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Ethics in the Multijurisdictional Practice of Admiralty Lawyers

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Abstract

In June 2002 the Commission on Multijurisdictional Practice of the American Bar Association (“ABA”) issued a report which covered a wide range of subjects including state judicial regulation and discipline of lawyers, the special problems of large firms moving lawyers around to work in branch offices, the use of in-house counsel not licensed in the state where they work, the particular problems of federal government and military lawyers practicing as part of their official duties in states where they are not licensed, as well as model rules for admission to practice on motion, for licensing of foreign legal consultants, and for admission pro hac vice in lawsuits. The focus of this Essay, however, is limited to just the activities which admiralty lawyers—and many other international lawyers—routinely engage in, which could be regarded by some courts or licensing authorities as the unauthorized practice of law. (P) ‘In general, a lawyer may not represent clients in court, or otherwise practice law within a particular state, unless the lawyer is licensed by the state to do so. By limiting law practice to those whom the state judiciary, through its admissions process, has deemed to be qualified to practice law in the state, a state government tries to ensure that lawyers who act on behalf of or give advice to clients in the state are competent and do so ethically. States give effect to restrictions through rules of professional conduct, which subject lawyers to the risk of sanction (in some states, criminal sanction) for practicing law within a state where they are not licensed, by treating such lawyers the same as laymen. Needless to say, a lawyer found by out-of-state authorities to have engaged in the unauthorized practice of law will also have many problems at home. (P) Today, every jurisdiction permits pro hac vice admission of out-of-state lawyers appearing in court or before some other tribunal/ But for transactional and counseling work, and other activities—including work done prior to commencement of a formal proceeding—there is no counterpart to pro hac vice admission.

ARTICLES

ETHICS IN THE MULTIJURISDICTIONAL PRACTICE OF ADMIRALTY LAWYERS

*Michael Marks Cohen**

In June 2002 the Commission on Multijurisdictional Practice of the American Bar Association (“ABA”) issued a report which covered a wide range of subjects including state judicial regulation and discipline of lawyers, the special problems of large firms moving lawyers around to work in branch offices, the use of in-house counsel not licensed in the state where they work, the particular problems of federal government and military lawyers practicing as part of their official duties in states where they are not licensed, as well as model rules for admission to practice on motion, for licensing of foreign legal consultants, and for admission *pro hac vice* in lawsuits.¹ The focus of this Essay, however, is limited to just the activities which admiralty lawyers—and many other international lawyers—routinely engage in, which could be regarded by some courts or licensing authorities as the unauthorized practice of law.

In general, a lawyer may not represent clients in court, or otherwise practice law within a particular state, unless the lawyer is licensed by the state to do so. By limiting law practice to those whom the state judiciary, through its admissions process, has deemed to be qualified to practice law in the state, a state government tries to ensure that lawyers who act on behalf of or give advice to clients in the state are competent and do so ethically.

States give effect to restrictions through rules of professional conduct, which subject lawyers to the risk of sanction (in some states, criminal sanction) for practicing law within a state where they are not licensed, by treating such lawyers the same as

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1. See generally ABA COMM’N ON MULTIJURISDICTIONAL PRACTICE, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE (2002), available at http://www.abanet.org/cpr/mjp/final_mjp_rpt_5-17.pdf.

laymen.² Needless to say, a lawyer found by out-of-state authorities to have engaged in the unauthorized practice of law will also have many problems at home. First, out-of state disciplinary proceedings are often given reciprocity in the state where the lawyer maintains his office. Next, the premiums for the firm's professional liability insurance could be expected to rise. In addition, the lawyer—and perhaps even the firm—are unlikely to be rated highly thereafter by Martindale, Chambers, Super Lawyers, or the Best Lawyers in America. Last but not least, the lawyer may well not be paid his fees and become unable to sue the client for them; or the client, otherwise entitled to reimbursement of attorneys fees under local law, may not be able to recover them from a losing party.

Today, every jurisdiction permits *pro hac vice* admission of out-of-state lawyers appearing in court or before some other tribunal. But for transactional and counseling work, and other activities—including work done prior to commencement of a formal proceeding—there is no counterpart to *pro hac vice* admission.

Neither the 1908 ABA Canons of Professional Ethics, nor the earlier 1877 Alabama Code of Ethics, addressed the issue at all of the unauthorized practice of law by out-of-state attorneys. Virtually every Proctor Member of the Maritime Law Association (“MLA”), since it was formed in 1899, and many international lawyers have engaged in multijurisdictional practice. But it did not become highly visible in the rest of the bar until after World War II when a number of federal law specialties emerged, like tax, immigration, customs, international trade, government procurement, antitrust, banking, collective bargaining, and federal securities laws.

