

TRENDS IN THE AREA OF INTERSTATE LEGAL PRACTICE

Claude J. Dorais, Esq.
805.965.2288

The great majority of the practice of insurance regulatory law occurs in the context of individual state statutes, regulations, regulatory agencies and enforcement practices. In addition to individual state rules, different state agencies have their own unique “personalities,” as do various divisions and individuals within them. For these reasons and others, the practice area we all share as members of FORC consists of over 51 “legal neighborhoods,” the successful navigation of which, in the author’s view, makes access to local expertise and familiarity usually helpful and often critical. One of the major benefits FORC provides to the insurance industry and to the legal profession is access to a national organization whose individual state members are all highly qualified and experienced in our fields. This article focuses on the expanding parameters of permissible professional conduct across state lines, but is not a suggestion we forget fundamental realities. While it is beneficial for each of us to have an appreciation of what we can and cannot do in states where we are not licensed, the fact we may be permitted to undertake representation in a matter is only the beginning of the analysis of how clients are best served.

Notwithstanding the value of local counsel, situations do arise where out-of-state counsel may desire or be required to practice in another jurisdiction. The author has seen four areas in which such situations often occur:

1. A single question or a very specialized question arises and needs to be addressed in one or more out-of-state jurisdictions. Utilizing different law firm relationships in each would not be cost-effective and would also unnecessarily delay providing the client with the answers needed.
2. An urgent matter arises. Local counsel for a non-litigation matter is both needed and desired, but not immediately available. Representation is needed until local representation is in place and up to speed.
3. Regular outside counsel for a client routinely handles acquisitions. Some of those transactions require approval processes, including occasional hearings, before insurance regulators out-of-state.
4. Litigation proceedings arise out-of-state and the client prefers to rely on regular counsel, even though that counsel is not admitted in the state where the proceedings are pending.

The first three types of matters can be considered “Administrative and Corporate Matters,” while the fourth will be referred to under the heading “Litigation Matters.” For our purposes, matters such as Form A hearings, even though they have litigation characteristics, are considered administrative in nature, while disciplinary proceedings are considered to be litigation.

Whether Administrative, Corporate, or Litigation in nature, in these types of circumstances, out-of-state counsel’s understanding of the parameters of permissible conduct in the away state is crucial in order to avoid the professional, ethical and even potential financial complications which can arise in both the away state and in the practitioner’s home state, as well as in any other jurisdictions in which the lawyer may be licensed to practice.

The professional and ethical considerations arise primarily with respect to statutes applicable to the unauthorized practice of law. The potential financial implications arise in the creation of issues which may be raised in defense to payment of fees otherwise owed.¹

When faced with an out-of-state situation, individual state research will be needed. Each state’s rules may vary and at present this is an area subject to ongoing nationwide study, with several states at any given time studying new rules, considering pending legislation, or with recently adopted new rules in place. The purpose of this article is to examine prevailing trends in this area.

Litigation Matters

Litigation Matters are the subject of well-settled principles of law and practice. Statutory and case law, state bar rules, and court rules all address the area with specificity. Representation of a party in litigation in

an away state by an attorney not licensed there requires an application to the court before which the proceeding is pending. Such motions usually require certification of the attorney's good standing in her or his home state or some other form of verification of eligibility from a competence and character point of view. Local co-counsel is required and that counsel also provides the local sponsorship which is a frequent pre-requisite.

California's rule is typical:

A person who is not a member of the State Bar of California but who is a member in good standing of and eligible to practice before the bar of any United States court or of the highest court in any state, territory or insular possession of the United States, and who has been retained to appear in a particular cause pending in a court of this state, may in the discretion of such court be permitted upon written application to appear as counsel *pro hac vice*, provided that an active member of the State Bar of California is associated as attorney of record. No person is eligible to appear as counsel *pro hac vice* pursuant to this rule if (1) he is a resident of the State of California, or (2) he is regularly employed in the State of California, or (3) he is regularly engaged in substantial business, professional, or other activities in the State of California. Absent special circumstances, repeated appearances by any person pursuant to this rule shall be a cause for denial of an application.²

As a practical matter where circumstances make it inconvenient or unrealistic to expect that a motion for admission for the purposes of the single case be filed prior to the first appearance, as can occur, for example, when extraordinary relief may be sought against a client on short notice, courts are typically understanding and permit initial appearances and participation of the out-of-state attorney, with local counsel, simply requiring the formalities be observed as soon as is reasonably possible. So long as the applicant has a clean disciplinary record, motions to appear *pro hac vice* are very rarely denied.

Administrative and Corporate Matters

The area in which tremendous activity is occurring relates to Administrative and Corporate Matters. There, the trend is clearly way from artificial restrictions and toward recognition that the business affairs of clients are more and more regional or national in nature and operate in a commercial world in which state boundaries do not define or encapsulate their markets, their products, or their interests. In order to serve clients in the current national marketplace, lawyers need greater flexibility than has been necessary in the past.

As the New York State Bar puts it:

Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where not permitted by law or court order to do so. 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 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.³

So how much latitude can a lawyer expect as to Administrative and Corporate Matters in the current environment?

