



Multijurisdictional Practice of Law for In-House Counsel

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Multijurisdictional Practice for In-House Counsel

- **Why it matters**

- *Reputational Risk*

- “GCs Forget One Detail: Their License,” *The National Law Journal*, Eliza Amon, April 9, 2007

- *Penalties*

- *Preserve Attorney-Client Privilege*



Brief History of the MJP Debate

- Clients' needs and attorneys' practices more frequently crossing state lines
- California Supreme Court's 1998 *Birbrower* decision
- ABA Commission on Multijurisdictional Practice
 - Appointed in July 2000
 - Recommendations issued and adopted by the ABA in 2002



Brief History of the MJP Debate

- Model Rule amendments adopted
 - Rule 5.5 amended to relax the previously existing constraints on cross-border practices
 - Rule 8.5 amended to subject lawyers providing legal services in a state to the disciplinary authority of that state



How Unauthorized Practice of Law Issues Arise

- Out-of-State Attorneys
 - Opposing Counsel
 - Disgruntled Clients
 - State Bar
 - Licensing Proceedings
- In-house Counsel
 - Lower priority for regulators than non-attorneys



Overview of the Law

- *General Rule*
 - o Rule 5.5 Unauthorized Practice of Law;
Multijurisdictional Practice of Law
 - 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.
 - b. A lawyer who is not admitted to practice in this jurisdiction shall not:
 - (1) except as authorized by these Rules or other law, 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.



Overview of the Law

- *Exception to the general rule for in-house counsel*
 - M.R. 5.5(d)(1). A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that: are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission;...



Overview of the law

- 14 States have adopted Model Rule 5.5 as proposed
 - Alaska, Arkansas, Illinois, Indiana, Iowa, Maryland, Massachusetts, Nebraska, New Hampshire, Oregon, Rhode Island, Utah, Vermont, and Washington
- 28 states and the District of Columbia have adopted a version of Model Rule 5.5



Overview of the Law

- 8 states have not adopted the revised Model Rule 5.5 or a version of it
 - Hawaii, Kansas, Michigan, Mississippi, Montana, New York, Texas, and West Virginia
 - Kansas and Michigan allow in-house counsel to practice upon registration
 - Texas has a policy that allows in-house counsel to practice as long as they are licensed and in good standing in another state
 - New York statute and case law generally applies unauthorized practice of law statutes to lawyers with a permanent presence in New York



Why do states have an in-house counsel exception?

- Serves the interests of the employer
- Presumed to be limited risk to employer



Goals of the Presentation

- Provide a framework for analyzing the multijurisdictional practice of law regulatory process
- Provide you with resources to aid in determining other states' multijurisdictional practice laws



The Process: Preliminary Questions

- Are you licensed and in good standing in at least one jurisdiction?
- Are you in good standing in all of the jurisdictions in which you are licensed?
 - Not suspended or disbarred



The Process: What questions do you need to ask?

- Step 1: Does your state have an in-house counsel exception to the unauthorized practice of law prohibition?
- Step 2: Do you qualify as in-house counsel under such an exception?
- Step 3: If there is an in-house counsel exception, is the scope of practice for in-house counsel limited?
- Step 4: If the scope of practice is limited, can in-house counsel apply for pro-hac vice admission?
- Step 5: When is a lawyer doing something that requires pro hac vice admission?
- Step 6: Does your state have a registration requirement for in-house counsel?



Step 1: Does your state have an in-house counsel exception?

- Five states have not adopted a version of amended Model Rule 5.5 or an in-house counsel registration rule
 - Hawaii, Mississippi, Montana, New York, and West Virginia
- Several other states that have adopted a version of amended Model Rule 5.5, have not adopted the in-house counsel exception
 - Florida, Louisiana, Minnesota
 - These states do allow in-house counsel to practice upon registration



Step 2: Does the state's rule classify you as an in-house counsel?

- Exclusivity of Practice
- Qualified Employers
 - o California: The employer must employ at least 10 people or have at least one lawyer registered in CA.
 - o Missouri: The employer must be a “corporation, its subsidiaries or affiliates; an association; a business; or a governmental entity” and the business must consist of “activities other than the practice of law or the provision of legal services”



Step 3: Is the scope of practice for in-house counsel limited?

