

CROSSING STATE LINES: MULTIJURISDICTIONAL PRACTICE

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Over recent years, the United States Supreme Court has sent a clear message to Congress that federal legislation that encroaches upon the powers of individual state governments will be struck down. Consequently, several attempts by Congress to assert jurisdiction based on the Commerce Clause have failed.^{Ftn 1} Given this trend, it is somewhat ironic that the right of each state to regulate the legal profession within its borders, accepted throughout the nation for decades, is now under scrutiny.

MULTIJURISDICTIONAL PRACTICE

With the continuing rise of international economic interdependence, a number of nations, including the United States with NAFTA and GATT, have made it easier for "lawyers from one signatory state to open offices and to practice their own national law within the other member states."^{Ftn 2} Yet within the 50 states of the United States, there continue to exist exclusionary provisions preventing lawyers who are not licensed in a given state from practicing within its borders.

When it comes to the unauthorized practice of law and Rule 5.5 of the Minnesota Rules of Professional Conduct and Minn. Stat. § 41.02, subd. 8, the usual application involves an individual who is practicing law and is not a licensed attorney in any jurisdiction. However, these provisions apply as well to those individuals who are licensed to practice law but who cross state lines and practice in a state where they are not licensed. This is seldom a problem for litigators since a lawyer who is licensed to practice in one state, and has a specific need to represent a client before the courts of another state, generally is allowed to appear before that court "*pro hac vice*," for that individual case. This is generally done by motion, and many states require that the lawyer who seeks temporary admission associate with a local attorney who is licensed in the state. While this may appear simply protectionist to some, the theory is that the locally licensed attorney will not only be familiar with the local rules of practice but will also be familiar with applicable case law and relevant ethical provisions.

The situation is different for transactional counsel. Transactional work covers a wide range, as one commentator notes, including "legal services relating to mergers and acquisitions, securities registrations and sales, private placements, lending matters, bond work, real estate matters, intellectual property advice and counseling including patent prosecution, international commercial practice, health care law, and trusts and estates."^{Ftn 3} The issue that presents itself is at what point an unlicensed transactional lawyer's work comes within the purview of a state's unauthorized practice of law provisions. Providing legal services while being physically within a state where you are unlicensed to practice and not associated with local counsel or engaged in litigation, would appear to be a clear violation of the unauthorized practice of law provisions. The harder question arises when you are within the state where you are licensed to practice but are giving a legal opinion as to the law of another state or closing a transaction that involves a case or property in a different state.^{Ftn 4} In one recent variation, an Illinois lawyer moved to Ohio but did not seek admission within that state. He then contracted to be a "consultant on federal law" to a law firm and gave

advice on a variety of transactional legal work. In that instance, the court held that such activities constituted the practice of law.[Ftn 5](#)

In the most famous case on the topic, *Birbrower*,[Ftn 6](#) a New York law firm represented a California corporation where California law governed the contract. Members of the firm traveled to California on a number of occasions; after the dispute was ultimately settled pursuant to arbitration, the firm sought payment for their legal fees from the California corporation. The client refused to pay and the California Supreme Court agreed with the client, ruling that the New York lawyers had engaged in the unauthorized practice of law. Clearly these were not naive or unsophisticated clients at risk of exploitation. Nevertheless, the court found that the only relevant inquiry was whether or not a state has the power to decide who can practice there, and if it does, then those not licensed in that state are not authorized to so practice.

More recently, the Hawaii Supreme Court distinguished *Birbrower* in awarding attorneys' fees to an Oregon firm who had helped a client win a judgment against the state of Hawaii in a case handled by lawyers licensed in that state. The court decided that the fact that the Oregon firm had retained local counsel was enough to allay fears of the unauthorized practice of law.[Ftn 7](#)

UNAUTHORIZED PRACTICE PROVISIONS

Just as every state has adopted its own set of ethical precepts, so every state has its own provisions addressing unauthorized practice. Restrictions might appear in a criminal statute (as it does in Minnesota), a civil statute, or a court rule. More significantly, the provisions do not specifically address what an attorney licensed in another state may or may not do in the state where the restriction applies. As one law professor has noted, "Although multijurisdictional practice has become the norm, rather than the exception, UPL provisions make no distinction between ordinary legal work performed by out-of-state lawyers and advice given by persons who have no legal training at all."[Ftn 8](#) All such provisions make it clear that a lawyer is not allowed to appear before a court of the state in which he or she is not licensed. Michigan and Virginia do allow incidental practice of law by lawyers licensed in another state. Given that most other states are silent on this issue and that "UPL laws may be employed against out-of-state lawyers in criminal or contempt prosecutions, and disciplinary proceedings, and legal malpractice actions, or by the client in defense of a fee action,"[Ftn 9](#) the fact remains that lawyers who engage in transactional work that spills over into states wherein they are not licensed do so at their own risk. While UPL laws are enforced infrequently, the fact that they remain on the books and that there have been recent calls for more aggressive prosecution against nonlawyers with these laws, should give attorneys licensed in other jurisdictions some cause for concern.

