

The concepts of multijurisdictional practice (MJP) and the unlicensed practice of law (UPL) have always been issues that lawyers need to be aware of in virtually every practice area, whether related to litigation or transactional work. In today's world, these issues have moved to the forefront, especially because of the ability of attorneys and clients to instantaneously communicate and exchange documents regardless of physical location. For materials regarding MJP and UPL, see ABA Center for Prof. Resp., *Multijurisdictional Practice of Law—Bibliography* (May 2009), available at [www.abanet.org/cpr/mjp/biblio.pdf](http://www.abanet.org/cpr/mjp/biblio.pdf).

This article focuses on MJP and UPL issues that face transactional lawyers when they engage in commercial real estate leasing in many states, including those in which they are not licensed. Commercial real estate leasing as a national practice has become increasingly common; therefore, MJP and UPL issues also are common. Unlike other types of commercial real estate transactions such as financing, in which local counsel is regularly retained when the project is located in a state or states in which the lead attorney is not licensed, the hiring of local counsel in commercial lease negotiations is less standard. This situation puts commercial leasing lawyers in a position in which potential MJP and UPL issues are not a rare occurrence but instead are, or should be, of critical importance as their practices take them (physically or virtually) to jurisdictions in which they are not licensed.

### **MJP, UPL, and Commercial Leasing**

In a modern commercial real estate practice, leasing lawyers tend to do work all over the country and, in the authors' estimation, rarely engage local counsel. National retailers in particular prefer a small number of outside counsel firms to handle leases in many different states, and the attorneys handling those transactions are usually not licensed in the majority of jurisdictions in which the real property being leased is located. This article assumes that the lawyer is properly licensed in at least one jurisdiction.

The issues of MJP and UPL are not new to transactional lawyers. These issues, however, started to become more relevant with the advent of a global (or at least a national) economy in which businesses expanded beyond the borders of the state in which they were originally doing business, coupled with the meteoric rise in telecommunications capabilities, such as e-mail and the Internet. Excellent (and more detailed) descriptions of these issues can be found in Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. Tex. L. Rev. 665 (1995), and in William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 Bus. Law. 1501 (2001). For lawyers with national

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## **MJP, UPL, and Commercial Leasing Lawyers**

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practices, the risks involve possible civil and criminal violations in the states in which the lawyer is not licensed but is practicing (that is, UPL), as well as discipline from the bar association in the lawyer's home state.

The case that brought the issue of MJP and UPL to the forefront in recent years is *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998). In *Birbrower*, a New York law firm represented a client in an arbitration in California. The California Supreme Court held that the law firm was practicing law in California, and as such the firm was not entitled to collect any portion of its legal fees for the activities that constituted the unlicensed practice of law in California. Although the decision did not seem to be groundbreaking, the case reverberated across the national legal community.

Mainly because of advances in telecommunications, transactional practice has gone from mostly local work to nationally focused practices. The business needs of the real estate client have likewise fueled the growth in the trend toward national practices. For many (if not most) leasing clients these days, having a limited number of lawyers who are intimately familiar with the client's ways of doing business and negotiating leases (regardless of where the client is or will be doing business) is of utmost importance, as opposed to retaining a different lawyer in each jurisdiction where the client is doing business for the sole reason of having someone familiar with that jurisdiction's local laws. See Raymond J. Werner, *Licensed in One State, But Practicing in Another: Multijurisdictional Practice*, Prob. & Prop., Mar./Apr. 2003, at 6, 9. For example, understanding the differences in each state's available remedies for defaults is normally not as important to the real estate client as having an attorney who is completely familiar with the client's position on the various clauses and concepts that are part of every commercial lease negotiation, such as construction issues, use issues, and assignment and subletting. This reality of the business world and leasing clients' needs runs counter to the

honorable public policy of protecting the citizens of a particular state from attorneys who have no familiarity with local law but are rendering legal advice in that state.

### The ABA Takes Action

It is against this backdrop that the ABA took the lead in attempting to address and balance these opposing points of view. In 2002, the ABA promulgated certain revisions to the *Model Rules of Professional Conduct* (the Model Rules). See ABA Center for Prof. Resp., *Report of the Commission on Multijurisdictional Practice*, August 12, 2002, available at [www.abanet.org/cpr/mjp/home.html](http://www.abanet.org/cpr/mjp/home.html) (the ABA Report). In particular, the revisions to Model Rule 5.5 attempt to establish four "safe harbors" for lawyers engaging in MJP. These safe harbors are conditioned, however, on the lawyer's being licensed in another state and not disbarred or suspended; and, most important for leasing situations, the lawyer must be providing services on a "temporary basis."

The first safe harbor is a restatement of the notion that a lawyer can provide temporary services in another jurisdiction in association with a lawyer admitted to practice in such other jurisdiction if the local lawyer actively participates in the matter. Engaging local counsel to assist lead counsel from another state is a time-honored method of protecting a client's interests in local law issues while still having lead counsel that is familiar with the client's business needs. For commercial leasing lawyers who regularly handle a client's work in a particular state in which the lawyer is not licensed, it would appear that, even if local counsel is engaged, the first safe harbor would not be helpful if the lawyer's work in that state is found to not be on a "temporary basis."

