In the practice of law today a lawyer who is licensed to practice law in one jurisdiction is often engaged in a transaction that has some tie or connection to another jurisdiction. Indeed, it is common for a lawyer licensed in one state to be involved in a transaction with another party who is located in another state relating to a matter or property in yet another state. Should the ethical rules prevent this situation or regulate the conduct of lawyers in this environment? Where is the lawyer practicing? Is it the physical place in which the lawyer is working that controls, or should a “significant contacts” approach be taken to analyze what the applicable licensing jurisdiction may be? How do new and changing means of communication affect the analysis of whether the lawyer is practicing in a jurisdiction in which the lawyer is not licensed? These are issues that the ABA has begun to address with the recent adoption of a new multijurisdictional practice rule in the Model Rules of Professional Conduct.

**Significant Contacts**

Most unauthorized practice statutes or rules prohibit the practice of law “in” the state without a license issued by that state. It is difficult, however, to discern what state a lawyer is practicing in when a transaction involves parties or properties in multiple jurisdictions.

The case that is cited as the catalyst for the development of new Model Rule 5.5 involved significant activities in California by New York lawyers who did not associate with California licensed counsel. **Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court,** 949 P.2d 1 (Cal. 1998). The dispute arose over payment of the lawyers’ fee. To prevent the collection of the fee, the client alleged that the lawyers committed malpractice and engaged in the unauthorized practice of law. The facts demonstrate how these cases often have roots in the state in which the lawyer is licensed and then spread to a state in which the lawyer is not licensed.

The New York law firm had represented the principal of the client and at least one of the related companies in New York for several years. The lawyers had consulted with the client in New York on the formation of a contract governed by California law. When questions arose about the other party’s performance under the contract, the New York firm was asked to review the matter. While in New York, the lawyers and client entered into a contingent fee agreement relating to the client’s claims against the other party to the contract. That fee agreement was later amended in California to an agreement for a fixed fee upon which the lawyers attempted to collect at the conclusion of the matter. The New York lawyers made several trips to California where the other party to the contract had its principal place of business, initiated arbitration with the American Arbitration Association’s San Francisco office, and held several meetings and negotiations in California. Based on these activities, the New York lawyers were held to be practicing law “in” California and could not collect fees for those activities. Because the lawyers also conducted some activities in New York, however, they could under proper circumstances collect the fees for their practice in New York.

The dissent disagreed, concluding that the activities of the New York lawyers did not fall within the definition of the practice of law.” Of course, not every activity of a lawyer that relates to a legal matter is the “practice of law.” Typically, fact patterns can run from one end of the spectrum to the other. It is the gray area in the middle that presents exposure for lawyers.

The issue of where the lawyer is practicing should not be purely dependent upon geography. The place where the lawyer is located at the time that legal work is done should not necessarily be determinative. Neither should the result turn on a purely quantitative analysis of how much time was spent in what jurisdiction. As stated in Birbrower: “Physical presence [in California] is one factor we may consider in deciding whether the unlicensed lawyer has violated [the unauthorized practice rules], but it is by no means exclusive.” 949 P.2d at 5.

The Birbrower court properly recognized that today’s

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Raymond J. Werner is a partner with Arnstein & Lehr, Chicago, Illinois, and is a member of the Section’s Standing Committee on Multijurisdictional Practice.
Practicing in Another:
Multijurisdictional Practice

By Raymond J. Werner
The focus is on the practice of law by a lawyer who is licensed in some jurisdiction but is not licensed to practice in the jurisdiction where the legal activity takes place.

significant contacts approach will be used to analyze whether a lawyer licensed in one jurisdiction is practicing law in another jurisdiction. The issue is more aptly framed as: where does the activity occur that requires the trained legal mind and the application of legal knowledge and techniques?

Licensed, But Not to Practice in the Jurisdiction

First and foremost, the focus is not upon the practice of law by someone who is not licensed to practice law in some jurisdiction of the United States. The focus is rather upon the practice of law by a lawyer who is licensed in some jurisdiction but is not licensed to practice in the jurisdiction where the legal activity takes place.

Some states have adopted ethical rules that allow multijurisdictional practice on a non-universal basis and in a non-uniform manner. For example, some neighboring states have adopted a reciprocity agreement that allows a lawyer who is admitted in one of the states to be admitted in the others without taking a bar examination. See, e.g., Or. R. REGULATING ADMIS. TO PRAC. L. 15.05. Other states expressly authorize representation in a state where the lawyer is not licensed with respect to litigation that is pending in yet another state, whether or not the lawyer is licensed in the forum state.

