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Quicksand! Multijurisdictional Law Firms and the Unauthorized Practice of Law

Today's multijurisdictional practice is likely to be a solo or small partnership, house counsel, legal staff member, or good Samaritan swirled into the interconnectivity of the modern legal milieu.

By **Marc Garfinkle** | August 02, 2018

The term “multijurisdictional law practice” once conjured images of a top-tier firm, starch-collared and venerable, broad and strong, transcending state boundaries to pursue the varied interests of its A-list clients. Judging from the attorneys’ problems that cross this writer’s desk, the reality is far different. The starch-collared law firms usually do not have UPL problems. Those firms already have boots on the ground where they need them these days—branch offices, local associates or other counsel who are members of the bar, authorized to act for the firm or its client. These law firms usually don’t exceed their jurisdictional limits; they often don’t have any.



Iryna Volina – Fotolia

Today’s multijurisdictional practice is a smaller, nimble creature. Spawned in a shrinking world, trying to stay relevant in the dizzying complexity of the modern legal business, a multijurisdictional practice is likely to be a solo or small partnership, house

counsel, legal staff member, or good Samaritan swirled into the interconnectivity of the modern legal milieu. These lawyers are giving advice, signing papers, interpreting contacts, going to court, agreeing to contract terms, and otherwise acting as lawyers outside their jurisdiction. Of these, some try working with local counsel, while others are flying solo in enemy air space.

A multijurisdictional practice can happen to (almost) anyone. Maybe you have a loyal but transient client who seeks your advice no matter where she happens to be. Maybe you represent a corporation contractually bound to ADR in Arkansas, and they want you to handle it. Perhaps your longest-standing client had an accident in Texas with a rented car, or your neighbor retired to Florida and wants you to update her will. Suppose your brother is buying real estate in New York, or the trust you are probating must hypothecate an Illinois asset. Maybe your client's CEO has been ordered to a California court to testify, or its shipment is being held up in a New Orleans customs house, or its judgment debtor fled your jurisdiction. In countless ways, a practice can creep into, or seep into, or be dragged into a foreign jurisdiction, and every day, unwitting attorneys engage in legal affairs beyond their licenses, exposing themselves to serious sanctions.

Serious is right. Lawyers involved in out-of-state legal matters may be charged with practicing law without a license. This is a criminal offense in all 50 states, usually referred to as "UPL"—the Unauthorized Practice of Law. It is independent of the ethics violations which may bear the same or similar name. Attorneys and non-attorneys alike can be charged under these statutes. That an attorney is licensed in another state may be of little consequence, depending on the activity and the jurisdictions involved.

Naturally, a significant number of the UPL charges fall to the more aggressive marketers among us, the lawyers "working" social media, trolling for injury or immigration clients, bankruptcies or loan modifications, among other media-propelled practices. They may plaster their messages wherever they can, disregarding local rules of attorney advertising and solicitation. Other high-risk practices include small firms seeking to expand their influence, eclectic niche firms being called into new markets, and media-based law firms acquiring national cases such as class actions. It is important to know the law. In New Jersey, the rule is RPC 5.5. Lawyers everywhere

should also become familiar with ABA Model RPC 5.5 whose text is cloned or approximated by most states and is likely to contain the language that determines your fate if your practice should spirit across state lines.

New Jersey Rule of Professional Conduct 5.5., subtitled, “Lawyers Not Admitted to the Bar of This State and the Lawful Practice of Law,” provides that a New Jersey lawyer may not practice law in any jurisdiction where it is prohibited, nor may she assist a non-lawyer in the performance of activity that constitutes the unauthorized practice of law. It also provides that a lawyer not admitted in New Jersey *may* engage in the lawful practice of law in New Jersey, but only under certain enumerated conditions. These are as follows:

(1) the lawyer is admitted *pro hac vice* and is associated with a lawyer admitted in New Jersey; **or**

(2) the lawyer is an in-house counsel in compliance with R. 1:27-2; **or**

(3) under **any** of the following circumstances:

