

# OCDC SPOTLIGHT

## Crossing the State Line: Is Multijurisdictional Practice Permitted?

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Have you ever represented a client where you traveled to another jurisdiction and you were not admitted to take a deposition, review documents or enter into negotiations? If so, you may have violated the attorney ethics rules for the jurisdiction or possibly even a criminal statute of the jurisdiction addressing the unauthorized practice of law.

The authority to regulate the practice of law generally rests with the supreme court of each state. ABA/BNA Lawyers' Manual on Professional Conduct § 21:8003 (1999). Each state has promulgated rules which address admission requirements to the state bar. ABA Report of the Commission on Multijurisdictional Practice 7 (2002). These admission requirements were designed to protect the public by ensuring that those licensed to practice law had the required knowledge of the licensing state's laws. *Id.* In addition to adopting admission standards, each state has adopted rules or statutes which prohibit the unauthorized practice of law by individuals not admitted to practice within the state. *Id.* at § 21:8001. However, the admission requirements and the unauthorized practice of law rules and statutes were generally developed many years ago when the need for legal services was locally based and the need for representation most often involved litigation matters.

Over time the practice of law has changed dramatically. Advances in technology have made interstate practice a common thing, if not the norm. Many clients engage in business in more than one state. It is very expensive, time-consuming, impractical and inefficient to hire local counsel every time a client needs representation for a matter outside of the state. Susan Poser, *Multijurisdictional Practice For a Multijurisdictional Profession*, 81 Neb. L. Rev. 1379 (2003). Consequently, over time many attorneys began crossing state lines to provide representation to their clients.

Until fairly recently, it never occurred to most attorneys that they might be engaging in the unauthorized practice of law when they occasionally ventured outside the boundaries of the state in which they were licensed, especially if the legal matter was a transactional matter or an action had not been filed in court yet. If it did occur to the attorney that he or she might be violating attorney ethics rules by crossing the state line, many took the gamble that they would not get caught, or if they were caught there would be no real consequences.

In 1998, however, the issue came to the forefront in the legal community with the California Supreme Court's decision in *Birbrower, Montalano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998). This decision provided that out-of-state attorneys engaged in the unauthorized practice of law when they represented a California client in preparation for an approaching California arbitration. What captured the legal community's full attention was the fact that the court barred the out-of-state attorneys from recovering fees for their services performed in the state of California.

The *Birbrower* opinion spurred other jurisdictions into action on the issue. For example, the Colorado Supreme Court issued a similar ruling in *Koscove v. Bolte*, 30 P.3d 784 (Colo. 2001). In *Koscove*, a Wisconsin attorney made a demand upon an oil company for royalties for a Colorado resident. The oil company later filed suit against the Colorado resident in a Colorado federal district court and the Wisconsin attorney was admitted pro hac vice in the federal court. The Colorado Supreme Court held that the Wisconsin attorney could not collect attorney's fees because the attorney engaged in the unauthorized practice of law when he made a demand for payment upon the oil company. *See also In re Ferrey*, 774 A.2d 62 (R.I. 2000) (out-of-state attorney who applied and received pro hac vice admission from a state agency engaged in unauthorized practice of law because only the Supreme Court can grant pro hac vice admission).

About the same time period as the *Birbrower* and *Koscove* decisions, Missouri courts also began coming down harshly upon out-of-state attorneys who failed to comply with Missouri's pro hac vice admission rule. In *Strong v. Gilster Mary Lee Corp.*, 23 S.W.3d 234 (Mo. App. E.D. 2000), the Missouri Court of Appeals affirmed the denial of an Application for Review with the Labor and Industrial Relations Commission seeking to reinstate a claimant's claim for workers' compensation. The matter had been initially handled by a Missouri attorney, but when the Missouri attorney was disbarred another attorney in the same firm took over the representation. The attorney taking over the matter was licensed only in Illinois. The court held that the non-resident attorney engaged in the unauthorized practice of law and the attorney's action in filing the Application for Review was a nullity and hence could be dismissed even though the attorney

asked for retroactive pro hac vice admission. *See also Wright v. State ex rel. Patchin*, 994 S.W.2d 100 (Mo. App. S.D. 1999) (pleadings requesting review of order by Division of Child Support Enforcement considered a nullity because they were filed by a non-resident attorney who had not been admitted pro hac vice.)<sup>1</sup>