- *Limited:*
 - California: In-house counsel are not permitted to make court appearances in California state courts or do anything else for which pro hac vice admission is required
 - North Carolina: In-house counsel are permitted to provide legal services for which pro hac vice admission is not required
- *Broad/Unlimited:*
 - Missouri: In-house counsel can do anything a lawyer licensed in Missouri can do
 - Colorado: In-house counsel has authority to do anything as if licensed in Colorado.



Step 4: Can in-house counsel apply for pro-hac vice admission?

- *Non-Residency Requirement:*
 - General rule is that states reserve pro hac vice admission for out-of-state residents
 - California: A lawyer is not eligible to apply for pro hac vice admission if he is a resident of California, is regularly employed in the state of California or is regularly engaged in substantial business, professional or other activities in California
 - North Carolina: Pro hac vice admission is only available for attorneys domiciled in another state
 - Colorado: Those applying for pro hac vice admission cannot be domiciled in Colorado or have a place of regular practice in Colorado



Step 4: Can in-house counsel apply for pro-hac vice admission?

- *Repeated Appearances:*

- o California: Absent special circumstances, repeated appearances pro hac vice by a lawyer are a cause for denial of application¹

- *Suspension of License:*

- o General Rule: suspension or disbarment by any court will generally prevent a lawyer from being granted pro hac vice admission
 - California: A lawyer cannot be suspended or disbarred by any court
 - Missouri: Cannot apply if under suspension or disbarment by the highest court in any state

- ¹2009 California Rules of Court, Rule 9.40(b)



Step 4: Can in-house counsel apply for pro-hac vice admission?

- *Local Counsel:*
 - o General Rule: An out-of-state lawyer must associate local counsel to be the attorney of record
- *Fees*
 - o California: Must pay “reasonable fee” (as set by Bar of Governors of State Bar of California), not to exceed \$50
 - o North Carolina: \$25/\$200
 - o Missouri: \$100. The fee is not refunded if the judge does not allow the attorney to appear
 - o Colorado: \$250
- *Reciprocity*
 - o North Carolina: Can only apply for pro hac vice admission if licensed in a state that allows NC lawyers to apply for pro hac vice admission



Step 4: Can in-house counsel apply for pro-hac vice admission?

- *Familiarity with State's Laws, Rules of Practice and Disciplinary Jurisdiction*
 - o General Rule: The lawyer must be familiar with the laws of the state in which the lawyer is making the pro hac vice appearance, even though the lawyer is not admitted to that state's bar. Additionally, the lawyer is subject to disciplinary action in the state²

² 2009 California Rules of Court, Rule 9.40(f), Missouri Supreme Court Rules 9.03 (2004), C.R.C.P, Colorado 221(7) (2003)



Step 5: When is a lawyer doing something that requires pro hac vice admission?

- *Federal Courts and State Courts*
 - Admission pro hac vice requirements are governed by the rules of each state or federal court
 - Generally, appearances in court require pro hac vice admission for out-of-state lawyers
 - Federal courts have requirements that may differ from the state court rules
 - Arbitration and Mediation: Whether a particular forum requires pro hac admission for arbitration or mediation depends on local rules



Step 5: When is a lawyer doing something that requires pro hac vice admission?

- California:
 - Out-of-State Attorney Arbitration Counsel Program³
 - No mention of mediation
- Missouri:
 - “Each case in each court or administrative tribunal in which the attorney seeks to appear”
- New York: Permits transitory practice by attorneys licensed elsewhere when such practice arises from representation of a client in the jurisdiction where the lawyer is licensed.
- North Carolina: Pro Hac Vice admission required for
 - Any civil or criminal legal proceeding pending in the General Court of Justice of North Carolina
 - NC Utilities Commission, Industrial Commission, Office of Administrative Hearings of NC or any administrative agency⁴
 - Court ordered mediation or arbitration

³ Cal. Code Civ. Pro. § 1282.4; Cal. Ct. Rule 983.4

⁴ N.C.G.S.A. § 84-4.1

⁵ Missouri Supreme Court Rules 6.01 (m)



Step 6: In-House Counsel Registration Rule

- *31 states have an in-house counsel registration requirement*

Alabama, Arizona, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Virginia, and Wisconsin



Step 6: In-House Counsel Registration Rule

- ABA has recommended a Model Rule for Registration.
 - Not formally adopted or law in any state, but provides guidelines on what rule could look like
 - 180 days from the commencement as in-house counsel.
 - Failure to register could lead to the lawyer being ineligible for admission on motion.



