Crossing State Lines Into The Unauthorized Practice Jungle

The Myth Of The Single State Practitioner[i]

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Thanks to modern communications you never need to be out of contact with the office or your clients. Sitting in the airport in Nashville it's easy to call clients in Bowling Green on your cell phone. On vacation in Florida the fax machine and e-mail will keep you supplied with the information you need to advise clients in Lexington. Investigating a matter in Tennessee, interviewing witnesses in Indiana, and negotiating a settlement in Ohio or West Virginia are things Kentucky lawyers often do in matters that cross state lines. Is there anything wrong with this? After all, you are a member of the KBA in good standing.

The whole area of unauthorized practice of law (UPL) is murky, but nowhere as much as when practicing a matter takes you across jurisdictional lines – federal and state. In all the examples the Kentucky lawyer is practicing law, but not in Kentucky. Is the lawyer violating Kentucky RPC 5.5 Unauthorized Practice of Law[ii] and the UPL laws of those states if not a bar member? With modern technology crossing state lines can be actual or virtual. For UPL purposes when does a lawyer "cross" jurisdictional lines into another state? With a telephone call? An e-mail message? Faxed documents? Or does it take physical presence in the other state?

If you've read this far, you may be wondering what's the big deal here. We all know that lawyers everyday for years have done these things and the sky has not fallen. What has happened is an unusual California case that electrified the issue of cross-border practice. This case brought into bold relief the point that few lawyers are single state practitioners anymore. Private practitioners often represent interstate clients or in-state clients with interstate legal matters. This has long been true for employed lawyers. These matters can be multistate and multijurisdictional. Archaic UPL rules simply do not do justice to the realities of modern interstate practice. This article uses the California case to illustrate the professional responsibility issues and provides an overview of the UPL factors you should consider when crossing the border.

The Birbrower Blast[iii]

The Geographical Setting

A California software company, ESQ, had contract claims against Tandem Computers, also a California based company. The contract expressly provided that California law governed its terms. ESQ representatives, while in New York, retained the New York Birbrower firm to investigate and prosecute these claims. No lawyer in the Birbrower firm was admitted to practice in California.

California Contacts

Birbrower lawyers traveled to California in 1992 to meet with ESQ accountants and discuss the dispute and case strategy with ESQ. Over a two day period the lawyers met four or five times with Tandem representatives to negotiate and make a demand for settlement. In March 1993 Birbrower lawyers traveled to California to interview potential arbitrators and work on the case. In August 1993 Birbrower lawyers again traveled to California to assist in settling the claims. They met with ESQ and Tandem representatives, gave ESQ legal advice, and recommended that ESQ not accept Tandem's settlement offer. ESQ subsequently settled with Tandem and in 1994 sued Birbrower for malpractice. Birbrower counterclaimed for fees for the work done in New York and California. ESQ defended on the basis that Birbrower engaged in the unauthorized practice of law in California causing the fee agreement to be unenforceable.

The California Supreme Court's Decision

California law provides "No person shall practice law in California unless the person is an active member of the State Bar." The Court easily found that Birbrower's activities while physically present in California were the practice of law. The hard question in applying the UPL law is what does "in California" mean. The Court reasoned:

- There must be "sufficient contact with the California client to render the nature of the legal services a clear legal representation."
- Part of the analysis is quantitative: "Mere fortuitous or attenuated contacts will not sustain a finding that the unlicensed lawyer practiced law ‘in California.'"
- The test is whether (a) there were sufficient activities in the state, or (b) the circumstances created a continuing relationship with a California client that includes legal duties and obligations.
- The test does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. That is one factor but not exclusive. Virtual presence in California also may lead to a UPL violation. The law may be violated "by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technology."
- Virtual presence in California is not an automatic UPL violation. Each case turns on its own facts.
- California's UPL law does not apply to legal services for out-of-state clients provided in the lawyer's home state.

Based on this analysis the Court found that Birbrower engaged in UPL in California and could not recover on its fee contract with ESQ for any legal services rendered in California, but might be able to recover for fees earned in New York.

What's A Lawyer To Do?