The first reference to multijurisdictional practice appeared in the 1970 Code of Professional Responsibility, with its Canons, Ethical Considerations, and Disciplinary Rules (“Code”). New York lawyers will be familiar with the Code because until later this year, alone among the fifty states, a version of it will still be in force in New York. Disciplinary Rule 3-101(B) of the Code provides only that a lawyer shall not “practice law in a jurisdic-

2. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1, 7 (Cal. 1998); see generally William T. Barker, *Extrajudicial Practice by Lawyers*, 56 *BUSINESS L.* 1501 (2001).

tion where doing so violates the regulation of the legal profession in that jurisdiction.”³ But this rather stark wording is somewhat softened by Ethical Consideration 3-9 which notes:

However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by the states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of a client or upon the opportunity of a client to obtain the services of a lawyer of the client’s choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.⁴

In 1983 the ABA issued, as a replacement for the Code, Model Rules of Professional Conduct (“Model Rules”), versions of which have been adopted by forty-eight states.⁵ The ABA maintains a website of state rules and regulations on this subject.⁶

Model Rule 5.5(a), widely copied and still in force in many of the states, was supposed to be an improvement over the Code. But it reverts just to the admonition that a lawyer shall not “practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.”⁷ The “official” ABA comments to Model Rule 5.5 make no reference whatsoever to the difficulties posed by multijurisdictional practice that were included in Ethical Consideration 3-9 of the Code.⁸

The Model Rules have been amended a number of times, most recently, for present purposes, in 2003 with new provisions in Rule 5.5(c) to govern multijurisdictional practice (“2003

3. MODEL CODE OF PROF’L RESPONSIBILITY DR 3-101(B) (1970).

4. MODEL CODE OF PROF’L RESPONSIBILITY EC 3-9 (1970).

5. The Code comes into force in New York in 2009. *See generally* Joel Stashenko, *N.Y. Adopts New Conduct Rules Aligned with ABA Model*, N.Y.L.J., Dec. 17, 2008, available at <http://www.law.com/jsp/article.jsp?id=1202426814836#>. Maine and California follow neither the Model Code of Professional Responsibility nor the Model Rules of Professional Conduct. *See* COMM. ON PROF’L RESPONSIBILITY, NEW YORK CITY BAR, REPORT OF SUBCOMMITTEE ON STANDARDS OF ATTORNEY CONDUCT: FORMAT CHANGE 2 (Nov. 22, 2005), available at www.abcny.org/pdf/report/Standards_of_Atty_Conduct.pdf.

6. *See generally* Am. Bar Ass’n, Ctr. for Prof’l Responsibility, Links to Other Legal Ethics and Prof’l Responsibility Pages, <http://www.abanet.org/cpr/links.html> (last visited Feb. 5, 2009).

7. MODEL RULES OF PROF’L CONDUCT R. 5.5(a) (1983).

8. MODEL RULES OF PROF’L CONDUCT R. 5.5(a) cmts. 1-21 (1983).

Amendments”). A number of states have already adopted the 2003 Amendments.⁹ A few, including New York, have rejected them.¹⁰

A threshold issue for a discussion about ethics in multijurisdictional practice is whether a lawyer has been engaged in the practice of law at all. Representing a client in a court of law is the starting point. Drafting documents for filing in a lawsuit. Taking depositions. Drafting a will for someone else. Giving legal advice. All of these activities have at one time or another been treated as the practice of law. One court, however, focused on whether the out-of-state lawyer held “himself out to the public as an attorney engaged in the general practice of law.”¹¹ Another court concentrated instead on whether there was “insulation of the unlicensed person from the public and from tribunals” in deciding that a lawyer not admitted to the bar had not practiced law by acting solely as a consultant and giving his advice or results of his research just to other lawyers, never meeting clients nor appearing in court.¹²

There are seven groups of cases that involved lawyers licensed only in their home state where they had their office (“out-of-state lawyer”) who gave advice, or engaged in activities traditionally regarded as practicing law, in a second state where they were not licensed. In the first group were out-of-state lawyers each of whom actually opened an office in the second state to counsel clients residing there about the law of his home state, or maybe just federal law. A lawyer who opens an office in a state where he is not admitted to the bar is never authorized to do so by the second state.¹³ The issue is not malpractice—i.e., whether the advice is sound—but rather whether he holds himself out as

9. Indiana, Iowa, New Hampshire, Ohio, Oklahoma, Oregon, and South Carolina, to name the most recent ones. See generally Am. Bar Ass’n, Ctr. for Prof’l Responsibility, Links to Other Legal Ethics and Prof’l Responsibility Pages, <http://www.abanet.org/cpr/links.html> (last visited Feb. 5, 2009).

10. Montana, New Mexico, and New York. See generally Am. Bar Ass’n, Ctr. for Prof’l Responsibility, Links to Other Legal Ethics and Prof’l Responsibility Pages, <http://www.abanet.org/cpr/links.html> (last visited Feb. 5, 2009). The failure of New York to adopt the 2003 Amendments is especially distressing because it means, among other things, that the salutary wording of Ethical Consideration 3-9 will no longer apply.

11. *Somuah v. Flachs*, 721 A.2d 680, 690 (Md. 1998) (quoting *Kennedy v. Bar Ass’n*, 561 A.2d 200 (Md. 1989)).

12. *In re R.G.S.*, 541 A.2d 977, 983 (Md. 1988) (citing *Lukas v. Bar Ass’n*, 371 A.2d 669, 671 (Md. 1977)).

13. See generally *Cleveland Bar Ass’n v. Misch*, 695 N.E.2d 244 (Ohio 1998); Ken-

qualified to give such advice at all, even if it is sound. The local bar authorities usually take action against laymen who pretend to be lawyers or who draft wills. But sometimes the local bar will move against lawyers who are not licensed by the state in which they maintain their office.

