Multijurisdictional Real Estate Practice and Implementation of ABA Model Rules 5.5 and 8.5

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A. BRIEF HISTORY OF THE MULTIJURISDICTIONAL DEBATE

1. In the early 1900s, states began enacting "unauthorized practice of law" ("UPL") legislation that prohibited persons (lawyers and non-lawyers) not licensed in a state from practicing law within that state. The most widely stated purpose of the UPL laws was to ensure that a state's citizens were represented by qualified legal practitioners. A state's UPL restrictions also operate to protect the livelihood of lawyers practicing within the state. Historically, the UPL laws had little impact on an attorney's conduct; the lawyer typically represented only clients that lived or were organized in his or her state and the clients' needs were limited to application of the laws of the lawyer's home state.

2. As clients' business needs expanded nationally and internationally during the twentieth century, however, clients increasingly sought advice from their attorneys in regard to transactions that crossed the borders of the lawyers' home states. With technological advances, changes in our transportation systems and the expansion of our economy, this cross-border, or multijurisdictional, practice led lawyers to travel to other states to negotiate or close transactions, to negotiate documents governed by the laws of other states and to sometimes render advice with respect to the application of other states' laws to the client's business dealings.

3. As lawyers more frequently crossed state lines (literally and figuratively) in service to their clients, the UPL laws were invoked not only by the states to prohibit lawyers licensed in another jurisdiction (but not licensed in the host state) from practicing in the host state, but also by clients in fee disputes with their attorneys. A key question that arose from many of these UPL cases was: under what circumstances is a lawyer licensed in one state practicing "in" another state when the transaction involves parties, laws, contract rights or other property situated in or governed by the laws of more than one jurisdiction? (An excellent survey of UPL decisions appears in William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 BUS. LAW. 1501 (2001), which is available for review at http://www.abanet.org/cpr/mjp/biblio.pdf.)

4. Perhaps the most significant case giving rise to the recent study of the American Bar Association ("ABA") *Model Rules of Professional Conduct* applicable to multijurisdictional practice was the California Supreme Court's decision in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998). In *Birbrower*, New York licensed lawyers were sued by their client for legal malpractice and related claims; the New York firm counterclaimed for attorneys' fees for work it had performed in both California and New York. The *Birbrower* court found that the New York lawyers had practiced law (without a license) "in" California and were not permitted to collect fees for services constituting the practice of law in California, by virtue of the following facts: the New York law firm, which had represented the client on matters of New York law for a number of years, consulted with the client, in New York, in regard to a contract governed by the laws of California; the New York lawyers traveled to California (where the other party maintained its principal place of business) on more than one occasion to meet with the other party and to negotiate resolution of the dispute; and the New York attorneys commenced arbitration with a California office of the American Arbitration Association.

5. In response to the *Birbrower* decision and similar developments in other states, ABA President Martha Barnett appointed the Commission on Multijurisdictional Practice (the "Commission") in July 2000 to, *inter alia*, "study and report on the application of current ethics and bar admission rules to the multijurisdictional practice of law" and to "make policy recommendations to govern the multijurisdictional practice of law that serve the public interest." American Bar Association, *Report of the Commission on Multijurisdictional Practice* (Aug. 2002) ("*MJP Report"*), at 1, available at http://www.abanet.org/cpr/mjp/home.html.

6. After numerous hearings, much study and extended debate, the Commission issued its final recommendations in June 2002, which were adopted by the ABA House of Delegates on August 12, 2002. *See MJP Report, supra*.

