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Multijurisdictional Practice: An Emerging Issue for a Changing Profession

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by Don Burnett

A few days ago, while re-reading that splendid anthology on the Idaho courts, *Justice for the Times*,[1] I found myself beguiled by photographs of our nineteenth century county courthouses. Ranging from classical to eclectic in architecture, these structures sat at the centers of Idaho communities, overlooking town squares and serving as hubs of law and commerce. Arrayed like satellites around the courthouses were lawyers' offices, identified by shingles carrying the names of solo practitioners or of partners in very small firms. In the practice of law around the town square, there was a sense of scale and place: clients were local, transactions were connected to the community, and disputes were resolved at the courthouse (or on the courthouse steps).

Today, of course, the place is different. The old courthouse may still be standing, but much of the action has moved elsewhere. Lawyers' offices are spread across the community, from high-rise buildings to strip malls. The scale of law practice has changed, too. Fueled by specialization, and by the rise of regulatory and transactional law, practices have grown so rapidly that firms once populated by several attorneys now have several dozen. Some Idaho law offices are branches of large multistate firms with locations throughout the West. Although many clients of Idaho lawyers have local roots, the growth in clientele stems largely from regional, national, and international sources. Regulatory agencies, and parties to commercial transactions, frequently transcend state or even national boundaries. So, too, do the practices of in-house counsel for large corporations with far-flung business operations.[2] And, of course, nothing could be more far-reaching in scope, or more defiant of boundaries, than the growing forms of law practice on the Internet.[3]

Even litigation, the quintessential local showcase of lawyering, has a diminished nexus to the courthouse. Litigators today find their time devoted to pleadings, motion practice, and discovery; indeed, a common lament among many of Idaho's best trial lawyers is that they actually try relatively few major cases per year. Adjudication, while still important as a dispute resolution process, is yielding to negotiation and mediation—causing many litigation practices to be settlement oriented, in many respects resembling transactional practices that could be located almost anywhere. The old sense of place that once pervaded the practice of law, evoked by the image of the courthouse on the town square, is becoming a wistful memory.

Yet, even as changes in the practice are making the location of practice increasingly irrelevant, the regulatory structure of the legal profession remains place-based. As recently noted by the American Bar Association, "In general, a lawyer may not represent clients before a state tribunal or otherwise practice law within a particular state unless the lawyer is licensed by the state or otherwise authorized to do so."[4] The ABA goes on to identify sound policy reasons for place-based regulation:

> Jurisdictional restrictions promote a variety of state regulatory interests. Most obviously, by limiting law practice in the state to those whom the state judiciary, through its admission process, has deemed to be qualified to practice law in the state, they promote the state interest in ensuring that those who represent clients in the state are competent to do so. Jurisdictional restrictions also promote the state interest in ensuring that lawyers practicing law within the state do so ethically and professionally ... [and that they may be] disciplined more easily and effectively than out-of-state lawyers. By strengthening lawyers' ties to the particular communities in which they maintain their offices, jurisdictional restrictions may also help maintain an active and vibrant local bar ... [where] lawyers serve voluntarily on court committees, in public office, and on boards of not-for-profit institutions in the community.[5]

Place-based regulation is intertwined historically with regulation of the legal profession by the state judiciary. There are sound policy reasons for this structural element, too. As noted in the preamble to the ABA Model Rules of Professional Conduct, and in the preface to the Idaho rules, lawyers are not merely representative of clients; they are also officers of the legal system and public citizens having a special responsibility for the quality of justice. An independent judiciary depends for its vitality upon the professionalism of a public-spirited bar, composed of lawyers whose ethical aspirations reach beyond the rewards of markets and whose ethical constraints have not been dictated by other branches of government.