THE FUTURE

While it is unlikely that Congress in the immediate future will attempt to abrogate the inherent authority of each state's highest court to regulate the practice of law, the fact remains that the profession is changing and evolving constantly. Legislation breaking down international barriers pertaining to lawyers and proposals for multidisciplinary practice (even if currently squelched) reflect concerted efforts to change the way our profession is regulated. While each state will continue to provide for minimal appearances by out-of-state lawyers with the court's permission, it is unlikely that any state will willingly give up its right to regulate the profession within its borders.

With respect to professional responsibility, lawyers currently may be disciplined in a state where they are licensed, for misconduct that may have occurred in another state, while they are also subject to

discipline in any other state where they are licensed pursuant to reciprocal discipline. Since disciplinary offices throughout the country have become considerably more professionally run and funded than they were in the immediate past, some have argued that "it is more reasonable today to expect an out-of-state lawyer to comply with the disciplinary rules of the state where the lawyer practices and to expect that, if the lawyer fails to do so, the lawyer will be subject to appropriate discipline."Ftn 10

Perhaps the day will be here soon when uniform state laws are passed, as recommended by a recent ABA symposium, that specify restrictions on out-of-state lawyers in a clear manner, while permitting out-of-state lawyers to apply for and receive permission to provide a greater range of legal services within the state.Ftn 11 Among the proposals is one to establish a "national registration system" that would be funded by fees from lawyers who practice in a number of states, making it "easier for regulators and prospective clients to ascertain relevant information about a lawyer including the lawyer's prior discipline history."Ftn 12

Underlying the entire debate is the strong feeling within our profession that state supreme courts must retain the inherent authority to regulate lawyers. At some point, there is the danger that state legislatures or Congress might act in a way not favorable to the legal profession to address concerns among legal consumers regarding barriers that prevent the efficient utilization of legal services from state to state and nation to nation. Hopefully we can accommodate limited encroachments due to multijurisdictional practice with reasonable restrictions, thereby avoiding more drastic solutions, while serving the public and protecting the profession.

NOTES

¹ See *U.S. v. Lopez*, 514 U.S. 549 (1995) and *U.S. v. Morrison*, No. 99-5, ___ U.S. ___ (2000), decided May 15, 2000.

² Anthony E. Davis, "Multijurisdictional Practice by Transactional Lawyers - Why the Sky Really is Falling," *The Professional Lawyer*, Winter 2000, p. 23.

³ Joseph R. Lundy & Robert A. Creamer, "Private Practitioner Problems with Multijurisdictional Law Practice in Transactional and Litigation Matters," *The Professional Lawyer*, Winter 2000, p. 10.

⁴ The use of the internet to give legal advice raises additional concerns. See Catherine J. Lanctot, "Attorney-Client Relationships In Cyberspace: The Peril and the Promise," 49 *Duke L.J.* 147 (1999).

⁵ *Cleveland Bar Association v. Misch*, 695 N.E.2d 244 (Ohio 1998).

⁶ *Birbrower, Montalbono, Condon & Frank, P.C. v. Superior Court (ESQ Business Services, Inc.)*, 949 P.2d 1 (Cal. 1998). The law in California was later amended to allow out-of-state lawyers to seek permission to participate in arbitrations.

⁷ *Fought & Co. v. Steel Engineering and Erection, Inc.*, 951 P.2d 487 (Hawaii 1998).

⁸ Carol A. Needham, Report of Symposium on the Multijurisdictional Practice of Law, March 2000, p. 8.

⁹ Bruce A. Green, Report, p. 11.

¹⁰ *Ibid.*, Report, p. 21.

¹¹ In July of 2000, ABA President Martha Barnett announced the appointment of a new Commission on Multijurisdictional Practice to examine some of these issues.

¹² *Bruce A. Green, Report, p. 26-27.*