There is one major exception. Since the federal government itself licenses laymen to represent clients in administrative proceedings before the Internal Revenue Service, Securities Exchange Commission, Patent Office, and Customs, lawyers who are authorized to appear in such proceedings but are not licensed by a state, may nonetheless hang out a shingle there and openly maintain a practice devoted exclusively to those administrative proceedings.¹⁴

Regrettably, the principle does not stretch to cover general litigation practice of a federal specialty like admiralty. Although the federal courts have their own bars to which out-of-state lawyers are routinely admitted, and state authorities acknowledge that they lack power to prevent out-of-state attorneys from repre-

nedy v. Bar Ass'n, 561 A.2d 200 (Md. 1989); Ginsburg v. Kovrak, 139 A.2d 889 (Pa. 1958).

An effort to camouflage such an office in which the out-of-state lawyer worked, by creating the illusion that he was merely a correspondent of a properly licensed lawyer who was also sometimes present in the office, was unsuccessful. See *Cleveland Bar Ass'n*, 695 N.E.2d at 247; *Lozoff v. Shore Heights*, 362 N.E.2d 1047, 1048 (Ill. 1977).

In a very recent case a former Texas judge living in Texas was appointed as one of three arbitrators to sit in a Texas arbitration under a contract governed by Texas law. In considering an application to vacate the award, a Texas court ruled that a valid cause of action was pleaded which alleged that the judge had impliedly misrepresented himself as a member of the Texas bar. See *Roehrs v. FSI Holdings*, 246 S.W.3d 796, 810-12 (Tex. 2008).

For a case involving admiralty lawyers who failed to register as a law corporation, which was a requirement under local law, and thereby lacked standing to sue other admiralty lawyers for alleged unethical solicitation of clients, see *Cappiello Hofmann & Katz v. Boyle*, 105 Cal. Rptr. 2d 147, 152 (Cal. App. 1st Dist. 2001).

14. *Sperry v. Florida*, 373 U.S. 379, 388, 399 (1963).

In re R.G.S., involved a professor of law at a Maryland law school who lived in Maryland but was not a member of the Maryland bar. See *In re R.G.S.*, 541 A.2d at 978. He became of counsel to a Maryland law firm, but he did research and gave advice only to the Maryland lawyers in the firm. See *id.* at 980. He did not argue in court; nor meet with clients. See *id.* The court held he had not practiced law at all, treating him somewhat similarly to a first year associate before passing the bar exam and being sworn in. See *id.* at 984. In a curious twist, while such activities were not regarded as the unauthorized practice of law, they were treated as sufficient experience in the practice of law to allow the professor to take an abbreviated bar exam for admission to the Maryland bar. See *id.* at 981.

senting clients in a federal court,¹⁵ it is clear that each state may prevent such out-of-state attorneys from opening an office to interact with their clients in the state, even if they devote themselves strictly to such federal practice.¹⁶

Nor has the principle been widely applied, beyond federal administrative agency proceedings, to permit opening an office devoted to practice in other areas of law, federal or state, in which laymen are authorized to represent clients. For example, in labor, maritime, insurance, and commodities arbitrations, some jurisdictions recognize that laymen may act as advocates in such proceedings.¹⁷ In transactional work, it is not uncommon for lay shipbrokers to draft charter parties, lay insurance brokers to draft marine insurance riders, lay accountants to give tax advice, and lay financial planners to structure estates. But with rare exception U.S. courts have not hesitated to find out-of-state attorneys engaged in the unauthorized practice of law when the defense was made that they should be permitted to act because laymen are allowed to engage in the same activities.¹⁸

Often in this particular group of cases, the proceedings are initiated by the local bar licensing authorities. But otherwise hardly any unauthorized practice cases arise in the context of disciplinary or criminal proceedings. Virtually all of the others are suits by a lawyer to collect his fees from the client (which may

15. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1, 6 (Cal. 1998).

16. *Cleveland Bar Ass'n*, 695 N.E.2d at 247; *Kennedy*, 561 A.2d at 208; *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 171 (2d Cir. 1966) (en banc).

17. *Prudential Equity Group v. Ajamie*, 538 F. Supp. 2d 605, 608 (S.D.N.Y. 2008); *Williamson v. John D. Quinn Constr. Corp.*, 537 F. Supp. 613, 616 (S.D.N.Y. 1982).

Indeed, the arbitration rules of some trade arbitration organizations in New York used to provide that lawyers could not appear at hearings. The restriction was the reason New York enacted a statute giving a party an unwaivable right to be represented by an attorney in an arbitration. See N.Y.C.P.L.R. 7506(d) (McKinney 2008).

Particularly in commodities arbitrations, lawyers are tolerated but not necessarily welcomed. Sometimes they are told they may speak to the clients during the proceedings but they have no right of audience and may not address the arbitrators; only the clients can make arguments to the arbitrators. *But see Mikel v. Scharf*, 444 N.Y.S.2d 690, 691 (N.Y. App. Div. 1981).

There are a number of commodities organizations in London which still bar lawyers from arbitral proceedings altogether. See, e.g., *BRITISH COFFEE ASS'N ARBITRATION RULES R. 26* (2008).