Counterpoised against this place-based and judicial regulation is the principle of client sovereignty—the notion that a client should have an unhindered right to choose his or her lawyer based on convenience, expertise, and efficiency. As noted (again) by the ABA:

> The existing system of lawyer regulation has costs for clients. For example, out of concern for jurisdictional restrictions, lawyers may decline to provide services that they are able to render skillfully and ethically. In doing so, they may deprive the client of a preferred lawyer including, at times, a lawyer who can serve the client more efficiently and economically than other available lawyers by drawing on knowledge gained in the course of prior work for the particular client or by drawing on expertise in the particular subject area.[6]

The chief obstacle to client sovereignty—and, conversely, the bedrock of place-based, judicial regulation of the profession—is ABA Model Rule 5.5. The rule, as substantially adopted in Idaho and elsewhere,[7] provides simply that a lawyer "shall not ...

practice law [or assist a person who is not a member of the bar] in a jurisdiction where doing so violates the regulation of the practice of law in that jurisdiction." Each state has its own statute or rule prohibiting the unauthorized practice of law,[8] usually annotated with cases broadly interpreting the "practice of law."[9] When Rule 5.5, as adopted in a lawyer's state of licensure, is combined with another state's statute or rule prohibiting unauthorized practice, the result is that a lawyer may be disciplined in the licensure state for performing legal services in the other state—even if the services were rendered pursuant to a lawyer-client relationship that originated in the licensure state.

Thus, if a lawyer licensed in California but not in Idaho accompanies a California client to a deposition in Idaho, and provides legal advice to the client during the deposition in Idaho, the lawyer could be prosecuted in Idaho for unauthorized practice and could be subjected to professional discipline in California for violating that state's version of Rule 5.5.[10] Similarly, to give a transactional lawyering example, if an attorney licensed in Idaho accompanies an Idaho client to California, where the attorney advises the client in connection with the negotiation of a business deal, the attorney could be prosecuted in California for unauthorized practice[11] and subjected to professional discipline in Idaho for violating our version of Rule 5.5. (Ironically, if the Idaho attorney advises the client while still in Idaho, he or she could opine about negotiations in California, and could give advice on rights and responsibilities under California law, without violating either the California statute or Idaho's Rule 5.5.) Other examples of cross-border practice dilemmas have been set forth by Boise lawyer Brian Kane in a useful article published two years ago in *The Advocate*.[12]

Practitioners know that cross-border activities of clients, and of the lawyers who serve them, are common; yet prosecutions and disciplinary proceedings for unauthorized practice seldom occur. Why? A narrow answer, applicable only to pending litigation, is that an out-of-state lawyer may impart legitimacy to cross-border legal service by seeking and obtaining admission *pro hac vice*—a limited right, granted by the court in which a matter is pending, to appear and participate in that particular case.[13] A broader reason for lack of prosecution and disciplinary proceedings may be that lawyers increasingly are becoming licensed in multiple states, not only by separate admissions but also by reciprocal admissions.[14] The broadest reason, however—arguably the main reason why cross-border practice has flourished in the face of rules and statutes against it—is simply that prosecutors and bar counsel are busy people. They have things to do other than enforcing jurisdictional restrictions upon otherwise proper legal services.

Is this lack of enforcement harmless? Perhaps not. Likening the unregulated multijurisdictional practice of transactional law to "sneaking around in the legal profession," one distinguished scholar, Charles Wolfram, reporter of the American Law Institute's *Restatement (Third) of the Law Governing Lawyers* (2000), has observed that when jurisdictional limits on law practice are not enforced, there is no longer a place-based, judicial framework for enforcing all the other ethical standards.[15] As Professor Wolfram further notes, "The concept that a jurisdiction may affect the professional status of any lawyer admitted there has proved to be largely unexceptionable. But its negative flipside—holding that nonadmitted lawyers are entirely beyond local disciplinary authority—is another matter."[16] Another respected commentator has argued that unenforced rules lead to low client expectations regarding lawyer obligations, and they negatively affect public perceptions of the legal profession.[17]

Recently, calls have come from academia to address the ethics enforcement gap in multijurisdictional practice.[18] One scholar-practitioner has suggested that the United States should forthrightly recognize and regulate multijurisdictional practice in a manner similar to the way cross-border practice is regulated within the European Union.[19] Indeed, he points to the irony that the United States, blessed with a coherent legal system, is now struggling with the issue of multijurisdictional practice, while Europe—long plagued with warring cultures and conflicting legal systems—has developed a scheme in which a lawyer, who is "a native of, and professionally trained in Italy, can practice law based on his Italian license in Norway with greater ease than, say, a Mississippi licensed lawyer can practice law in Florida."[20]

