

SHOULD BORDERS MATTER TO THE TRANSACTIONAL LAWYER?

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I. INTRODUCTION

Lawyer mobility, client needs, and the realities of modern multijurisdictional practice have once again prompted the American Bar Association ("ABA") to modify existing Model Rules of Professional Conduct and to adopt a new Model Rule to address cross-border practice. The underlying aim of these changes is to assist attorneys in avoiding the unauthorized practice of law – because if permissible multijurisdictional practice is one side of the coin, the unauthorized practice of law is the other.

For the "litigator," permissible cross-border practice is generally more easily defined and arguably more in the forefront of the attorney's mind. The litigator knows that she¹ cannot appear in court or file pleadings in a jurisdiction in which she is not licensed, unless she has been admitted *pro hac vice*. Some of the litigator's more nuanced cross-border practice concerns may include: whether she can interview or depose witnesses in a jurisdiction in which she is not licensed, or whether she can represent a client in an arbitration taking place in a jurisdiction other than her own.

What of the "transactional attorney"² and multijurisdictional practice? The transactional attorney, not representing a client before a tribunal, may not give the unauthorized practice of law more than a passing thought. But what if that same transactional attorney advertises in a jurisdiction in which he is not licensed, or opens an office outside his jurisdiction? Or represents a client located outside the attorney's home jurisdiction? Or perhaps represents a client located in his jurisdiction, but regarding a transaction, the focus of which is in another jurisdiction? And finally, what if the attorney needs to quickly relocate

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1. Throughout this analysis, the author will use the pronouns "he" and "she" interchangeably.

2. For purposes of this discussion, "transactional attorney" refers to an attorney in private practice whose practice does not involve litigation or alternative dispute resolution. Such attorneys would include business or "corporate law" attorneys who advise clients on organizational structure and inter-business deals. It would also include attorneys whose practices are focused upon the law of real estate, banking, or trusts and estates.

his practice to a new jurisdiction in which he is not presently licensed to practice law?

This analysis will explore (1) the extent to which new ABA Model Rules would address some of these concerns through revisions to ABA Model Rule 5.5 on multijurisdictional practice and the Model Rule on Admission by Motion, and through the adoption of the new Model Rule regarding Practice Pending Admission; (2) why jurisdictions may not adopt these provisions anytime soon; and (3) some of the dangers of the unauthorized practice of law that may stalk the unwary transactional lawyer.

II. THE AMENDMENTS TO ABA MODEL RULE 5.5 AND THE MODEL RULE ON ADMISSION BY MOTION, AND THE ADOPTION OF THE ABA MODEL RULE ON PRACTICE PENDING ADMISSION, WOULD LESSEN THE BURDEN ON THE RELOCATING ATTORNEY

In August 2012, the ABA House of Delegates approved multiple resolutions submitted by the ABA Commission on Ethics 20/20. A number of complementary initiatives included (1) an amendment to ABA Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law); (2) adoption of a new ABA Model Rule on Practice Pending Admission; and (3) an amendment to the ABA Model Rule on Admission by Motion. The combined effect of the first two changes (*i.e.*, amending Model Rule 5.5 and adopting the Rule on Practice Pending Admission) “would enable lawyers to practice in a new jurisdiction while the lawyer actively pursues admission through one of the procedures that the jurisdiction authorizes, such as admission by motion or passage of that jurisdiction’s bar examination.”³ The effect of the third change (*i.e.*, amending the Rule on Admission by Motion) “would allow lawyers to qualify for admission by motion at an earlier point in their careers than the current Rule allows (*i.e.*, after three, instead of five, years of practice).”⁴

In 2002, at the recommendation of the ABA’s Commission on Multijurisdictional Practice, the ABA House of Delegates revised the then-existing ABA Model Rule 5.5 to allow greater cross-border practice. Since 2002, technological developments have further complicated the issues surrounding a lawyer’s “systematic and continuous presence” under Model Rule 5.5. The ABA Commission on Ethics 20/20 specifically recognized these changes and, for the benefit of clients (to allow them their choice of counsel with respect to their various jurisdictional needs) and for attorneys (to allow greater

3. ABA Comm’n on Ethics 20/20, Report to the House of Delegates: Resolution 105D, 1 (2012) [hereinafter ABA Report 105D].

4. ABA Comm’n on Ethics 20/20, Report to the House of Delegates: Resolution 105E, 1 (2012) [hereinafter ABA Report 105E].

ease in moving to another jurisdiction when client needs or life changing events prompt such a move), stated:

The ABA Commission on Ethics 20/20 has examined how globalization and technology are transforming the legal marketplace and fueling cross-border practice. In studying these developments, the Commission has reviewed the existing regulatory framework governing multijurisdictional practice and lawyer mobility and produced several Resolutions and Reports. The Resolutions accompanying this Report [re: a new Rule for Practice Pending Admission and the “conforming amendment” to Model Rule 5.5] are designed to address the ethics and regulatory issues associated with a lawyer’s establishment of a practice in a new jurisdiction.

* * *

This proposal recognizes the reality that, in today’s legal services marketplace, a lawyer licensed in one U.S. jurisdiction may need to relocate to a new U.S. jurisdiction, sometimes on short notice, and that the admissions process in the new jurisdiction can take considerable time. Subject to numerous restrictions to protect clients and the public, the new Model Rule [re: Practice Pending Admission] is designed to permit the relocating lawyer to practice in the new jurisdiction in the interim, thus affording clients their choice of counsel and giving lawyers the ability to practice without the risk of engaging in the unauthorized practice of law.⁵

The new ABA Model Rule on Practice Pending Admission attempts to address the gap in time between (1) when an attorney moves to a new jurisdiction to establish a systematic or continuous presence in that jurisdiction; and (2) when the attorney becomes fully licensed to practice in that new jurisdiction. Absent rules addressing this lag time, the moving attorney is in a quandary as to the limits of her capacity to practice.