Step 6: In-House Counsel Registration Rule

- General Rule on Residency
 - Must be a resident of the state in which registering
- California: Rule 9.46 of California Rules of Court
 - Pay \$991 to register
 - 25 CLE hours in first year, 25 hours every three years after
 - Annual Registration: \$390
 - Must register within six months of the start of employment, otherwise application might be denied



Step 6: In-House Counsel Registration Rule

- Colorado: Rule 222, Single Client Counsel Certification
 - o Pay \$725 to register
 - o 45 CLE hours in three years
 - o Annual Registration \$225
 - o No specified deadline as to when to apply or penalties for applying late



Step 6: In-House Counsel Registration Rule

- Missouri: Supreme Court Rules 8.105
 - o Pay \$1,240 to register
 - o 15 CLE hours per year
 - o Annual Registration \$305
 - o No specified deadline to apply



Practicing in states in which not a resident: Hypothetical

- Lawyer lives in state 1
- Licensed in state 2
- Wants to practice law in a state 3
 - o What to do?
 - o Look at State 3's law



The Process

- Step 1: Does state 3 have an in-house counsel exception to its unauthorized practice of law prohibition?
- Step 2: Does the lawyer qualify as in-house counsel under such an exception?
- Step 3: If there is an in-house counsel exception, does state 3 grant unlimited authority to the lawyer or just authority for non-pro hac vice activities?
- Step 4: If the lawyer is doing something for which pro hac vice admission is required, can the lawyer apply for pro hac vice admission?
 - Likely yes, since the lawyer is an out-of-state resident.
- Step 5: Does the out-of-state lawyer have to register as in-house counsel with the state bar?
 - Likely no, since registration requirements typically apply to in-state residents.



Multijurisdictional Rules Applicable to All Lawyers

- Model Rule 5.5(c): A lawyer admitted in another U.S. 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 reasonably related to pending or potential proceeding before a tribunal, and lawyer expects to be authorized to appear before a tribunal or is assisted by someone who is authorized to appear
 - (3) are reasonably related to pending or potential arbitration or mediation if the services arise out of or are reasonably related to lawyer's practice in a jurisdiction in which lawyer is admitted
 - (4) arise out of or are reasonably related to lawyer's practice in a jurisdiction in which the lawyer is admitted
- Most states have some version of this rule



New York

- No exception for in-house counsel
- The Appellate Division adopted new rules of professional conduct in April 2009, despite recommendations from the state bar, no exception for in-house counsel was included
 - Out of deference to statutes in the New York Code regarding unauthorized practice of law and case law interpreting them
- A lawyer resident in NY cannot practice law in NY without a New York license or pro hac vice admission and the lawyer cannot register as in-house counsel
- In-house counsel practicing in New York without a New York license or pro hac vice admission may be engaged in the unauthorized practice of law
 - If you are unsure, check with local bar counsel



New York – Pro Hac Vice Admission

- NY requires pro hac vice admission, which is granted “in the discretion of any court of record to participate in any matter in which the attorney is employed”⁶
 - Must associate local counsel for the duration of pre-trial or trial proceedings
 - No non-resident requirement; in-house counsel living in NY can apply for pro hac vice admission, unlike in North Carolina and California

⁶ § 520.11 Admission Pro Hac Vice, PART 520. RULES OF THE COURT OF APPEALS FOR THE ADMISSION OF ATTORNEYS AND COUNSELORS AT LAW



Summary

- If the scope of the in-house counsel exception is limited to activities for which pro hac vice admission is not required, and pro hac vice admission is limited to out-of-state residents, resident in-house counsel will be prohibited from pro hac vice activities in the state
- An out-of-state lawyer may be prohibited from doing non-pro hac vice activities in a state in which he is not licensed unless the lawyer is practicing law in a state that has a version of Rule 5.5(c) or 5.5(d)(1) for in-house counsel, or the state provides an exception by statute and the lawyer's practice meets one of those exceptions



Helpful Websites

- **Association of Corporate Counsel:**
<http://www.acc.com/advocacy/keyissues/mjp.cfm>
- **American Bar Association :**
<http://www.abanet.org/cpr/mjp/home.html>
 - o Links to reports and updated on MJP rules
 - o Keeps track of each state's developments with respect to multijurisdictional practice



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