18. See *Cleveland Bar Ass'n*, 695 N.E.2d at 247; cf. *Birbrower*, 949 P.2d at 18 (Kennard, J., dissenting). *But see Prudential Equity Group*, 538 F. Supp. 2d at 608; *Williamson*, 537 F. Supp. at 616.

well generate counterclaims for malpractice); or, sometimes, efforts by the lawyer to collect an award of attorneys' fees on behalf of the client as a prevailing party in a proceeding where the lawyer represented it. The cases where the lawyer is permitted to recover his fees often betray a very strained quality in the courts' efforts to avoid injustice.¹⁹ Characteristically, in these cases there are a great number of reversals on multiple levels of appeal by closely divided appellate courts.

In the second group of cases the out-of-state lawyer travels to a second state, to counsel clients residing there about the laws of his home state or federal law. Whether an out-of-state lawyer is competent, or is acting ethically, when physically present in a state and giving advice to residents there about the law of another state or federal law, constitutes a form of practicing law in the second state.²⁰ States may feel a particular sensitivity to the activities by an out-of-state lawyer in connection with advertising his services, or a moratorium on solicitation of clients, after a major disaster. There does not appear to be any instances of proceedings brought by local bar licensing authorities. But sometimes efforts have been made to deny lawyers payment of their fees.²¹

This is certainly true in a third group of cases where the out-of-state lawyer travels to a second state, to counsel clients residing there about the law of the second state in which he believes he has special expertise. For admiralty lawyers this situation could arise in matters governed by state law, such as ship construction, ship sale, marine insurance, ship brokerage, insurance brokerage, pilotage, oil pollution, the doctrine of laches, Outer Continental Shelf Act cases, personal injury claims arising in state territorial waters, and even whether to commence a Jones Act suit in state court which cannot be removed to a federal court. There are decisions, some in the highest state courts, where fees in this type of cases have been denied.²²

In a fourth group of cases the out-of-state lawyer travels to

19. See generally *In re Estate of Waring*, 221 A.2d 193 (N.J. 1966); *Appell v. Reiner*, 204 A.2d 146 (N.J. 1964).

20. *In re R.G.S.*, 541 A.2d 977, 981 (Md. 1988).

21. See, e.g., *Ginsburg v. Fahrney*, 258 N.Y.S.2d 43, 44 (N.Y. Sup. Ct. 1965).

22. See, e.g., *Spivak v. Sachs*, 211 N.E.2d 329, 330-31 (N.Y. 1965); *Ranta v. McCarney*, 391 N.W.2d 161, 166 (N.D. 1986); *Taft v. Amsel*, 180 A.2d 756, 757 (Conn. Super. 1962).

the second state to conduct an investigation or formal discovery, in connection with a proceeding outside the second state. There do not appear to be any reported cases in which a lawyer has been denied his fees for taking such actions.

But the antipathy of some foreign countries to U.S. lawyers conducting discovery abroad is very well known.²³ Moreover, while the need for work permits does not arise domestically for U.S. citizens traveling from one state to another, it certainly is a live issue when they go to a foreign country. Every country, including our own, prohibits engaging in paid employment after entry into the country on just a tourist visa. There are also foreign blocking statutes which prohibit foreign nationals from disclosing documents, even when U.S. courts require them to be disclosed on pain of default. It is not inconceivable that a client resident in a foreign country might resist paying fees incurred during depositions there on the ground that the lawyer's actions constituted the unauthorized practice of law. Indeed, in a foreign lawsuit or arbitration, a losing party might well object to including such fees in any recovery of legal costs by the prevailing party.

In a fifth group of cases the out-of-state lawyer travels to the second state to conduct an investigation or formal discovery, in connection with a proceeding in the second state, or to testify as an expert in such a proceeding or to lecture at a Continuous Legal Education ("CLE") program,²⁴ or to participate in an arbitration, or to sit second chair in a proceeding without seeking admission *pro hac vice*. The most famous case in this category is the 1998 decision of the Supreme Court of California in *Birbrower, Montalbano, Condon & Frank v. Superior Court*,²⁵ which became the catalyst for the 2003 Amendments. In that case New York lawyers traveled to California to assist a California client in

23. For example in 2003, when responding to a questionnaire of the Hague Conference on Private International Law about the Hague Evidence Convention, the German Government singled out for criticism the practice of American lawyers who took depositions of voluntary witnesses in Germany, noting that since such depositions are "conducted without the knowledge of German judicial authorities, this constitutes a violation of German jurisdictional competency." Hague Conference on International Law, Response of Germany to Evidence Questionnaire, 2 (2003), available at http://www.hcch.net/index_en.php?act=publications.details&pid=3060&dtid=33.