The new Rule would only apply to those attorneys licensed to practice in another U.S. jurisdiction and who have been “actively engaged” in the practice of law for three of the last five years. Such lawyers may provide legal services in the new jurisdiction “through an office or other systematic or continuous presence” for no more than one year (365 days), and so long as the lawyer complies with a number of other requirements.⁶ For example, the lawyer must not be disbarred or suspended in any jurisdiction, nor be subject to any discipline or pending disciplinary proceeding in any jurisdiction.⁷ The lawyer must not have been previously denied admission to the new jurisdiction, nor failed to pass

5. ABA Report 105D, *supra* note 3, at 1.

6. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (1) (2012).

7. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (1)(a) (2012).

that jurisdiction's bar examination.⁸ If the lawyer intends to practice law in the jurisdiction under the authority granted by this Rule, the lawyer must provide written notice to the jurisdiction's disciplinary counsel and admissions office.⁹ Within forty-five days of establishing her systematic presence in the jurisdiction, the lawyer must also submit a completed application for full admission by motion or by examination.¹⁰

Further, the lawyer relying upon the Rule on Practice Pending Admission must associate with another lawyer who is already fully licensed to practice in the new jurisdiction, with that association being akin to a local counsel relationship like that under ABA Model Rule 5.5(c)(1).¹¹ Importantly, the lawyer relying upon the Rule must also comply with the advertising and solicitation rules of the new jurisdiction so that the lawyer's clients and the general public understand that the lawyer's authority to practice is limited until she can become fully licensed in the jurisdiction.¹² The new Rule also provides similar opportunities for foreign legal consultants.¹³

The list of requirements continues. If the lawyer becomes subject to a disciplinary action, or disciplinary sanctions, during the pendency of her application for full admission, the lawyer must notify the jurisdiction's disciplinary counsel and admissions office, which may consider any such actions when determining whether the lawyer should be fully admitted.¹⁴ If the lawyer withdraws her application for admission, or if the application is denied, the lawyer's limited authority to practice under the Rule is terminated.¹⁵ The lawyer's authority to practice under the Rule is also terminated if she does not file an application for admission within forty-five days of establishing her office or systematic presence,¹⁶ or if she fails to continuously comply with other

8. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (1)(b) (2012).

9. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (1)(c) (2012).

10. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (1)(d) (2012).

11. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (1)(f) and cmt. (2012). (More of a concern for "litigators," the Rule also requires that, before the lawyer is formally and fully admitted to practice in the jurisdiction, she must still be admitted *pro hac vice* prior to appearing before any tribunal that would otherwise require it of attorneys not licensed to practice in the jurisdiction. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (3) (2012)).

12. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (1)(g) and cmt. 3 (2012). The rule and comment note that "[t]he lawyer cannot hold himself out to the public as a fully licensed attorney until he becomes one." Further explaining: "[b]ecause such a lawyer will typically be assumed to be admitted to practice in this jurisdiction, that lawyer must disclose the limited practice authority and jurisdiction of licensure in all communications with potential clients, such as on business cards, websites and letterhead."

13. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (2) (2012).

14. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (4) (2012).

15. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (5)(a) (2012).

16. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (5)(b) (2012).

requirements of the Rule.¹⁷ Further, when a lawyer's authority to practice under the Rule is terminated, she must close her office within thirty days; end her systematic and continuous presence in the jurisdiction;¹⁸ notify all clients, and all opposing counsel and co-counsel in pending matters, that she is no longer authorized to practice;¹⁹ and do whatever is necessary to protect her client's interests.²⁰ She also may not commence any new representations that would constitute the practice of law in that jurisdiction.²¹

The corresponding change to Model Rule 5.5 recognizes that the lawyer not licensed to practice in the jurisdiction may nonetheless provide legal services in the jurisdiction through an office or other systematic and continuous presence, if the services are authorized by federal or other law or rule (such as the new "Model Rule on Practice Pending Admission").²² The change specifically acknowledges that the lawyer may not only provide legal services in the jurisdiction in which she is not yet licensed, but may do so through establishment of an office in the jurisdiction.

The restrictions set forth in these complementary Rules (especially as to the Model Rule on Practice Pending Admission) try to balance the needs of clients and lawyer mobility, on the one hand, and protection of the public, on the other. However, given the ease with which these changes would allow a not-yet-licensed attorney to establish a systematic presence in the jurisdiction, some jurisdictions may see these changes as going beyond what is necessary to recognize a Practice Pending Admission Rule, if the jurisdiction even adopts such a Rule.

As shown below, states' hesitancy to adopt such a provision may be inferred from their hesitancy to adopt the ABA Model Rule on Admission by Motion. In August 2002, the ABA adopted its Model Rule on Admission by Motion, which allows an experienced lawyer licensed in one jurisdiction to become fully admitted to practice in another jurisdiction without having to pass the jurisdiction's bar examination. The Model Rule allows the experienced lawyer to essentially "apply into" admission in the other jurisdiction.²³ However, the ABA Commission on Ethics 20/20 found that the admission by motion process was time consuming and frustrated the attorney's ability to represent clients. The lag time also affected the attorney's career choices.²⁴ Pursuant to the Model Rule, the applicant must (1) be licensed in another state, territory, or the District

17. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (5)(c) and (e) (2012).

18. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (6)(a) (2012).

19. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (6)(b) (2012).

20. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (6)(d) (2012).