The first area of consideration for away matters is the lawyer's own home state rules. The typical state rule will prohibit an attorney licensed in that state from practicing in another jurisdiction where doing so violates the rules of the distant jurisdiction.⁴

With respect to what is considered permissible conduct by out-of-state lawyers, many states use the Model Rules of Professional Conduct of the American Bar Association (“Model Rules”) as their source document for their statutes and professional rules regarding lawyer conduct. As a result, when the Model Rules move in a given direction, a trend across the states often follows. The current path in the evolution of out-of-state practice rules has been heavily influenced by the recommendations set forth in Report 201B of the ABA’s Commission on Multijurisdictional Practice. That Report, which was adopted by the ABA’s House of Delegates on August 12, 2002, represents the ABA’s latest recommendation on the subject.⁵

The most relevant portions of the current Model Rules read as follows:

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:

...

(2) are in or reasonable(sic) related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or 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.

While (c) (2) and (3) are themselves applicable to Litigation Matters more than to Administrative and Corporate Matters, their significance in this portion of the discussion is as a lead-in to (c) (4). With respect to that subsection, the Comments to the Model Rules provide:

[5] There are occasions in which a lawyer admitted to practice 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 under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized.

[6] There is no single test to determine whether a lawyer’s services are provided on a “temporary basis” in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be “temporary” even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

With the exception of appearance at formal hearings, Commissioners of Insurance across the country do not object, or even comment, when lawyers from other states come to them on behalf of their clients. This reality, which is not unique to insurance regulatory practice, is addressed in a further portion of the Comments:

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission *pro hac vice* or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission *pro hac vice* before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

An example of the persuasive nature of the Model Rules can be found in the new treatment on the subject of unauthorized practice and multijurisdictional practice provisions on the Washington State Rules of Professional Conduct which became effective on September 1, 2006, and which track the Model Rules, right down to the Section Number and comments.⁶ Other states have also adopted the Model Rules, word for word, in this area. They include Arkansas,⁷ Delaware,⁸ Indiana,⁹ Iowa,¹⁰ Maryland,¹¹ Minnesota,¹² Nebraska,¹³ Oregon,¹⁴ and Utah.¹⁵

The ABA's Center for Professional Responsibility tracks implementation of Model Rule 5.5 and, for the most part, current status is readily ascertainable.¹⁶ In addition to the ten states listed above, twenty states have adopted rules which the ABA considers to be similar to the Model Rules in this area, six states have recommendations in their highest court to adopt rules identical or similar to the Model Rules, six more have study committees which have recommended adopted of the Model Rules or similar rules, and a further twelve have created committees to study the recommendations. Thus, a total of forty of the fifty-one jurisdictions comprising the continental U.S. and Hawaii have either adopted the new Model Rules, rules similar to them, or are clearly headed in that direction.

Under these circumstances, a client's selection of counsel may depend less than ever on whether a given lawyer is admitted in a particular state than on whether the client involved perceives that a particular lawyer, wherever situated, is its best source of representation for a matter.¹⁷

The author believes that the expanding parameters for multijurisdictional practice are a reasonable and proper recognition of the economic and business realities of the clients served by the legal profession. Notwithstanding that latitude, in the area of insurance regulatory law, the benefits of familiarity with state-specific factors¹⁸ which are often fully available only through the involvement of practitioners who have a long history of regular and broad involvement with a specific state remain strong practical considerations in the selection of counsel.

¹ See, for example, *Birbrower et al. v. Superior Court* (1998) 17 Ca.4th 119, 70 Cal.Rptr.2d 303, 949P.2d 1.

² Rule 983, California Rules of Court

³ New York State Bar Association, "The Lawyer's Code of Professional Responsibility," EC ("Ethical Consideration) 3-9, page 36. See also similar language in Comment 5 to Rule 5.5 of the Texas Rules of Disciplinary Conduct.

⁴ Examples include Illinois Rules of Professional, Rule 5.5 (a); California Rules of Professional Conduct Rule 1-300 (A); New York State Bar Association, "The Lawyer's Code of Professional Responsibility," DR (Disciplinary Rule) 3-101 B.

⁵ <http://www.abanet.org/cpr/mjp/201b.doc>

⁶ http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garpc5.5

⁷ <http://courts.state.ar.us/opinions/2005a/20050303/arpc2005.html>

⁸ <http://courts.delaware.gov/Rules/?FinalDLRPCclean.pdf>

⁹ <http://www.in.gov/judiciary/orders/rule-amendments/2004/0904-prof-conduct.pdf>

¹⁰ <http://www.judicial.state.ia.us/wfdata/frame2395-1066/File1.pdf>

¹¹ <http://198.187.128.12/maryland/lpext.dll?f=templates&fn=fs-main.htm&2.0>

¹² <http://www.courts.state.mn.us/rules/professionalConduct/MRPC.DOC>

¹³ <http://court.nol.org/rules/RulesProfConduct34.htm#rule55>

¹⁴ <http://www.osbar.org/docs/rulesregs/ORPC.pdf>

¹⁵ http://www.utcourts.gov/resources/rules/ucja/13_proco/5_5.htm

¹⁶ http://www.abanet.org/cpr/jclr/5_5_quick_guide.pdf

¹⁷ An interesting sidenote here is that the concept of reciprocity in bar admissions is becoming far less significant, except for lawyers who either seek to relocate or who appear frequently before tribunals which require *pro hac vice* admissions and would prefer avoiding the need for such motions and/or the need for the involvement of local counsel.

¹⁸ For example, a) such dimensions as the impact of unwritten interpretations, prior decisions and practices which may not be readily available to occasional practitioners, b) the internal operational dynamics of a

particular state's agency, c) the preferred access points for particular types for questions, d) the agency's current and historical enforcement priorities and policies, and e) political history and current political considerations.