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Peer to Peer 2

"Not Now; I'm on a Zoom Call!" Multi-Jurisdictional Practice in a Virtual World

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Part 1. Overview of Multi-Jurisdictional Ethics Issues

(by Desmond D. Connall, Jr.)

I. Model Rules of Professional Conduct and Restatement of Law (3rd) of the Law Governing Lawyers

The Model Rules of Professional Conduct (the "Model Rules")[1] can be found on the American Bar Association's website at the following link:

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html

All states and the District of Columbia have adopted some form of the Model Rules, but there are some differences. Reference should be made to the rules where the lawyer practices. The Model Rules are an aspirational set of rules on attorney conduct that are non-binding unless adopted by the applicable state. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

Restatement of Law (Third) of Law Governing Lawyers (the "Restatement")[2] is a treatise compiled by a panel of judges and scholars that offers analysis and guidance pertinent to the law governing law practice and attorney conduct.

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[1] References in this outline to a "Rule" shall refer to one of the Model Rules.

Model Rule 5.5 *Unauthorized Practice of Law; Multijurisdictional Practice of Law* 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.*

Understanding this Rule is essential for lawyers who practice outside their home jurisdictions, as most of us do today. A few highpoints follow.

First, the Rule applies to the individual lawyer, not the firm as a whole. It makes no difference if you are a solo practitioner or in a national firm with many lawyers barred in the state in which you are practicing. If you are not barred in that state, you must comply with the Rule.

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[2] References in this outline to a Section or "§" symbol refer to one of the sections of the Restatement.

Second, it is easier for litigators to comply with the Rule than transactional lawyers. Under subsection (c)(2), a lawyer can appear in court in a foreign jurisdiction as long as the court allows it (a common practice through pro hac vice admission), and under subsection (c)(3), a lawyer can handle an arbitration or mediation in a foreign jurisdiction "if the services arise out of or are reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted to practice . . . ."

This is counterintuitive. One might expect the ethical requirements for handling a lawsuit in a foreign jurisdiction to be more stringent than those for a transactional lawyer working on a lease in a foreign jurisdiction, but they are not. The rules for litigators are more clear cut.

Which brings us to the scenario that occurs countless times every day: a real estate lawyer in a law firm working on a lease or other real estate transaction in a foreign jurisdiction. To comply with the Rule, the lawyer must engage local counsel who must be actively involved in the representation. Subsection (c)(1) states:

> *An attorney admitted in another United States jurisdiction . . . may provide legal services on a temporary basis in this jurisdiction that:*
>
> *(1) Are undertaken in association with an attorney who is admitted to practice in this jurisdiction and who actively participates in the matter;* (emphasis added)

Thus, to satisfy this requirement, the lawyer's services must be both temporary and performed in association with local counsel who actively participates. The meaning of "actively participates" is unclear. The only Comment addressing this subject is Comment 8, which states:

> *Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.*

This presents a serious practical problem for the practitioner. Many of us have clients with property in states other than our home jurisdictions. Those clients expect us to handle their leasing matters efficiently and promptly. To represent our clients competently (as required by Model Rule 1.1), we must know the law and customs in the foreign jurisdiction. But that knowledge can be acquired by retaining local counsel whose involvement is limited to state-law issues. While satisfying our duty of competence, a limited engagement of local counsel probably does not satisfy the "actively participates" test in subsection (c)(1). It serves neither the client nor the lawyer to require involvement by another lawyer who will "actively participate" and "share responsibility," but that is what the Rule requires.

At first blush, it appears that subsection (c)(4) might be a safe harbor. That subsection provides:

> *(c) An attorney 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:*
>
> *(4) are not within subsections (c)(2) or (c)(3) of this Rule and arise out of or are reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted to practice.*

However, the Comments make clear that (c)(4) is intended to apply to limited circumstances and not as a whole-sale exception to subsection (c)(1). Comment 14 explains the rationale behind subsection (c)(4):

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

Sections 2 and 3 of the Restatement set forth applicable general principles:

> *§2. Admission to Practice Law*
>
> *In order to become a lawyer and qualify to practice law in a jurisdiction of admission, a prospective lawyer must comply with requirements of the jurisdiction relating to such matters as education, other demonstration of competence such as success in a bar examination, and character.*
>
> *§3. Jurisdictional Scope of the Practice of Law by a Lawyer*
>
> *A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client:*
>
> *(1) at any place within the admitting jurisdiction;*
>
> *(2) before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with requirements for temporary or regular admission to practice before that tribunal or agency; and*
>
> *(3) at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice under Subsection (1) or (2).*

Rule 1.1 and Section 52(1) also provide guidance.