7. Among the recommendations approved by the ABA House of Delegates were amendments to Model Rule 5.5 that relax previously existing constraints on cross-border practices (the rule with Comments are Attachment A, *infra*), amendments to Model Rule 8.5 that subject lawyers providing legal services in a state to the disciplinary authority of that state regardless of the attorney's state of licensure,

and a Model Rule for Temporary Practice by Foreign Lawyers that allows foreign counsel to provide legal services on a temporary basis in the United States in certain circumstances that closely parallel the permitted cross-border practices authorized by Model Rule 5.5. Additionally, the ABA House of Delegates approved a number of other Model Rule revisions and new Model Rules intended to relax the UPL restrictions that exist in various jurisdictions, including amended Model Rule 6A and proposed Model Rule 22 (promoting reciprocal disciplinary enforcement by a state in which the attorney has practiced and the state in which the attorney is licensed), a Model Rule on "Pro Hac Vice Admission" with respect to practice before courts and tribunals of other states, a Model Rule on "Admission by Motion" under which an attorney can pursue permanent admission to another jurisdiction's bar without taking its bar examination, and promotion of the states' adoption of a Model Rule for the "Licensing of Legal Consultants" that permits a counselor outside the United States to advise American clients about the laws of the counselor's home nation. For a detailed description of the Commission's recommendations, *see MJP Report*, *supra.*

8. At the ABA Midyear Meeting, February 12, 2007, the House of Delegates responded to the calls to allow lawyers displaced by major disasters to temporarily move their practices to other jurisdictions and to allow lawyers from outside the major disaster area to provide *pro bono* legal services within the major disaster area. New language was added to Comment 14 of Model Rule 5.5 (*see* Attachment A*, infra)* and the newly adopted rule was entitled "Model Court Rule on Provision of Legal Services Following Determination of Major Disaster," *see* Attachment E, *infra.*

B. ABA MODEL RULE 5.5, AS AMENDED IN 2002, AFFIRMATIVELY PERMITS CERTAIN CROSS-BORDER PRACTICES PERFORMED ON A TEMPORARY BASIS

1. The focus of these materials is the effect of Amended Model Rule 5.5 (now titled "Unauthorized Practice of Law; Multijurisdictional Practice," *see* Attachment A, *infra*) on outside legal counsel providing legal services to clients engaged in cross-border business. The model rule is written from the perspective of the state in which the practitioner is not admitted to practice, and the model rule uniformly requires, as a condition to any permitted multijurisdictional conduct,

that the lawyer not be suspended from practice or disbarred in any other jurisdiction.

2. Amended Model Rule 5.5 clarifies that certain actions remain prohibited:

   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." *Model Rule 5.5(a).*

   b. "A lawyer who is not admitted to practice in this jurisdiction shall not:
      (1) . . . 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." *Model Rule 5.5(b).*

3. Amended Model Rule 5.5(c) affirmatively authorizes certain multijurisdictional practices conducted on a temporary basis:

   (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. *Model Rule 5.5(c).*

Comment 5 to Model Rule 5.5, however, states that these four areas of permitted, temporary practice are intended to be examples of authorized cross-border practice: "[t]he fact that conduct is not so identified does not imply that the conduct is or is not authorized."

4. Additionally, Model Rule 5.5(d)(2) permits in-house counsel, if licensed in one United States jurisdiction and not suspended or disbarred from practice in any jurisdiction, to perform legal services in the state to the "lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission."

5. Moreover, Model Rule 5.5(d)(2) states that an attorney licensed in another jurisdiction (and not disbarred or suspended from practice elsewhere) may provide services in the state that the lawyer is "authorized to provide by federal law or other law of this jurisdiction."

C. WHAT CONSTITUTES RENDERING LEGAL SERVICES ON A TEMPORARY BASIS THAT REASONABLY RELATE TO THE LAWYER'S PRACTICE IN THE JURISDICTION IN WHICH THE LAWYER IS ADMITTED TO PRACTICE?

1. The Commission's greatest departure from common law and existing UPL restrictions affecting transactional lawyers lies in Subsection (c)(4) of Model Rule 5.5, which permits a practitioner licensed in one state to provide legal services, on a temporary basis, in other states 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." An earlier version of subsection (c)(4) proposed by the Commission in its November 2001 interim report had limited cross-border transactional practice to non-litigation work ancillary to the lawyer's representation of a client in the jurisdiction in which the lawyer was licensed to practice law. After significant testimony by transactional lawyers (represented by ACREL, the ABA Business Law Section, the ABA Real Property, Probate and Trust Law Section, and other organizations), the Commission ultimately recognized that permitted cross-border

practices should not be dependent upon the lawyer's prior representation of the client in the lawyer's state of licensure.