24. At least one court has held that teaching is not the practice of law. See *In re R.G.S.*, 541 A.2d at 984 n.5.

25. 949 P.2d 1 (Cal. 1998).

a dispute against another company doing business in California.²⁶ The dispute was subject to arbitration in California under California law.²⁷ The New York lawyers advised their client how to proceed, filed a demand on its behalf for arbitration in California, and conducted negotiations with the other side in California which resulted in a settlement.²⁸ Months later the client sued the New York lawyers in California for malpractice and they counterclaimed for their fees.²⁹ The California Supreme Court emphasized that the New York lawyers had advised a California client about a dispute against another California entity which was subject to arbitration in California under California law and were physically present in California when they provided legal services to the client there.³⁰ Partial summary judgment, denying any fees to the New York lawyers for the services they physically provided in California, was affirmed.³¹ In response to criticism of the decision, especially by arbitration organizations, California later changed its rules to permit out-of-state lawyers to represent parties in all arbitrations.³²

Spanos v. Skouras Theatres Corp. involved an out-of-state prominent federal antitrust lawyer who moved into a New York hotel for a considerable period in order to counsel a New York client, and to sit in on a large antitrust suit which was started in New York.³³ He never addressed the court, nor moved for admission *pro hac vice*.³⁴ In a short, tortured opinion, which Judge Henry Friendly wrote, the Second Circuit sitting *en banc*, held that the local New York lawyers should have moved for the out-of-state lawyer's admission *pro hac vice* (even though he never requested it), and had they done so, the authority to practice thereby granted to him for court appearances would also have covered his activities in New York even before the suit was

26. *See id.* at 3.

27. *See id.*

28. *See id.*

29. *See id.* at 4.

30. *See id.* at 7.

31. *See id.* at 13.

32. *See generally* CAL. R. CT. 9.48 (West 2009) (non-litigation matters).

33. *See Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 163-64 (2d Cir. 1966) (en banc).

34. *See id.* at 166-67.

started.³⁵ The failure of duty of the local lawyers was imputed to the client who therefore had to pay the out-of-state lawyer's fees.³⁶

In a sixth group of cases the lawyer remains at home and from his office electronically provides services to clients residing in a second state, in connection with events outside the second state. In the *Birbrower* case, the court regarded the legislative purpose of the California rules as generally not directed at "those services an out-of-state firm renders in its home state" and remanded for a trial court determination about such services by the New York lawyers from their office in New York to the California client.³⁷

In a very thoughtful recent law review article, Martin Davies proposed, as a way of getting around the awkward procedures of the Hague Evidence Convention that testimony abroad be taken by live video.³⁸ But the German authorities for example, might well regard such live video testimonies taken by Louisiana lawyers from German witnesses as an affront to German sovereignty.

In the seventh group of cases the lawyer stays at home and from his office electronically counsels clients residing in a second state about federal law or the laws of the second state in connection with events in the second state. In *Birbrower*, the Supreme Court of California observed that physical presence is only "one factor" in considering whether an out-of-state lawyer had engaged in unauthorized practice of law, suggesting that acting out-of-state by "advising a California client on California law in connection with a California legal dispute by telephone, fax, e-mail, or satellite" might transgress the California rules of practice.³⁹ While it is unlikely a local bar authority would bring on a proceeding for such activities, it is not surprising that the client in a second state might resist payment of the out-of-state lawyer's fee.⁴⁰

35. *See id.* at 169. *But see In re Ferrey*, 774 A.2d 62, 63, 65 (R.I. 2001) (admission *pro hac vice* is not *nunc pro tunc*).

36. *See Spanos*, 364 F.2d at 171.

37. *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1, 2, 11 (Cal. 1998).

38. *See generally* M. Davies, *Bypassing the Hague Convention*, 55 AM. J. COMP. L. 205 (2007).

39. *Birbrower*, 949 P.2d at 5-6.

40. *Cf. Fischbarg v. Doucet*, 880 N.E.2d 22, 30 (N.Y. 2007) (New York court had long-arm jurisdiction over out-of-state client of New York lawyer who was admitted *pro*

The 2003 Amendments to Rule 5.5(c) of the ABA Model Rules (attached as Appendix I to this Essay), reduces the risk of a finding of unauthorized practice of law in some but not all of these categories of cases.

I. *FIRST CATEGORY OF CASES: OPENING AN OFFICE
IN THE SECOND STATE.*

No change. Indeed Rule 5.5(b)(1) specifically prohibits an out-of-state lawyer to “establish an office or other systematic and continuous presence” in the second state.⁴¹ Although an argument can be made that there is not much difference between an out-of-state lawyer who opens an office in the second state, and an out-of-state lawyer who only travels there, other organizations besides the ABA draw a distinction between the two. The *Restatement of the Law Governing Lawyers* (“*Restatement*”) asserts that “there is much to be said for a rule permitting a lawyer to practice in any state,”⁴² noting that it might even be constitutionally required by the Interstate Commerce or Privileges and Immunities clauses.⁴³ But the *Restatement* excludes from its approval of activities by out-of-state lawyers both advocacy before local courts and “establishing a permanent in-state branch office.”⁴⁴ The International Bar Association (“IBA”) makes clear that it approves of visits by foreign lawyers to counsel clients in second countries, but without establishing “an office or other systematic and continuous presence in the jurisdiction.”⁴⁵

II. *SECOND CATEGORY OF CASES: TRAVEL TO THE SECOND
STATE NOT IN CONNECTION WITH POSSIBLE LITIGATION,
BUT SIMPLY TO COUNSEL THE CLIENT THERE ABOUT LAW
OTHER THAN THE LAW OF THE SECOND STATE.*

Rule 5.5(c)(4) authorizes such activities if they are “reasona-

hac vice in Oregon and represented client in Oregon litigation, while performing all of his services in New York).