The ABA recognized that the term "temporary basis" would need to be interpreted over time. Comment 6 to Model Rule 5.5 states:

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.

The second safe harbor is mainly for litigators, in that it recognizes the ability of a lawyer not licensed in that jurisdiction to be admitted pro hac vice. The third safe harbor, also mainly for litigators, attempts to resolve the issue faced by the law firm in *Birbrower*, in that it provides for MJP in arbitration, mediation, or other alternative dispute resolution matters.

The fourth safe harbor is for transactional lawyers, in that it provides a lawyer with the ability to engage in MJP not within the purview of the second or third safe harbors, if the practice "arise[s] out of or [is] reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." Model Rule 5.5(c)(4). The fourth safe harbor may not work for commercial leasing lawyers with national practices, however, because it requires the representation to "arise out of" or be "reasonably related" to the lawyer's practice in his or her home state. This is a reasonableness standard and needs to evolve through court decisions and debate among the various state bar associations.

In Comment 14 to Model Rule 5.5, the ABA helpfully describes some guidelines to interpret the terms "arise out of" and "reasonably related," stating that:

A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that

jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

Despite the comments quoted above, as yet there clearly is no bright-line rule that a lawyer can look to in analyzing the issue of whether the lawyer's services are being provided on a "temporary basis" and whether they "arise out of" or are "reasonably related" to the lawyer's home jurisdiction. For example, a lawyer in New York who represents a new client based in California in lease negotiations for real property in Illinois is not handling a matter that can be said to arise out of or be reasonably related to the lawyer's practice in New York. In addition, the overall prerequisite for permissible MJP is that the lawyer is permitted to perform services in a state in which the lawyer is not licensed only on a "temporary basis." If the same New York attorney in the previous example is handling the leasing for the client's 10 new locations in Illinois, does that constitute practicing law in Illinois on a "temporary basis"? Similarly, if the client is a developer and the out-of-state lawyer is handling the leasing for a 50-store shopping center or a 30-story office building, is the lawyer practicing on a "temporary basis"? It should be said that, while there may be issues as to what types of activities constitute the practice of law, and whether a particular representation is actually being conducted "in" a certain jurisdiction, the authors have presumed that the negotiation of commercial real estate leases does constitute the practice of law in the state in which the property is located.

According to the ABA, as of July 1, 2009, the District of Columbia and

the following 41 states have adopted the ABA's revisions to Model Rule 5.5 or similar versions: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. See *State Implementation of ABA MJP Policies*, July 1, 2009, [www.abanet.org/cpr/mjp/recommendations.pdf](http://www.abanet.org/cpr/mjp/recommendations.pdf) [sic], accessed July 27, 2009. In addition, the state bar associations of two other states, Michigan and Tennessee, have recommended the adoption of identical or similar rules to their highest courts. *Id.* Mississippi's bar association recommended adoption of identical rules through an MJP study committee. *Id.* Moreover, according to the ABA, all but four other states, Hawaii, New York, Texas, and West Virginia, have created committees to study the ABA's revisions to the Model Rules. *Id.* Kansas and Montana have considered and rejected the adoption of such a rule at this time. *Id.* New York recently adopted revised ethics rules that mostly mirror the ABA Model Rules, but among the differences between the ABA Model Rules and New York's new rules is that New York did not adopt a rule similar to Model Rule 5.5. See Richard Acello, *New York Makes Itself a "Model" State*, A.B.A. J., Sept. 2009, at 22.

### The Risks

What is the scenario in which it is most likely that a leasing lawyer would be accused of UPL in a state in which the lawyer is not licensed (and as a corollary possibly face sanctions in the lawyer's home state)? As was demonstrated in the *Birbrower* case, one way the issue can arise is out of a fee dispute with the client. In that case, the client raised the UPL issue when the law firm sued for its legal fees (as part of a counterclaim in the client's malpractice lawsuit). In addition, lawyers in the

state in which the out-of-state lawyer is practicing could raise the issue. This situation may arise for a number of reasons, such as "protecting turf" by in-state lawyers threatened by lawyers from out-of-state taking away business. An in-state lawyer also might feel duty-bound to report a potential situation of unlicensed activity in the state. In particularly heated lease negotiations, an in-state lawyer might use a veiled threat of UPL to gain a negotiating advantage over an out-of-state lawyer. (Presumably this in-state lawyer also does not engage in MJP, so the in-state lawyer is not worried that someone else might bring up the issue.)