> (a) *Rule 1.1: Competence*
>
> *A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*
>
> (b) §52. *The Standard of Care*
>
> *(1) For purposes of liability under §§ 48 and 49, a lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances.*

There are many reasons to be competent in our work—but among them is Rule 1.1, which makes it unethical not to be. Most states have particular laws or customs pertaining to real estate transactions. If we do not know them, we cannot competently practice in a foreign jurisdiction. Thus, aside from Rule 5.5, Rule 1.1 compels us to seek local counsel assistance when practicing outside our home jurisdiction.

The comments to Restatement §3 provide useful insight into the factors to consider:

> *"When other activities of a lawyer in a non-home state are challenged as impermissible for lack of admission to the state's bar, the context in which and purposes for which the lawyer acts should be carefully assessed. Beyond home-state activities, proper representation of clients often requires a lawyer to conduct activities while physically present in one or more other states. Such practice is customary in many areas of legal representation. As stated in Subsection (3), such activities should be recognized as permissible so long as they arise out of or otherwise reasonably relate to the lawyer's practice in a state of admission. In determining that issue, several factors are relevant, including the following; whether the lawyer's client is a regular client of the lawyer or, if a new client, is from the lawyer's home state, has extensive contacts with that state, or contacted the lawyer there; whether a multistate transaction has other significant connections with the lawyer's home state; whether significant aspects of the lawyer's activities are conducted in the lawyer's home state; whether a significant aspect of the matter involves the law of the lawyer's home state; and whether either the activities of the client involve multiple jurisdictions or the legal issues involved are primarily either multistate or federal in nature. Because lawyers in a firm often practice collectively, the activities of all lawyers in the representation of a client are relevant. The customary practices of lawyers who engage in interstate law practice is one appropriate measure of the reasonableness of a lawyer's activities out of state. Association with local counsel may permit a lawyer to conduct in-state activities not otherwise permissible, but such association is not required in most instances of in-state practice. Among other things, the additional expense for the lawyer's client of retaining additional counsel and educating that lawyer about the client's affairs would make such required retention unduly burdensome."*

II. The Leading Case — Birbrower.

The leading case in this area of law is Birbrower, Montalbano, Condon & Frank v. Superior Court, 17 Cal. 4th 119; 949 P.2d 1 (1998). In this case, the California Supreme Court held that an out-of-state law firm, not licensed to practice law in California, violated California law when it performed legal services in California for a California-based client under a fee agreement which stipulated that California law would govern all matters in the representation. Birbrower is the seminal decision discussing the unauthorized practice of law under these circumstances.

California's Business and Professions Code Section 6125 provided that "[n]o person shall practice law in California unless the person is an active member of the State Bar." In the early 1990's (prior to the prevalent use of e-mail), three attorneys from a New York law firm, each licensed in New York and not in California (none of the firm's attorneys were licensed in California), performed "substantial work" for a California client under California law. 17 Cal 4th at 124-125. The attorneys traveled to California several times in their representation of the client, and in those meetings, they practiced law by giving recommendations and legal advice and even filing an arbitration demand in California. Id.

The client subsequently sued the law firm for legal malpractice, alleging, among other claims, that the firm practiced law without a license in California, making its fee arrangement unenforceable. Id. at 126.

The California court discussed at length the definition of the statutory phrases the "practice of law" and "in California." Id. at 127-128. It concluded there was no doubt that the firm was practicing law, but noted that there was no authority on what it meant to practice law "in California." The court said:

> *the practice of law 'in California' entails sufficient contact with the California client to render the nature of the legal service a clear legal representation. In addition to a quantitative analysis, we must consider the nature of the unlicensed lawyer's activities in the state. 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.* Id. at 128.

The court adopted a case-by-case approach, noting that an unlicensed lawyer's physical presence in the state is only one factor in deciding whether a person engaged in the unauthorized practice of law. "For example, one may practice law in the state . . . 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," rejecting "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." Id. at 128-29.