Several states have adopted protective provisions for in-house counsel who are not licensed in the state in which their office is located. These rules modify to a certain extent the generally accepted principle that a lawyer employee who is not licensed in the state in which the lawyer works is permitted to perform legal services for the employer as long as those legal services do not involve the appearance of the lawyer before a tribunal. Restatement (Third) of Law Governing Lawyers § 3 cmt. f (2000). Unfortunately, these protective provisions are far from uniform in their scope and protections. See American Bar Association, Report of the Commission on Multijurisdictional Practice (Aug. 2002) (MJP Report), at 10, available at www.abanet.org/cpr/mjp-home.html.

Most of these permissive regulations require registration and subject the in-house lawyer to the state’s regulatory authority, even though bar examination and formal admission to the bar of the state is not required. See, e.g., Rules Regulating the Florida Bar 17-1.4 (requiring registration, the payment of a fee, and the submission to the Supreme Court of Florida for disciplinary purposes). In addition, some of these rules provide only temporary protection and thus by implication would expose out-of-state lawyers who overstay the time limit to sanctions. See, e.g., Kan. S. Ct. R. 706. In any event, these protections may require that the in-house lawyer licensed in another state pay fees and be subject to some of the local rules governing lawyers, such as complying with the host state’s mandatory continuing education requirements.

Lawyers licensed in one state but practicing in another state are exposed to disciplinary actions in both states. In some states, the lawyer practicing in a state in which the lawyer is not licensed is exposed to criminal penalties. See, e.g., Cal. Bus. & Prof. Code § 6125; Ind. Code Ann. § 33-1-5-1. Further, if the lawyer is disciplined in the state in which the lawyer is practicing improperly, that disciplinary action may be the basis for charges against the lawyer in the state in which the lawyer is licensed.

The ABA’s New Model Rule

At the Annual Meeting of the American Bar Association in Washington, D.C., during the summer of 2002, the ABA finalized the promulgation of its revised Model Rules of Professional Conduct by the adoption of amendments to Rule 5.5. At the same time, the ABA adopted other model rules that support the momentum behind the relaxation of stiff unauthorized practice rules that discourage what the marketplace wants in commercial transactions under appropriate circumstances when the public interest is protected. These other model rules, beyond the scope of this article, include Rule 22 of the ABA Model Rules for Lawyer Disciplinary Enforcement to promote reciprocal discipline of attorneys, a model rule for “Pro Hac Vice Admission,” a model rule on “Admission by Motion,” a model rule for the “Licensing of Legal Consultants,” and a model rule for “Temporary Practice by Foreign Lawyers.”
In revising Model Rule 5.5, the ABA sought “the proper balance between the interests of a state in protecting its residents and justice system, on the one hand; and the interest of clients in a national and international economy in the ability to employ and retain counsel of choice efficiently and economically on the other.” MJP Report, at 5.

In reaching its final position, the ABA Commission on Multijurisdictional Practice recommended certain provisions that largely restate prior provisions or are not controversial. Lawyers are prohibited from practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assisting another in doing so. Model Rule 5.5(a). Lawyers are also generally prohibited from establishing an office or having a systematic and continuous presence in a jurisdiction in which they are not licensed, or holding themselves out to the public that they are admitted to practice in a jurisdiction in which they are not licensed. Model Rule 5.5(b). These prohibitions are in substance the same as the prior version of this rule, which merely prohibited the unauthorized practice of law and the assistance of another in unauthorized practice.

Moving beyond these rather straightforward and obvious rules, one sees the real areas of controversy and areas of high concern to transactional lawyers. The ABA’s approach recognizes that clients want to retain attorneys and counselors in whom they have confidence, a relationship that is typically built over time. The client’s lawyer of choice often has special knowledge of the client’s business affairs and operations and knows the bias from which the client approaches issues that are typically raised in a transaction. Moreover, because the client may concentrate its business in a small number of lawyers and firms, that client’s business is more meaningful to those chosen lawyers. It should be up to the sophisticated client to select the lawyer who the client believes is uniquely qualified in the matter without the interference of rigid and antiquated state border regulations that would expose that lawyer to sanctions. In today’s world of high productivity, it is beneficial to the client that its lawyers not have to devote time to education and familiarization with the client’s way of doing business.

In the client’s mind, the familiarity and special knowledge accumulated by its usual lawyer are far more valuable than the fact that some other lawyer, with whom the client has no relationship, or at best an infrequent or passing relationship, may be licensed in a particular jurisdiction. Indeed, for most lawyers, their expertise in a particular area or familiarity with the client’s way of doing business is far more valuable to a client than the familiarity of a lawyer with local law. It is easy for the lawyer to become familiar with local law on a subject, through research and study of the local law or by associating on a formal or informal basis with local lawyers who are knowledgeable.

It must be pointed out that another ethical rule comes into play in the representation of clients generally, whether or not in multijurisdictional matters. The lawyer is duty bound to represent the client competently. Model Rule 1.1 provides: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.” 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.