21. ABA MODEL RULE ON PRACTICE PENDING ADMISSION (6)(c) (2012).

22. MODEL RULES OF PROF'L CONDUCT R. 5.5(d)(2) (2012).

23. ABA Report 105E, *supra* note 4, at 2.

24. *Id.* at 2-3.

of Columbia; (2) hold an appropriate law degree from an approved law school; (3) have been “primarily engaged in the active practice of law”²⁵ for a certain number of years; (4) establish that he or she is in good standing in all jurisdictions of licensure, and not subject to any current disciplinary sanctions or pending charges; and (5) establish “character and fitness to practice law.”²⁶ Before August 2012, the ABA Model Rule required that the attorney applicant be engaged in the active practice of law for five of the prior seven years immediately preceding the filing of her application for admission by motion. The August 2012 changes to the Model Rule reduce that timetable to three of the last five years.²⁷

III. THE ABA’S NEW AND REVISED MODEL RULES REGARDING PERMISSIBLE CROSS-BORDER PRACTICE ARE NOT LIKELY TO BE ADOPTED BY JURISDICTIONS IN THE NEAR FUTURE

Passage of these measures by the ABA House of Delegates is one thing; adoption by any given jurisdiction is quite another. The ABA itself and various commentators have recognized that states are hesitant to ease restrictions on cross-border practice, and various jurisdictions have identified a variety of reasons for guarding admission to practice in their respective jurisdictions.²⁸ In fact, in arguing for reduction of the “time-in-practice” requirement to three of the past five years for Admission by Motion, the ABA Ethics 20/20 Commission discounted a number of arguments against such a reduction, including: (1) insufficient competence of a third-year attorney; (2) bar exam passage as an

25. See ABA MODEL RULE ON ADMISSION BY MOTION (2) (2012) (“Active practice” includes (a) representing client(s) in private practice; (b) serving as a lawyer for a federal, state or local government authority or agency; (c) teaching law at an approved law school; (d) serving as a federal, state or local judge, or judicial law clerk; and (e) serving as in-house counsel.).

26. ABA MODEL RULE ON ADMISSION BY MOTION (1) (2012).

27. ABA MODEL RULE ON ADMISSION BY MOTION (1)(c) (2012).

28. See, e.g., ABA Report 105E, *supra* note 4, at 5 (“The Commission concluded that the widespread adoption of admission by motion procedures is a positive development, but also found that a number of jurisdictions have not yet adopted an admission by motion process or have adopted a process that imposes unnecessary restrictions and requirements. Thus, in addition to proposing the amendments described above, the Commission also urges the eleven jurisdictions that have not adopted the Model Rule to do so and urges other jurisdictions with admission by motion procedures to eliminate any restrictions, such as reciprocity requirements, that do not appear in the Model Rule.”); Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5 – An Interim Assessment*, 43 AKRON L. REV. 729, 767 (2010) (While analyzing many jurisdictions’ divergent treatment of the issue of multijurisdictional practice, Prof. Greenbaum maintained a positive outlook for the future: “Once experience with a modern multijurisdictional regime proves positive across a number of jurisdictions, the outliers that have not yet adopted a rule [allowing multijurisdictional practice] are likely to follow. And as the forces that created the movement to multijurisdictional practice continue to accelerate, it is likely that the permissible scope of multijurisdictional practice also will broaden.”).

indication of knowledge of the laws of the particular jurisdiction; and (3) taking and passing an “easier” bar to then move to a more challenging jurisdiction.²⁹ Other, more cynical explanations for states’ hesitancy to relax cross-border practice restrictions include monopolistic control over the practice of law.

Regardless of the reasons for maintaining such restrictions, past history of the acceptance (or not) of the ABA’s Model Rule on Admission by Motion reflects the hesitancy of states to allow systematic cross-border practice and the free movement of an attorney’s practice from a jurisdiction in which he is licensed to one in which he is not. The ABA itself has recognized that eight years after the ABA’s adoption of the Model Rule on Admission by Motion, 11 states – California, Delaware, Florida, Hawaii, Louisiana, Maryland, Montana, Nevada, New Jersey, New Mexico, and South Carolina – have not adopted any rule that allows an attorney to simply move for admission based on his years of practice in a sister state.³⁰ Most of the other 40 jurisdictions in the United States (including the District of Columbia) that have adopted some form of admission by motion include the “five-out-of-seven years in active practice” provision originally proposed by the ABA. However, many jurisdictions place significantly greater burdens on the applicant. Some jurisdictions require that the applicant certify that a percentage (usually a majority) of his or her practice will be conducted in the new jurisdiction.³¹ Many more jurisdictions require “reciprocity,” meaning the applicant can only take advantage of the jurisdiction’s admission by motion option if the applicant’s home jurisdiction allows attorneys from the other jurisdiction to be admitted by motion. Some jurisdictions with a “reciprocity requirement” even require that the applicant establish that the home jurisdiction has a no less stringent admission by motion process.³² Neither

29. ABA Report 105E, *supra* note 4, at 3-4. Charles Wolfram’s work, *Symposium: Ethics and the Multijurisdictional Practice of Law: Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by the Transactional Lawyer*, 36 S. TEX. L. REV. 665 (1995), provides a compelling piece challenging many of the arguments against allowing more permissible cross-border practice. Even back in 1995, Wolfram recognized: “Innovations in telecommunications and transportation have made keeping in touch with distant clients almost as effective as communication with clients in the same community. For their part, lawyers’ reputations, at least in some specialties, have also spread beyond an otherwise confining web of state lines.” *Id.* at 669.

30. See ABA Report 105E, *supra* note 4, at 3, (referencing American Bar Association, *Comparison of ABA Model Rule on Admission by Motion With State Versions* (2010), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/admission_motion_comp.authcheckdam.pdf).

31. See, e.g., IND. ADMISSION AND DISCIPLINE R. 6(1)(i) (requiring, in part, that the applicant file “an affidavit of the applicant’s intent to engage in the practice of law as defined in Section 1(a) predominantly in Indiana,” with “predominantly” meaning that “the applicant’s practice in Indiana must exceed, or be equal to, his or her practice in all other jurisdictions combined”).

32. See, e.g., KY. SUP. CT. R. 2.110(1) and (3) (allowing for admission by a person licensed in the highest court of another state or the District of Columbia and who has been engaged in the

“home practice” nor “reciprocity” is part of the old or revised ABA Model Rule on Admission by Motion; yet, as of 2010, 26 of the 40 jurisdictions that allow either admission by motion or its equivalent required some form of reciprocity from the applicant’s home jurisdiction.