The court ultimately held that the law firm engaged in the unauthorized practice of law in California. In making its decision, the court said "[a]lthough we are aware of the interstate nature of modern law practice and mindful of the reality that large firms often conduct activities and serve clients in several states, we do not believe these facts excuse law firms from complying with section 6125." Id. at 124-25.

For real estate lawyers, the "sufficient contact" analysis in Birbrower usually does not come into play—the location of the property is enough to establish where we are practicing law. Nevertheless, in cases where contact with a foreign jurisdiction is less clear, Birbrower's "sufficient-contact" analysis is often followed and is consistent with the way most courts analyze cases involving contact emanating outside of their state. The two key factors seem to be: (1) whether the attorney advises the client on the law of the state or engages in conduct (such as negotiations) that might require knowledge of the law, and (2) whether the client is located in the state where the attorney is unlicensed. Where the answer to both of those questions is "yes," courts tend to find unauthorized practice in the state.

III. A Scary Scenario—No Good Deed Goes Unpunished!

In a decision that many find surprising, in 2016 the Minnesota Supreme Court held that engaging in email communications with people in Minnesota may constitute the unauthorized practice of law in Minnesota, in violation of Minn. R. Prof. Conduct 5.5(a), even if the lawyer is not physically present in Minnesota. In *In Re: Charges of Unprofessional Conduct in Panel File No. 39302*, a Colorado lawyer represented his in-laws with respect to a Minnesota judgment for $2,368.13 and attempted to negotiate, via email, the satisfaction of that judgment with a Minnesota lawyer. Apparently, he was doing a favor for his in-laws!

The Minnesota lawyer reported the Colorado lawyer to the Minnesota bar alleging a violation Rule 5.5.

In evaluating the Minnesota lawyer's allegations of the unauthorized practice of law, the Minnesota Supreme Court, leaned on the *Birbrower* analysis. "Appellant contacted 'D.R.,' a Minnesota lawyer, and stated that he represented Minnesota clients in a Minnesota legal dispute. This legal dispute was not inter-jurisdictional; instead, it involved only Minnesota residents and a debt arising from a judgment entered by a Minnesota court." 884 N.W.2d at 666. While limiting the sanction to a private admonition, the Minnesota Supreme Court nevertheless held the Colorado lawyer in violation of Rule 5.5.

Part 2. Virtual Practice

(by Nancy R. Little)

I. COVID-19 Pandemic. During the pandemic, lawyers across the country have practiced virtually from their homes, and many still do. In response, the American Bar Association Standing Committee on Ethics and Professional Responsibility (the "Committee") has issued several Formal Opinions concerning virtual practice.

On December 16, 2020, the Committee issued an opinion on "Lawyers Working Remotely".[3] The opinion states:

> *Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction.*[4]

In analyzing this situation, the opinion states that, if the local jurisdiction in which an attorney is physically located has determined (by rule, case law or otherwise) that virtual practice in another state is the unauthorized practice of law, then such conduct would not be permitted by Model Rule 5.5(a). The Committee took the position that, if the local jurisdiction has not made such a determination, a lawyer may practice virtually while physically located in a state in which he/she is not licensed; provided, however, that the lawyer's practice must comply with certain restrictions.[5] Among the reasons the Committee cited for the local jurisdiction adopting rules for virtual practice is the interest that the local jurisdiction has in "ensuring lawyers practicing in its jurisdiction are competent to do so".[6]

In the opinion, the Committee provided additional commentary on the circumstances under which such a virtual practice would be permitted, including:[7]

1. The lawyer does not hold out to the public that it has an office in the local jurisdiction where he/she is physically located but not licensed.

2. The lawyer's local address is not on his/her letterhead, business cards, website or other advertising.

3. The lawyer does not "establish a systematic and continuous presence" or hold himself/herself out as available to practice law in the local jurisdiction.

4. The presence of the lawyer in the local jurisdiction is "incidental" and not for the practice of law.

5. The lawyer "may not state or imply that the lawyer is licensed to practice in the local jurisdiction."[8]

The opinion also indicates that several states have adopted similar positions, including Maine in Maine Ethics Opinion 189 (2005) and Utah in Utah Ethics Opinion 19-03 (2019), noting that the Utah opinion states: *"what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same—none."*[9]

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[3] See ABA. Comm. on Ethics and Prof. Resp., Formal Op. 495 (Dec. 16, 2020).