41. MODEL RULES OF PROF'L CONDUCT R. 5.5(b)(1) (1983) (amended 2003).

42. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (2000).

43. See *Spanos v. Skouras Theatres Corp.*, 364 F.2d 161, 170 (2d Cir. 1966) (en banc).

44. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (2000).

45. INT'L BAR ASS'N, SECTION ON BUSINESS LAW, TASK FORCE ON INTERNATIONAL MULTIJURISDICTIONAL COMMERCIAL PRACTICE, RECOMMENDATIONS FOR TEMPORARY CROSS-BORDER COMMERCIAL PRACTICE 4 (2004) [hereinafter IBA, RECOMMENDATIONS] (available from the International Bar Association at iba@int-bar.org, Attention: Press Office).

bly related to the lawyer's representation of an *existing* client in a jurisdiction *in which the lawyer is admitted to practice*.⁴⁶ The *Restatement* allows an out-of-state lawyer to provide services to any client, new or existing, wherever residing, if the lawyer's activities are "reasonably related to the lawyer's practice" in his home state.⁴⁷ The *Restatement* also acknowledges that an out-of-state lawyer may be qualified to advise a client about "the law of another state" even though the lawyer is not licensed to practice in the other state; and, somewhat surprisingly, goes on to comment that there "is no *per se* bar against such a lawyer giving a formal opinion based in whole or in part on the law of another jurisdiction, but a lawyer should do so only if the lawyer has adequate familiarity with the relevant law."⁴⁸

The IBA does not limit counseling to existing clients in the home state, noting that if a foreign lawyer has "expertise in a particular area of law or transaction and has thus acquired a thorough knowledge of the law of another jurisdiction," he should be permitted to give a client in the second country the benefit of his expertise "even if that advice involves the law of a jurisdiction in which the cross-border commercial lawyer is not admitted to practice."⁴⁹

The 2003 Amendments give only very limited relief from the risk of unauthorized practice to lawyers in this group of cases specializing in maritime financing, and to those who draft charter parties, bills of lading, and marine insurance policies. One way around the problem would be for such lawyers to seek the protection of Rule 5.5(c)(1) which authorizes the out-of-state lawyers to engage fully in his practice "in association with a lawyer who is admitted to practice" in the second state, as long as the local lawyer "actively participates in the matter."⁵⁰ It could,

46. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(4) (1983) (amended 2003) (emphasis added). Note that the lawyer is not authorized by this Rule to travel to the second state to counsel a new client resident outside the lawyer's home state even about the law of the lawyer's home state.

47. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (2000).

48. *Id.*

49. IBA, RECOMMENDATIONS, *supra* note 45, at 2. The recommendations do not apply to counseling private individuals about family matters, trust and estates, purchasing a home, or personal taxes.

50. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(1) (1983) (amended 2003).

The *Restatement (Third) of the Law Governing Lawyers* does not favor routine association of a local lawyer with the out-of-state lawyer just for cosmetic reasons, noting that parochial restrictions on such multijurisdictional practice "could seriously inconve-

however, be difficult to stimulate “active participation” of a local lawyer in some aspects of esoteric admiralty counseling.

It is important to remember that the greatest danger to the out-of-state lawyer in this area is not disciplinary or criminal proceedings, which are virtually unheard of. But rather, a failure of the out-of-state lawyer to collect his fees. If the out-of-state lawyer at risk acts prudently to secure a retainer especially from a new client, which the client refreshes from time to time as it becomes depleted, or he is otherwise comfortable about extending credit to a client with whom he has a longstanding relationship, then he may decide to take the risk if only to save the client from having to pay possibly wasteful fees to a local lawyer. But, otherwise, simply associating with a local lawyer probably would be sufficient by itself to insulate the out-of-state lawyer from the risk and would be cheap insurance (since the client rather than the out-of-state lawyer would pay the local lawyer’s fees) against the out-of-state lawyer getting stiffed for his fees.

*III. THIRD CATEGORY OF CASES: TRAVELING TO THE SECOND STATE NOT IN CONNECTION WITH POSSIBLE LITIGATION, BUT SIMPLY TO COUNSEL A CLIENT THERE ABOUT THE LAW OF THE SECOND STATE.*⁵¹

The 2003 Amendments do not authorize this except under Rule 5.5(c)(1), requiring association with a local lawyer who actively participates in the counseling. Such active participation almost certainly could be achieved because the focus is on local law. In addition, the out-of-state lawyer can protect himself further by making sure to disclose to the client that he is not licensed to give formal advice about the law of the second state, and that the client will incur a second set of fees for the local

nience clients who have need of such services” within the second state and that retaining local counsel would “often cause delay and expense and could require the client to deal with unfamiliar counsel.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (2000). By contrast the International Bar Association (“IBA”) urges that the foreign lawyer “should generally consult with” a local lawyer in the second country. *See* IBA, RECOMMENDATIONS, *supra* note 45, at 4.