Kentucky’s own experience with revising its version of Rule 5.5 further shows that jurisdictional borders are here to stay for the foreseeable future. Prior to the 2009 revisions, Kentucky’s version of Rule 5.5 did not address permissible cross-border practice:

SCR 3.130 (5.5) Unauthorized practice of law.

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 the unauthorized practice of law.

The Kentucky Bar Association (KBA) Ethics 2000 Committee³³ proposed significant changes to Kentucky’s version of Rule 5.5. In addition to a nearly wholesale change to the Rule’s commentary, the Committee proposed that Kentucky modify its Rule 5.5 as follows:

SCR 3.130 (5.5) Unauthorized practice of law; multijurisdictional practice of law (as proposed by the KBA Ethics 2000 Committee).

- (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 or maintain an office or other 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.

active practice of law for five of the last seven years; admission is also contingent upon the applicant establishing that “the district or state from which the applicant applies and in which the applicant performs the major portion of his or her professional activities has rules or other provisions providing for admission without examination and by reciprocity or comity which are no more restrictive than the rules of this Commonwealth”).

33. The KBA Board of Governors created the KBA Ethics 2000 Committee on July 1, 2003 to investigate changes to the ABA Model Rules and to recommend changes to Kentucky’s version of the Rules of Professional Conduct. The Committee’s November 16, 2006 Report became the basis for many changes adopted by the Kentucky Supreme Court, effective July 15, 2009.

(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 if such services:

(1) comply with SCR 3.030(2),³⁴ or do not require compliance with SCR 3.030(2), and are legal services undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; or

(2) are in, or reasonably related to, a pending or potential proceeding before a tribunal or alternative dispute resolution proceeding in another jurisdiction for a client, or prospective client pursuant to Rule 1.18, 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 pursuant to SCR 3.030(2); or

(3) are not within paragraph (c)(2) and arise out of, or are reasonably related to, the representation of the lawyer's client in the jurisdiction in which the lawyer is admitted.

(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) comply with SCR 2.111 regarding a Limited Certificate of Admission to Practice Law in this jurisdiction; or

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

(e) A lawyer is authorized to provide legal services under this Rule shall be subject to the Kentucky Rules of Professional Conduct and shall comply with SCR 3.030(2) or, if such legal services do not require compliance with that Rule, the lawyer must actively participate in, and assume responsibility for, the representation of the client.³⁵

In explaining its deviation from the then-existing ABA Model Rule version of Rule 5.5, the KBA Ethics 2000 Committee stated that it:

disagreed with the scope of the [ABA Model] Rule in allowing out-of-state lawyers to practice in Kentucky The key modification in [subpart c] was to add the requirement that for the covered temporary

34. KY. SUP. CT. R. 3.030(2) provides: "A person admitted to practice in another state, but not in this state, shall be permitted to practice a case in this state only if that attorney subjects himself or herself to the jurisdiction and rules of the Supreme Court of Kentucky, pays a one time per case fee of two hundred seventy dollars (\$270.00) to the Kentucky Bar Association, and engages a member of the association as co-counsel, whose presence shall be necessary at all trials and at other times when required by the court. No motion for permission to practice in any state court in this jurisdiction shall be granted without submission to the admitting court of a certification from the Kentucky Bar Association of receipt of this fee."

35. KBA Ethics 2000 Comm., Report, at 5-16 (Nov. 16, 2006).

legal services to be authorized the services must “arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.” This limitation is for the protection of the public with regard to new client matters.³⁶

The KBA Ethics 2000 Committee concluded that the ABA Model Rule:

went too far in allowing lawyers from other jurisdictions to temporarily provide legal services in new client matters unrelated to their practice in the jurisdiction they are authorized to practice. The changes the Committee recommends are considered a reasonable balance between the need to recognize in the Rules the realities of multijurisdictional practice as it exists today and the need to protect the public by limiting circumstances in which lawyers unfamiliar with Kentucky law are permitted to provide legal series in Kentucky.³⁷

The Kentucky Supreme Court accepted most of the Committee’s recommendations on Rule 5.5, including its modification of Kentucky Rule 5.5(c)(3).³⁸ The only substantive change that the Kentucky Supreme Court made to what the Commission proposed was to change Kentucky Rule 5.5(c)(1) to read: “comply with SCR 3.030(2), or they do not require compliance with SCR 3.030(2) due to federal statute, rule or regulation”³⁹ The Kentucky Supreme Court’s acceptance of the Commission’s recommendation on deviating from the ABA Model Rule approach, plus the Court’s additional change on its own initiative, suggests that the Court carefully considered the recommendations and the implications of a revised Rule 5.5 with respect to permitting cross-border practice in the Commonwealth. It also shows that Kentucky was not willing to go as far as the ABA Model Rule suggested with respect to permissible cross-border practice.

These examples show just how protective state supreme courts and their respective bar associations are regarding their borders and how concerned they are about ensuring that attorneys practicing within their borders are licensed there.

IV. PITFALLS FOR TRANSACTIONAL ATTORNEYS WITH RESPECT TO THE UNAUTHORIZED PRACTICE OF LAW

Suffice it to say, the above-noted experience suggests that we are not likely to see the unhindered movement of attorneys from one jurisdiction to another in the near future. States may generally accept temporary forays into their borders

36. *Id.* at 5-20.

37. *Id.* at 5-21.

38. KY. SUP. CT. R. 3.1.30 (Rule 5.5(c)(3)).

39. KY. SUP. CT. R. 3.1.30 (Rule 5.5(c)(1)).

for the attorney licensed in another jurisdiction, but they are unlikely to allow a systematic presence anytime soon.