A well-publicized example several years ago involved a Georgia law firm

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that was indicted (with two of its lawyers) by a North Carolina grand jury for UPL in North Carolina. The case stemmed from the law firm's giving advice to a university in North Carolina regarding a dispute between the university trustees and the president of the school. An attorney in North Carolina (and former school trustee) filed a complaint against the Georgia law firm with the North Carolina State Bar Association. See Jonathan Ringel, *Ga. Lawyers Indicted for Advising N.C. College*, Law.com, available at [www.law.com/jsp/article.jsp?id=1081348826442](http://www.law.com/jsp/article.jsp?id=1081348826442), accessed August 9, 2009. The law firm took the position that its representation of the university did not constitute "practicing law" in North Carolina. The issue apparently was never litigated since the indictment appears to have

been withdrawn, but the law firm and its lawyers had to defend themselves against a criminal charge of UPL. Raymond D. Fortin et al., *Licensure and Admittance to Practice*, in 2 *Successful Partnering Between Inside and Outside Counsel* § 36:17 (Raymond D. Fortin ed., 2009).

### Further Action Needed to Protect Commercial Leasing Lawyers

Based on the discussion above, it is the authors' position that neither of the two safe harbors applicable to transactional lawyers (the first safe harbor in Model Rule 5.5(c)(1) and the fourth safe harbor in Model Rule 5.5(c)(4)) settles this issue for commercial leasing lawyers who have a regular, national practice. There are still too many unresolved gray areas and issues, particularly regarding what it means to practice in a jurisdiction on a "temporary basis" and (as to the fourth safe harbor) whether a representation really does "arise out of" or is "reasonably related" to the lawyer's home-state practice. For an argument against limiting MJP to services provided on a temporary basis, see Ann M. Burkhart, *Real Estate Practice in the Twenty-First Century*, 72 Mo. L. Rev. 1031, 1061 (2007). If the ABA (and state bar associations) are going to recognize the very legitimate interest of real estate clients in having their regular leasing counsel handle lease transactions on a national or at least a regional basis, further clarification of the MJP rules will likely be needed.

### What Can Be Done in the Meantime?

Until the rules are further clarified, how can commercial leasing lawyers with national practices attempt to protect themselves in this era of heightened awareness of the risks associated with MJP and UPL? The first step is to make sure that each state in which the lawyer may be handling leases has adopted the ABA's Model Rule. If the particular state has no rules allowing MJP by unlicensed lawyers, perhaps the lawyer needs to give consideration to foregoing the representation of its

client in that state (or, at the very least, retaining local counsel and relying on having the protection of local counsel's involvement, as lawyers have traditionally done). If the state has adopted the ABA's Model Rule, then the lawyer has to make a determination that the work the lawyer is doing for the client in that state is in fact being done on a "temporary basis." As noted above, however, there is no bright-line rule in this regard.

Assuming a lawyer is satisfied that the work in question is in fact being performed on a temporary basis, the lawyer then needs to fit within either the first safe harbor in Model Rule 5.5(c)(1) (local counsel) or the fourth

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safe harbor in Model Rule 5.5(c)(4) (the work arises out of or is reasonably related to the lawyer's practice in the state in which the lawyer is licensed). As discussed above, the fourth safe harbor may be difficult to establish for commercial leasing lawyers with national practices.

### A Practical Proposal

Although the best chance for complying with the Model Rule seems to be associating with local counsel pursuant to Model Rule 5.5(c)(1), most national leasing clients are not interested in paying two different law firms to handle

a lease negotiation. If this is true, then what is the national leasing bar to do?

Presumably, there are enough lawyers with national commercial leasing practices that a group, or "coterie," could be established with two or three lawyers per state, as a kind of local counsel review panel. A proposal worth considering as a starting point is that each lawyer in the coterie agree to review leases for out-of-state lawyers solely for compliance with local law requirements and issues and agree to give a one-page letter basically saying that the lease complies with local law, subject to a "standard" set of qualifications similar to those found in legal opinions in real estate transactions. For example, qualifications could include statements that not every remedy in a particular lease is enforceable (such as self-help) and that remedies may also be limited by equitable defenses. Assuming that the coterie can come up with a standard letter that each lawyer is comfortable in giving, the in-state lawyer could review a lease relatively quickly (say, an hour) and be paid a fee for such review as set by the coterie (probably an agreed-on amount that is comparable to one hour's work). This scenario presumes satisfaction of the requirement in Model Rule 5.5(c)(1) that a local lawyer "actively participates in the matter." Even if the client will not agree to cover the cost of the local counsel review, the local lawyer could be paid out of the lead counsel's legal fees, as the cost of doing business on a national basis in compliance with state bar association rules. If the amount of local counsel lease review work that is coming in is similar to the local counsel review work that is going out, then ultimately the lawyer's cost for this service will be offset by the lawyer's income in performing the service for the other coterie members.

Granted, this scenario is not perfect and needs to be worked out with a number of lawyers to establish a coterie, but with the current climate of heightened awareness of MJP and UPL, maybe it is time to start doing something instead of, as Professor Wolfram so eloquently put it, just "sneaking around." ■