**Multijurisdictional Practice**

Recognizing the desirability of multijurisdictional practice in certain limited circumstances, new Model Rule 5.5(c) provides:

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 model rule is written from the perspective of the jurisdiction in which the lawyer is not licensed and requires that the lawyer be admitted and in good standing in the jurisdiction of licensure. As written, Model Rule 5.5 attempts to allow practice in another jurisdiction on a temporary basis under circumstances that do not create unreasonable risks to the interests of clients, the public, or the courts. MODEL RULE 5.5 cmt. 5. There is, however, no bright line test to establish the temporary nature of this type of practice. The commission acknowledged that judgment and reasonableness are needed in interpreting this rule and that guidance will come over time from the courts and regulatory bodies that govern the conduct of lawyers. Indeed, the lawyer’s activity may be temporary even when the services are provided in a jurisdiction on a recurring basis or over an extended period of time. MODEL RULE 5.5 cmt. 6.

The first of the permitted activities (MODEL RULE 5.5(c)(1)) is the time-honored situation in which the lawyer associates with a lawyer licensed in the jurisdiction in question. The relationship with local counsel must be real, and the local counsel must participate on an active basis. The retention of local counsel cannot be a mere artifact. MODEL RULE 5.5 cmt. 8. The locally licensed lawyer must share in the responsibility for the matter for this exception to apply.

The second situation (MODEL RULE 5.5(c)(2)) involves contested matters, litigation, or administrative proceedings in which the lawyer is acting in conformity with the rules of the body before which the matter is pending or has been or is expected to be admitted pro hac vice. This provision also allows a lawyer who is licensed in State A to review documents, attend meetings, interview witnesses, and take depositions in State B in which the lawyer is not licensed, if the activity relates to a proceeding in State A. Under this exception, the lawyer is allowed to handle matters outside of the licensing state if those matters are in anticipation of litigation in the state in which the lawyer is licensed or in which the lawyer anticipates being admitted pro hac vice.

The third situation (MODEL RULE 5.5(c)(3)) again relates to litigated or disputed matters that arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is licensed. Again, the representation in the host state must be temporary and must arise out of or be reasonably related to the lawyer’s practice in a state in which the lawyer is licensed.

This newly revised model rule recognizes the practical realities of sophisticated business practice today—in other words, the desirability of retaining counsel to assess the merits of similar matters in multiple jurisdictions.

It is the fourth of the permitted circumstances that is of primary import to the practicing transactional bar. Model Rule 5.5(c)(4) governs the situation in which a local counsel is not associated and pro hac vice admission is not available because the matter is not in court.

To be covered by this safe harbor, the services must be of a temporary nature and arise out of or be reasonably related to the lawyer’s practice in the jurisdiction in which the lawyer is licensed. The way in which the essential attorney-client relationship is established is not explicitly stated. The attorney-client relationship may arise out of a previous representation of the client; the client may be based in or have substantial contacts in the jurisdiction in which the lawyer is licensed; the matter itself, as opposed to the client, may have a significant connection to the jurisdiction in which the lawyer is admitted to practice; significant aspects of the representation may be carried out in the jurisdiction of licensure; or a significant aspect of the matter may involve the law of the jurisdiction of licensure. MODEL RULE 5.5 cmt. 14.

This newly revised model rule recognizes the practical realities of sophisticated business practice today—in other words, the desirability of retaining counsel to assess the merits of similar matters in multiple jurisdictions, such as selecting a new corporate headquarters or embarking on new lines of business on a national or regional basis. Similarly, the rule recognizes the need for the national client to engage a lawyer who is expert in certain matters, regardless of the jurisdiction in which the lawyer is licensed. Id.

This safe harbor applies to matters that are ancillary to a matter being handled in the state in which the lawyer is licensed, such as meetings with the client and others that are held outside of the state of licensure. The far more important aspect of this protection applies to a broader scope of engagements, allowing the client to retain the lawyer to handle matters that are entirely unrelated to the lawyer’s state of licensure. This carve out allows the client to retain counsel of its choosing in several related business matters, irrespective of the state in which the matter is localized. It will not, however, allow a lawyer to represent a client with whom the lawyer has had no prior dealings or relationship. MJP Report 201B, at 10. This comment could present a problem for transactional lawyers with nationwide reputations.

Another provision of new Model Rule 5.5 is especially important to in-house counsel. Model Rule 5.5(d) reads as follows:

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from prac-
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.

Model Rule 5.5(d)(1) allows a lawyer in good standing to provide legal services to an employer, or an affiliate of an employer, as long as pro hac vice admission is not required. In other words, this provision in and of itself protects the in-house transactional lawyer who does not have to represent an employer in court on the matter in question.

The rule also protects the lawyer who is otherwise allowed to represent the client by federal or other law (that is, patent or copyright practice). This section of Model Rule 5.5 reflects established law on this subject.

