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The evolution of MJP

BY IRMA S. RUSSELL

On Aug. 12, 2002, the ABA House of Delegates adopted revisions to Model Rules 5.5 and 8.5 recommended by the ABA Commission on Multijurisdictional Practice (MJP Commission), liberalizing to some extent the organization's approach to multijurisdictional practice (MJP) and the unauthorized practice of law (UPL). Although the practice of law today is often national in scope, every state prohibits practice within its jurisdiction without a license or other state authorization.

MJP

Environmental, energy and resources problems and client needs often do not fit neatly within state borders; thus, most Section lawyers engage in out-of-state practice. For example, purchase and merger transactions often involve environmental issues, property and owners in multiple states. Corporate counsel frequently must advise clients on federal environmental laws relating to factories and other assets in numerous states. Despite the trend toward cross-border services, UPL issues remain, making it necessary for lawyers to either comply with various and sometimes arcane state rules or risk prosecution for the unauthorized practice of law.

As defined by the MJP Commission, multijurisdictional practice is the "legal work of a lawyer in a jurisdiction in which the lawyer is not admitted to practice law." Thus, lawyers are vulnerable to significant negative consequences for MJP without regard to their competence or the quality of the legal services they provide. Lawyers may be disciplined for UPL and may be prevented from collecting fees already earned. Other lawyers practicing in a firm with or assisting a lawyer engaged in MJP may be charged with assisting in UPL. A lawyer engaged in MJP may be prosecuted under UPL statutes because such statutes impose the prohibition with equal force against both laypersons and lawyers who are not licensed by the state.

Revised Model Rules

Revised Model Rule 8.5 states the "authority of a jurisdiction to discipline lawyers licensed in another jurisdiction who practice law within their jurisdiction pursuant to the provisions of Rule 5.5 or other law." This revision clarified the necessary power of states to regulate the practice of law. Comment 1 to Revised Rule 8.5 notes the state interest in ensuring competent legal services:

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"Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction."

Revised Model Rule 5.5 permits some activities by lawyers outside their home states, allowing lawyers to provide specified services "on a temporary basis" when the legal work is "undertaken in association with a lawyer" admitted to practice in state so long as that in-state lawyer "actively participates in the matter." The prohibition of the rule creates some ambiguity. Its prohibition is qualified rather than sweeping. The rule forbids a lawyer not admitted to practice in a jurisdiction to "establish an office or other systematic and continuous presence" for the practice of law in a state.

Except with regard to lawyers admitted to the federal bar of a state or employed by an organizational client, all of the exceptions to the prohibition are temporary. Rule 5.5 permits temporary practice in four situations, approving of such practice when the services are 1) "undertaken in association" with another lawyer admitted in the state who "actively participates in the matter," 2) "reasonably related to a pending or potential proceeding before a tribunal" when the lawyer or his associate "is authorized" to appear in the proceeding or "reasonably expects to be so authorized," 3) relate to "pending or potential arbitration, mediation or other alternative dispute resolution" in the state if the services are reasonably related to the lawyer's practice and are not ones that the "forum requires *pro hac vice* admission," or 4) "arise out of or are reasonably related to the lawyer's practice" in his state of licensure.

Thus, revised Rule 5.5 affords continuing protection to corporate counsel to provide services to the employer or its affiliates and gives temporary protection to other lawyers in limited situations. It does little, however, to ameliorate the general problem for lawyers whose clients require out of state services.

Do the Revised Model Rules go far enough?

The prohibition against practice by laypersons who have no legal education bears a reasonable relationship to the state interest in insuring competent legal services to the public. UPL statutes are consistent with ordinary licensure rules applied to most trades and professions. State UPL statutes articulate no specific state interest in prohibiting practice by lawyers licensed in other states, however, and the general justification of insuring competency falls short of explaining this application in today's legal world.

For example, many specialized areas like environmental and energy law are largely a matter of

federal statutory law and state statutes influenced by federal law. While state practice rules are of great importance, the challenging aspects of law fall in substantive areas.

