paper attempts to provide lawyers with a roadmap to negotiate the MJP maze. However, lawyers beware: no lawyer will successfully exit the maze without careful study of, and adherence to, each state's rules.

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<sup>1</sup> It is fitting that the ABA formed this committee since it was the ABA's Committee on Unauthorized Practice, founded in 1930, that successfully convinced "states to prohibit the practice of law except by duly licensed practitioners." Clark, *The Two Faces of Multi-Jurisdictional Practice*, 29 N. Ky. L.Rev. 251 (2002). States did just that without consideration for the out-of-state lawyer. As lawyers became more mobile, and the UPL rules were used to gain advantage against opponents, Clark argues that UPL rules "serve to protect against competition instead of incompetence." *Id.* at 254.

<sup>2</sup> The ABA Center for Professional Responsibility maintains a web page on the Commission on Multijurisdictional Practice. See [www.abanet.org/cpr/mjp-home.html](http://www.abanet.org/cpr/mjp-home.html). The page should be bookmarked by all lawyers who cross state lines in their practice. It contains the entire MJP Commission report as well as charts on the adoption of MJP proposals. Citations to reports of the MJP Commission in this paper can be found via this web page. The Report is divided into Reports A-J. Report 201A affirms the ABA's support for state judicial regulation of the practice of law. Report 201B addresses the changes in Model Rule 5.5. Report 201C addresses the changes in Model Rule 8.5. Report 201D addresses the recommendation to amend Rules 6 and 22 of the ABA Model Rules of Lawyer Disciplinary Enforcement. Report 201E covers two resolutions that were later adopted by the ABA. First, the ABA resolved to encourage "the use of the National Lawyer Regulatory Data Bank to promote interstate disciplinary enforcement mechanisms and urges jurisdictions to adopt the International Standard Lawyer Numbering System®." Second, the ABA urged "jurisdictions to require lawyers to report to the lawyer regulatory agency in the jurisdiction in which they are licensed, all other jurisdictions in which they are licensed and any status changes in those other jurisdictions." According to the accompanying report, the ABA National Regulatory Data Bank "was established in 1968 to facilitate effective reciprocal discipline by providing a national clearinghouse for information about lawyers publicly disciplined for misconduct." Report 201F contains a Model Rule on *Pro Hac Vice* Admission, which contains a provision for charging a fee except for pro bono representation. Report 201G addresses the Model Rule for Admission by Motion which establishes criteria for admission without the need to take the state bar examination. Report 201H encourages states to adopt the ABA Model Rule for Licensing of Legal Consultants. Report 201J addresses a model rule for temporary practice by foreign lawyers and mirrors Rule 5.5(c). This paper focuses on Reports 201B and C.

<sup>3</sup> The MJP Commission concludes: "The Commission's conclusion is that, for the present, the judicial branch of government in each state should identify those particular interstate practices, comparable to *pro hac vice* representation, that should explicitly be authorized, because client choice and other interests in favor of multijurisdictional law practice outweigh the countervailing regulatory interests, and identify other reforms to facilitate and effectively regulate appropriate interstate and multi-state law practice. The Commission believes that allowing such practices will not only serve the public interest, but also improve obedience to and enforcement of the applicable rules." MJP Commission Report 201A, p. 5.

<sup>4</sup> MJP Commission Report 201B, p. 1.

## THE UNAUTHORIZED PRACTICE OF LAW

Statutes governing the unauthorized practice of law may have originally been designed to prevent nonlawyers from giving legal advice, but they were never limited to nonlawyers. The following examples explain why the Model Rules were amended and why so many states are changing the rules to reflect economic realities.