51. In 2004, two Georgia lawyers were indicted by a North Carolina grand jury for giving legal advice to a North Carolina college, after they conducted an internal investigation on behalf of the school into charges that the school president had manipulated the grades of a basketball player to make him eligible to play. *See* ABA/BNA LAWYER’S MANUAL ON PROFESSIONAL CONDUCT 20:203 (2004).

lawyer.⁵² But, all of the disadvantages of associating with a local lawyer, which are discussed above in connection with Rule 5.5(c)(1), would apply here as well.

IV. *FOURTH CATEGORY OF CASES: TRAVEL TO THE SECOND STATE TO TAKE DEPOSITIONS, INVESTIGATE, OR OTHERWISE CONDUCT DISCOVERY IN CONNECTION WITH POSSIBLE COURT LITIGATION OUTSIDE THE SECOND STATE.*

Rule 5.5(c)(2) allows such activities “if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such a proceeding or reasonably expects to be so authorized.”⁵³ This Rule is so broadly worded—protecting both partners and associates—that an out-of-state lawyer can certainly be comfortable about engaging in such activities in a second state which has adopted the 2003 Amendments. But not all states have. Even so, this is a category of cases in which, even without the 2003 Amendments, domestic cases of a lawyer being stiffed are completely unknown.

If there is a significant potential danger here, it could arise in cross-border voluntary discovery in foreign countries, undertaken outside the Hague Evidence Convention, even when accomplished under authority of a court order here authorizing such discovery abroad as provided in the Federal Rules of Civil Procedure. At the very least, a lawyer expecting to engage in these activities should determine whether the foreign country is hostile to voluntary discovery proceedings. The risks of becoming a target for actions by local authorities complaining about unauthorized practice of law, or the lack of work permits, or violation of a blocking statute, or engaging in employment after entering the country only on a tourist visa, should all be explored. It is almost certainly prudent to associate with a local

52. See *Somuah v. Flachs*, 721 A.2d 680, 690-91 (Md. 1998); see also IBA, RECOMMENDATIONS, *supra* note 45, ¶ 3.3 (if the foreign lawyer gives advice about the law of a jurisdiction in which he is not admitted to practice, “the commercial client should be informed.”). But see *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 949 P.2d 1, 2, 11 (Cal. 1998).

53. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(2) (1983) (amended 2003) (emphasis added). The *Restatement (Third) of the Law Governing Lawyers* likewise sanctions activities of an out-of-state lawyer “in contemplation of” admission *pro hac vice*. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (2000).

foreign lawyer—probably even to take depositions or conduct other discovery, in the foreign lawyer’s offices rather than in a hotel.

An alternative would be to take depositions before a U.S. consul on the grounds of the U.S. Embassy. This last scenario is least likely to expose the lawyer to personal risks. Local complaints would probably be taken up in diplomatic correspondence protesting the use of the embassy for such purposes. But there are precedents in the form of laws and many treaties authorizing consuls to receive marine protests.⁵⁴ Still it might as a practical matter be difficult to free up a consul to preside over long and complicated proceedings.

V. FIFTH CATEGORY OF CASES: TRAVEL TO THE SECOND STATE TO PARTICIPATE IN PROCEEDINGS IN THE SECOND STATE.

Rule 5.5(c)(2) discussed above, which legitimizes pre-litigation activity of an out-of-state lawyer who expects to be admitted *pro hac vice* in the litigation also applies to court proceedings in the second state.⁵⁵ A more limited authorization for arbitration and alternative dispute resolution proceedings, wherever they are expected to be held, appears in Rule 5.5(c)(3), which requires that the out-of-state lawyer’s services be at least “reasonably related to the lawyer’s representation of an *existing* client” in the lawyer’s home state.⁵⁶ The *Restatement* takes a somewhat broader view, focusing on whether the out-of-state lawyer’s activities “arise out of or otherwise reasonably relate to the lawyer’s practice” in his home state, including whether the client is a “regular client” of the lawyer; whether a new client “contacted the lawyer” in his home state; whether there are “significant con-

54. See, e.g., 22 U.S.C. § 4193.

Bilateral Consular Treaties between the United States, France, the Republic of Korea, and Poland go further to provide that U.S. consuls in each of those countries can take evidence “on behalf of” U.S. courts which is “voluntarily given by any person” in those countries. See Consular Convention Between the United States of America and France, U.S.-Fr., art. 30(3), July 18, 1966, 18 U.S.T. 2939; Consular Convention Between the United States of America and the Kingdom of Belgium, U.S.-Belg., art. 26(f), Sept. 2, 1969, 25 U.S.T. 41; Republic of Korea Consular Convention, U.S.-S. Korea, art. 4(c), Jan. 8, 1963, 14 U.S.T. 1637; Consular Convention Between the United States of America and Poland, U.S.-Pol, arts. 25(i), 27, May 31, 1972, 24 U.S.T. 1231.

55. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(2) (1983) (amended 2003).