In 2000, in response to the *Birbrower* decision and other similar rulings, the American Bar Association (ABA) appointed a commission to study the issue of multijurisdictional practice and to make policy recommendations to the ABA.<sup>2</sup> The Multijurisdictional Practice Commission (MJP Commission) did not seek to challenge the long standing premise that individual states have an interest in protecting their residents by ensuring that those licensed to practice in the state have the requisite knowledge of the state's law. ABA Report of the Commission on Multijurisdictional Practice 12 (2002). It did, however, recognize that: (1) over time the nature of the practice of law has expanded to include attorneys engaging in cross-border legal practice, (2) the trend of cross-border legal practice is expected to continue and increase, and (3) due to the increasing complexity of legal matters it is often necessary for clients to retain the services of an out-of state attorney. *Id.* Thus, the commission sought to balance the states' interest in protecting their residents and the legal system's interest in retaining competent counsel economically in a national economy. Comment, *Multijurisdictional Practice of Law Under the Revised South Carolina Rules of Professional Conduct*, 57 S.C. L. Rev. 549 (2006).

When the MJP Commission was formed, every jurisdiction permitted pro hac vice admission. ABA Report of the Commission on Multijurisdictional Practice 10 (2002). A number of jurisdictions already had licensing rules for in-house corporate lawyers providing legal services from an office located in a state where the lawyer was not licensed. *Id.* Similarly, a number of jurisdictions had licensing rules for foreign attorneys to be licensed without examination and to practice law within the state on a restricted basis. *Id.* However, in most states there was no provision to allow out-of-state attorneys who were not in-house counsel to engage in transactional work, counseling practices or work outside court or agency proceedings. *Id.* The MJP Commission focused on drafting model rules which would allow transactions, counseling and other work outside the courtroom to occur by out-of-state attorneys on a temporary or occasional basis.

In August 2002, based upon the recommendations of the MJP Commission, the ABA adopted revisions to Model Rule 5.5 of the Rules of Professional Conduct.<sup>3</sup> The commission noted that in drafting the revised rule it took a conservative approach and only allowed conduct that did not pose an unacceptable risk to the public. ABA Report 201B of the Commission on Multijurisdictional Practice 3 (2002).

Prior to the amendment of Model Rule 5.5, the rule merely provided that a lawyer could not practice law in a jurisdiction where doing so violated the regulation of the legal profession in that jurisdiction and could not assist another person who was not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

ABA Model Rule 5.5, as revised, has four parts.<sup>4</sup> Subsection (a) is worded somewhat differently than the prior rule but makes no substantive change to the prior rule. In essence, it requires an attorney to forgo practicing in another jurisdiction if not permitted to do so by the rules of the other jurisdiction and forbids a lawyer from assisting another, whether a lawyer or non-lawyer, in the unauthorized practice of law.

Subsection (b) prohibits a lawyer from establishing an office or maintaining a systematic and continuous presence in the jurisdiction or falsely holding himself out as being admitted to a jurisdiction. Prior to the passage of the revised model rule, this provision was widely recognized and articulated in case law. *See e.g. Kennedy v. Montgomery County Bar Ass'n*, 561 A.2d 200 (Md. 1989) (out-of-state lawyer engaged in unauthorized practice of law when he established office in Maryland even if the matters he was handling did not involve Maryland law or clients). Left unanswered by subsection (b) are questions regarding what conduct constitutes a systematic and continuous presence in a state. For example, does an attorney who maintains an office in the state of his licensure but routinely advertises in an adjoining state have a systematic and continuous presence in a state? The courts will have to address such unanswered issues.