The Birbrower decision caused great consternation, upset ethics experts, and was called bizarre. As a practical matter state bars rarely pursue interstate practice UPL violations and then usually only against out-of-state lawyers. The irony of Birbrower is that it is a fee dispute case – it was never prosecuted by the California State Bar to protect the public or discipline Birbrower lawyers. Nonetheless it is on the books and California is just too big economically and legally to ignore the implications of this decision. Its primary importance is that it addresses UPL issues that desperately need review. Pending some more definitive official guidance the following is offered as a review of some of the considerations in avoiding UPL when actually or virtually crossing jurisdictional lines:

Federal Courts: The Supreme Court and each circuit and district court have issued rules for admission. These admission requirements are derivative in that they rely on admission to a state bar for proof of competence, and character and fitness for Federal practice. If a lawyer is a member of any state bar, admission to most district and circuit courts is almost automatic. But this should not be take for granted. For example, some Federal district courts require lawyers seeking admission to be a member of the state bar of the state in which the district court is located. If you are planning to appear in a Federal court, research that court's local admission rules early in the representation. Although the current system is cumbersome, thanks to the internet, it is now much easier to determine Federal court admission requirements. There is an ongoing effort to develop uniform Federal court admission and professional responsibility rules, but when, and if, they will be promulgated is an open question.

Federal and State Administrative Agencies: Administrative agencies have the authority to regulate whom may appear before them in a representative capacity. Some agencies allow nonlawyers to appear. Some require specific qualifications other than legal such as passing an examination or being a certified public accountant.[iv] Some state agencies defer to the state supreme court rules on UPL to determine whom may appear. Consult agency regulations to be sure you are authorized to appear.

Arbitration and Mediation: The question when participating in out-of-state arbitration and mediation proceedings is whether this is the practice of law in that state. If it is not, then there is no issue of UPL. California law allows non-admitted lawyers to participate in arbitration if they file a certificate with specified information.[v] KBA Ethics Opinion E-377 (1995) holds that mediation is not the practice of law, but excludes from the definition of mediation "the giving of legal advice in the course of such mediation." Non-admitted lawyers will have a UPL problem if they participate in mediation in Kentucky. This is a developing area of practice. If there is a trend, it is to take a more relaxed UPL approach in arbitration and mediation proceedings. It remains crucial, however, to consult state UPL rules prior to participation.

Other States: Other state admission requirements are manageable for litigation matters, but are problematic for transactional practice. A short review of options follows:

Admission by Examination: Taking the other state's bar exam is the obvious way to admission. For equally obvious reasons few out-of-state lawyers choose to do so.

Admission On-Motion: A bare majority of states allow bar admission on motion. Twenty two do not. States that permit on-motion admission often have difficult additional conditions. Examples are requirements to maintain an office in the state, perform pro bono, and meet CLE requirements. In short, admission on-motion often is not feasible even if available.

Limited Certificate of Admission to Practice Law: Employed lawyers of interstate businesses are especially frustrated by UPL laws. Nine states, including Kentucky, have alleviated the problem by providing a special admission procedure for in-state employed lawyers that allows them to give legal advice to employers.[vi] While this approach solves the problem for non-admitted lawyers employed in-state, it does not help the visiting employed lawyer in-state on a temporary basis.

Pro Hac Vice: Pro hac vice admission saves litigation lawyers from most of the UPL risk attendant to cross-border practice. Kentucky's rule is representative of the procedure:

> Kentucky SCR. 3.030(2) Membership, Practice by Nonmembers and Classes of Membership: A person admitted to practice in another state, but not this state, shall be permitted to practice a case in this state only if he subjects himself to the jurisdiction and Rules of the Court governing professional conduct 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.

The Law Digest volumes of Martindale-Hubbell Law Directory, under Legal Profession: Attorneys and Counselors, contains pro hac vice rules for each jurisdiction.

Association With Local Counsel: Litigation lawyers routinely associate with local counsel when being admitted pro hac vice. Unfortunately, the out-of-state transactional lawyer has no judge to grant special admission. Association with local counsel may work for the transactional lawyer in some states. In Birbrower, however, the Court noted that while California had pro hac vice procedures, California UPL law does not recognize mere association with local counsel as qualifying to practice. KBA Unauthorized Practice Opinion U-28 (1980) approved non-admitted lawyer representation in administrative hearings as long as the lawyer

associated with a Kentucky lawyer. It is not much of an extrapolation from this opinion to reason that non-admitted transactional lawyers who associate with a Kentucky lawyer do not engage in UPL in Kentucky. The key point, however, is that association with local counsel is not clearly a safe harbor for transactional lawyers. It also can be a questionable added expense for the client. State association with local counsel rules must be consulted. They are often as vague as those in Kentucky.

