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Multijurisdictional Practice: A Changing Landscape

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Multi-Jurisdictional Practice: A Changing Landscape

by Grace M. Giesel

The Hypothetical

Lawyer Leo, admitted to practice in Kentucky, has his office in Kentucky and has a client who has corporate offices in Kentucky and factories in Kentucky, Indiana, and Tennessee. Leo is not admitted in Indiana or Tennessee. Leo often visits the client's factories in Indiana and Tennessee and discusses legal issues with various representatives of the client at those Indiana and Tennessee locations.

1. Has Leo practiced law unauthor- izedly and thus contrary to ethical principles and, perhaps, criminal statutes?
2. Will a court enforce Leo's fee contract with his client if the client refuses to pay him for the work in Tennessee and Indiana?

The Kentucky Ethics Rule on Unauthorized Practice

Practicing law unauthor- izedly is a violation of the ethics rules applicable to Kentucky attorneys. Kentucky Supreme Court Rule 3.130 (5.5) states:

A lawyer shall not:

- (a) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdic- tion; or
- (b) Assist a person who is not a member of the bar in the performance of activ- ity that constitutes the unauthorized practice of law.

With this rule, Kentucky lawyers involved in activities in other jurisdictions need to be aware of the rules of those other jurisdic- tions. In addition, Kentucky law, like that of many other states, provides that the unau- thorized practice of law is a crime.¹

The Definition of the Practice of Law

Leo, the lawyer in the hypothetical, is not ad- mitted to practice in Indiana or Tennessee, so to determine whether Leo has practiced law unauthor- izedly one must determine whether Leo's activities constitute the practice of law in those jurisdictions. Kentucky's definition of the practice of law, found in Kentucky Supreme Court Rule 3.020, is as follows:

The practice of law is any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy in or out of court, rendered in respect to the rights, du- ties, obligations, liabilities, or business relations of one requiring the services. But nothing herein shall prevent any natural person not holding himself out as a practicing attorney from drawing any instrument to which he a party without consideration unto himself therefore. An appearance in the small claims division of the district court by a person who is an officer of or who is regularly employed in a managerial capacity by a corporation or partner- ship which is a party to the litigation in which the appearance is made shall not be considered as unauthorized practice of law.

This definition is very broad, but most states have similarly broad definitions. For example, in *Matter of Thonert*, the Indiana Supreme Court stated:

A person who gives legal advice to clients and transacts business for them in matters connected with the law is engaged in the practice of law.... Thus, the practice of law is not defined only as the giving of legal advice or acting in a representative capacity—it also had been extended by this Court to conducting the business management of a law practice.²

Tennessee prohibits engaging in "law busi- ness" or the "practice of law"³ and defines the two concepts as follows:

- (1) "Law business" means the advising or counseling for a valuable consid- eration of any person, firm, associa- tion, or corporation, as to any secular law, or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights, or the doing of any act for a valuable consid- eration in a representative capacity, obtaining or tending to secure for any person, firm, association or corpora- tion any property or property rights whatsoever, or the soliciting of clients directly or indirectly to provide such services; and
- (2) "Practice of law" means the appear- ance as an advocate in a represen- tative capacity or the drawing of papers, pleadings or documents or the performance of any act in such

capacity in connection with proceed- ings pending or prospective before any court, commissioner, referee or any body, board, committee or com- mission constituted by law or having authority to settle controversies, or the soliciting of clients directly or indirectly to provide such services.⁴

Under any of these definitions Leo's meetings in Indiana and Tennessee may be examples of the practice of law or engaging in "law business."

Unauthorized Practice Rules of Tennessee and Indiana

Leo has violated Kentucky's ethics rule on unauthorized practice, Rule 5.5, only if practicing law in Indiana and Tennessee violates the rules of those jurisdictions. Leo has violated the Kentucky rule because his activities in Tennessee definitely violated Tennessee's rules regarding the unauthorized practice of law. Perhaps surprising to some readers is the fact that Leo may not have violated Indiana's rules.

Tennessee's Rule 5.5

Tennessee's ethics rule on unauthorized prac- tice is identical to that of Kentucky,⁵ and Ten- nessee has a statute making the unauthorized practice of law and conducting a law business a crime.⁶ Given the broad definition of the practice of law, Leo practiced law in Tennes- see without being admitted to the Tennessee bar and without being given permission in any other way such as *pro hac vice* admission. Leo has violated Tennessee rules and thus has violated Kentucky Supreme Court Rule 3.130 (5.5) by engaging in the unauthorized practice of law in Tennessee.