That being the case, attorneys need to be mindful that jurisdictions will look harshly upon an out-of-state attorney who systematically “practices law” within their borders. One difficulty is that the “practice of law” does not fit easy definitions. For example, Kentucky defines the practice of law as “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, duties, obligations, liabilities, or business relations of one requiring the services”⁴⁰ This definition, like that of many other jurisdictions, is very broad and encompasses a variety of areas. Courts also jealously guard their duty to regulate the practice of law, and to protect the public from the unauthorized practice of law. Kentucky, for example, recognizes: “Public interest dictates that the judiciary protect the public from the incompetent, the untrained, and the unscrupulous in the practice of law. Only persons who meet the educational and character requirements of this Court and who, by virtue of admission to the Bar, are officers of the Court and subject to discipline thereby, may practice law. The sole exception is the person acting in his own behalf.”⁴¹ Likewise, South Carolina recognizes: “Our duty to regulate the legal profession is not for the purpose of creating a monopoly for lawyers, or for their economic protection; instead, it is to protect the public from the potentially severe economic and emotional consequences which may flow from the erroneous preparation of legal documents or the inaccurate legal advice given by persons untrained in the law.”⁴²

In terms of either the lawyer licensed in another jurisdiction or, more often, the person or entity that is not a licensed attorney at all, the notion of the unauthorized practice of law appears obvious. Because of the differences in a litigation practice and a transactional practice, the likelihood that the transactional attorney will fall victim to the unauthorized practice of law is more pronounced. With respect to the litigator, if the litigator is not licensed to practice in the particular jurisdiction where a case is pending, it is universally accepted that he or she will need to be admitted *pro hac vice* for that particular jurisdiction; additionally, states require that an out-of-state attorney associate with a locally licensed attorney who actively participates in the representation. Many states will allow an attorney not licensed to practice in that jurisdiction to take a deposition or review documents as contemplated by Rule 5.5. But there are some states whose *pro hac vice* requirements are more onerous and require,

40. KY. SUP. CT. R. 3.020.

41. *Frazee v. Citizens Fidelity Bank & Trust Co.*, 393 S.W.2d 778, 782 (Ky. 1964).

42. *Linder v. Ins. Claims Consultants, Inc.*, 560 S.E.2d 612, 617 (S.C. 2002).

for example, the litigator to identify all cases in the past five years in which his or her law firm's attorneys have been admitted *pro hac vice* in that jurisdiction.⁴³

Regardless of the subtle differences in *pro hac vice* procedures among jurisdictions, at least with respect to litigation, the court acts as a "goal keeper" against the unauthorized practice of law. In contrast, a transactional attorney lacks a similar "goal keeper" to assess when the attorney is approaching, or has crossed, the (indefinite) line of unauthorized practice. Consequently, concerns over the unauthorized practice of law are a significant issue for the transactional attorney. Transactional attorneys who have practiced in jurisdictions in which they are not licensed have encountered disciplinary problems, have subjected themselves to personal jurisdiction in those locations, and have even opened themselves up to private causes of action for the unauthorized practice of law.

A. Unauthorized Practice of Law May Prevent a Lawyer From Becoming Licensed in the Jurisdiction

In *In re Application of Steven B. Jackman for Admission to the Bar*,⁴⁴ New Jersey postponed a candidate's admission to the bar because he had practiced transactional law in New Jersey for a number of years without a license.⁴⁵ The candidate had been licensed to practice law in Massachusetts, did so for six years, and then became an associate in a New Jersey law firm.⁴⁶ He applied to take the New Jersey bar exam; however, he was working on a very large transaction and his managing partner asked him to forego taking the exam at that time.⁴⁷ The managing partner told him it was "a good idea" for him to take the bar exam at some point,⁴⁸ but the managing partner also told him it was not necessary for him to take the New Jersey bar exam to practice corporate law in New Jersey.⁴⁹ Over approximately a seven-year period in which he did not sit for the New Jersey bar exam, the candidate actively practiced merger and acquisition law and general corporate law in New Jersey.⁵⁰ He met and consulted with clients, signed legal documents, and negotiated with other attorneys on behalf of his clients – while billing his services as a senior

43. See, e.g., IND. ADMISSION AND DISCIPLINE R. 3(2) (2012). Subsection (a)(4)(vi) requires the out-of-state attorney seeking *pro hac vice* admission in Indiana to identify, by caption and case number, all cases or proceedings in which either he or any member of his firm has appeared *pro hac vice* before an Indiana court or administrative agency in the last five years.

44. 761 A.2d 1103 (N.J. 2000).

45. *Id.* at 1103-04.

46. *Id.* at 1104.

47. *Id.*

48. *Id.*

49. *Id.* at 1104.

50. *Jackman*, 761 A.2d at 1105.

associate.⁵¹ After not making partner at the New Jersey law firm in any of the four years in which he was eligible, the candidate joined a New York law firm which required him to take both the New York and New Jersey bar examinations.⁵²

Even though the candidate had passed the New Jersey bar exam, the New Jersey Bar Association's Committee on Character and Fitness denied his admission, finding that the candidate had engaged in the unauthorized practice of law during his almost seven years with the New Jersey law firm.⁵³ Because of his unauthorized practice, the candidate was deemed unfit to be admitted to practice in New Jersey.⁵⁴ In ruling that the candidate's admission be delayed until January 2001, the New Jersey Supreme Court recognized that there was no exception to the state's license requirement for one engaged solely in transactional practice and not appearing in court.⁵⁵ Interestingly, the Court also specifically noted the difference between regularly providing legal services in New Jersey and the more incidental or temporary provision of services to a New Jersey client by a non-New Jersey licensed attorney. Addressing prior New Jersey opinions, the Court recognized:

Both *Appell* and *In Re Waring* involved transitory legal activities in New Jersey by out-of-state attorneys employed by out-of-state firms that were countenanced by the Court because of the unique facts of those cases. In those cases the out-of-state attorney was not practicing long term as a member of an in-state law firm. *Appell* and *In Re Waring* permitted the use of out-of-state attorneys only to participate in a single transaction. [The candidate's] actions during the almost seven year period he served as an associate at the New Jersey law firm ... without a New Jersey license, was patently distinct. His activities were not authorized by the past precedent of either *Appell* or *In Re Waring*.⁵⁶

The Court likewise distinguished the candidate's systematic presence with *Opinion 33*,⁵⁷ in which the New Jersey Supreme Court found overly broad the Committee on the Unauthorized Practice of Law's opinion regarding use of out-of-state attorneys by New Jersey government bodies on state and municipal bond matters.⁵⁸ Because New Jersey law firms lacked expertise in that area, the Court

51. *Id.* at 1104.

