

Feature Article

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**Laying it on the Line:
Ethical Issues in Crossing State Lines to
Conduct Depositions**

The “show me state,” the land of Lincoln, the land of 10,000 lakes . . . where is your home state? For lawyers, our home state is defined as the state or states in which we are licensed to practice law. The unauthorized practice of law (UPL) generally occurs when non-lawyers attempt to practice law in the areas of estate planning and real estate. Real estate agents, brokers and title companies have often crossed the line into the land of UPL by giving advice to buyers and sellers, bypassing the role of the lawyer in the closing of property. Non-lawyers also occasionally attempt to circumvent their lawyer by drafting will or estate documents. For many areas of practice, the threat of UPL is only discussed with regard to non-lawyers, as lawyers’ own practices are localized and do not cross state lines. However, for those lawyers who represent national clients, serve as national and/or local counsel, and need to travel to other states to depose witnesses and counsel clients, the term “home state” takes on new meaning.

Rule 5.5 of the Illinois Rules of Professional Conduct addresses UPL as follows:

A lawyer shall not:

- (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (b) assist a person who is not a member of the bar in the performance of activity that constitutes unauthorized practice of law.

The foregoing is a bare bones guideline for those lawyers seeking light in the often dimly lit ethical arena of a multijurisdictional practice. The beacon of light comes from the *Restatement (Third) of Law Governing Lawyers (2000)* and the American Bar Association’s (ABA) Model Rule of Professional Conduct 5.5 which cover UPL and multijurisdictional practice of law. In fact, there is currently a recommendation in the Illinois Supreme Court to adopt a rule identical to ABA Model Rule 5.5.

ABA Model Rule 5.5 defines and explains UPL in a multijurisdictional setting as follows:

- (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.

(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 that 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 practice 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 paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) 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:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission;

or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

According to the *Restatement (Third) of the Law Governing Lawyers* § 3, a lawyer currently admitted to practice in a jurisdiction may provide legal services to a client:

(1) at any place in the admitting jurisdiction;

(2) before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with requirements for temporary or regular admission to practice before that tribunal or agency; and

(3) at a place within a jurisdiction in which the lawyer is not admitted to the extent that the lawyers' activities arise out of or are otherwise reasonably related to the lawyers' practice under subsection (1) or (2).

The rules are pretty clear if you remain in your home state or obtain pro hac vice admission. If a lawyer is licensed in State A, that lawyer may only practice in State A, or obtain temporary or regular admission to practice before the tribunal or agency of another jurisdiction. However, for lawyers in a multijurisdictional practice, lines get crossed and ethical issues arise within subsection (3) of the *Restatement (Third) of the Law Governing Lawyers* § 3 and subsection (C)(3) and (4) of ABA rule 5.5. These subsections come into play for lawyers who represent national clients or find themselves in a mass tort case where they must cross state lines to perform legal services for national counsel, or as national counsel or local counsel. Often, depositions of experts, fact witnesses and corporate witnesses take place outside of the home state of a lawyer.

States recognize that past restrictions on lawyers practicing law outside their home states cause serious inconvenience, delay and expense to clients, whose needs extend nationally. *Restatement (Third) of the Law Governing Lawyers* § 3. Practicing beyond the borders of a lawyer's home state depends on the type of activity and whether the activity is incidental or continuous and regular. For example, is it permissible for a lawyer in State A, who represents a national client to attend a deposition of a fact witness in State B in which the lawyer is not licensed?

A lawyer who is properly admitted to practice in a state with respect to litigation pending there, either generally or pro hac vice, may need to conduct proceedings and activities ancillary to the litigation in other states, such as counseling clients, dealing with co-counsel or opposing counsel, conducting depositions, examining documents, interviewing witnesses, negotiating settlements, and the like. Such activities incidental to permissible practice are appropriate and permissible.