(i) the lawyer is negotiating a transaction on behalf of an existing client, which transaction is related to the lawyer’s jurisdiction; or

(ii) the lawyer represents a party in alternate dispute resolution for which services *pro hac vice* admission is not required, (such as court-ordered or rule-imposed ADL);

(iii) the lawyer investigates, engages in discovery, interviews or deposes witnesses for a proceeding in the lawyer’s jurisdiction;

(iv) the out-of-state lawyer’s practice in NJ is occasional, and the lawyer associates with local NJ counsel; or

(v) the lawyer’s actions in New Jersey are occasional, on behalf of an existing client in the lawyer’s jurisdiction, and the lawyer’s disengagement would result in substantial inefficiency, impracticality or detriment to the client.

New Jersey’s further restrictions are common, though not universal. For example, any foreign lawyer practicing here under any of the above circumstances must be in good standing in all jurisdictions of admission and must have no pending disciplinary

proceedings or license suspension or disbarment anywhere. Moreover, the lawyer must agree to be subject to our RPCs, to the authority of our Supreme Court, and to the appointment of the clerk of that court as agent for service of process. Although you should be familiar with the UPL statute in New Jersey, the other 49 states may have different rules that count more than ours, should you run afoul. It is wise, perhaps imperative, to read the UPL statutes in each jurisdiction your practice touches. Remember this also: Even though *you* have a license, other people in your sphere—lawyers and non-lawyers alike—may be acting as attorneys, wittingly or otherwise. If so, consider whether you may have exposure for assisting someone in UPL.

There are ways to avoid problems when our practice interfaces with jurisdictions where we are not “barred.” For example, house counsel for a New Jersey corporation venturing out of state need only read and follow the house counsel rule of the jurisdiction(s) in question. House counsel usually must limit their out-of-state practice to broader corporate issues and are required to engage locally-licensed lawyers to make appearances, negotiate and handle certain transactions, and so on. This has been going on for a long time. The recent trend toward reciprocity of licensing between state bars is changing this landscape rapidly. It is getting easier for house counsel to be admitted into the foreign jurisdiction. The wave of lawyers who “waive into” various state bars includes many house counsel seeking admission to the state bars where their clients have dealings. Other lawyers may find this route attractive, too, since the bona fide office rule has been virtually eliminated. They should just remember that each additional bar admission may entail annual dues and registrations, CLE requirements and, often, proof of appropriate insurance.

Attorneys who must appear in court in a foreign jurisdiction should consider pro hac vice admission. With matters in litigation, or with litigation pending, most courts, such as ours, require the out-of-state attorney to associate with local counsel who will be held accountable for the actions of both. There may be additional requirements of notice, insurance, proof of good standing and more. It can be burdensome. For example, an attorney who stopped paying Iowa bar dues or registering her CLE credits will lack standing to appear pro hac vice. Irrespective of how you proceed, become familiar with the rule in the foreign state, and make sure you would qualify to appear. In all cases, you might consider referring the matter outright to local counsel.

One ticklish problem is being resolved. It concerns the appearance of out-of-state counsel for in-state ADL. The widely-adopted ABA Model Rule 5.5, addresses the circumstances under which an attorney may represent a client in negotiations or mediation or arbitration (or other ADL) out of state. Simply stated, if the negotiation or ADL is required by an agreement among parties, out of state counsel familiar with the client and the matter may appear. ADL arising out of litigation, however, or pursuant to a court's rule or a judge's order, would require a pro hac vice appearance.

Multijurisdictional ethics matters can be like quicksand. You don't know that you are in trouble until you are in deep. Your best protection is awareness. Educate yourself. Understand the rules of all relevant jurisdictions. Heighten your sensitivity and enhance your vigilance when dealing with matters that originate or resonate out-of-state. It's better to share the pie than to take more that you should eat, so engage local talent. If you're not admitted, and you can't seem to find a good lawyer to work with you, look for a good bail bondsman. You may need one.

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