# 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). [1] 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.[2] The MJP Commission affirmed the principle of state judicial regulation of the practice of law,[3] 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."[4]

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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[1] 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.

[2] The ABA Center for Professional Responsibility maintains a web page on the Commission on Multijurisdictional Practice. See 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.

[3] 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.

[4] 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.[5]

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.[6]

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.*[7]

*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 (7th Cir. 2003) illustrates the point. This was a client-

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[5] 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.

[6] 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).

[7] *Birbrower* was distinguished in *Condon v. McHenry*, 65 Cal.App.4th 1138 (1st 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,[8] presumably converting Ferrey's prior work to *pro bono* service.[9]

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[8] 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.

[9] 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.[10]

Against this backdrop of uncertainty and disparity,[11] 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.[12]

## 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.[13] 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.*
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> *(b) A lawyer who is not admitted to practice in this jurisdiction shall not:*
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> *(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 pubic 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 (9th 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.")

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

[11] 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.

[12] 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 budges. 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_ChartI.pdf and http://www.abanet.org/cpr/clientpro/2004UPLSURVEY_ChartII.pdf.

[13] *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.[14] 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"[15] 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.[16]

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[14] 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.

[15] 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.

[16] *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.[17]

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.[18] 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.*
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> *[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.[19]*

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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.

[17] 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?

[18] *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.

[19] 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.*[20]

The third exception allows a lawyer to participate in a dispute resolution process without being licensed in the jurisdiction.[21] 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."[22]

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.*[23]

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.

[20] MJP Commission Report 201a, p. 3

[21] 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.

[22] MJP Commission Report 201a, p. 3.

[23] 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."[24]

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?[25] 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[26] 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;[27] or*
>
> *(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.*

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[24] MJP Commission Report 201a, p. 3-4.

[25] *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).

[26] 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.

[27] 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).

 

Comment [16] gives a good explanation of the reach of, and rationale underlying, Rule 5.5(d)(1) but cautions the lawyer against providing personal legal services to colleagues in the jurisdiction:

> *Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees.*[28] *The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.*[29]

The exception in Rule 5.5(d)(2) recognizes the supremacy of federal law authorizing the lawyer to render legal services authorized by federal law.[30] Comment [18] explains that "other law" includes "statute, court rule, executive regulation or judicial precedent."[31]

One has to engage in considerable deliberation to identify what a lawyer cannot do under Rules 5.5(c) (on a temporary basis) and 5.5(d) (on a permanent basis)[32] in a jurisdiction in which the lawyer is not licensed.[33]

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[28] Presumably, a real property lawyer for a company not licensed in the jurisdiction would be prohibited from assisting a colleague with a real estate closing in the jurisdiction to the extent that legal services are needed in connection with the closing. On the other hand, if the transaction will take place in the jurisdiction in which the lawyer is licensed, even if the lawyer is not physically located there, the lawyer should be able to render the legal advice.

[29] MJP Commission Report 201b, p. 4.