The California Supreme Court galvanized the MJP movement in 1998 when it held that a New York law firm engaged in the unauthorized practice of law by representing a California company in a dispute subject to arbitration under a contract in which California law governed. *Birbrower et al. v. The Superior Court*, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (1998). Birbrower's client, ESQ, settled the dispute before it went to arbitration and then sued Birbrower for malpractice. Birbrower counterclaimed for legal fees in excess of \$1 million for work performed in both California and New York. The trial court held that Birbrower violated Section 6125 of the Business and Professional Code which provided, "No person shall practice law in California unless the person is an active member of the State Bar." Hence, it summarily adjudicated the attorneys' fee claim in favor of ESQ except for work performed by the firm in New York.

The case worked itself up to the California Supreme Court which reached the following conclusions:

1. The practice of law "in California" under Section 6125 means "sufficient contact with the California client to render the nature of the legal service a clear legal representation." "Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law 'in California.' The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations." 949 P.2d at 5.
2. This interpretation does not "depend on or require the unlicensed lawyer's physical presence in the state." Physical presence is a factor in evaluating the existence of a violation of Section 6125. "For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means. Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person automatically practices law 'in California' whenever that person practices California law anywhere, or 'virtually' enters the state by telephone, fax, e-mail, or satellite. ... We must decide each case on its individual facts." *Id.* at 5-6.
3. The statute is not limited to nonattorneys but applies to any person whether or not a licensed member of another bar. *Id.* at 7.
4. "By applying section 6125 to out-of-state attorneys who engage in the extensive practice of law in California without becoming licensed in our state, we serve the statute's goal of assuring the competence of all attorneys practicing law in this state." *Id.* at 8. (Citation omitted.)
5. The Supreme Court declined an invitation to carve an exception for a private arbitration, noting that the Legislature had created an exception for international arbitration but had not enacted a similar exception for private arbitration. *Id.* at 9.
6. The Federal Arbitration Act does not preempt Section 6125. *Id.*
7. "It is a general rule that an attorney is barred from recovering compensation for services rendered in another state where the attorney was not admitted to the bar." *Id.* at 10. "Because Birbrower practiced substantial law in this state in violation of section 6125, it cannot receive compensation under the fee agreement for any of the services it performed in California. Enforcing the fee agreement in its entirety

would include payment for the unauthorized practice of law in California and would allow Birbrower to enforce an illegal contract.” *Id.* at 11.<sup>5</sup>

8. “We agree with Birbrower that it may be able to recover fees under the fee agreement for the limited legal services it performed for ESQ in New York to the extent they did not constitute practicing law in California, even though those services were performed for a California client. Because section 6125 applies to the practice of law in California, it does not, in general, regulate law practice in other states. Thus, although the general rule against compensation to out-of-state attorneys precludes Birbrower’s recovery under the fee agreement for its actions in California, the severability doctrine may allow it to receive its New York fees generated under the fee agreement, if we conclude the illegal portions of the agreement pertaining to the practice of law in California may be severed from those parts regarding services Birbrower performed in New York.” *Id.* at 11. (Citations omitted.)
9. “Thus, the portion of the fee agreement between Birbrower and ESQ that includes payment for services rendered in New York may be enforceable to the extent that the illegal compensation can be severed from the rest of the agreement. On remand, therefore, the trial court must first resolve the dispute surrounding the parties’ fee agreement and determine whether their agreement conforms to California law. If the parties and the court resolve the fee dispute and determine that one fee agreement is operable and does not violate any state drafting rules, the court may sever the illegal portion of the consideration (the value of the California services) from the rest of the fee agreement. Whether the trial court finds the contingent fee agreement or the fixed fee agreement to be valid, it will determine whether some amount is due under the valid agreement. The trial court must then determine, on evidence the parties present, how much of this sum is attributable to services Birbrower rendered in New York. The parties may then pursue their remaining claims.” *Id.* at 13.<sup>6</sup>

Whatever one’s views of the merits of this case, the following statement was the attention-grabber:

*For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means.*<sup>7</sup>

*Birbrower* is not the only attention-grabber in the UPL jurisprudence. Arbitration awards have been attacked where the lawyer representing one of the parties was not represented by an attorney licensed in the jurisdiction. *Sirotzky v. New York Stock Exchange*, 347 F.3d 985 (7<sup>th</sup> Cir. 2003) illustrates the point. This was a client-

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<sup>5</sup> The Supreme Court determined that none of the exceptions to the general rule of nonrecovery of fees applied. The three exceptions discussed were (1) compensation for activities related to federal court practice; (2) services not involving a courtroom appearance; (3) a case where there has been full disclosure that the lawyer was not licensed in the state. 949 P.2d at 10-11.