52. *Id.* at 1104-05.

53. *Id.* at 1103.

54. *Id.* at 1104.

55. *Id.* at 1106.

56. *Jackman*, 761 A.2d at 1108 (citing *In re Waring's Estate*, 221 A.2d 193 (N.J. 1966); *Appell v. Reiner*, 204 A.2d 146 (N.J. 1964)).

57. *Id.* at 1108-09 (citing *In re Opinion 33 of the Comm. on the Unauthorized Practice of Law*, 733 A.2d 478 (N.J. 1999)).

58. *Jackman*, 761 A.2d at 1108 (citing *In re Opinion 33*, 733 A.2d at 478).

had recognized that, for a number of years, it was necessary for New Jersey to use out-of-state attorneys.⁵⁹ While acknowledging that those out-of-state attorneys had engaged in the practice of law, the Court also applied a “public interest” test to balance the risks and benefits of allowing such practice.⁶⁰ The Court ultimately determined that an out-of-state bond counsel may practice bond law in New Jersey if she associates with New Jersey-licensed bond counsel who retains responsibility for the representation.⁶¹

It should be noted that New Jersey is one of the jurisdictions that has not adopted an admission by motion rule. This might indicate that New Jersey and other states who likewise have not adopted admission by motion procedures are more sensitive to the unauthorized practice of law by out-of-state transactional attorneys. The exceptions noted by the New Jersey Supreme Court might be particularly helpful to the transactional attorney. It would appear that New Jersey, as with many other states, will allow temporary practice consistent with the exceptions found in ABA Model Rule 5.5. Likewise, if there is a particular lack of expertise within the jurisdiction and the attorney not licensed to practice in that jurisdiction affiliates with a locally licensed attorney, who retains responsibility for the matter, it is equally likely that the attorney may not be deemed to have engaged in the unauthorized practice of law. The problem in *In re Application of Steven B. Jackman* arose because the attorney seemingly gave no consideration to the fact that he had maintained a systematic presence in a jurisdiction in which he was not licensed. It is also patently clear that this type of situation presents an easy opportunity for the candidate to be caught, *i.e.* when seeking admission to a state bar in which the attorney has had a longstanding systematic presence in the jurisdiction. It should also be noted that under the ABA’s new Rule on Practice Pending Admission, the candidate would be in no better position because he had waited nearly seven years to seek admission to the New Jersey Bar and had allowed his Massachusetts license to become “inactive.”

B. Opening an Office in a Jurisdiction Where the Attorney is not Licensed is Likely to Lead to Unauthorized Practice Charges

Some states, such as Florida, are especially sensitive to out-of-state attorneys opening offices in their jurisdiction. In *Florida Bar v. Savitt*,⁶² the Florida Bar initiated injunction proceedings to stop the unauthorized practice of law against a New York-based law firm and its attorney. The law firm was opening an office

59. *Id.*

60. *Id.*

61. *Id.*

62. 363 So. 2d 559 (Fla. 1978).

in Miami and putting in charge a partner who was not licensed in Florida.⁶³ Pursuant to a Joint Motion and Stipulation of Settlement approved by the Florida Supreme Court, the law firm agreed that, instead of attorney Savitt, a Florida-licensed attorney would supervise the office.⁶⁴ The non-Florida licensed attorneys working in the office could provide assistance to the Florida-licensed attorneys; however, the firm would be required to identify to clients and others those lawyers not licensed to practice in Florida.⁶⁵ In addition, the non-Florida licensed attorneys would be permitted to provide advice on matters of federal law or the law of other jurisdictions, so long as the non-Florida licensed attorney was only in Florida on a temporary basis and it was specifically noted that the lawyer was not licensed in Florida.⁶⁶

Similarly, in *Cleveland Bar Ass'n v. Misch*,⁶⁷ an Illinois-licensed attorney, living in Ohio, engaged in the unauthorized practice of law by working out of an Ohio office, advising Ohio clients on Ohio tax matters, representing a client before the Ohio Board of Tax Appeals, and drafting buy-sell agreements for Ohio companies.⁶⁸ The respondent attorney argued that he was a "consultant" retained by an Ohio law firm to advise clients on various corporate matters, including buy-sell agreements and restructuring, ostensibly under the supervision of the Ohio law firm's attorneys.⁶⁹ The respondent used the firm's Ohio office and stationary (without noting that he was not licensed in Ohio), and directly advised firm clients on Ohio law matters, with no supervision by an Ohio-licensed attorney.⁷⁰ Admitted to practice before the United States District Court for the Northern District of Ohio, the respondent was designated on firm invoices as "Federal Court Counsel." The Ohio Supreme Court found that the respondent's conduct constituted the unauthorized practice of law and enjoined the respondent from further practice in Ohio.⁷¹

C. Practicing the Law of a Foreign Jurisdiction Can Lead to Availing Oneself to Personal Jurisdiction

The unlicensed attorney can also subject himself to personal jurisdiction in a foreign jurisdiction if he advises clients on the law of that jurisdiction and promotes his alleged expertise on that jurisdiction's laws. For example,

63. *Id.*

64. *Id.* at 560.

65. *Id.*

66. *Id.* at 561.

67. 695 N.E.2d 244 (Ohio 1998).

68. *Id.* at 246-47.