Indiana's Rule 5.5: The New Approach

Until recently, this result would have been the result for all jurisdictions. Yet, one rarely hears of an attorney being disciplined or prosecuted for practicing in a jurisdiction in which the attorney is not admitted.⁷ Dis- cipline bodies have not pursued attorneys for the unauthorized practice of law, in part because such activity as Leo's is a part of almost every attorney's practice.

In 2000 the ABA president appointed a Commission on Multi-Jurisdictional Practice to investigate the issue of the unauthorized practice of law in the context of lawyers practicing in multiple jurisdictions. This

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Commission recognized the disconnect between the rules and the reality of modern law practice. The Commission suggested a new version of Rule 5.5 that would take several common scenarios out of the definition of improper conduct while still prohibiting the unauthorized practice of law in general. The Commission also recommended a new conflict of laws rule, Rule 8.5, to deal with the newly-recognized possibility of a lawyer rightfully practicing in a jurisdiction in which the lawyer is not admitted.⁸ The ABA adopted the new Model Rules 5.5 and 8.5 in 2002.

The new Rule 5.5 begins by prohibiting attorneys from practicing law in a jurisdiction in violation of the rules of the legal profession in that jurisdiction or assisting another to do so. This part of Rule 5.5 is not a change from tradition. The Rule continues with a statement that no lawyer who is not admitted in the jurisdiction may "establish an office or other systematic or continuous presence" in the jurisdiction⁹ or "hold [the lawyer] out to the public" as admitted in the jurisdiction. These statements are certainly consistent with the traditional rule though the earlier forms of Rule 5.5 did not deal in such specificity.

The new Rule 5.5 differs from earlier versions, however, in that it lists specific, previously unrecognized exceptions to the unauthorized practice of law doctrine. The Rule allows a lawyer admitted elsewhere but not admitted in the target jurisdiction to practice in the target jurisdiction "on a temporary basis" if the legal services:

1. are provided "in association with a lawyer who is admitted" and who "actively participates" in the representation;
2. are "in or reasonably related to a pending or potential proceeding before a tribunal" in any jurisdiction if the lawyer expects to be authorized to appear in the proceeding or the person the lawyer is assisting expects to be authorized to appear;
3. are "in or reasonably related to a pending or potential" alternative dispute resolution proceeding "if the services arise out of or are reasonably related to the lawyer's practice in an admitted jurisdiction and *pro hac vice* admission is not otherwise required" by the jurisdiction; or
4. "arise out of or are reasonably related to the lawyer's practice" in an admitted jurisdiction.¹⁰

The new Rule 5.5 also contains an exception that allows in-house counsel to render legal services to the employer if the services do not otherwise require *pro hac vice* admission. Finally, the new Rule 5.5 contains an exception for the rendering of any legal services that "federal law or other law of this jurisdiction" might authorize.¹¹

Indiana is one of eight states, along with Arkansas, Delaware, Iowa, Maryland, Nebraska, Oregon, and Utah, that has adopted this new version of Rule 5.5 without modification.¹² Eighteen states have adopted a substantially similar rule.¹³ Other states such as Illinois, Montana, Michigan, New Hampshire, and Washington are moving toward adopting a version of the new Rule 5.5.¹⁴ Kentucky has a committee considering the new version of Rule 5.5 along with many other suggested changes to the ethics rules.

Leo may have a good argument that his work for his client which takes him to Indiana is "temporary" and "arise[s] out of" or is "reasonably related" to Leo's Kentucky practice. If so, under the new version of Rule 5.5, Leo may not have violated the rules regarding unauthorized practice. Because Indiana follows this version of Rule 5.5, Leo may not have violated Indiana's unauthorized practice rules and so may not have violated Kentucky's Rule 5.5.

Enforcement of Fee Contracts

As noted above, Leo's chances of discipline or prosecution for the unauthorized practice of law are slim. Yet, if Leo has practiced law unauthorizedly, courts may refuse to enforce the fee contract on the basis that the contract is contrary to public policy. Several courts in the past have so held.¹⁵

This result may not occur in the future in light of the evolution of Rule 5.5 and recognition of the realities of the modern practice of law. Recently, in *Winston & Strawn, LLP v. Salt Lake Tribune Publishing Company, LLC*,¹⁶ the client claimed that it did not need to pay its attorneys according to the fee contract because the attorneys rendered services in Utah but were not admitted to practice law in Utah. The United States District Court for the District of Utah refused to grant the client's motion for summary judgment noting that local counsel was involved in the matter and that the client participated in the strategic decision that the attorneys not to be admitted *pro hac vice*.¹⁷

Conclusion

With regard to the issue of multi-jurisdictional practice by attorneys, the legal profession is in a period of transition. Kentucky attorneys engaging in activities in other jurisdictions need to be especially cognizant of the applicable unauthorized practice of law rules of the jurisdictions in which those attorneys act. Fortunately for Kentucky attorneys, the unauthorized practice rules of some jurisdictions, such as Indiana, are relaxing to allow the applicable rules to better reflect the realities of modern practice. Other states, such as Tennessee, have not yet relaxed the unauthorized practice of law rules for multi-jurisdictional practice. Kentucky attorneys should be aware of the implications for discipline purpose as well as for fee contract enforcement purposes.

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End Notes

- 1 See **K.R.S. 524.130** (misdemeanor). See also **Tenn. Rev. Stat. 23-3-103** (misdemeanor).
- 2 693 N.E.2d 559, 563 (Ind. 1998) (citations omitted).
- 3 See **Tenn. Rev. Stat. 23-3-103**.
- 4 **Tenn. Rev. Stat. 23-3-101**.
- 5 See **Tenn. Rules of Sup. Ct. Rule 5.5**.
- 6 See **Tenn. Rev. Stat. 23-3-103**.
- 7 But see *Georgia Law Firm, Lawyers are Indicted for Unauthorized Practice in North Carolina, Lawyers' Manual on Professional Conduct*, Vol. 20, No. 8, p. 203 (Atlanta attorneys participated in an investigation of a North Carolina college basketball team).
- 8 See *Client Representation in the 21st Century, Report of the Commission on Multijurisdictional Practice* (2002), found at http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.doc.
- 9 At least one court has held that a lawyer who is not admitted in a jurisdiction may have an office in that jurisdiction for the conduct of a practice authorized by federal law or federal courts. See *Surrick v. Killion*, ___ F.3d ___, 2006 WL 1511233 (3d Cir. 2006) (state ban on an office could not

be enforced against an attorney admitted in federal court who used the office solely for federal practice). See also *In re Desilets*, 291 F.3d 925 (6th Cir. 2002) (attorney may practice in federal court though not admitted in the state).

10 **ABA Model Rules of Professional Conduct Rule 5.5**. Section 3 of the *Restatement (Third) of the Law Governing Lawyers* also provides for an expanded practice sphere. Section 3 states:

A lawyer currently admitted to practice in a jurisdiction may provide legal services to a client:

- (1) at any place within 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 lawyer's activities arise out of or are otherwise reasonably related to the lawyer's practice under Subsection (1) or (2).

Restatement (Third) of the Law Governing Lawyers sec. 3 (1999).

11 **ABA Model Rules of Professional Conduct Rule 5.5(d)**.

12 See *State Implementation of ABA Model Rule 5.5*, at http://www.abanet.org/cpr/jclr/5_5_quick_guide.pdf.

13 The states are Arizona, California, Colorado, Florida, Georgia, Idaho, Louisiana, Minnesota, Missouri, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Pennsylvania, South Carolina, South Dakota, and Wyoming. See *State Implementation of ABA Model Rule 5.5*, at http://www.abanet.org/cpr/jclr/5_5_quick_guide.pdf.

14 See *State Implementation of ABA Model Rule 5.5*, at http://www.abanet.org/cpr/jclr/5_5_quick_guide.pdf.

15 See *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998) (New York firm with no attorneys admitted in California could not enforce contract for fees for legal services provided in California). The *Birbrower* court stated:

The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.

Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. Physical presence here is one factor we may

consider in deciding whether the unlicensed lawyer has violated section 6125, but it is by no means exclusive. For example, one may practice law in the state in violation of section 6125 although not physically present * 129 here by advising a California client on California law in connection * * 6 with a California legal dispute by telephone, fax, computer, or other modern technological means. Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person automatically practices law "in California" whenever that person practices California law anywhere, or "virtually" enters the state by telephone, fax, e-mail, or satellite. 949 P.2d at 5. See also *Spivak v. Sachs*, 211 N.E.2d 329 (N.Y. 1965) (California lawyer could not enforce fee contract for services rendered in New York).

16 ___ F. Supp. 2d ___, 2006 WL 1129401 (D. Utah 2006).

17 See also *Superadio Limited Partnership v. Winstar Radio Prods.*, 844 N.E.2d 246 (Mass. 2006) (court refused to set aside arbitration award though attorney involved may have been practicing law unauthorizedly).

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