[4] Id. at 1.

[5] Id. at 2.

[6] Id.

[7] Id.

[8] Id.

[9] Id. at 3.

In addition, the Committee discussed providing legal services on a temporary basis in a jurisdiction where the lawyer is not licensed as permitted by Model Rule 5.5(c)(4), providing as an example a pandemic that may force the closure of offices for safety reasons, requiring lawyers to work remotely. In such a situation, the Committee noted that the length of the "temporary period" may vary depending on the circumstances.[10]

II. Additional Guidance. In March of 2021, the Committee issued Formal Opinion 498,[11] which reinforced a lawyer's "ethical duties regarding competence, diligence, and communication"[12] given the widespread use of technology in the practice of law. Among the concerns noted in the opinion with the use of technology include:

1. the importance of maintaining confidentiality and the requirement that the lawyer take reasonable steps to avoid unauthorized disclosures while effectively communicating with a client,[13] and

2. the need to supervise junior lawyers and support staff to ensure compliance with applicable ethics rules.[14]

The opinion goes on to discuss potential issues with the use of technology, including security, use of passwords and encryption, considerations in providing access to client files and information, issues with virtual meetings and data exchanges and the need for "bring your own device" policies.[15]

Various jurisdictions and commentators have written and/or commented on the remote practice of law. Several jurisdictions have proposed ethics guidance for remote workers. For example, the District of Columbia Court of Appeals issued Opinion 24-20: Teleworking from Home and the COVID-19 Pandemic on March 23, 2020. The Florida Standing Committee on the Unlicensed Practice of Law (the "Florida Standing Committee") issued a Proposed Advisory Opinion "FAO #2019-4, Out-of-State Attorney Working Remotely from Florida Home" with respect to a lawyer domiciled in Florida who sought guidance in connection with his proposal to work for a New Jersey law firm that did not have a Florida office or place of business. In that case, the Florida Standing Committee found that the lawyer would not have a presence in Florida for the practice of law; "he will merely be living here."[16]

Although the remote practice of law has become ordinary course during the pandemic, one commentator noted that general counsel should carefully consider ethics issues before hiring more lawyers to work remotely and/or to establish permanent remote in house legal positions.[17] The article notes that licensing regulations with respect to in-house counsel vary by state and suggests that counsel should be consulted as the different facts of each case could produce different results and consequences, possibly triggering a requirement to be licensed in a particular jurisdiction.[18]

Part 3. In-House Counsel Considerations

(by Nancy R. Little)

I. In-House Counsel – An Overview. Whether your client owns or leases real estate all over the country, or you are an in-house leasing lawyer and have to be sure that the required number of locations is under lease each year, you need to consider the rules regarding licensure and multi-jurisdictional practice. As

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[10] Id.

[11] See ABA. Comm. on Ethics and Prof. Resp., Formal Op. 498 (Mar. 10, 2021).

[12] Id. at 1.

[13] Id. at 2-3.

[14] Id. at 3.

[15] Id. at 3-7.

[16] The Fla. Bar Standing Comm. On the Unauthorized Practice of Law, Proposed Advisory Op, 2019-4 (Aug. 17, 2020) at 5.

[17] "What GCs Should Consider as They Hire Remote Attys" by Michele Gorman, Law 360 (Nov. 25, 2020).

[18] Id. at 2.

others have noted,[19] there are a myriad of issues regarding multi-jurisdictional practice of law by lawyers. The issues generally involve the following fact patterns:

1. Handling a transaction in a jurisdiction in which the lawyer is not licensed to practice;

2. Representing a client located in a jurisdiction in which the lawyer is not licensed to practice; and

3. Representing a client in a jurisdiction in which the lawyer is licensed while located in a jurisdiction in which the lawyer is not licensed to practice.

Given the marketplace we live in today, multi-jurisdictional practices, such as in-house leasing counsel, are common. Depending on the facts and the jurisdiction, the rules for in-house counsel can be a bit simpler… or maybe not.

II. In-House Rules.

An understanding of the differences between the rules for outside counsel and inside counsel, begins with a review of the basic rules with respect to the unauthorized practice of law set forth in the American Bar Association Model Rules of Professional Conduct[20] ("Model Rules"). The general guidelines are in Model Rule 5.5.[21]

1. Model Rule 5.5(a) provides that a lawyer cannot practice law in a jurisdiction in violation of the regulations in that jurisdiction.

2. Model Rule 5.5(b) precludes a lawyer not admitted to practice in a jurisdiction from establishing an "office or other systematic and continuous presence" in the jurisdiction except in certain circumstances. For example, an out of state lawyer can practice in-state "in association with" an in state lawyer or on some other temporary basis.[22]

3. Model Rule 5.5(d)(1) and the related comments address the practice of law by in-house lawyers:

   (*d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:*

   (1) are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice;

4. The result is that Model Rule 5.5(d)(1) would permit in-house counsel to do something that outside lawyers are not permitted to do: Establish a "systematic and continuous presence" in a jurisdiction where the in-house lawyer is not licensed. Some of the comments to Model Rule 5.5(d) also provide additional support for this position. Comment 16 to Model Rule 5.5(d)(1) states:

   [16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client to provide legal services to the client or its organizational

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[19] See *"Siting the Lawyer: Living with Rules of MJP, UPL and LDE in a Virtual World"* by William B. Dunn (the "Dunn Outline") presented at 2013 ICSC Law Conference for a thorough discussion of these and other issues and the rules applicable to the unauthorized practice of law and multi-jurisdictional practice of law.

[20] American Bar Association, 2013.

[21] See Model Rules on the ABA website for the full text of Model Rule 5.5.

[22] Model Rule 5.5(c).

> *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. 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. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction or on the law of the United States, the foreign lawyer authorized to practice under paragraph (d)(1) of this Rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.*

Note that the Model Rule permits the in-house lawyer to represent his or her employer and the employer's "organizational affiliates, i.e., entities that control, are controlled by, or under common control with the employer."[23]

The Restatement, Third, The Law Governing Lawyers[24] (the "Restatement") includes commentary on the topic of a multi-jurisdictional practice by in-house counsel. Comment f of Section 3 of the Restatement provides:

> *f. Multistate practice by inside legal counsel*. States have permitted practice within the jurisdiction by inside legal counsel for a corporation or similar organization, even if the lawyer is not locally admitted and even if the lawyer's work consists entirely of in-state activities, when all of the lawyer's work is for the employer-client (compare § 4, Comment *e*) and does not involve appearance in court. Leniency is appropriate because the only concern is with the client-employer, who is presumably in a good position to assess the quality and fitness of the lawyer's work. In the course of such work, the lawyer may deal with outsiders, such as by negotiating with others in settling litigation or directing the activities of lawyers who do enter an appearance for the organization in litigation.

Therefore, the Restatement commentary would also permit in-house counsel to handle transactions for his or her employer in jurisdictions in which the lawyer is not admitted to practice if:

1. All of the work is for the lawyer's employer, and
2. The work does not involve appearance in court by the lawyer.

In states that follow Model Rule 5.5(d)(1) and the Restatement commentary, an in-house lawyer would be allowed to represent his or her employer, even if the lawyer is not licensed in that state, if the employer's interests are served, there is no unreasonable risk to the client and the work does not involve a court appearance. The underlying concept it that the employer is well-positioned to determine if the in-house lawyer is qualified to handle the matters (e.g., leasing transactions) that the in-house lawyer is undertaking and the work is solely for the employer.

Applying the Model Rules and the Restatement to the three situations described in Part 2, Paragraph I, above, for states that follow the Model Rules and the Restatement, the in-house lawyer should, for example, be able to handle a transactional leasing matter for his or her employer:

a. if the lease is for property in a jurisdiction in which the lawyer is not licensed to practice,
b. if the employer is located in a state in which the in-house lawyer is not licensed to practice, or
c. if the lawyer is located in a jurisdiction where the lawyer is not licensed to practice.

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[23] Model Rule 5.5 cmt. [16].

[24] The American Law Institute, 2000.

In-house lawyers should remember that, under the Model Rules, they are not authorized to provide personal legal services to their employers' personnel (i.e., officers and other employees).[25] Therefore, the in-house lawyer would not be able to serve in that kind of role without obtaining a license in the applicable jurisdiction.

The in-house lawyer can always follow the appropriate procedures and become admitted to practice in the applicable jurisdiction, by taking the bar exam or otherwise becoming licensed under applicable state rules. In that case, the lawyer could take on legal matters that may otherwise be prohibited and may undertake a wider range of legal matters for clients other than his or her employer. In addition, the in-house lawyer holding an active state license would likely have more options if his or her in-house employment ends.

II. Always Consult the Rules.

Matters would be easier for in-house lawyers if all jurisdictions followed the Model Rules and the Restatement commentary. However, each state may adopt more restrictive requirements, and some have done so. Some states have established registration requirements for in-house counsel. The comments to Model Rule 5.5 note that in-house counsel may be subject to registration or other requirements "including assessments for client protection funds and mandatory continuing legal education."[26] Examples of requirements in various jurisdictions include the following:

1. Some states do not have formal requirements. Texas historically has not had a rule on in state practice by corporate counsel. It does count time spent by in-house counsel practicing in Texas toward the requirement for admission by motion. For this purpose, Texas does have certain requirements, such as the lawyer must hold a valid, active license in another state. However, most states have registration or other requirements.

2. New York adopted registration rules for "in-house counsel", effective in April of 2011. The applicant may be admitted, at the Appellate Division's discretion, if the applicant is admitted in another United States jurisdiction, is in good standing and possesses good moral character and fitness.[27]

3. Missouri provides for a "limited license" for in-house counsel if the lawyer is admitted in another jurisdiction in the United State and is employed exclusively in Missouri for a corporation, its subsidiaries or affiliates or other business or governmental entity and satisfies certain other requirements. Licensure is not a matter of right, and the lawyer is entitled to practice exclusively for the employer and to handle pro bono work.[28]

4. Virginia will issue a "Corporate Counsel Certificate" to an in-house lawyer who satisfies the Virginia requirements.[29]

5. The Supreme Court of South Carolina may issue a "limited certificate of admission" for a lawyer who, among other requirements, "performs most of his duties for the business employer in South Carolina and has his principal office in South Carolina" and provides legal services in South Carolina solely for the business employer or the parent or subsidiary of such employer".[30]

6. The District of Columbia permits an exception to the unauthorized practice of law for "internal counsel" providing advice to his or her employer where "the employer does not reasonably expect that it is receiving advice from a person authorized to practice law in the District of Columbia".[31]

In-house counsel should consult the applicable state rules to determine if there are requirements for registration, certification or qualification in the state in which the lawyer is practicing. The variation in state rules can also make it unclear as to whether the in-house lawyer can practice across state lines in a national leasing practice. Therefore, even if the lawyer is registered, certified or otherwise qualified in the

[25] See Model Rule 5.5(d)(1) cmt. [16].
[26] Model Rule 5.5(d)(1) cmt [17].
[27] 22 NYCRR § 522.1 (2013).
[28] Mo. Sup. Ct. R. 8.105 (2013).
[29] Va. Sup. Ct. R. 1A:5 (2013).
[30] Rule 405, SCACR (2012).
[31] D.C. Ct. App. Rule 49 (2012).

state in which the lawyer practices, an in-house lawyer may still not be protected if the lawyer handles leasing transactions in other jurisdictions or his or her employer is located in another jurisdiction or in other circumstances that may be addressed under applicable rules of a particular state.

In addition, in accordance with applicable state rules, in-house counsel should take care not to drift into performing legal services for his or her employer's personnel, pro bono services if prohibited or services for which pro hac vice admission is required.

III. Conclusion.

As with multi-jurisdictional practices of outside lawyers, the practice by in-house counsel is not entirely clear. As noted above, the rules regarding the unauthorized practice of law and multi-jurisdictional practices have evolved as the virtual practice of law has become more commonplace; however, the rules still have a way to go to catch up to the actual practice of law. Hopefully, that evolution will continue at an expedited pace. [32]

[32] Nancy Little would like to express special thanks to her partner, Thomas E. Spahn, a nationally–recognized author and speaker on ethics, for the background information and research source materials he provided that were invaluable in the preparation of this outline. (MW 146552932.3.doc)