56. *Id.* R. 5.5(c)(3).

nections” with the lawyer’s home state; whether “significant aspects” of the lawyer’s work will be accomplished in his home state; whether “a significant aspect of the matter” involves the law of the lawyer’s home state; whether the “activities of the client involve multiple jurisdictions;” or whether the legal issues involved are “multistate or federal in nature.”⁵⁷

Although rejected in *Birbrower*, an argument could be made that since laymen are authorized to represent parties in settlement negotiations, mediations, and even arbitrations, out-of-state lawyers should also be able to so act.⁵⁸

In the past, this category of cases has proved the most troublesome for out-of-state lawyers trying to collect their fees. Not all states have adopted the 2003 Amendments. Some have on the books troublesome precedents. It would therefore be prudent for an out-of-state lawyer to become particularly sensitive to the added risk to himself which these cases pose. There may well be advantages to the lawyer in such circumstances if he seeks admission *pro hac vice* at an early opportunity, or associates himself with a local lawyer.

Experienced lawyers often do consider and reject these actions in trying to protect the client’s interests: first by avoiding the carpetbagger label that admission *pro hac vice* might bring with it, or by simply saving the client from having to pay unnecessary duplicate fees to a local lawyer. Ironically, the very same actions could be desirable in order to protect the lawyer’s collection of his own fees from the client. If this conflict of interest—between giving advice based strictly on promoting the client’s interests and the need to protect himself—makes a lawyer feel uncomfortable, it can be avoided by seeking a retainer and insisting that it be kept refreshed. But some lawyers dislike requesting a retainer because they fear it discourages clients from seeking them out again for their services.

57. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (2000).

58. *Williamson v. John D. Quinn Constr. Corp.*, 537 F. Supp. 613, 616 (S.D.N.Y. 1982).

VI. *SIXTH CATEGORY OF CASES: THE OUT-OF-STATE LAWYER COMMUNICATES ELECTRONICALLY FROM HIS OFFICE IN HIS HOME STATE TO A CLIENT IN A SECOND STATE WITH LEGAL ADVICE CONCERNING EVENTS OUTSIDE THE SECOND STATE.*

Most of the time these activities would be covered by one or more of the provisions of Rule 5.5(c). But there are a few gaps—for example if the client were a new client and the governing law were not that of the lawyer's home state. Suffice it to say that this is an area where, even without the 2003 Amendments, lawyers have not been known to be frustrated in the collection of their fees by accusations of unauthorized practice. In order to avoid whatever local prejudice against out-of-state lawyers which could exist in the second state, it might be prudent for the out-of-state lawyer to bring suit for his fees in a court of his home state, if the circumstances would entitle him to proceed under the long-arm statute of his home state.⁵⁹

VII. *SEVENTH CATEGORY OF CASES: THE OUT-OF-STATE LAWYER COMMUNICATES FROM HIS OFFICE IN HIS HOME STATE TO A CLIENT IN A SECOND STATE ABOUT EVENTS IN THE SECOND STATE WHICH ARE GOVERNED BY THE LAW OF THE SECOND STATE.*

Acting under Rule 5.5(c)(1), to associate with a local lawyer would offer some protection.⁶⁰ The *Restatement* takes the view that associating with local counsel is unnecessary because it is always "clearly permissible" for a lawyer to communicate electronically with a client in a second state with advice about the law of the second state.⁶¹ But there is a need for caution here. While it might not constitute the unauthorized practice of law in the second state, giving advice, about the law of a jurisdiction in which the attorney is not admitted to practice, could be regarded by the licensing authorities of the attorney's home state as malpractice.

Also, an out-of-state lawyer who advertised in a second state that he could advise inexpensively, via electronic communications from his office in his home state, about the law of the sec-

59. See *Fischbarg v. Doucet*, 880 N.E.2d 22, 30 (N.Y. 2007).

60. MODEL RULES OF PROF'L CONDUCT R. 5.5(c)(1) (1983) (amended 2003).

61. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 3 (2000).

ond state, might well attract the attention of the local licensing authorities of both the second state and his home state. The former could conceivably seek to persuade the courts in the second state to exercise a form of long-arm jurisdiction over the out-of-state lawyer; or the second state authorities could request their counterpart in the home state to treat such advertising as a violation of the ethical rules of the home state.

In sum, admiralty lawyers in their routine practice of law are still especially exposed to the risk of being accused of unauthorized practice of law. As long as the out-of-state lawyer does not open an office in the second state, or advertise himself as an expert in the law of the second state, he probably will not be pursued by local licensing authorities. However, if the lawyer physically travels to the second state as part of his work, he should be sensitive to the factors which could be used to deny him recovery of his fees. A checklist of the factors would include:

- Is the client a new one, or a resident of the second state?
- Is the out-of-state lawyer giving advice about the law of the second state?
- Is the lawyer engaging in pre-litigation activities in connection with a lawsuit or other proceeding which is pending, or can be expected to commence, in the second state?
- Has the lawyer not disclosed to the client that he is unlicensed to practice in the second state and that the engagement of a local lawyer, which would give rise to duplicate fees, may be required?
- Is the lawyer conducting discovery in a foreign country which objects to discovery, even on a voluntary basis?

If the answer to any of these questions is "yes," the lawyer should do what he can, as discussed earlier, to protect himself.

APPENDIX A
AMERICA BAR ASSOCIATION
MODEL RULES OF PROFESSIONAL CONDUCT

Rule 5.5: UNAUTHORIZED PRACTICE OF LAW;
MULTIJURISDICTIONAL PRACTICE OF LAW

(c) 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 representation of an existing client 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 paragraph (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice.