PLI Ethics Programs: Spring 2017

• Ethics for the Negotiating Lawyer 2017
• Ethics for Financial Industry Lawyers 2017
• Ethics for Government Lawyers 2017
• Ethics for Commercial Litigators 2017
• Ethics for Corporate Lawyers: Multijurisdictional Practice and Other Current Issues 2017

Co-Chairs
David Rabinowitz
Michael S. Sackheim
Howard Schneider
David Sarratt
Yasmine H. Viehland
C. Evan Stewart

To order this book, call (800) 260-4PLI or fax us at (800) 321-0093. Ask our Customer Service Department for PLI Order Number 183368, Dept. BAV5.
Lawyers and the Border Patrol: The Challenges of Multi-Jurisdictional Practice (August 2011)

C. Evan Stewart

Cohen & Gresser LLP


Reprinted from PLI Course Handbook, PLI Ethics Programs: Winter 2014–2015 (Order #50039)

©2011. All Rights Reserved.

If you find this article helpful, you can learn more about the subject by going to www.pli.edu to view the on demand program or segment for which it was written.
The interrelated topics of multi-jurisdictional practice and the unauthorized practice of law are not new. Indeed, readers of the *New York Business Law Journal* were recently given a brief glimpse into these matters. What this particular article is aimed at is the flagging of the potholes that lie in the legal highway for New York lawyers going forward, as we practice law beyond the geographic boundaries of New York State.

**WHAT ARE THE RULES?**

To understand that legal highway, it is first necessary to identify the two relevant Model Rules promulgated by the American Bar Association. The first is Rule 5.5. Subsection (c) thereof identifies a number of “safe harbors” by which an out-of-state lawyer may provide legal services on a “temporary basis” in a state where she is not licensed. And subsection (d)(1) of that same Model Rule permits another “safe harbor” for in-house lawyers to work at a corporation in a state where they are not licensed.

The second Model Rule is 8.5. By subsection (a) of that rule, a “temporary” lawyer’s host state is given jurisdiction co-equal to the jurisdiction of the state in which the lawyer has her license; under this provision a lawyer could be subject to disciplinary authority by both jurisdictions for the same conduct. Subsection (b) of Model Rule 8.5 relates to choice of law principles and, frankly, it is pretty opaque. The easy part relates to conduct on a matter pending before a tribunal—the jurisdictional rules of where the tribunal sits governs. As to “any other” conduct:

- one looks to the jurisdiction in which the conduct occurred; or
- if the predominant effect of the conduct is in a different jurisdiction, one looks to that jurisdiction; but
- a lawyer is not to be disciplined if the conduct conforms to the rules of a jurisdiction where the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.

So when New York State ushered in its new legal ethics in 2009, how did these provisions fare? As for Rule 5.5, the powers that be simply ignored all the work done by the ABA—merely positing instead that lawyers should not engage in the unauthorized practice of law. And as for Rule 8.5, the New York drafters agreed with the straightforward parts of the Model Rule (i.e., the dual jurisdiction approach, as well as the tribunal jurisdictional approach). As to the choice of law principles for
“any other conduct,” the drafters adopted a more common sense (and understandable) protocol:

- if the lawyer is only licensed to practice in New York, then New York’s rules are to be applied; or
- if the lawyer has dual licenses, the rules of the state where the lawyer principally practices are to be applied; unless, if the predominant effect of the conduct is in another jurisdiction in which the lawyer is licensed, then that second state’s rules are to be applied to the conduct.6

SO WHERE DOES THAT LEAVE US?

Yogi Berra once said: “When you come to a fork in the road, take it.”7 That advice, of course, is not terribly helpful on professional responsibility issues generally, and it is certainly not going to get the job done on the matters at issue here.

While out-of-state transactional lawyers have no “rule” guidance to help them, the New York courts over the years have provided a fair amount of jurisprudential directions from which non-New Yorkers can structure their professional behavior.8 As for in-house lawyers working in New York based companies, a number of bar association proposals had been advanced, but without success;9 just recently, the New York Court of Appeals stepped into this space and approved a special registration process for out-of-state in-house lawyers.10

But enough about out-of-state lawyers, what about us New York licensed lawyers—what do we face? First and foremost is the reality that many states have very different takes on how they implemented Rules 5.5 and 8.5.11 And while this dissonance has led to calls for some type of uniform, across-the-board protocol to govern these issues, do not hold your breath.12 As a result, every New York lawyer going outside New York State’s boundaries needs to educate herself as to the rules of each state into which she hands out her business card.13

And it is not just me who is raising this flag of warning. Recently, an ABA group, called the Commission on Ethics 20/20, released a white paper to highlight a number of problems facing lawyers who practice in more than one jurisdiction.14 Some of these problem areas will have particular resonance for New York lawyers.