<sup>6</sup> For a rapid dissection of *Birbrower*’s reasoning, see Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 *Ariz. L. Rev.* 685, 688-90 (2002).

<sup>7</sup> *Birbrower* was distinguished in *Condon v. McHenry*, 65 Cal.App.4<sup>th</sup> 1138 (1<sup>st</sup> Dist. 1998). The case involved the award of fees to Colorado lawyers rendering services to a Colorado resident who was co-executor of an estate probated in California. The California co-executor challenged the award because the Colorado lawyers were not admitted in California. The court of appeal held that that the Colorado co-executor was permitted to choose counsel, that it was reasonable to choose the Colorado lawyers because they did business where the co-executor lived and had done the legal work on the estate plan of the decedent, and that California law provided that the attorney for the executor “shall” receive compensation without exception for the state of admission of the attorney. *Id.* at 1143. *Birbrower* was not applicable because the co-executor – the client – resided in Colorado, not California, and his lawyers were in Colorado as well. *Id.* at 1146. And the principles set forth in *Birbrower* were also not controlling. Section 6125’s goal is to protect California citizens “from incompetent or unscrupulous practitioners of law,” the court of appeal explained. Whether Colorado counsel entered California physically or “virtually,” the evidence was that communications with attorneys in California were made by telephone, facsimile, or mail from Colorado, there was no evidence that California law was involved in the work in issue, and, in any event, non-California clients do not have to retain California lawyers to advise them on California law. *Id.* at 1147-48. An effort to defeat a retainer agreement based on the holding in *Birbrower* was rejected in *Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 24 F.Supp.2d 66, 82 (D.D.C. 1998). The district court explained that California enforces retainer agreements where *pro hac vice* admission is going to be sought. The district court explained that retainer agreements with out-of-state attorneys are enforceable as long as the attorneys comply with California Rule of Court 986 and are admitted *pro hac vice*. But to be admitted *pro hac vice*, a lawyer must first be retained by a client under California Rule of Court 983. The district court refused to put attorneys into the “impossible situation” of needing to be retained to seek admission but voiding the retainer agreement because admission had not yet occurred.

broker dispute that was arbitrated in Illinois. The broker prevailed but did not use Illinois-licensed counsel. The client sued to upset the award on this basis but was not successful. There was a collateral issue involving removal of the matter and remand to state court, but on the UPL issues, the Seventh Circuit had this to say:

*We have had many cases, though more criminal than civil, in which a party complains about not having a lawyer; but Sirotzky's is our first case in which a party who has a lawyer is complaining that his opponent does not have a (licensed) lawyer. Ordinarily a litigant is delighted to find himself up against an unrepresented party, or a party represented by a defrocked or otherwise ineligible lawyer.*