Subsection (c) allows a lawyer admitted in another jurisdiction who has not been disbarred or suspended from practice to provide legal services on a temporary basis in the host jurisdiction in four distinct situations. The rule does not define the term "temporary basis" and the comments to the rule provide there is no single test to determine whether a lawyer's services are provided on a "temporary basis." ABA Model Rule 5.5, cmt 6. The comments do make clear, though, that the length of time the services are provided is not determinative in situations where the lawyer is representing a client in a single, lengthy negotiation or litigation. *Id.*

The first situation permitted by subsection (c) is when the services are undertaken in association with a lawyer who is admitted in the jurisdiction and *who actively participates in the matter*. The key issue with this provision is that the lawyer admitted to practice in the jurisdiction must actually share responsibility for the representation. The in-state counsel must be genuine co-counsel with the out-of-state attorney rather than merely an attorney who is willing to have his name added to the pleadings. ABA Report 201B of the Commission on Multijurisdictional Practice 4 (2002).

The second situation addressed by subsection (c) allows out-of-state lawyers to provide services secondary to pending or prospective litigation. *Id.* at 5. For example, this provision would allow an attorney to travel outside the jurisdiction of

licensure to interview witnesses or review documents if the attorney's services are in anticipation of litigation reasonably expected to be filed in the lawyer's state of licensure or a state where the attorney expects to be admitted pro hac vice. *Id.* The provision also allows subordinate lawyers to conduct research and review documents in support of the lawyer responsible for the litigation. Model Rule 5.5, cmt. 11. The provision, however, does not supersede any rules regarding pro hac vice requirements, and before appearing in court an out-of-state attorney must obtain pro hac vice admission. ABA Report 201B of the Commission on Multijurisdictional Practice 5 (2002).

The third situation addressed by subsection (c) allows an attorney to provide services in connection with the representation of clients in pending alternative dispute resolution proceedings where the work arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. *Id.* Subsection (c)(3), however, does not supersede any pro hac vice rules addressing alternative dispute resolution proceedings. *Id.*

The fourth situation addressed by subsection (c) permits an attorney to perform transactional work, counseling or other non-litigation work that arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

The commission noted that a variety of factors could constitute the "reasonably related" language found in subsections (c)(3) and (c)(4). These factors included: (1) whether the lawyer previously represented the client, (2) whether the client is a resident of, or has significant contact with, the state where the attorney is licensed, (3) whether the matter has a significant relation with the jurisdiction where the lawyer is licensed, (4) whether a significant aspect of the matter involves the law of the jurisdiction where the attorney is admitted, (5) whether the client's activities or the legal issues involve multiple jurisdictions, and (6) whether the services requested draw upon the lawyer's recognized expertise involving federal, nationally uniform, foreign or international law. Model Rule 5.5, cmt. 14. The commission obviously intended the "reasonably related" language to be interpreted very broadly, and the language could potentially be interpreted to permit lawyers to do almost anything short of establishing an office in a state where they are not licensed. Susan Poser, *Multijurisdictional Practice For A Multijurisdictional Profession*, 81 Neb. L. Rev. 1379, 1389-90 (2003).

Subsection (d) has two provisions. The first provision would permit a lawyer employed by an organizational entity admitted in another United States jurisdiction to provide legal services in a jurisdiction in which the lawyer is not admitted on behalf of the employer. To participate in judicial and agency proceedings the out-of-state attorney would still need to obtain pro hac vice admission. The provision would allow an out-of-state attorney to work permanently from the office

of his or her employer. The provision would not, however, allow the attorney to represent the employer's officers or employees in their personal capacity, nor would it allow the attorney to represent a third party in the jurisdiction. ABA Report 201B of the Commission on Multijurisdictional Practice 10-11 (2002).

The second part of subsection (d) allows an attorney to render legal services in a jurisdiction in which the lawyer is not licensed to practice law when authorized to do so by federal or other law.

To ensure that the host state had the ability to discipline an out-of-state attorney who practiced law in the host jurisdiction, the MJP Commission revised Model Rule 8.5 to provide that a lawyer practicing in a jurisdiction in which she is not admitted is subject to that jurisdiction's disciplinary rules as well as the rules of the jurisdiction in which the lawyer is licensed.<sup>5</sup> The ABA also advocated reciprocal discipline whereby the host state must notify the state in which the attorney is licensed and the licensing state has the opportunity to discipline the attorney for the conduct occurring in the host state.