The in-house lawyer may, however, be subject to the disciplinary authority of the host state. Model Rule 5.5 cmt. 19. Moreover, the adoption of rules that regulate in-house practice by lawyers who are licensed in other states may well be interpreted to override the established law and require compliance with the regulatory requirements of the host state ethical rules. It should also be noted that the in-house lawyer who has a systematic presence in a jurisdiction in which the lawyer is not licensed may have to register or may be subject to other requirements of the state licensing laws and rules. MODEL RULE 5.5 cmt. 17.

Jurisdiction over Disciplinary Matters

In a related action, the MJP Report, as adopted by the ABA House of Delegates, recommended changes to Model Rule 8.5 relating to disciplinary proceedings. MJP Report 201C, at 1. This rule clearly subjects a lawyer to the authority of the disciplinary body of the state in which the lawyer is practicing under the multijurisdictional practice provisions of Model Rule 5.5 or otherwise. The result is that the lawyer may be subject to discipline by the state in which the lawyer is licensed and the state in which the lawyer is practicing under the MJP rules. As adopted, new Model Rule 8.5 provides:

(a) Disciplinary Authority. 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.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

1. for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

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. A lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.

This rule adopts the prevailing concept that the state of the lawyer’s licensure has the authority to discipline the lawyer for improper conduct, wherever that conduct may occur. The disciplinary authorities of the state in which the conduct occurs are also granted the power to discipline a lawyer for that conduct. In a disciplinary action in the nonlicensure state, the issue of which state’s ethical rules should be applied comes into focus. (See also Rule 6 of the ABA Model Rules for Lawyer Disciplinary Enforcement, which provides: “[A]ny lawyer not admitted in this jurisdiction who practices law or renders or offers to render any legal services in this state is subject to the disciplinary jurisdiction of this court and the board.”) The basis for selecting the applicable set of rules is set out in Model Rule 8.5(b)(2), which creates a hierarchy of criteria to be used in making the determination. (Model Rule 8.5(b)(1) applies the ethical rules of the forum state to matters that are pending before a tribunal. Because the focus of this discussion is on transactional matters, Model Rule 8.5(b)(1) is merely noted for informational purposes.) It should be noted that this section does not apply to conduct in anticipation of litigation, but only to matters that are in litigation. See Model Rule 8.5 cmt. 4. The ethical rules of the jurisdiction in which the predominant effect of the conduct will be felt should be applied. Otherwise, the ethical rules of the jurisdiction in which the conduct occurred will be applied.

Conclusion

Transactional lawyers owe a debt of gratitude to the ABA for opening debate on this subject. Transactional lawyers are especially indebted to the Real Property, Probate and Trust Law Section and the American College of Real Estate Lawyers, which, together with other interested groups, lobbied the MJP Commission heavily for these changes. This effort was not without opposition, and the task is far from over. If transactional lawyers want the freedom from exposure to disciplinary sanctions that could be aimed at the evolution of their practice, the effort must now turn to the state bars to follow the lead of the ABA and reform their ethical rules based upon the model promulgated by the ABA.
ARCHITECT’S DESIGN DEFECT liability not subject to economic loss rule. The “economic loss rule,” which limits tort claims when contract damages are available, does not apply to a claim for an architect’s negligent design resulting in physical damages to property. Plaintiff’s pleadings and affidavits alleging physical harm to the common areas of a condominium that necessitated the expenditure of substantial sums of money to repair were sufficient to state a cause of action for tortious negligence that survived the economic loss rule. Aldrich v. Add Inc., 770 N.E.2d 447 (Mass. 2002).

BONA FIDE PURCHASER at foreclosure sale obtains clear title. The foreclosed trust deed was based upon a grantor’s fraudulent claim of ownership, and clear title passed to the purchaser even though the trust deed beneficiary may have known of the fraud. Bonner v. Norwest Bank of Minnesota, 571 S.E.2d 387 (Ga. 2002).

BONA FIDE PURCHASER from possessor obtains clear title. The property possessor had no record title. The original patent from the U.S. government was erroneously recorded in Salt Lake County, the property being located in Utah County adjacent to the boundary with Salt Lake County. Salt Lake County was the record owner and finally corrected the mistaken recording in 1998, nine years after the quit-claim deed from the possessor to the bona fide purchaser was recorded, and according to the court, nine years too late. Salt Lake County v. Metro West Ready Mix, Inc., 53 P.3d 499 (Utah Ct. App. 2002).

INSTALLMENT CONTRACT forfeiture subject to equitable right of redemption. In a case of first impression, South Carolina finds an equitable right of redemption applies to the forfeiture remedy on an installment land purchase contract. Lewis v. Premium Investment Corp., 568 S.E.2d 361 (S.C. 2002).

LANDLORD’S acceptance of tenant surrender upheld. The tenant attempted to revoke its offer to sur-