*Yet the cases are divided on whether a judgment is reversible merely because one's opponent was not represented by a licensed lawyer. Compare Alexander v. Robertson, 882 F.2d 421, 423-25 (9th Cir. 1989), and Gomes v. Roney, 88 Cal.App.3d 274, 151 Cal.Rptr. 756 (1979), holding that it is not, with Leonard v. Walsh, 73 Ill.App.2d 45, 220 N.E.2d 57, 58 (1966); cf. Jacobs v. Queen Ins. Co. of America, 51 S.D. 249, 213 N.W. 14, 15 (1927); State ex rel. Mather v. Carnes, 551 S.W.2d 272, 288 (Mo.App. 1977), holding that it is. A rule of automatic reversal is difficult to defend, but Sirotzky's gripe is that at the arbitration hearing Bernstein's New York lawyer was permitted to engage in tactics that an Illinois lawyer would be forbidden by the rules of ethics governing members of the Illinois bar to engage in, and if this is right it does suggest a way in which a litigant can be harmed by the unlicensed status of his opponent's lawyer. However, the procedures and evidentiary rules in arbitration are matters for the arbitrators and the arbitration contract to determine, (citations omitted), rather than for a court to impose. The rules of the New York Stock Exchange governing arbitration do not even require parties to be represented by a lawyer, see Rule 614, Article XI NYSE Constitution and Arbitration Rules, June 2003, at 17, <http://www.nyse.com/pdfs/Rules.pdf>; A Guide to Arbitration at the New York Stock Exchange, at 1-2, <http://www.nyse.com/pdfs/Guidelns2.pdf>, let alone a licensed one, even if they are institutions rather than individuals and hence would not in ordinary litigation be allowed to proceed without a lawyer.*

*Id.* at 989-90.

Appearing before a state agency without a clear *pro hac vice* admission process has also been problematic. *In Re Ferrey*, 774 A.2d 62 (R.I. 2001) involved a *pro hac vice* request to the Rhode Island Supreme Court to permit Ferrey, a Massachusetts attorney, to appear before the Energy Facility Siting Board and a request that his admission be made *nunc pro tunc* to cover his earlier appearance before the Board, which had given Ferrey permission to appear. The supreme court determined that only it could determine who is permitted to practice in Rhode Island and explained that Rhode Island statutes prohibit a lawyer from receiving compensation for legal services prior to a *pro hac vice* admission, and doing so would subject the recipient to criminal prosecution. It then granted Ferrey's motion to appear but not on a *nunc pro tunc* basis,<sup>8</sup> presumably converting Ferrey's prior work to *pro bono* service.<sup>9</sup>

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<sup>8</sup> The Rhode Island Supreme Court said it approved the *pro hac vice* request because the Board, believing it had the authority to do so, had previously permitted Ferrey to appear, and it was not going to penalize Ferrey for his good faith belief in the Board's authority. To approve the *nunc pro tunc* request, however, would be the equivalent of approving after the fact the UPL and "we are duty bound to follow (the) law and not blindly ignore or condone past transgressions thereof." 774 A.2d at 65.

<sup>9</sup> Slightly more fortunate was Jeremy Flachs. A Virginia licensed lawyer, he entered into a retainer agreement with Somuah who had been injured in an automobile accident in Maryland. He neglected to mention he was not admitted in Maryland. Flachs incurred a substantial amount of expense in collecting and preserving evidence. Somuah moved to Maryland after the accident and Flachs sought to associate Wells, a Maryland lawyer, to assist

Disgruntlement can also lead to a lawyer's collision with the UPL statutes of a state. In April 2004, a grand jury in North Carolina indicated two Georgia lawyers on misdemeanor charges for the unauthorized practice of law. The lawyers had conducted an investigation of the conduct of a college president in connection with the eligibility of a college basketball player. The president was cleared of wrongdoing. The lawyers' report resulted in the reassignments of two faculty members. That upset other faculty members who resigned in protest, which ultimately resulted in the resignation of the president who was the original subject of the investigation. One of the faculty members, a lawyer, filed a grievance with the North Carolina Bar taking the position that the Georgia lawyers were not licensed in North Carolina and thus were engaging in the unauthorized practice of law in North Carolina. He sent a copy of the grievance to the county district attorney who secured the indictment.<sup>10</sup>

Against this backdrop of uncertainty and disparity,<sup>11</sup> one can readily see why MJP rules were and are needed. Model Rules 5.5 and 8.5 were drafted to attempt to reduce the uncertainty and create uniformity.<sup>12</sup>