It is safe to say, for example, that an energy lawyer licensed in Colorado who works regularly on FERC projects and issues relating to utilities is able to provide more competent representation on electricity to a New York client in New York than a lawyer licensed in New York who lacks expertise in those areas or other energy areas. Under the analysis of all state UPL statutes, however, the New York probate lawyer is presumed competent to provide representation on energy matters to New Yorkers while the Colorado energy lawyer is presumed incompetent.

Although enforcement of UPL is infrequent, the statutes create significant risks as well as the overhead that often accompanies risks for both lawyers and clients. For example, in *Wellmore Coal Corp. v. Harman Mining Corp.*, 568 S.E.2d 671 (Va. 2002), the Virginia Supreme Court dismissed Wellmore's appeal of a \$6 million judgment based on its failure to include a signature of Virginia counsel on the notice of appeal even though Wellmore hired local Virginia counsel and the out-of-state lawyer who signed the appeal was admitted *pro hac vice*.

In the well-known *Birbrower* case, 949 P.2d 1 (Cal. 1998), the Supreme Court of California refused to award lawyers' fees to a New York firm that rendered legal services to a California client and noted that the California UPL statute could apply to legal services activity outside the state. After the *Birbrower* case, the California legislature authorized out-of-state lawyers to represent parties to California arbitrations by associating with California counsel.

Competent representation involves both legal skills and access to legal rules and information. The organization of legal education today is evidence of the general nature of legal competence. Rather than training students for practice in a particular state, American law schools seek to prepare lawyers for practice in any U.S. jurisdiction. Law schools teach lawyers to find and apply common law and statutory principles to fact settings as they arise. They do not teach filing rules or other matters particular to a jurisdiction.

Moreover, access to legal knowledge has changed dramatically in recent years. In the days when access to state laws and court rules depended on obtaining physical copies of the laws, a reasonable relationship existed between a lawyer's state of licensure and the ability to access legal information. Today, however, laws and court rules are readily available to anyone in any location with access to computer research, fax and e-mail.

The goal of insuring competent representation seems best advanced by the right of clients to bring malpractice actions against lawyers who fail to perform competently and to bring disciplinary actions against lawyers for conduct that violates the ethics rules of the jurisdiction. The already robust move

toward general legal education, multi-state testing and recognition of the power of each jurisdiction to discipline lawyers who practice in the state also supports the goal of insuring competent legal representation.

Courts have the inherent power to regulate the lawyers who practice before them. Tort law allows clients to sue lawyers for malpractice within a jurisdiction with substantial relationship to the services rendered. The disciplinary authority of each state is made clear by Revised Model Rule 8.5. That rule arguably reaches beyond these justifiable purposes, however, raising the question of the reasonable relationship between the regulation and the state interest in insuring competent representation.

MJP is a reality of today's legal world. Representing clients in states outside the lawyer's state of licensure is commonplace, particularly in areas of practice that involve federal law and clients with far-flung property or business transactions in numerous jurisdictions, such as environmental law.

Unraveling and mastering the law related to MJP itself is not a cost-free process. Ethics rules relating to MJP and state statutes on UPL add a layer of legal requirements on top of substantive and procedural issues. The task of complying with MJP rules adds costs to all out of state work.

These costs must be borne by the client, the firm or the lawyer. While such costs are justified if they serve significant state interests, in some cases UPL statutes are tantamount to a "pay to play" rule, essentially creating a cost for the client without any corollary benefit other than clearing the statutory hurdle itself.

Model Rules 5.5 and 8.5 are now available for consideration by the states. The ABA revision to these rules represents the first step in a necessary liberalization of ethical rules and statutes to permit competent lawyers to serve client needs efficiently. The revised rules encourage more uniformity of approach and endorse liberalization of standards for some types of representation. Nevertheless, the rules and UPL statutes continue to create significant risks for lawyers and significant costs for clients and firms.

Progress toward effective and efficient regulation of MJP awaits further reform at the national level and in the ethics rules and statutes of each state to reflect modern norms of legal practice.