Incidental, Innocuous, or Attenuated Non-Admitted Lawyer Contacts: The Court in Birbrower recognized a de minimis rule when it noted that fortuitous or attenuated contacts by out-of-state lawyers do not constitute UPL. A New York court held that "recognizing the numerous multi-State transactions and relationships of modern times, we cannot penalize every instance in which an attorney from another State comes into our State for conferences or negotiations relating to a New York client and a transaction somehow tied to New York."[vii] Michigan covers incidental non-admitted practice best. It provides that UPL law does not apply to a person who is duly licensed and authorized to practice law in another state while temporally in Michigan and engaged in a particular matter.[viii] If lawyers can count on an incidental contacts rule, much of the interstate practice UPL problem is removed. The concern is that until a state officially approves incidental contacts as Michigan has, you are at risk that a state bar will decide on a UPL crack down using your incidental contacts as an example. A review of the KBA's UPL opinions indicates that a non-admitted lawyer depending on an incidental contact exception in Kentucky is taking a real chance. My guess is that this is true in other states as well.

Going Bare: Many lawyers simply take the chance that cross-border activities will not offend the visited state. If they are wrong, they face criminal action there for UPL and bar disciplinary action back home. If the UPL occurs at trial, the judge could issue an injunction, hold the lawyer in contempt, and deny the right to receive fees. Accused lawyers defend by arguing that UPL laws only apply to in-court practice or by showing in fee dispute cases that the client was fully informed of the lawyer's lack of authority to practice in that jurisdiction.[ix] These are not the recommended approaches to resolving UPL issues in interstate practice.

Summing Up

It pays to know what you're doing – and especially when it comes to UPL. The best risk management is to carefully analyze UPL exposure when engaged in interstate practice. Research the other jurisdiction's rules on formal admission, special admission, pro hac vice, association with local counsel, and incidental non-admitted lawyer contacts. The internet makes much of this information readily available. Stay abreast of virtual presence UPL developments. Birbrower is an extreme decision, but other states may

follow suit by ruling that physical presence in the state is not required for a UPL violation.

Sometimes you just have to rise above principle and be practical. Accordingly, have out-of-state clients come to you whenever you can. Do as much work as possible in Kentucky. Most important, get significant retainers from out-of-state clients. UPL laws are designed to protect the public, assure lawyer competence, and provide a system for policing offenders. They were not intended to assist clients in avoiding paying lawyer fees.

Endnotes

[i]Wolfram, Sneaking around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers, 36 S. Tex. L. Rev. 666 (1995).
[ii]"A lawyer shall not: (a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction;…"
[iii]Birbrower v. Superior Court, 949 P.2d 1(Cal.1998).
[iv]P. 445, ABA Annotated Rules of Professional Conduct (3rd ed.).
[v]Cal Code Civ Proc § 1282.4 (1999).
[vi]Kentucky SCR 2.111 Limited Certificate Of Admission To Practice Law:
"(1) Every attorney not a member of the Bar of the Commonwealth who performs legal services in this Commonwealth solely for his employer, its parent, subsidiary, or affiliated entities, shall file with the Clerk of the Supreme Court ... an application for limited certificate of admission to practice law in this Common-wealth."...
"(3) Upon the granting of such limited certificate of admission to practice law, such applicant shall be ... an active member of the Kentucky Bar Association, subject to all duties and obligations of members...."
"(4) The only restrictions and limitations applicable ... to such attorney's right to practice ... shall be:

> (a) ... shall perform legal services in this Commonwealth solely for his employer ... and shall not provide legal services in this Commonwealth, to any other individual or entity.
> (b) ... shall not appear as Attorney of Record for his employer ... in any case or matter pending before the courts of this Commonwealth, without first engaging a member of the Association admitted under SCR 2.100 or SCR 2.110 as co-counsel...." ...

"(7) ... the rules, rights and privileges governing the practice of law shall be applicable to an attorney admitted under this Rule."
[vii]Spivak v,. Sachs, 211 N.E.2d 329 (N.Y.1965).
[viii]Mich. Comp. Laws § 600.916(1948); Mich. Stat. Ann. § 27 A (Callaghan 1986).
[ix]See generally, 11 ALR 3d 907, Attorneys - Out-of-State Practice.