### **MODEL RULE 5.5 STILL RECOGNIZES STATE REGULATORY SUPREMACY**

Model Rule 5.5 recognizes the supremacy of state judicial regulation in limiting the ability of lawyers to practice law in jurisdictions where they are not licensed to practice.<sup>13</sup> Rule 5.5(a) and (b) provide:

*(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*

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him. During a meeting with Flachs and Wells, Somuah was told by Flachs that he was not licensed to practice in Maryland. Wells decided not to accept the case. Somuah then discharged Flachs who wrote Somuah demanding payment for the time he spent and the expenses he incurred. The Maryland Court of Appeals held that Somuah rightfully discharged Flachs. *Somuah v. Flachs*, 721 A.2d 680, 682, (Md. Ct. App. 1998). But it determined that his investigative work, primarily consisting of "gathering evidence and preserving evidence in order to analyze (Somuah's) potential claims" did not constitute the UPL where Flachs did not hold himself out to the public as an attorney licensed in Maryland and did not have an office in Maryland. *Id.* at 690. It further held that Flachs was entitled to recovery on a *quantum meruit* basis but that he could not maintain any action for compensation until Somuah recovers in her action. *Id.* at 690-693. *Cf. Z.A. v. San Bruno Park School District*, 165 F.3d 1273, 1276 (9<sup>th</sup> Cir. 1999) (citing *Birbrower*, refusing to award attorneys fees for successful administrative resolution of a dispute involving a child's special education placement where the attorney assisting the child's parent was not admitted in California: "On balance, the equities favor application of the law forbidding the unauthorized practice of law and denying recovery of attorney fees to those lawyers unauthorized to practice in state proceedings.")

<sup>10</sup> This information comes from an article from the Fulton County Daily Report of April 8, 2004, reprinted at <http://www.law.com/isp/article.jsp?id=1081348826442>.

<sup>11</sup> For interested readers, numerous other cases are discussed in Clark, *supra*, *The Two Faces of Multi-Jurisdictional Practice* and Barker, *Extrajurisdictional Practice by Lawyers*, 56 Bus. Law. 1501 (2001) and which can also be found at <http://www.abanet.org/cpr/mjp-home.html>.

<sup>12</sup> It must be noted that UPL rules traditionally have not been uniformly enforced. The ABA Standing Committee on Client Protection conducted a survey of UPL Committees in 2004. Questionnaires were sent to all jurisdictions in the United States and 36 jurisdictions responded. The survey results reflected that, "Twenty-three jurisdictions actively enforce UPL regulations, although some jurisdictions indicate that insufficient funding makes enforcement difficult. Ten jurisdictions stated that enforcement is inactive or non-existent. For example, because of limited resources, California reported that it only investigates a few UPL cases per year." According to the survey results, the Florida Bar "leads the country in funding UPL enforcement, spending approximately \$1.4 million annually." This compares to \$100 for Wyoming, \$3,500 for Colorado, \$5,000 for Virginia, and \$5,900 for Arkansas among states with lower UPL enforcement budgets. Bear in mind that UPL enforcement would relate to the offering of legal services by non-lawyers as well as by nonadmitted lawyers. The Standing Committee on Client Protection's Report also identifies how jurisdictions define "the practice of law," the remedies available, the identity of the enforcement authority (the State Bar or attorney generals, county attorneys, or district attorneys), and the nature of nonlawyer permitted activities among other of the state-by-state survey results. *2004 Survey of Unlicensed Practice of Law Committees*, ABA Standing Committee on Client Protection, December 2004, which can be located through <http://www.abanet.org/cpr/home.html>. Survey results are presented in charts by state and survey question at [http://www.abanet.org/cpr/clientpro/2004UPLSURVEYRESULTS\\_Chart1.pdf](http://www.abanet.org/cpr/clientpro/2004UPLSURVEYRESULTS_Chart1.pdf) and [http://www.abanet.org/cpr/clientpro/2004UPLSURVEY\\_Chart11.pdf](http://www.abanet.org/cpr/clientpro/2004UPLSURVEY_Chart11.pdf).