[30] Illustratively, federal regulations allow a lawyer admitted in any state or territory to practice before the Patent and Trademark Office. *See The Florida Bar v. Sperry*, 373 U.S. 379 (1963). One commentator has suggested that Model Rule 5.5(d)(2) allows out-of-state lawyers to give advice on federal law issues, Needham, *Multijurisdictional Practice Regulations Governing Attorneys Conducting a Transactional Practice*, 2003 Ill. L.R. 1331, 1373 (http://home.law.uiuc.edu/lrev/publications/2000s/2003/2003_5/needham.pdf), but the language of Model Rule 5.5(d)(2) appears more narrow than this interpretation, which would appear to be encompassed instead by Model Rule 5.5(c)(2)-(4). However, federal courts decide who may practice before them. *Sperry, supra*, 373 U.S. at 383-84. Even disbarment by a state does not automatically preclude a lawyer from practicing before a federal court. *In Re Lite Ray Realty Corp.*, 257 B.R. 150, 153 (S.D.N.Y. 2001) (citations omitted). However, bankruptcy lawyers seeking to establish a "federal exception" to the UPL under state law have had mixed success where they were not in good standing or were not admitted in the state jurisdiction where the bankruptcy court was located. *Compare In re Peterson*, 163 B.R. 665, 673-675 (D. Conn. 1994) (lawyer not admitted in Connecticut who had an office in Connecticut required to disgorge fees for, among other reasons, the UPL where he gave bankruptcy advice to debtors as well as advice on state foreclosure laws, and prepared the bankruptcy petition, schedules and statements, negotiated with creditors, corresponded with a receiver under Connecticut law, and appeared in the bankruptcy court); *In Re Lite Ray Realty Corp., supra*, 257 B.R. at 155-57 (denying motion by debtor to retain attorney under the bankruptcy laws where attorney had been suspended by New York from practicing law but remained in good standing in the bar of the Southern District of New York and failed to associate local counsel. "His federal court admission...does not permit him to open an office and practice generally, even if his practice is limited to bankruptcy") *Rittenhouse v. Delta Home Improvement, Inc.*, 255 B.R. 294, 298-99 (W.D. Mich. 2000) (creditor successfully obtained order requiring disgorgement of fees and payment of a fine where lawyer limited his practice to bankruptcy but was not admitted in Michigan and necessarily had to offer legal advice on Michigan law as part of his bankruptcy practice) with *In re Mendez*, 231 B.R. 86, 90-92 (B.A.P. 9th Cir. 1999) *aff'd* 230 F.3d 1367 (9th Cir. 2000) (unpublished) (trustee's effort to recover fees paid by debtor to attorney failed where attorney was admitted to practice in Illinois, not Arizona, but was admitted to practice in the District of Arizona, and did not maintain an office in Arizona and where there was no evidence regarding the scope and nature of attorney's legal activities in Arizona); *In re Poole*, 222 F.3d 618, 622 (9th Cir. 2000) (attorney not admitted in Arizona but admitted to practice in the district court was entitled to compensation for his services against claim by trustee that he should be disallowed fees; proper method to challenge lawyer's right to practice is to seek lawyer's suspension or disbarment from the practice of law in the District of Arizona using procedures "that comport with Due Process"). In the past, states have not looked kindly on lawyers opening offices to practice bankruptcy or federal tax law in a state where they were not admitted. *Attorney Grievance Commission of Maryland v. Harris-Smith*, 737 A.2d 567, 573-74 (Ct. App. Md. 1999) (bankruptcy); *Ranta v. McCarney*, 391 N.W.2d 161, 162 n.1 (N.D. 1986) (tax law). In *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 170 (2nd Cir. 1966) (*en banc*), the Second Circuit invoked the privileges and immunities clause of the United States Constitution in holding that no state "can prohibit a citizen with a federal claim or defense from engaging an out-of-state lawyer to collaborate with an in-state lawyer and give legal advise concerning it within the state." The case arose out of an effort by a former client, following an antitrust settlement, to avoid paying a contingent fee required under a contract with an antitrust lawyer. The court of appeals agreed with the district court that had the former counsel been involved in the litigation and sought to be admitted *pro hac vice*, the motion would have been granted. In *Leis v. Flynt, supra*, 439 U.S. at 442, n.4, the Supreme Court stated that the privileges and immunities portion of the opinion "must be considered to have been limited, if not rejected entirely," by *Norfolk & Western R. Co. v. Beatty*, 423 U.S. 1009 (1975). *Beatty* was a *per curiam* affirmance of a judgment of the district court, 400 F.Supp. 234 (S.D. Ill. 1975) which limited out-of-state lawyers to a supporting role in the trial of a Federal Employers' Liability Act matter, as a condition of their admission *pro hac vice*. In distinguishing *Spanos*, the district court had said that some of the language in *Spanos* was not necessary to the decision and cited the dissent of Judge Lumbard in *Spanos* for the proposition that courts have the power to regulate those who practice before them. *Id.* at 237.

[31] MJP Commission Report 201b, p. 4.

 

The key interpretive issue will likely come from Rule 5.5(c)(4) and will likely focus on the scope of "services" that "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." If the focus is on the nexus of a transaction to, or the location of the client in, the jurisdiction in which the lawyer is admitted, the interpretation will be more limiting. If the focus is on services "related" to the lawyer's practice, the interpretation could be more expansive. A Kentucky real estate lawyer could argue that a closing in Ohio on land located in Ohio is "related to" the Kentucky lawyer's real estate practice even if it is for a client not located in Kentucky.[34]

But let's look at something lawyers routinely do: interviewing a witness. Interviewing potential witnesses is specifically discussed in Comment [10] as contemplated by Rule 5.5(c)(2) but should also be embraced by subsections (c)(3) and (c)(4). Hence, an in-person contact with, for example, a former employee in a jurisdiction in which the lawyer is not licensed in connection, say, with future litigation, apparently is regarded as the multijurisdictional practice of law. Does talking by telephone or writing to or e-mailing that same former employee from a jurisdiction in which the lawyer is licensed also represent the multijurisdictional practice of law? Apparently not. Given the use of the phrase "in this jurisdiction" in new Rule 5.5(c), in the case of a contact with a former employee, at least new Rule 5.5 appears to envision a physical presence in the jurisdiction in which the lawyer is not licensed. And as long as such contacts are episodic, as they presumably would be, they should not amount to a "systematic and continuous presence" under Rule 5.5(b)(1).