69. *Id.* at 247.

70. *Id.*

71. *Id.* at 248.

Delaware courts have exercised personal jurisdiction, pursuant to Delaware's Long Arm Statute, over non-Delaware licensed attorneys. In *Sample v. Morgan*,⁷² the Court denied the defendant lawyer's and law firm's motion to dismiss for lack of personal jurisdiction.⁷³ The Court concluded that it was "constitutionally permissible to exercise jurisdiction over the lawyer and law firm" when they directed their conduct towards Delaware by regularly advising on Delaware law.⁷⁴ The Court specifically posed the question thusly:

The question presented is a straightforward one. May a corporate lawyer and his law firm be sued in Delaware as to claims arising out of their actions in providing advice and services to a Delaware public corporation, its directors, and its managers regarding matters of Delaware corporate law when the lawyer and law firm: i) prepared and delivered to Delaware for filing a certificate amendment under challenge in the lawsuit; ii) advertise themselves as being able to provide coast-to-coast legal services and as experts in matters of corporate governance; iii) provided legal advice on a range of Delaware law matters at issue in the lawsuit; iv) undertook to direct the defense of the lawsuit; and v) face well-pled allegations of having aided and abetted the top managers of the corporation in breaching their fiduciary duties by entrenching and enriching themselves at the expense of the corporation and its public stockholders? *The answer is yes.*⁷⁵

The defendant lawyer and law firm should have reasonably expected, under the circumstances, that they could be required to defend themselves in a lawsuit in Delaware, especially when the underlying action was based on the law firm's advice and representation.

D. Some Jurisdictions Recognize a Private Cause of Action for Unauthorized Practice of Law

Some jurisdictions even allow a private cause of action for "unauthorized practice of law," and some of those do not require the plaintiff to allege the existence of an attorney-client relationship with the lawyer. In *Fogerty v. Parker, Poe, Adams & Bernstein, LLP*,⁷⁶ the Alabama Supreme Court affirmed in part, but reversed in part, the trial court's dismissal of the plaintiffs' claims against a North Carolina law firm.⁷⁷ The law firm represented an Alabama

72. 935 A.2d 1046 (Del. Ch. 2007).

73. *Id.* at 1065.

74. *Id.* at 1048.

75. *Id.* at 1047 (emphasis added).

76. 961 So. 2d 784 (Ala. 2006).

77. *Id.* at 785.

company in which the plaintiffs had invested.⁷⁸ Plaintiffs were minority members in three Alabama closely held companies, all of which were failing real estate ventures in Gulf Shores, Alabama.⁷⁹ The plaintiffs requested the ability to inspect the company books in order to investigate the status of their investment and the representations that majority members had made to them.⁸⁰ The North Carolina law firm, supposedly representing the majority members, told the plaintiffs that they would not be allowed to inspect or copy the company books; that Alabama law purportedly did not entitle them to review the books; and that legal action would be pursued against the plaintiffs if they continued to seek a review of the books or claim that the majority members had committed fraud.⁸¹

When the plaintiffs filed suit against the majority members, they also asserted claims against the North Carolina law firm for unauthorized practice of law.⁸² The law firm moved to dismiss the claims against it, arguing that plaintiffs were not clients of the firm; that plaintiffs' exclusive remedy was a claim under the Alabama Legal Services Liability Act ("ALSLA");⁸³ and that there is no cause of action in Alabama for the unauthorized practice of law or violation of the Alabama Rules of Professional Conduct.⁸⁴ The trial court granted the law firm's motion, and plaintiffs appealed.

In reversing the trial court's decision, the Alabama Supreme Court disagreed with the defendant law firm's assertion that ALSLA was plaintiffs' exclusive remedy. The Court held that ALSLA only applies to legal malpractice allegations against attorneys duly licensed to practice in Alabama.⁸⁵ ALSLA simply did not apply because the North Carolina lawyers were not licensed to practice in Alabama.⁸⁶ The Court also noted that ALSLA applies only to claims by the recipient of the legal services (*i.e.*, the client) against his or her lawyer.⁸⁷

More importantly, the Court reaffirmed a private cause of action for unauthorized practice of law under Alabama Code § 34-3-6.⁸⁸ The Court also held that plaintiffs had sufficiently stated a claim for the unauthorized practice of law by alleging: (1) that the North Carolina attorneys were not licensed to practice law in Alabama; (2) that those attorneys had made representations concerning Alabama law for the majority members of the company and for the

78. *Id.* at 786.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Fogerty*, 961 So. 2d at 786-87.

83. ALA. CODE §§ 6-5-570 to 6-5-581 (1996).

84. *Fogerty*, 961 So. 2d at 787.

85. *Id.* at 789

86. *Id.*

87. *Id.*

88. *Id.* at 790-91

company itself; and (3) that the plaintiffs were injured as a result.⁸⁹ The North Carolina law firm sought to overturn Alabama precedent that recognized the private cause of action for the unauthorized practice of law – *Armstrong v. Brown Service Funeral Home West Chapel*.⁹⁰ However, the Alabama Supreme Court refused to do so and noted that the *Armstrong* case was “consistent with the law in other jurisdictions recognizing the unauthorized practice of law as a private cause of action.”⁹¹

Some states, such as South Carolina,⁹² have specifically rejected a private cause of action for the unauthorized practice of law. Although it dealt with non-attorney insurance adjusters, the holding of *Linder v. Insurance Claims Consultants, Inc. a/k/a ICC, Inc.*, recognizes that there is no private cause of action in South Carolina for the unauthorized practice of law.⁹³ The South Carolina Supreme Court specifically stated: “We do not, however, authorize a private right of action. Furthermore, there are statutes which prevent the unauthorized practice of law, and while they state that such activity will be deemed a crime, they do not sanction a private cause of action.”⁹⁴ Interestingly, the South Carolina Supreme Court also specifically noted that the respondents were only entitled to compensation for those actions that did not constitute the practice of law. Stated differently, the respondents were not entitled to any compensation for any actions that constituted the unauthorized practice of law.⁹⁵

Still other states, one example being Ohio, recognize a private cause of action for the unauthorized practice of law, but require that the state’s highest court first determine that the particular defendant has engaged in the unauthorized practice of law.⁹⁶ At least as to Ohio, it is not enough that the

89. *Id.*

90. *Armstrong v. Brown Serv. Funeral Home W. Chapel*, 700 So. 2d 1379 (Ala. Civ. App. 1997).