The Missouri Bar Special Committee on Multijurisdictional Practice supported the MJP Commission's recommendations. To implement the ABA recommendations, the Missouri Bar special committee proposed amendment to the Missouri Rules of Professional Conduct and the Missouri Board of Governors voted to submit the amendments to the Supreme Court of Missouri for its consideration. On March 9, 2005, the Missouri Supreme Court amended Rule 4-5.5 to address the multijurisdictional practice of law. It adopted a rule very similar to ABA Model Rule 5.5, with modifications to accommodate particular aspects of the Missouri Rules of Professional Conduct.<sup>6</sup> It also adopted revised Model Rule 8.5 (Rule 4-8.5) on the same date. The rule changes became effective on January 1, 2006. What does this change mean for Missouri attorneys? Generally, nothing, unless the Missouri attorney is assisting another in violating Rule 4-5.5, as the rule primarily governs the conduct of attorneys licensed outside of Missouri.

What should be of interest to Missouri attorneys is whether other states have adopted the ABA's Model Rule 5.5 or something similar to it. Presently, nine jurisdictions have adopted Model Rule 5.5 without change.<sup>7</sup> These states include the neighboring states of Arkansas, Iowa and Nebraska, among others. Twenty jurisdictions, including Missouri, have adopted a rule similar to ABA Model Rule 5.5. Other jurisdictions are expected to follow suit, but there is no way of predicting how quickly this may occur. Of particular interest to Missouri attorneys is the fact that Illinois, Kansas, Kentucky, Oklahoma, and Tennessee have not adopted multijurisdictional practice rules yet. Until all jurisdictions adopt the ABA Model Rule 5.5 or something similar to it, any Missouri attorney providing legal services outside of the state should proceed carefully. Otherwise he or she may have to defend a claim of unauthorized practice of law, defend a claim brought by the

host state's disciplinary authority,<sup>8</sup> and/or may not be able to collect his or her fees for the out-of-state work.

#### Footnotes

<sup>1</sup> In *Hensel v. American Air Network, Inc.*, 189 S.W3d. 582 (Mo. 2006), the Missouri Supreme Court overruled *Patchin*.

<sup>2</sup> Multijurisdictional practice refers to practice in one jurisdiction by an attorney admitted only in another jurisdiction.

<sup>3</sup>The ABA also amended Model Rule 8.5 addressing disciplinary authority and Model Rule 22 addressing reciprocal discipline and adopted model rules addressing pro hac vice admission, admission on motion and temporary practice for foreign lawyers. The model rules addressing pro hac vice admission, admission on motion and temporary practice by foreign lawyers are beyond the scope of this article.

<sup>4</sup>The model rule, as amended, provides:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

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

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

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

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

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

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are

not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

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

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

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

<sup>5</sup> ABA Model Rule 8.5, as revised, provides in pertinent part:

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

<sup>6</sup>The Missouri Supreme Court modified the ABA Model Rule somewhat. The changes provide that : (1) a lawyer admitted in another jurisdiction may establish a systematic and continuous presence in the jurisdiction if the attorney has obtained a limited admission for in-house counsel as provided for in Rule 8.105 or a general license pursuant to the other provisions of Rule 8; (2) an attorney who is not compliant with the continuing legal education rules and regulations and whose name is referred by the Missouri Bar to chief disciplinary counsel or the commission on retirement, removal and discipline shall not practice in Missouri; and (3) it does not contain the specific provision stating an attorney not licensed in the state may be able to practice in the state if permitted by federal law.

<sup>7</sup> The jurisdictions that have adopted Model Rule 5.5 without change are: Arkansas, Delaware, Indiana, Iowa, Maryland, Nebraska, Oregon, Utah and Washington. State Implementation of ABA Model Rule 5.5 as of September 13, 2006. The following jurisdictions have adopted a rule similar to Model Rule 5.5: Arizona, California, Colorado, District of Columbia, Florida, Georgia, Idaho, Louisiana, Minnesota, Missouri, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, South Dakota and Wyoming. *Id.*

<sup>8</sup> Pursuant to Rule 4-8.5(a), the Missouri attorney would be subject also to discipline in Missouri.