<sup>13</sup> *See Leis v. Flynt*, 439 U.S. 438, 442 (1979) ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions.").

(2) *hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.*

The Comment to Model Rules 5.5(a) and (b) does not meaningfully illuminate the breadth of these rules. Comment [4] does caution, however, that, “Presence may be systematic and continuous even if the lawyer is not physically present here.” If a lawyer has a client in a state in which the lawyer is not licensed and the lawyer advises that client by telephone on matters related to that state’s law, week-in and week-out, but the lawyer rarely visits the client, does that represent a “systematic and continuous presence”? Based on this comment, it may.<sup>14</sup> That’s where the exceptions to the UPL come in.

### **EXCEPTIONS TO THE UPL UNDER MODEL RULE 5.5(C)**

What does it mean in Rule 5.5(a) to “practice law”? Model Rule 5.5(c) answers this question by identifying four circumstances in which a lawyer may provide legal services “on a temporary basis”<sup>15</sup> in a jurisdiction in which the lawyer is not licensed. Model Rule 5.5(c) states:

*(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.*

The first exception is traditional—affiliating with involved local counsel insulates one from a UPL claim. There is now, however, a threshold minimum: the local counsel must “actively participate” in the matter.<sup>16</sup>

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<sup>14</sup> If presence can be “systematic and continuous” without a physical aspect to it, then arguably “presence” is equivalent to “contact” or “communication,” and week-in, week-out communication and contact may then be regarded as “systematic and continuous.” Unless the client complains, or another lawyer raises the issue, the likelihood of UPL review of this conduct is remote.

<sup>15</sup> Comment [6] gives more expanse to the words “temporary basis” than might be inferred by the text in the rule: “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.” So, a “systematic and continuous” presence can occur without a physical presence in the jurisdiction and services may be temporary even if they are recurring or provided for an extended period of time in the jurisdiction. The UPL case law will have to fill the large gap between these two concepts.

<sup>16</sup> *Cf. Servidone Construction Corp. v. St. Paul Fire & Marine Insurance Company*, 911 F.Supp. 560 (N.D.N.Y. 1995). In this case, Goddard was licensed to practice in Maryland, and two federal courts, but was not admitted in New York. He maintained an office in New York—his only office—as a partner with a firm called Goddard & Blum, which had several attorneys admitted in New York. He performed legal services for Servidone in New York, but never appeared in a New York court on behalf of Servidone. Goddard had a contingent fee agreement with Servidone on a claim against St. Paul.

Outside of litigation, one has difficulty conceiving of circumstances when the “active participation” test will ever be evaluated unless an opposing lawyer decides he or she has an ethical obligation to raise a UPL issue where the nonadmitted lawyer is not using local counsel’s services, or not using them enough, whatever “enough” may mean in a given set of circumstances.<sup>17</sup>

The second exception is cryptically written but Comments [9]-[11] essentially provide that *pro hac vice* admission or appearance before a tribunal or agency under rules permitting such an appearance, work in anticipation of such appearances, and discovery ancillary to a proceeding in another jurisdiction would be ethically permissible in a jurisdiction for a lawyer not licensed in that jurisdiction:

*[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority.<sup>18</sup> To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.*

*[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.<sup>19</sup>*

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Funds were interpleaded into the United States Court of Federal Claims by St. Paul, and Goddard, who had by then been discharged by Servidone, sought to obtain a portion of his fee under a retainer agreement that he alone had entered into with Servidone, since Goddard & Blum had not yet been formed. St. Paul opposed the effort to recover fees claiming the retainer agreement was unlawful because Goddard engaged in the UPL. Goddard used the affiliation with Goddard & Blum as a shield to protect him from the UPL claim but insisted that he alone was entitled to funds under the retainer agreement as Servidone’s sole legal representative. *Id.* at 572. The district court held that Goddard’s insistence that he alone was Servidone’s legal representative and that Servidone was not a client of Goddard & Blum was fatal on the UPL claim. The fact that Goddard “may have relied upon the assistance of” colleagues at Goddard & Blum admitted in New York “does not change the fact that Servidone did not contract with Goddard & Blum for its services.” *Id.* at 575. It further held that his prosecution of Servidone’s claim in the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit without New York counsel was not a defense, that the retainer agreement was thus unlawful, that he therefore had no lien for services performed under the agreement and could not maintain an action in *quantum meruit*. *Id.* at 576.

<sup>17</sup> Model Rule 5.5(a) provides: “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.” Model Rule 8.3(a) provides that, “A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.” Rule 8.4 provides that, “It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;...” If Rule 5.5(c)(1) is being used as the safe harbor to avoid the UPL and if the local counsel is not actively participating, does the local counsel have a duty to report the nonadmitted counsel under Model Rules 8.3(a)? Or if the nonadmitted lawyer’s “honesty, trustworthiness or fitness” as a lawyer is not in issue, must the local lawyer withdraw so as to not knowingly assist the nonadmitted lawyer in violating the rules of professional conduct?

<sup>18</sup> See *Seitzinger v. Community Health Network*, 2004 WI 28, 676 N.W.2d 426, 437-38 (2004) where the Supreme Court of Wisconsin determined in a 4-3 decision that a doctor could not retain a New Jersey lawyer to represent the doctor in a hospital peer-review proceeding where the hospital’s by-laws permitted the doctor to have counsel. The supreme court interpreted the by-laws to refer to Wisconsin counsel. *Pro hac vice* admission was not permitted because Wisconsin’s Supreme Court Rule 10.03(4) allowing for *pro hac vice* admission was determined to be applicable to a court. *Id.* 676 N.W.2d at 437. As discussed below, Wisconsin is a state where there is a recommendation pending to adopt a rule similar to Rule 5.5.

<sup>19</sup> Would the result in *Kennedy v. Bar Association of Montgomery County, Inc.*, 561 A.2d 200 (Md. Ct. App. 1989) be different under Model Rule 5.5? Kennedy was licensed in Washington, D.C., but evaluated cases from an office in Maryland. The court of appeals held that triaging for clients from an

[11] *When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.*<sup>20</sup>

The third exception allows a lawyer to participate in a dispute resolution process without being licensed in the jurisdiction.<sup>21</sup> In a litigation setting, a lawyer employed to participate in a mediation who has not been admitted for the matter should be mindful of the admonition in Comment [12]: “The lawyer, however, must obtain admission *pro hac vice* in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.”<sup>22</sup>

The fourth exception potentially gives a lawyer such wide latitude that the prohibitions contained in Rules 5.5(a) and (b) become meaningless. Comment [13] does nothing more than restate the rule:

[13] *Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.*<sup>23</sup>

Comment [14] is more thoughtful and attempts to set forth factors that demonstrate that the services to be provided in the jurisdiction in which the lawyer is not licensed “arise out of” or are “reasonably related” to the lawyer’s practice in a jurisdiction in which the lawyer is admitted. Comment [14] gives these examples:

1. 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.”
2. The matter, although involving other jurisdictions, “may have a significant connection with that jurisdiction.”
3. “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.”
4. 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.”

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office in Maryland represented the unauthorized practice of law in Maryland: “Kennedy may not utilize his admission to the bar of the federal court in Maryland, or his admission in Washington D.C., as a shield against injunctive relief by asserting he will operate a triage. He is not permitted to sort through clients who may present themselves at his Maryland office and represent only those whose legal matters would require suit or defense in a Washington D.C. court or in the federal court in Maryland because the very acts of interview, analysis and explanation of legal rights constitute practicing law in Maryland. For an unadmitted person to do so on a regular basis from a Maryland principal office is the unauthorized practice of law in Maryland.” *Id.* at 210. Probably not. The regularity of the activities in Maryland seems fatal.

<sup>20</sup> MJP Commission Report 201a, p. 3

<sup>21</sup> The condition—“if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer”—presumably will never pose an obstacle to participation in a dispute resolution process.

<sup>22</sup> MJP Commission Report 201a, p. 3.

<sup>23</sup> MJP Commission Report 201a, p. 3.

5. 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.”<sup>24</sup>

These examples, however, do not address the meaning of a “temporary basis” in the introductory paragraph to Rule 5.5(c). As noted earlier, Comment [6] says that there is no “single test” to determine whether a lawyer’s services are provided on a temporary basis. This Comment adds that 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.” In the example used above--a lawyer who gives telephone advice regularly to a client on legal issues in a jurisdiction in which the lawyer is not licensed from the lawyer’s office in a jurisdiction in which the lawyer is licensed--Comment [6] might offer a safe harbor. But what if the state bar does not adopt Comment [6], and there is nothing to guide a reviewing grievance committee or court of what it means to provide services on a “temporary basis”? In addition, one might argue that the introductory paragraph to Rule 5.5 uses the phrase, “in this jurisdiction.” Does that mean a physical presence?<sup>25</sup> If it does, then none of the exceptions to the UPL in Rule 5.5 would be applicable to a telephone practice, sending the lawyer back to Rule 5.5(b) where the question would be: is the lawyer’s “telephone practice” a “systematic and continuous presence”? Echoing the California Supreme Court in *Birbrower*, Comment [3] says this requirement can be violated without a physical presence. Lawyers in this type of out-of-state client relationship should be alert not just to the rule adopted by the client’s jurisdiction but also to the scope of the comment(s), if any are adopted.

## **EXCEPTIONS FROM THE UPL FOR LAWYERS FOR AN ORGANIZATION OR AS AUTHORIZED BY FEDERAL LAW OR THE LAW OF THE JURISDICTION**

Finally Rule 5.5(d) addresses in-house counsel and allows them to practice law as long as the legal services are provided to the lawyer’s employer or its organizational affiliates. It also applies to government counsel and to unadmitted lawyers authorized by federal law or a law of the jurisdiction to provide legal services:

*(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<sup>26</sup> 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;<sup>27</sup> or*

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

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<sup>24</sup> MJP Commission Report 201a, p. 3-4.

<sup>25</sup> *Cf. Fought & Company, Inc. v. Steel Engineering and Erection, Inc.*, supra, 951 P.2d at 498 (holding that in-house’s collaboration from Oregon with counsel in Hawaii did not represent the rendering of legal services within the jurisdiction of Hawaii).

<sup>26</sup> Does an in-house counsel in Oregon provide legal services in Hawaii where the in-house counsel’s employer, Fought, retained Hawaii counsel who handled litigation in Hawaii and in-house counsel provided legal services only from Oregon, did not draft or sign any papers filed during an appeal, did not appear in court, and did not communicate with other parties on Fought’s behalf? No, according to *Fought & Company, Inc. v. Steel Engineering and Erection, Inc. et al.*, 951 P.2d 487 (Haw. 1998). Fought was allowed to recover attorneys fees authorized by contract, where the attorney fees included time spent on the matter by Fought’s in-house counsel. The party opposing the fees had argued that the in-house counsel’s services were performed in the jurisdiction of Hawaii and since the in-house counsel was not admitted in Hawaii, the fees could not be recovered. But the supreme court held that collaborating with Hawaii counsel from Oregon did not represent service “within the jurisdiction” of Hawaii and rejected the argument. *Id.* at 498.

<sup>27</sup> The ABA maintains a chart of how Rule 5.5(d)(1) is faring in the states. See <http://www.abanet.org/cpr/mjp-home.html> (scroll to the link “in house counsel” under “Charts on State Adoption of MJP Proposals”).