91. *Fogerty*, 961 So. 2d at 791.

92. South Carolina has also taken an interesting stance on the “attorney at law” exception to South Carolina’s Consumer Credit Counseling Act (“the S.C. Act”) (S.C. CODE ANN. §§ 37-7-101 to 37-7-122 (West 2003)). In *Lexington Law Firm v. S.C. Dep’t of Consumer Affairs*, 677 S.E.2d 591 (S.C. 2009), a Utah-based law firm with no South Carolina-licensed attorneys filed a declaratory judgment action, claiming that it was entitled to the “attorney at law” exemption to the licensing requirements of the S.C. Act. The South Carolina Supreme Court reversed summary judgment in the law firm’s favor because it expressly held that the “attorney at law” exception applied only to South Carolina-licensed attorneys. *Lexington Law Firm*, 677 S.E.2d at 594-95. The Court was also unimpressed with the law firm’s contradictory arguments that, on the one hand, it was entitled to the “attorney at law” exception, but on the other hand, it was not engaged in the “unauthorized practice of law,” but merely “conducting a business.” *Id.* at 595.

93. 560 S.E.2d 612, 622-23 (S.C. 2002).

94. *Id.* at 623.

95. *Id.* at 622.

96. *Greenspan v. Third Fed. Sav. & Loan Ass’n*, 912 N.E.2d 567, 572 (Ohio 2009) (The court recognized that prior to the General Assembly’s 2004 amendment to Ohio Revised Code § 4705.07, there was no private cause of action for the unauthorized practice of law. However,

defendant has allegedly engaged in conduct for which the Ohio Supreme Court has found someone else guilty of the unauthorized practice of law. Rather, Ohio requires that the Ohio Supreme Court first determine that the particular defendant has personally engaged in the unauthorized practice of law before a plaintiff can assert such a claim against that person.⁹⁷

Florida, on the other hand, recognizes a private cause of action for the unauthorized practice of law, but while the plaintiff must allege that the Florida Supreme Court has determined that the conduct in question constitutes the unauthorized practice of law, it is not necessary for the Supreme Court to have determined that the specific defendant has personally engaged in the unauthorized practice of law. The Court may have made that determination, for example, through review of proposed advisory opinions of the Florida Bar's Standing Committee on Unauthorized Practice of Law or through other actions filed by the Florida Bar.⁹⁸ Thus, a Florida court will not entertain a private cause of action if the Florida Supreme Court has had no occasion to determine whether the type of conduct constitutes the unauthorized practice of law. Such a complaint alleging an issue of first impression may be dismissed without prejudice or the case may be stayed until a determination can be made as to whether such conduct constitutes the unauthorized practice of law. As the Florida Supreme Court has explained: "if the actions complained of have been ruled on by this Court, then a plaintiff may be able to state a cause of action with proper pleading, even though the defendant accused of the unauthorized practice of law has not been subject to a Florida Bar proceeding."⁹⁹

specifically noting its responsibility for determining the unauthorized practice of law, the Court stated: "the General Assembly avoided invading this court's exclusive jurisdiction over the practice of law by creating a statutory scheme under which a claimant may commence a civil action for the unauthorized practice of law only 'upon a finding by the supreme court that the other person has committed an act that is prohibited by the supreme court as being the unauthorized practice of law.' . . . Moreover, the statute provides that '[t]he court in which the action for damages is commenced is bound by the determination of the supreme court regarding the unauthorized practice of law and shall not make any additional determinations regarding the unauthorized practice of law.'" (citing OHIO REV. CODE ANN. § 4705.07(C)(2) (West 2008)); see also *Lowry v. Legalzoom.com, Inc.*, No. 4:11-CV-02259, 2012 U.S. Dist. LEXIS 100155, *4 (N.D. Ohio, July 19, 2012) ("Once the Supreme Court of Ohio has exercised its exclusive jurisdiction to determine that a specific party has engaged in the unauthorized practice of law, an aggrieved person may seek damages in a civil action against that specific party arising from such conduct.").

97. *Columbus Bar Ass'n v. Am. Family Prepaid Legal Corp.*, 916 N.E.2d 784, 800-01 (Ohio 2009).

98. See *Goldberg v. Merrill Lynch Credit Corp.*, 35 So. 3d 905, 907 (Fla. 2010) (noting that while a private plaintiff is not jurisdictionally barred from seeking recovery for damages caused by the unauthorized practice of law, to state a cause of action, the plaintiff must allege that "this Court has ruled that the specified conduct at issue constitutes the unauthorized practice of law," and failure to do so warrants dismissal).

99. *Id.* at 908.

V. CONCLUSION

Irrespective of technological advancements or the specialization or globalization of the legal world, when it comes to the practice of law, borders still matter. The new ABA Model Rules regarding multijurisdictional practice and Practice Pending Admission endeavor to ease the concerns of the lawyer moving from one jurisdiction to another. To the extent states adopt these Rules, they will make it easier for the lawyer to move his/her practice. But there remains a tacit understanding that the lawyer who has been “practicing law” in a jurisdiction in which he or she is not licensed is subject to discipline and/or civil or criminal liability. So long as there remain jurisdictional-specific rules prohibiting a lawyer who is licensed in one jurisdiction from unlimited practice in another, the transactional lawyer involved in cross-border transactions, in any capacity, must remain mindful of the permissible limits of his or her representation and advice.