- **Virtual Law Practices.** A solo lawyer advertises her will-writing services over the internet on her website. While she mostly drafts wills for clients from her home state, she occasionally works on
estate documents for clients in state X where she is not licensed. Assuming the two states have different rules for advertising, conflicts of interest, and fee agreements, would state X have jurisdiction over her?; and, if so, what state’s laws would state X apply?

- **Partnering and Sharing Fees with Non-Lawyers.** A law firm has offices in multiple states, the District of Columbia, and London, England. The District of Columbia allows for non-lawyer equity partners, and the firm has two economist non-lawyer equity partners in Washington who do work for various clients throughout the firm on antitrust matters. The firm’s London office has three non-lawyer equity partners who are financial planners and work with firm clients world-wide on trusts and estates matters. Are there any constraints on distributing firm monies to the non-lawyers? Are there any constraints on distributing the proceeds of work generated by non-lawyer equity partners to lawyers not based in Washington and London?

- **Screening of Laterals in Multi-State Law Firms.** A lateral partner is being considered by a multi-state law firm. Bringing her into the firm, however, would create an imputed conflict of interest for a partner who works in another state. The state in which the lateral is admitted and will practice allows for screening to prevent an imputation of a conflict; but the state where the other partner is admitted and practices (e.g., New York) does not. Is the firm at risk? Is the New York based partner at risk?15

- **Conflicts in International, Multi-Office Law Firms.** A partner in an international law firm’s foreign office wants to take on a case adverse to a client that a partner in the New York office represents on an unrelated matter. Under the rules in the foreign office, such a representation is permitted; under New York’s rules, such a representation is not. Is the firm at risk? What obligations does the New York based partner have vis-à-vis this issue?16

- **Choice of Law Provisions in Engagement Letters.** The law firms in the prior two examples hope to avoid any problems by specifying in engagement letters that the conflicts rules in jurisdictions which do not prohibit the activities in question will govern the attorney-client relationships. Will such drafting avoid the mandates of Rule 8.5 (the ABA’s Model Rule, New York’s rule, other states’ rules)?

- **Client Fraud.** Various partners of a large, multi-state law firm are representing a client in a major transaction, and in the course of that
representation they learn that the client has been engaging in a fraud vis-à-vis its counterparty. Partner A is licensed in New Jersey (which requires her to disclose the fraud); Partner B is licensed in Connecticut (which gives her discretion to disclose the fraud); Partner C is licensed in New York (which does not permit her to disclose the fraud). Is the firm at risk? What should Partners A, B & C do?

By identifying these problem areas, the ABA group clearly believes that the ABA’s current formulation of Model Rule 8.5 is not sufficient. Indeed, beyond the white paper’s specific emphasis, the group is also looking at, and seeking feedback about, a variety of possible amendments to Rule 8.5. How that process (with all of its inevitable compromises) will end up is anyone’s guess. In the interim, we must deal with the rules as they are, and recognize that for a number of multi-jurisdictional/cross-border practice issues there are no safe harbors or easy answers. Caveat counselor.

3. Model Rule 5.5(c) reads as follows:

(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 this 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 a 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.
4. Six years after the adoption of Model Rule 5.5(d)(1), the ABA House of Delegates adopted, by voice vote, a Model Rule Registration of In-House Counsel, which reads as follows:

GENERAL PROVISIONS:

A. A lawyer admitted to the practice of law in another United States jurisdiction who has a continuous presence in this jurisdiction and is employed as a lawyer by an organization as permitted pursuant to Rule 5.5(d)(1) of the Model Rules of Professional Conduct, the business of which is lawful and consists of activities other than the practice of law or the provision of legal services, shall register as in-house counsel within [180] days of the commencement of employment as a lawyer or if currently so employed then within [180] days of the effective date of this rule, by submitting to the [registration authority] the following:

1. A completed application in the form prescribed by the [registration authority];
2. A fee in the amount determined by the [registration authority];
3. Documents proving admission to practice law and current good standing in all jurisdictions in which the lawyer is admitted to practice law; and
4. An affidavit from an officer, director, or general counsel of the employing entity attesting to the lawyer’s employment by the entity and the capacity in which the lawyer is so employed, and stating that the employment conforms to the requirements of this rule.

SCOPE OF AUTHORITY OF REGISTERED LAWYER:

B. A lawyer registered under this section shall have the rights and privileges otherwise applicable to members of the bar of this jurisdiction with the following restrictions:

1. The registered lawyer is authorized to provide legal services to the entity client or its organizational affiliates, including entities that control, are controlled by, or are under common control with the employer, and for employees, officers and directors of such entities, but only on matters directly related to their work for the entity and only to the extent consistent with Rule 1.7 of the Model Rules of Professional Conduct [or equivalent provision in the jurisdiction]; and
2. The registered lawyer shall not:
   a. Except as otherwise permitted by the rules of this jurisdiction, appear before a court or any other tribunal as defined in Rule 1.0(m) of the Model Rules of Professional Conduct [or jurisdictional equivalent], or
   b. Offer or provide legal services or advice to any person other than as described in paragraph B.1., or hold himself
or herself out as being authorized to practice law in this jurisdiction other than as described in paragraph B.1.

PRO BONO PRACTICE:

C. Notwithstanding the provisions of paragraph B above, a lawyer registered under this section is authorized to provide pro bono legal services through an established not-for-profit bar association, pro bono program or legal services program or through such organization(s) specifically authorized in this jurisdiction;

OBLIGATIONS:

D. A lawyer registered under this section shall:

1. Pay an annual fee in the amount of $\text{___________};
2. Fulfill the continuing legal education requirements that are required of active members of the bar in this jurisdiction;
3. Report with [____] days to the jurisdiction the following:
   a. Termination of the lawyer’s employment as described in paragraph A.4.;
   b. Whether or not public, any change in the lawyer’s license status in another jurisdiction, including by the lawyer’s resignation;
   c. Whether or not public, any disciplinary charge, finding, or sanction concerning the lawyer by any disciplinary authority, court, or other tribunal in any jurisdiction.

LOCAL DISCIPLINE:

E. A registered lawyer under this section shall be subject to the [jurisdiction’s Rules of Professional Conduct] and all other laws and rules governing lawyers admitted to the active practice of law in this jurisdiction. The [jurisdiction’s disciplinary counsel] has and shall retain jurisdiction over the registered lawyer with respect to the conduct of the lawyer in this or another jurisdiction to the same extent as it has over lawyers generally admitted in this jurisdiction.

AUTOMATIC TERMINATION:

F. A registered lawyer’s rights and privileges under this section automatically terminate when:

1. The lawyer’s employment terminates;
2. The lawyer is suspended or disbarred from practice in any jurisdiction or any court or agency before which the lawyer is admitted; or
3. The lawyer fails to maintain active status in at least one jurisdiction.

REINSTATMENT:

G. A registered lawyer whose registration is terminated under paragraph F.1 above, may be reinstated within [xx] months of
termination upon submission to the [registration authority] of the following:

1. An application for reinstatement in a form prescribed by the [registration authority];
2. A reinstatement fee in the amount of $_____;
3. An affidavit from the current employing entity as prescribed in paragraph A.4.

SANCTIONS:

H. A lawyer under this rule who fails to register shall be:

1. Subject to professional discipline in this jurisdiction;
2. Ineligible for admission on motion in this jurisdiction;
3. Referred by [registration authority] to the disciplinary authority of the jurisdictions of licensure.

The report submitted in 2006 in support of the Model Rule on Registration of In-House Counsel provided, in part, as follows:

The Council of the Section of Legal Education and Admissions to the Bar,… approved the Model Rule for Registration of House Counsel (Rule) for use by jurisdictions adopting or intending to adopt amended Model Rule 5.5(d) of the Model Rules of Professional Conduct. Rule 5.5(d) now excludes from the definition of unauthorized practice of law the provision of legal services by in-house counsel admitted in one jurisdiction and practicing in another jurisdiction, when the lawyer is providing legal services solely to the lawyer’s employer. Rule 5.5(d) states:

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.

Rule 5.5(d) applies to lawyers who are in-house corporate lawyers, government lawyers, and others who are employed to render legal services to the employer. The provision assumes that the in-house lawyer can establish an office or other “systematic presence” in the jurisdiction and forgo legal licensure without unreasonable risk to the client or others because the employer is able to assess the lawyer’s qualifications and the quality of the lawyer’s work.

Model Rule 5.5, Comment [17], states that lawyers who establish an office or continuous presence in the state “may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.” In an effort to create a regulatory model useful to states that might wish to follow the registration approach, the Bar Admission Committee drafted, and the Council of the Section has approved for submission to the House, this Rule.
PURPOSE OF THE REGISTRATION RULE

The Council recognizes that in addition to client security fund assessments and continuing legal education requirements, registration would make an in-house counsel’s status known to the public. … Furthermore, a lawyer who practices pursuant to this rule is subject to the disciplinary authority of the local jurisdiction. (See Rules 5.5 and 8.5, ABA Model Rules of Professional Conduct.)

5. Instead of tackling anything done by the ABA, the New York State code reads as follows:

Rule 5.5 Unauthorized 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.
(b) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.


11. See, e.g., S. Gillers, R. Simm, A. Perlman, “Regulation of Lawyers: Statutes and Standards” (Wolters Kluwer 2010). In their treatise, Professors Gillers, Simm and Perlman state that “[a]t least 42 jurisdictions have adopted multijurisdictional practice rules similar or identical to ABA Model Rule 5.5.” Id. at 358. But they then go on to detail how many important commercial states diverge on this rule.
Id. at 359-65. And as for Model Rule 8.5, the Professors do not even attempt to make a “similar or identical” representation, defaulting to describing the different states’ approaches. Id. at 516-19.

12. The Association of Corporate Counsel has for many years advocated a “driver’s license model” to apply to the professional licensing of lawyers. See “ABA Commission Hears Concerns Over Multijurisdictional Practice,” *BNA Antitrust & Trade Regulation Report* (March 2, 2001). That proposal, however, has been a controversial one, with many bar authorities labeling it as “disastrous.” See “Final Multijurisdictional Practice Hearing Reveals Much Support, But Also Bar’s Concerns, About Permitting Multistate Practice,” *BNA’s Corporate Counsel Weekly* (September 19, 2001); see also supra n.1.

13. Two excellent internet sources to help lawyers are (i) ACC’s MJP homepage: http://www.acc.com/advocacy/keyissues/mjp.cfm; and (ii) the ABA’s Center for Professional Responsibility MJP home: http://www.abanet.org/cpr/mjp/home.html. The need to understand each state’s different approach to these issues is underscored by the fact that states give different priorities to (and commit disparate resources to) the enforcement of out-of-state lawyers’ unauthorized practice of law. See “Latest ABA Review of UPL Enforcement Finds More Regulation, More Prosecution,” *ABA/BNA Lawyers’ Manual on Professional Conduct* (May 27, 2009).

One area, outside of Rules 5.5 and 8.5, where state laws vary greatly is whether an insurance company’s in-house counsel may represent insureds. See “In-House Counsel for Insurance Carrier Cannot Be Assigned to Defend Insureds,” *ABA/BNA Lawyers’ Manual on Professional Conduct* (March 16, 2011).


15. A committee of the New York City Bar Association has proposed that New York amend Rule 1.10 (which addresses the imputation of conflicts) to exempt out any imputations where another jurisdiction’s rules permit such representations; to date, that proposal has gone nowhere. See supra n.6. For a review of New York’s decision not to permit screening, see supra n.2.

16. Another international/cross-border issue about which lawyers need to be aware is that many communications with lawyers abroad may not be privileged. See, e.g., *AM&S v. EC Commission*, Case 155/79 [1982] 2 CMLR 264 (Court of Justice of the European Communities limited the attorney-client privilege to cover only “independent” lawyers “who are not bound to the client by a relationship of employment.”); *Azko Nobel Chemicals Ltd. v. Comm’n of the European Communities*, Euro. Ct. First Inst., Case T-253/03 (September 17, 2007) (same).

17. See supra n.14.
NOTES