2. In its report, the Commission did not state, explicitly, what constitutes a reasonable relationship to the lawyer's practice in his or her state of licensure. Rather, the Commission stated, in Comment 14 to Model Rule 5.5, that a "variety of factors evidence such a relationship," citing as examples that the client may have previously engaged the lawyer in question, the client may be a resident of or have substantial contacts in the lawyer's home state, the matter at issue may have "significant connection" with the lawyer's home state or "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."

3. Comment 5 to Model Rule 5.5 states that "continuous presence" in a jurisdiction "may be systematic and continuous even if the lawyer is not physically present" in the state, and a lawyer not licensed in the state "must not hold out to the public or otherwise represent that the lawyer is admitted to practice law" in the host jurisdiction.

4. Comment 6 further states that there "is no single test to determine whether a lawyer's services are provided on a 'temporary basis,'" given that professional advice 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."

D. PRACTICE TIPS FOR THE REAL ESTATE ATTORNEY ENGAGED IN CROSS-BORDER PRACTICE

1. Practitioners must be mindful that Model Rule 5.5., as amended, only applies in those United States jurisdictions that have adopted the amended rule, although that is getting easier because the District of Columbia and most states have adopted some form of Model Rule 5.5 (*see* paragraph 2, *infra*). The Commission affirmed in its report its belief that “the principle of the regulation of the practice of law by the state judicial branch of government, which includes jurisdictional limits on the legal practice, should be preserved. . . .” *MJP Report*, at 13.

2. As of May 3, 2007, the ABA reported that that the revision of Model Rule 5.5 on multijurisdictional practice, and the related amendments to Model Rule 8.5 on disciplinary authority in cases involving cross-border practice, have been adopted and are effective in form identical to or substantially similar to the 2002 Model Rule Revisions in the highest courts of the District of Columbia and 32 states: Arizona, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, Maryland, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Washington, and Wyoming. Model Rule 8.5 is effective in Connecticut and Model Rule 5.5 was adopted on July 24, 2007, and is effective on January 1, 2008. Three states have adopted one but not the other: Montana, and Wisconsin have adopted Model Rule 8.5 but the adoption Model Rule 5.5 is still pending in Montana, while in Wisconsin it has been recommended for adoption; and Alabama has adopted Model Rule 5.5 but is still studying Model Rule 8.5. Recommendations to adopt the model rule revisions in form identical or substantially similar to the 2002 Model Rule Revisions are pending in the highest courts of four states: Illinois, Michigan, New York, and Virginia. MJP Study Committees in three other states have recommended adoption of rules identical or similar to the 2002 Model Rules: Alaska, Maine and Vermont. Eight other jurisdictions have created study committees to consider the 2002 Model Rules revisions: Hawaii, Kansas, Kentucky, Massachusetts, Mississippi, Tennessee, Texas, and West Virginia. For a summary of the status of implementation of revised Model Rule 5.5 in the various United States jurisdictions as of May 3, 2007, *see* the ABA table in Attachment B, *infra* (adoption of Model Rule 5.5 is still listed as pending in Connecticut). For a more detailed statement of the status of the various jurisdictions' implementation of Model Rule 5.5, Model Rule 8.5 and Model Rule for Temporary Practice by Foreign Lawyers, as of June 20, 2007, *see* the ABA table in Attachment C, *infra* (which includes state specific websites). For a summary description of the implementation of Model Rule 8.5, *see* the ABA table in Attachment D, *infra*. Note that each of these summary tables are regularly updated and posted to the Commission's website, http://www.abanet.org/cpr/mjp/home.html.

3. Because the separate jurisdictions' review and implementation processes for revised Model Rule 5.5, and the corresponding revisions to Model Rule 8.5, are ongoing, the real estate practitioner, before providing advice with respect to a

transaction that involves the laws of, parties related to or property in another state, should consult the current status of such other state's implementation of the Model Rule revisions. The ABA tables included in these materials are an excellent source of information.

4. Furthermore, as noted by the Commission, "restrictions on unauthorized practice of law are also embodied in laws and rules that differ from state to state," such that care must be exercised by the practitioner venturing across state borders to ensure that appropriate legislative reform has been coupled with adoption of the Model Rules. *MJP Report*, at 23. Attachment C, *infra*, provides some guidance in this area.

5. Commentators on the Commission's Model Rule revisions have noted that revisions to Model Rule 8.5 (which subjects the cross-border lawyer to the disciplinary authority of both the lawyer's home state and the state in which the lawyer provides legal advice and includes choice of law provisions governing the issue of which state's disciplinary rules apply) appear to be the "price that lawyers must pay for the opportunity for limited interstate practice." ABA/BNA Lawyers' Manual on Professional Conduct, *Conference Report,* August 14, 2002. (Note that, even in-house lawyers, under revised Model Rule 8.5, would be subject to the disciplinary authority of the host state, and in-house counsel must be mindful that they may still be subject to the host state's licensing and registration requirements. *Model Rule 5.5, comment 17).* A complete compilation of amended Model Rule 8.5, and the Comments thereto, are set forth in Appendix C to the *MJP Report.*

6. As the Commission cautions, "in the context of determining whether work performed outside the lawyer's home state is reasonably related to the lawyer's practice in the home state, as is true in the many other legal contexts in which a 'reasonableness' standard is employed, some judgment must be exercised." *MJP Report*, at 29.

7. Real estate lawyers must remain mindful of a separate ethical standard, set forth in Model Rule 1.1 (and adopted in most, if not all, states), which mandates that a "lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation." As noted in Raymond J. Werner, *Licensed in*

One State, But Practicing in Another: Multijurisdictional Practice, PROBATE AND PROPERTY (March/April 2003) 6, at 9:

> If the lawyer knows or is concerned that a certain legal issue may be treated differently under the law of a state that governs a transaction, the lawyer is duty bound to investigate that issue and react accordingly. Acquiring knowledge of relevant law and using it are merely aspects of the professionalism that sophisticated clients expect and to which all clients are entitled. Moreover, the lawyer has an obligation to explain matters to the client so as to enable the client to make an informed decision regarding matters that are the subject of the representation. *Model Rule 1.4(b).* If the lawyer believes that there are limits on the lawyer's ability to represent the client, the lawyer must so inform the client so the client can decide how to proceed.

The prudence of informing the client that the lawyer is not licensed in a particular jurisdiction was reinforced by the Commission in Comment 20 to amended Model Rule 5.5: "In some circumstances, a lawyer who practices law in this jurisdiction . . .may have to inform the client that the lawyer is not licensed . . .in this jurisdiction. For example, that may be required when the representation occurs primarily in the jurisdiction and requires knowledge of the laws of this jurisdiction. See Rule 1.4(b)."

8. Engaging local counsel, while recognized in Model Rule 5.5.(c)(1) as a legitimate safe harbor, still requires that local counsel "actively participate in and share responsibility for the representation of the client." *Model Rule 5.5, Comment 8.*

9. An out-of-state lawyer engaging in a representation involving litigation or arbitration is, of course, treated differently by Model Rule 5.5. While it often is relatively easy for an out-of-state lawyer engaged to represent a client in a court proceeding to be admitted *pro hac vice*, the states have had a great deal of difficulty in determining how to handle out-of-state lawyers representing clients in arbitrations. For example, Rule 1-3.11 of the Rules Regulating The Florida Bar requires out-of-state lawyers to file a statement with The Florida Bar in all domestic arbitration proceedings, pay a $250 fee, and only engage in domestic arbitration proceedings in Florida no more than three times in a 365 day period.