Id. Thus, traveling beyond one's home state to conduct a deposition appears to fall within permissible conduct because that activity arises out of or is reasonably related to that lawyer's practice in his/her home state. A lawyer's activity falls within the scope of UPL when he or she is "engaging in the continuous, regular or repeated representation of clients" outside their home state or generally practicing law outside their home state. *Id.* When a lawyer's activities outside his or her home state are challenged, the context of which and purpose for which the lawyer acts should be carefully assessed. Several factors are considered in determining the permissibility of a lawyer's non-home state activities:

Whether the lawyer's client is a regular client of the lawyer or, if a new client, is from the lawyer's home state, has extensive contacts with that state, or contacted the lawyer there; whether a multistate transaction has other significant connections with the lawyer's home state; whether significant aspects of the lawyer's activities are conducted in the lawyer's home state; whether a significant aspect of the matter involves the law of the lawyer's home state; and whether either the activities of the client involve multiple jurisdictions or the legal issues involved are primarily multistate or federal in nature.

Id.

An appropriate measure of the reasonableness of a lawyer's activities out of state is the customary practices of lawyers who engage in interstate law practice. *Id.* Lawyers representing a multistate or multinational organization often find themselves working with local counsels across the country in order to stave off rising defense costs. Customary practice for lawyers engaging in interstate law practice includes three very common practices: (1) traveling outside of one's home state to attend and/or conduct a deposition of a witness for a case filed in the home state; (2) attending and/or conducting a deposition for a non-home state lawyer in a non-home state case within one's home state; and (3) attending and/or conducting a deposition in a non-home state case, for a non-home state lawyer in a neighboring state in which a lawyer is not licensed. Thus, the lawyer conducting the deposition would not be licensed in the state where the case is pending or deposition proceeding.

The first instance is laid out above and appears to be permissible. The second instance does not necessarily fall within one of the aforementioned parameters. For example, a lawyer represents a client in State A and is only licensed in State A. Local counsel for the client in State B has a fact witness deposition in State A. State B counsel calls State A counsel to conduct the deposition on his behalf, which is taking place in State A. The case originates in State B. The State A lawyer would in fact be practicing law in his or her home state. However, the State A lawyer would also be on record for a case in a jurisdiction in which he or she is not licensed. Does the fact that the case is pending in a jurisdiction beyond the State A lawyer's home state change the permissibility of the lawyers conduct? What about the fact that the deposition may be used as trial testimony? The State A lawyer, who is not licensed in State B, is now on record in a case outside his or her home state. ABA Model Rule 5.5 does not clarify this specific scenario. While lawyers can argue that the deposition is taking place in a jurisdiction in which he or she is licensed, one can equally argue that the lawyer should seek pro hac vice admission, as the case is filed in a non-home state jurisdiction and is conducted according to potentially very different rules.

The third example clearly is not permissible. While in the second instance one can argue that he or she is practicing law in his/her home state, despite the fact that the case is filed in another jurisdiction, in the third instance all activities are taking place outside the lawyer's home state.

From a practical standpoint, the first and second scenarios seem to be a customary practice for many lawyers. The comments to the Illinois State Bar Association and Chicago Bar Association's proposal regarding adoption of the ABA's Model Rule 5.5 identifies an obvious but often overlooked reality that the definition of the practice of law is established by each individual state and varies from one jurisdiction to another. *Proposal of Illinois State Bar Association and Chicago Bar Association on Ethics 2000, as Modified by Supreme Court Committee on Professional Responsibility, cmt 2, (Proposal 04-18, 2007)*. Illinois does not define the practice of law in another jurisdiction. Therefore, what may be permissible in Illinois may not be permissible elsewhere. Not all states have adopted ABA Model Rule 5.5. Additionally, Rule 5.5 of the Illinois Rules of Professional Conduct and ABA Model Rule of Professional Conduct 5.5 clearly state that 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, again demonstrating that each state defines the practice of law within its jurisdiction.

The policy behind limiting the practice of law to those who are licensed and limiting the practice to jurisdictions in which one is licensed is to prevent injury to the public as a result of incompetence. As laws differ from jurisdiction to jurisdiction, states have long recognized the need to monitor those practicing within its bounds and protect the public from those not qualified. However, as the world continues to become more and more transient and clients cross state lines, the need for more uniform rules across the country intensifies. A uniform model rule for interstate practice needs to be implemented. Until that time, the clear answer to one's multijurisdictional practice ethical quandary is to seek pro hac vice admission or work closely with local counsel licensed in jurisdictions out of one's home state.

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