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[32] The Professional Guidance Committee of the Philadelphia Bar Organization rendered an opinion dated August 4, 2004 interpreting Pennsylvania's new Rule 5.5(d) which is virtually identical to Model Rule 5.5(d) (see *infra*). Opinion 2004-6 states that a lawyer not admitted in Pennsylvania but admitted to the Federal Immigration Court could maintain an office in Pennsylvania provided he limit his practice to immigration work. The Committee looked to Comment [15] to Model Rule 5.5(d) even though Pennsylvania did not adopt the Comments. The lawyer was reminded that any advertisements, business cards and the like must note that the lawyer is not admitted in Pennsylvania and his practice is limited to immigration matters. See http://www.philabar.org/public/ethics/displayethics.asp?id=21484912162004. Virginia recently affirmed its similar rule. Virgina UPL Opinion 201 October 1, 2001) http://www.vsb.org/profguides/upl/opinions/upl_ops/upl_op201.html (citing UPL Op. 55 (1983). Cf. *Ginsburh v Kovrak*, 139 A.2d 889 (Pa. 1958) (*per curiam*) (affirming an injunction prohibiting Kovrak from the UPL including, among other things, maintaining an office in Philadelphia, but modifying the injunction so as not to prohibit Kovrak from appearing in the Eastern District of Pennsylvania where Kovrak was admitted).*See also Surrick v. Killion*, Civ. No. 04-5668 (E.D. Pa. April 18, 2005). Surrick had been suspended by the Pennsylvania Supreme Court, and, because of reciprocity, by the Eastern District of Pennsylvania. He served out his federal suspension, which was shorter than his state suspension. He obtained readmission to federal court, but did not apply for readmission to practice in Pennsylvania. In August 2004, the Pennsylania Supreme Court ruled in *Office of Disciplinary Counsel v. Marcone*. 855 A.2d 654 (Pa. 2004) that a suspended attorney could not operate in Pennsylvania a law practice limited to federal court matters. Surrick argued that this policy violated the supremacy clause. The district court agreed holding that Pennsylvania may not prohibit a non-admitted attorney from having an office dedicated solely to practice in federal court. But it placed numerous restrictions on Surrick related to signage and limitations on business cards and the like that his practice was restricted to the Eastern District, said he could not provide legal advice on state law matters and must "promptly" tell clients of the limitation on his practice with respect to state law matters, and had to tell clients that they could raise ethics complaints with the chief judge of the Eastern District in addition to state disciplinary authorities. Surrick also had to seek reinstatement to the Pennsylvania bar. The district court permitted Surrick to have a website with the appropriate disclaimer, even though it acknowledged the expansive nature of such a form of advertising. http://www.paed.uscourts.gov/documents/opinions/05D0490P.pdf (p. 17-25).

[33] See cases cited in n.30 for a discussion of the difference between services authorized by federal law – permissible in a state in which the lawyer is not admitted as *Sperry* holds – and the regular presence of a nonadmitted lawyer in a state where the nonadmitted lawyer is seeking only to do work in federal court. See also *Kennedy v. Bar Association of Montgomery County, Inc., supra*, 561 A.2d at 211: "We will not go so far as to say that it is theoretically impossible for Kennedy to maintain a principal office in Maryland exclusively for engaging in a practice before the federal court in Maryland....It seems, however, that it would be practically impossible do so." Nonetheless, the Maryland Court of Appeals modified an injunction barring a Washington, D.C.-admitted attorney from engaging in the UPL in Maryland to permit the attorney to present to the Montgomery County circuit court "any proposal for modification whereby Kennedy, without holding himself out as practicing law in Maryland, could first pinpoint clients whose specific matters actually required counsel before those courts Kennedy is currently admitted to practice, and thereby could limit his legal representation in Maryland to those specific matters." *Id.* Virginia formerly had declared that it was the UPL for a non-Virginia attorney to render legal advice in Virginia on the law of the lawyer's home jurisdiction and had prohibited a Washington, D.C., attorney from moving his practice to Virginia to handle exclusively federal matters none of which involved Virginia law. Virginia UPL Ops. 107 and 100. Both opinions were overruled by UPL Op. 158 (1996). See Virginia UPL Opinion 201, n. 1 (2001) at http://www.vsb.org/profguides/upl/opinions/upl_ops/upl_op201.html.

[34] *Cf. Lozoff v. Shore Heights, Ltd.*, 362 N.E.2d 1047, 1048-49 (Ill. 1977). In this case, Lozoff, a Wisconsin lawyer not admitted in Illinois, approached Illinois counsel for a seller of land located in Illinois to effect a sale to Aldridge, an Illinois company. Seller entered into a letter agreement with Lozoff that established he would be paid $65,000 as attorneys' fees in connection with the sale. Seller entered into an agreement to sell the land but differences between the seller and Aldridge arose and Aldridge elected not to close. Lozoff sought his fee from seller who refused, so Lozoff sued and won a jury verdict. The appellate court reversed determining that Lozoff was not entitled to a fee because he was not admitted in Illinois. The supreme court held that Lozoff engaged in the practice of law in Illinois, that Illinois's *pro hac vice* rule did not embrace transactions, and that Illinois law barred the allowance of legal fess for persons other than licensed attorneys, and affirmed. Apart from the amount of the fee sought in relation to a transaction that did not occur, this result is questionable under Model Rule 5.5.

 

## QUID PRO QUO DUAL AUTHORITY TO DISCIPLINE UNDER MODEL RULE 8.5

While the scope of services a lawyer can offer in a jurisdiction in which the lawyer is not licensed appears quite broad, there is a trade off for this privilege. It appears in Model Rule 8.5, which now provides that the lawyer can be subject to discipline in the state in which the lawyer is not licensed but is practicing law or offers to do so:

> *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.*

Comment [1] to Rule 8.5 establishes two additional critical points:

> *A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.*[35]

In other words, if Comment [1], or a variation of it, is adopted by the state in which the lawyer provides or offers to provide legal services, the lawyer has consented to an agent for service of process designated by the state's supreme court and may find himself or herself within the jurisdictional long arm of the state's courts in a civil proceeding, should the lawyer's conduct give rise to a civil claim.[36]

Under Rule 8.5(b), if, in fact, "legal services" are provided "in this jurisdiction," the choice-of-law rules for the exercise of disciplinary authority are as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits will be applied unless the rules of the tribunal provide otherwise.

(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." There is an exception to this rule. "A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of the jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur."

To illustrate how these choice-of-law rules might work, let's look again at the propriety of a contact with a former employee of an organization. Model Rule 4.2 would govern the lawyer's conduct and while most states permit contacts with former employees subject to the utmost respect for privileged communications, some

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[35] MJP Commission Report 201c, p. 2.

[36] Comment [20] to the "Scope" of the 2002 Model Rules provides that violation of a Model Rule should not itself give rise to a cause of action against a lawyer or create any presumption in such a case that a legal duty has been breached. It maintains that the Rules are not designed to be a basis for civil liability. The end of this comment, however, adds: "Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." Lawyers should be mindful of this or comparable admonitions in each state's rules of professional conduct in evaluating risks associated with their interpretation of, and conduct under, a state's rules of professional conduct. *Cf. Crews v. Buckman Laboratories International, Inc.*, 78 S.W.3d 852 (Tenn. 2002) (complaint for retaliatory discharge by at-will employee stated a cause of action under Tennessee law). Plaintiff was the assistant general counsel in a company and was allegedly fired by the company for reporting that the company's general counsel was engaged in the unauthorized practice of law. The duty not to aid a non-lawyer in the unauthorized practice of law under Disciplinary Rule 3-101(A) is "a clear public policy" that supports a retaliatory discharge claim, the supreme court held. *Id.* at 864.

 

states limit the contact.[37] So let's assume a contact with a former employee and evaluate how Rule 8.5(b) would identify the applicable law:

1. In litigation, the rules of professional conduct of the court where the litigation is pending will control the conduct of the lawyer making contact with a former employee.[38]
2. In any other tribunal where rules of professional conduct are identified, those rules will govern.
3. It is unclear whether "rules" will include contract terms in an arbitration process that is designed by the parties participating in the arbitration. If it does, the drafting of an arbitration agreement can set forth the applicable rules of professional conduct and those, presumably, should control the conduct. If it does not, the rules of the jurisdiction in which the tribunal sits will control.
4. A tribunal is defined in Model Rule 1.0(m) as denoting "a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity." Other forms of alternative dispute resolution that may involve fact gathering (a facilitated mediation with a discovery component or a nonbinding arbitration) apparently are not covered by this definition. Hence, if the contact is made outside the context of a "tribunal," an attack on the propriety of the contact will be determined by where the conduct occurred unless it can be shown that the "predominant effect of the conduct" is in a different jurisdiction. Where the rules of the jurisdiction where the contact is made and the jurisdiction in which the lawyer is licensed are the same, there should be no difference in the outcome. Where the rules are more restrictive in the jurisdiction in which the contact is made than in the jurisdiction where the lawyer is licensed, the lawyer making the contact must evaluate the "predominant effect" standard. For example, if the contact is a prelude to litigation that will be filed in the jurisdiction in which the lawyer is licensed, where is the "predominant effect"? If the lawyer had made the contact after the filing of an action, the rules of the court in which the action was filed would have controlled. If those rules provide for the application of the state's rules of professional conduct, the lawyer's conduct would be governed by those rules. Does that logic establish the jurisdiction of "predominant effect" if the contact is made before litigation is filed? Or does this logic support a lawyer's "reasonable belief" that the lawyer's conduct should be governed by the jurisdiction in which the lawyer is licensed?

As one can see, the choice of law can become a complicated exercise but, because of disciplinary issues, an important one.

## CONFORMING THE RULES OF DISCIPLINARY AUTHORITY TO CHANGES IN MODEL RULES 5.5 AND 8.5

The ABA Model Rules of Lawyer Disciplinary Enforcement were also reviewed by the ABA House of Delegates in 2002. The Ethics 2000 Commission Report[39] had originally explained:

> *Several states have adopted a bracketed provision in Rule 6 of the ABA Model Rules for Lawyer Disciplinary Enforcement that provides disciplinary jurisdiction over "any lawyer not admitted in this state who practices law or renders or offers to render any legal services in*

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[37] *See, generally*, Barkett, John, ed., *Ex Parte Contacts With Former Employees*, Environmental Litigation Committee, Section of Litigation (2002)

[38] *See Meschi v. Iverson*, 60 Mass. App. 678, 805 N.E.2d 72, 75 (2004) (finding no abuse of discretion in denying a lawyer's motion to appear *pro hac vice* because of the lawyer's conduct under Mass. R.P.C 4.2: "More importantly, we do not disagree with the assessment of the motion judge that Mr. Ryan skated perilously close to the line in his election to engage Loretta in conversation despite knowing that she was represented by counsel.").

[39] The 2002 edition of the Model Rules reflects the work of the Commission on Evaluation of the Rules of Professional Conduct, or the "Ethics 2000" Commission. The Commission's Report is cited as "American Bar Association, Commission on Evaluation of the Rules of Professional Conduct, Report with Recommendation to the House of Delegates (August 2001)." The Ethics 2000 Report is located at http://www.abanet.org/cpr/ethics2k.html.

 

*this state." The Commission believes that this is an appropriate rule to adopt in the Model Rules of Professional Conduct, given that a jurisdiction in which a lawyer is not admitted may be the one most interested in disciplining the lawyer for improper conduct. There are a number of ways in which discipline might be implemented, including making a disciplinary record and sending it to states in which the lawyer is admitted and having those jurisdictions impose reciprocal discipline. (Alternatively, if disciplinary authorities are ever given a broader range of sanctions, e.g., fines, fee forfeiture or an award of damages, the disciplining jurisdiction could act on the lawyer directly.)*

The House of Delegates approved changes in the ABA's *Model Rules for Lawyer Disciplinary Enforcement* as proposed by the MJP Commission. Rule 6 of the ABA *Model Rules for Lawyer Disciplinary Enforcement*, addressing jurisdiction, was amended to include "any lawyer not admitted in this state who practices law or renders or offers to render any legal services in this state."[40] Rule 22, addressing reciprocal discipline, was amended to require a jurisdiction in which a lawyer is licensed to reciprocally enforce another jurisdiction's disciplinary decision, even if the lawyer is not admitted in that other jurisdiction, unless there are public policy reasons not to approve reciprocal discipline.[41]

Using the example above of contacts with former employees, it is unclear what would happen under the disciplinary rules if state 2 limits contacts with former employees in a manner in which state 1 does not. The referral to state 1 by state 2 contemplated by Disciplinary Rule 22 may trigger a form of "public policy" objection by state 1 to accepting state 2's proposed disciplinary record or recommendation, if one is made.

But let's not get too extreme with examples. After all, these are "model" rules and states are free adopt them, reject them, or modify them. And the states have not been shy in doing all three.

## THE UPL MAZE

Have Model Rules 5.5 and 8.5 been adopted in a manner to reduce uncertainty and create uniformity?[42] To some extent, yes. However, lawyers who practice in a number of states or law firms that have lawyers practicing in a number of states where the firm does not have licensed lawyers will be confronted with a patchwork of rules and a demand for fees that will require vigilance. In-house counsel who hoped to be cosseted by a rule comparable to Model Rule 5.5(d)(1) in every state to allow them to do their job of giving legal advice to their employer are now instead finding in many states a need to comply with "limited" license regulations accompanied by registrations and initial and annual fees. Transactional lawyers face uncertain language in some states that have elected to modify Model Rule 5.5(d)(1) to establish nexus requirements of various kinds.

There are resources to allow lawyers to monitor what changes states are making in their rules of professional conduct.[43] But while not intended to take the place of a thoughtful review of a state bar's regulations, let me present a summary of the more significant actions taken by states to date.

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[40] MJP Commission Report 201D, p. 1

[41] MJP Commission Report 201D p. 1

[42] Admittedly, the Model Rules themselves contain uncertainty so even if adopted verbatim there would be a need for case law development. Uniformity would have reduced the complexity of the MJP maze but, as will be seen, uniformity among the states has been elusive.

[43] See note 1, *supra*. See also www.crossingthebar.com, a web page devoted to MJP maintained by Ethics Northwest, Inc.

 

**States That Have Adopted Model Rule 5.5 Or 8.5**

The following chart[44] reflects those states that, as of December 27, 2005, have adopted a rule identical to Model Rule 5.5 or 8.5 or where a recommendation exists to adopt a rule identical to Model Rules 5.5 or 8.5. Seven states, Arkansas, Delaware,[45] Iowa, Nebraska, Oregon, Utah, and Washington have adopted both Model Rules 5.5 and 8.5. Two states, Indiana and Maryland, have adopted a rule identical to Rule 5.5, and eight states, Arizona, Arkansas, Idaho, Louisiana, Minnesota, Missouri, Pennsylvania, and South Dakota, have adopted one identical to Rule 8.5. Four states have recommended the adoption of rules identical to Model Rules 5.5 and 8.5: Illinois, Michigan, Montana, and Vermont. The recommendations are either before the highest court in the state or at the level of the state's MJP committee (Vermont).

| State | Rule 5.5 Adopted | Rule 5.5 Recommended | Rule 8.5 Adopted | Rule 8.5 Recommended |
|---|---|---|---|---|
| Arizona | | | Yes | |
| Arkansas | Yes | | Yes | |
| Delaware | Yes[46] | | Yes | |
| Idaho | | | Yes | |
| Illinois | | Yes[47] | | Yes |
| Indiana | Yes | | | |
| Iowa | Yes | | Yes | |
| Louisiana | | | Yes | |
| Maryland | Yes | | | |
| Michigan | | Yes | | Yes |
| Minnesota | | | Yes | |
| Missouri | | | Yes | |

[44] The information comes from the "Quick Guide" charts that can be found at http://www.abanet.org/cpr/mjp-home.html.

[45] On September 13, 2005 the Delaware Supreme Court adopted a limited practice of in-house counsel rule. For a complete text of the rule and the order: http://courts.delaware.gov/Rules/?supremerule55-1.pdf.

[46] The decision to adopt Rule 5.5 in Delaware has already resulted in one ethics opinion that approves of a Maryland lawyer conducting a real estate transaction involving property in Delaware. Ethics Docket 03-07, Maryland State Bar Association, Inc. Committee On Ethics, October 15, 2003 (Final Amended and Supplemental Opinion) (since Delaware adopted the ABA's Rule 5.5, Delaware now allows out-of-state attorneys to provide legal services in Delaware on a temporary basis, so it would not be the unauthorized practice of law for a Maryland lawyer to conduct a real estate settlement involving Delaware property in Maryland for a Maryland client, amending http://www.msba.org/members/ethics/2003/2003-07.htm which had reached the opposite conclusion before the adoption by Delaware of Model Rule 5.5).

[47] Even if Illinois adopts Rule 5.5, there already exists Illinois Supreme Court Rule 716 which permits "limited admission for in-house counsel." It went into effect July 1, 2004. There is an annual registration and fee required among other requirements. The scope of the limited admission appears in subparagraph(e) of the Rule: "(e) **Limitation of Practice.** Licensed house counsel, while in the employ of an employer described in subparagraph (a) of this rule, may perform legal services in this state solely on behalf of such employer; provided, however, that such services shall (1) be limited to (a) the giving of advice to the directors, officers, employees and agents of the employer with respect to its business and affairs; and (b) negotiating, documenting and consummating transactions to which the employer is a party; and (2) not include appearances as counsel in any court, administrative tribunal, agency or commission situated in this state unless the rules governing such court or body shall otherwise authorize or the lawyer is specially admitted by such court or body in a particular case or matter. Lawyers licensed under this rule shall not offer legal services or advice to the public or in any manner hold themselves out to be so engaged or authorized." Rule 716 appears in Appendix I and can also be found at http://www.state.il.us/court/SupremeCourt/Rules/MRAmend021104.htm.

 

| State | Rule 5.5 Adopted | Rule 5.5 Recommended | Rule 8.5 Adopted | Rule 8.5 Recommended |
|---|---|---|---|---|
| Montana | | Yes | | Yes |
| Nebraska | Yes | | Yes | |
| Oregon | Yes | | Yes | |
| Pennsylvania | | | Yes | |
| South Dakota | | | Yes | |
| Utah | Yes | | Yes | |
| Vermont | | Yes | Yes | |
| Washington | Yes | | Yes | |

### One State Has Rejected Rule 5.5

The House of Delegates of the Connecticut Bar Association (CBA) rejected a recommendation to adopt a rule comparable to Rule 5.5 on January 12, 2004.[48] That decision was particularly chagrining to in-house counsel because the CBA's Committee on the Unauthorized Practice of Law issued an opinion in July 2002 that provided that locally "unadmitted" in-house counsel were not authorized to give legal advice on Connecticut law, draft legal documents that involve Connecticut law, or appear in Connecticut state courts.[49]

### States That Have Adopted A Modified Rule 5.5

A number of states have adopted Rule 5.5 in a modified form. The following table summarizes these states' modifications.[50] In each case, the privilege of practicing in a state is accompanied by the lawyer's subjecting himself or herself to the disciplinary process of the state's bar. And it goes without saying that the privilege is limited to lawyers who are licensed and in good standing in another state.

| State | Rule |
|---|---|
| Arizona | Arizona added three paragraphs in its E.R. 5.5. First, a nonadmitted lawyer acting under E.R. 5.5 must advise the lawyer's client that the lawyer is not admitted in Arizona and "must obtain |

[48] *See* http://www.crossingthebar.com/news104.htm. The opinion appears in Appendix I.

[49] *See* http://www.ethicsandlawyering.com/Issues/files/ConnUPL.pdf. The opinion did allow that locally unadmitted in-house counsel could perform paralegal-like services for their employer as long as they are working under the supervision of a lawyer admitted in Connecticut. While it may be small comfort, the opinion stated that to the extent locally unadmitted in-house counsel gave legal advice to their employer, they "are not subject to criminal penalties provided for in the Connecticut unauthorized practice statute (Conn. Gen Stat. §51-88)." However, "they might be held in contempt of court for engaging in the unauthorized practice of law." *Id.* The CBA UPL committee conceded that no Connecticut court has issued the definitive word on the subject and the law was evolving. Hence it acknowledged that a court faced with the question might permit the locally unadmitted in-house counsel to provide legal services to its employer on matters concerning the employer's affairs. I assume that this opinion has not been accompanied by enforcement, but its existence has been noted by the Association of Corporate Counsel. *See* http://www.acca.com/admissionRules/detail.php?stateid=CT. Cf. Connecticut Bar Association Informal Opinion 92-19 (July 22, 1992) (permitting a Connecticut lawyer to represent a client who approached the lawyer on matters involving legal issues arising under the laws of another state's jurisdiction so long as the activities "thereby engaged in do not constitute 'the practice of law' as defined within that jurisdiction." Opinion 92-19 added that whether the lawyer's actions constitute the "practice of law" under the laws of the other state's jurisdiction "must be left for consideration by the proper authority within that jurisdiction, and is consequently beyond the scope of this opinion.").

[50] The table contains a summary of the highlights of the modifications and is not a substitute for reading the entire rule in each state. Readers should refer to the full text of the applicable rule to comprehend all of the requirements in each state.

 

| State | Rule |
|---|---|
| | the client's informed consent to such representation." Second, the lawyer must comply with the Arizona Supreme Court's rules for *pro hac vice* admission.[51] And third, the lawyer who takes advantage of E.R. 5.5 "shall be subject" to the Arizona RPC and Rules of the Arizona Supreme Court governing attorney discipline.<br><br>*See* http://www.law.cornell.edu/ethics/az/code/AZ_CODE.HTM#ER_5.5. |
| California | California's Supreme Court adopted the recommendations of its MJP Implementation Committee on April 8, 2004. They became effective on November 15, 2004. *See* http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=12441<br>Rule 966 has a number of features but, in essence, it provides that a lawyer is not engaged in the UPL if the attorney's services are part of a formal legal proceeding or an anticipated legal proceeding and the attorney seeks authorization after it becomes possible to do so. Service by the locally unadmitted lawyer must be "temporary."<br>*See* http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=12501&id=16042.<br>Rule 967 provides that a lawyer not involved in litigation is not engaged in the UPL if the lawyer: (1) "Provides legal assistance or legal advice in California to a client concerning a transaction or other nonlitigation matter, a material aspect of which is taking place in a jurisdiction other than California and in which the attorney is licensed to provide legal services;" (2) "Provides legal assistance or legal advice in California on an issue of federal law or of the law of a jurisdiction other than California to attorneys licensed to practice law in California;" or (3) "Is an employee of a client and provides legal assistance or legal advice in California to the client or to the client's subsidiaries or organizational affiliates."<br>*See* http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=12501&id=16043.<br>Rule 965 addresses in-house counsel. They must register with the State Bar and pay fees. If they do, Rule 965 provides: "Subject to all applicable rules, regulations, and statutes, an attorney practicing law under this rule: (1) Is permitted to provide legal services in California only to the qualifying institution that employs him or her; (2) Is not permitted to make court appearances in California state courts or to engage in any other activities for which pro hac vice admission is required if they are performed in California by an attorney who is not a member of the State Bar of California; and (3) Is not permitted to provide personal or individual representation to any customers, shareholders, owners, partners, officers, employees, servants, or agents of the qualifying institution."<br><br>*See* http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=12501&id=15664 and http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=12501&id=15661. See also the Appendix for Rule 965. |
| Colorado | Colorado's MJP rule appears in its Rules of Civil Procedure, Rules 220-222. A good summary of these rules appears at: http://www.cobar.org/tcl/tcl_articles.cfm?ArticleID=2095.<br><br>Rule 220 allows out-of-state attorneys to appear before a Colorado court or state agency provided that the attorney complies with the *pro hac vice* rules of C.R.C.P. 221 and 221.1. It also apparently permits transactional counseling or other out-of-court counseling. *Id.* Out of |

[51] Arizona Supreme Court Rule 33(c) requires *pro hac vice* applicants to, among other things, associate with local counsel, and provide a listing of all previous motions for *pro hac vice* motions filed within the previous three years. As noted below, payment of a fee of $369.75 is also required.

 

| State | Rule |
|---|---|
| | state attorneys are subject to discipline by the Colorado Regulation Counsel. The *pro hac vice* rules require affiliation with local counsel, and obtaining permission to practice from the trial court after filing of a verified motion as prescribed in Rule 221 and payment of $250. Clients must be notified of the motion. Rule 221.1 governs admission in administrative proceedings. Rule 222 addresses in-house counsel. Again there is a registration requirement, and a fee of $725 must be paid for certification. Once certified, the in-house counsel must pay annual registration fees to the bar and comply with CLE requirements applicable to Colorado lawyers.<br><br>*See* http://www.cobar.org/group/display.cfm?GenID=2735. See the Appendix for the in-house counsel rule. |
| Florida | Florida adopted a number of changes to Model Rule 5.5 effective January 1, 2006. Whereas Model Rule 5.5 prohibits a nonadmitted lawyer from establishing an "office or other systematic and continuous presence" in a jurisdiction for the practice of law, Florida uses the phrase "office or other regular presence." Florida adopted Model Rule (c)(1). With respect to Model Rule 5.5(c)(2) which allows for prelitigation activity where the nonadmitted lawyer expects to be authorized to appear, Model Rule Comment [11] extends the authorization to an associated lawyer who does not expect to appear *pro hac vice* or to subordinate lawyers, but the Florida rule omits this part of the Comment as being too broad. Report of the Special Commission on the Multijurisdictional Practice of Law 2002, p. 10, (10/24/03) (Florida MJP Commission Report).[52] According to the Comment, this presumption would not apply to a lawyer appearing in international arbitrations held in Florida.<br><br>Florida modified (c)(3) to add what has become a new subparagraph (B): "(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction and the services are not services for which the forum requires pro hac vice admission: (A) if the services are performed for a client who resides in or has an office in the lawyer's home state, or (B) where 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." In the case of alternative dispute resolution proceedings in Florida under Rule 5.5(c)(3), Florida's comment to RPC 5.5(c)(3) also cautions nonadmitted lawyers on the amount of time that they can spend in Florida. It provides that any such lawyer "who files more than 3 demands for arbitration or responses to arbitration in separate arbitration proceedings in a 365-day period shall be presumed to be providing legal services on a regular, not temporary, basis."[53] New RPC1-3.11 dealing with appearances of non-Florida lawyers in an arbitration proceeding in Florida contains this same prohibition. This restriction does not apply to a lawyer appearing in international arbitrations.<br><br>Florida added this clause on the scope of services allowed by Model Rule (c)(4): "(A) are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is authorized to practice." |

[52] http://www.flabar.org/tfb/TFBComm.nsf/840090c16eedaf0085256b61000928dc/c0b5c0f13119379185256ee1004ab2d1?OpenDocument.

[53] In *Florida Bar v. Rappoport*, 845 So.2d 874, 878 (Fla. 2003), the Florida Supreme Court held that the Federal Arbitration Act did not preempt Florida's UPL rule and a nonadmitted lawyer representing claimants in securities arbitrations in Florida should be enjoined from engaging in the unauthorized practice of law. Presumably the limitation on the number of appearances is related in part to the Florida Bar's experience in this matter.

 

| State | Rule |
|---|---|
| | Florida's proposal does not include Model Rule 5.5(d)(1) addressing in-house counsel because Florida already has an authorized house counsel rule.[54] Nor does Florida's proposed rule include Model Rule 5.5(d)(2) because it was regarded as redundant.[55]<br><br>However, Florida's proposed rule does include foreign-licensed lawyers.[56] Florida's RPC 4-5.5(d)(5) allows a foreign-admitted lawyer to provide services in Florida which are primarily governed by international law or the law of a non-United States jurisdiction in which the lawyer is a member.<br><br>Florida's Rule 2.061 of the Rules of Judicial Administrations limits a nonadmitted lawyer to three appearances in litigation in a 365-day period and also requires payment of a $250 fee on a per case basis and registration with the Florida Supreme Court.[57] There is no longer discretion allowed to the trial courts to adjust this time period and appearances in related litigation count against the limit of three appearances.<br><br>See http://www.floridasupremecourt.org/decisions/2005/sc04-135.pdf. |
| Georgia | Georgia Rule 5.5 is essentially the same as Model Rule 5.5 except that it distinguishes between "domestic" and "foreign" lawyers allowing them both to perform legal services in Georgia. *See* http://www.gabar.org/grpc55.asp. |
| Idaho | Effective July 1, 2004, the Idaho Supreme Court approved changes to its Rule 5.5 that are similar to Model Rule 5.5. Idaho Rule 5.5(b) provides:<br><br>"(b) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction when:<br>(1) the lawyer is authorized by law or order, including pro hac vice admission pursuant to Idaho Bar Commission Rule 222, to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or<br>(2) other than engaging in conduct governed by paragraph (1):<br><br>(i) a lawyer who is an employee of a client acts on the client's behalf or, in connection with the client's matters, on behalf of the client's commonly owned organizational affiliates;<br>(ii) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice; or<br>(iii) the lawyer is associated in the matter with a lawyer admitted to practice in this |

[54] Chapter 17, Rules Regulating the Florida Bar. The Authorized House Counsel Rule is organized by sections (17.1.1-8) and can be found at: http://www.flabar.org/divexe/rrtfb.nsf/WContents?OpenView&Start=1&Count=30&Expand=17.1#17.1.

55 Florida MJP Commission Report, p. 11-12. The Supreme Court's opinion approving RPC 4-5.5 did say, "there may be times when other law, such as a federal rule or regulation, allows a lawyer to have a regular presence in Florida." http://www.floridasupremecourt.org/decisions/2005/sc04-135.pdf (p.5).

[56] Florida MJP Commission Report, p. 12. Florida's proposed rule 4-5.5(d)(5) allows a foreign-admitted lawyer to provide services in Florida which are primarily governed by international law or the law of a non-United States jurisdiction in which the lawyer is a member. *Id.* at 13.

[57] Florida Rules of Judicial Administration, Rule 1-3.10. Lawyers who represent clients in international arbitrations are not required to file verified statements or pay filing fees. *Id.*, Rule 1.311. http://www.floridasupremecourt.org/decisions/2005/sc04-135.pdf (p. 21-26).

 