The academic calls for reform have been given sharp urgency by two court decisions that reveal a new approach to enforcement of jurisdictional limits upon the practice of law. In each case, enforcement has entailed neither criminal prosecution nor professional discipline for the unauthorized practice of law; rather, the courts have utilized civil remedies. In *Birbrower et al. v. Superior Court of Santa Clara County*, 949 P.2d 1 (Cal. 1998), the California Supreme Court decided that a New York law firm could not collect a fee from a California client for services rendered in California. Noting that the New York lawyers were not licensed to practice in California, the Court held that the lawyers' services constituted the unauthorized practice of law, rendering the fee agreement unenforceable and the fees uncollectible. More recently, in *The Florida Bar v. Rapoport*, 2003 WL 359303 (Fla. S. Ct. Docket No. SC 01-73, February 20, 2003), the Florida Supreme Court granted the state bar's petition to enjoin a lawyer in Washington, D.C., from representing Florida clients in securities arbitration proceedings in Florida. The Court observed that the lawyer was not admitted to practice in Florida, yet he had advertised for clients in Florida. The Court held that no federal or

state law authorized a nonlawyer to provide legal services and advice in securities arbitration matters.

In response to *Birbrower*, and perhaps anticipating future cases like *Rapoport*, in which claims for civil relief would rest upon allegations of unauthorized practice, the American Bar Association, in July, 2000, established a Commission on Multijurisdictional Practice ("MJP Commission"). The President of the ABA charged the Commission to study the application of then-current ethics and bar admissions rules to multijurisdictional practice, and to make recommendations that would supplement the report of the ABA's previously appointed Commission on the Evaluation of the Professional Rules of Conduct (the "Ethics 2000 Commission").[21]

Initially, the MJP Commission recommended that Model Rule 5.5 be amended to allow enumerated kinds of cross-border legal services, thus excepting them from the Rule's prohibition of unauthorized practice. This "safe harbor" approach drew criticism, however, from important elements of the legal ethics community including the National Organization of Bar Counsel, the Association of Professional Responsibility Lawyers, the American Corporate Counsel Association, and the ABA's own Law Practice Management Section.[22] The criticism reflected disagreement over specific definitions of the permitted activities, as well as a more fundamental view that cross-border activities should not be permitted or (by negative implication) precluded by category. Rather, the groups suggested that presumptive validity be accorded to cross-border services—thereby expressing the principle of client sovereignty—but that such activities also should be limited in circumstance and duration, thereby affirming the principle of place-based, judicial regulation of the practice of law.

Under this balanced approach (or "commonsense" approach as its supporters have called it), Rule 5.5 would be amended to allow a licensed lawyer to practice law outside the state of licensure on a *temporary* basis in certain *circumstances*, including:

- Work in association with a lawyer admitted to practice in the jurisdiction, who actively participates in the representation;
- Services ancillary to pending or prospective litigation or administrative proceedings, where *pro hac vice* representation is contemplated;
- Representation of clients in, or ancillary to, alternative dispute resolution ("ADR") settings; and
- Nonlitigation work that arises from, or is reasonably related to, the lawyer's practice in his or her state of licensure.

In addition, the Commission has recommended amending Model Rule 8.5 (disciplinary authority and choice of law) to make clear a state's authority to discipline a lawyer licensed elsewhere who comes into the state and engages in any practice not authorized by the revised Rule 5.5. The Commission also has proposed other "housekeeping" measures to improve the effectiveness of disciplinary enforcement, and to facilitate the sharing of information among the states.

In August 2002, the ABA House of Delegates approved the MJP Commission's recommendations. The House earlier had acted upon other rule changes, as proposed by the Ethics 2000 Commission. Consequently, the states now have a full array of issues to consider in deciding whether to amend their own rules. In Idaho, as explained elsewhere in this issue of *The Advocate*, an Idaho State Bar committee (nicknamed the "E2K" committee) is developing recommendations to be presented and discussed at the Bar's annual meeting in July, 2003.

When the discussion in that meeting turns to multijurisdictional practice, the question will be whether the principle of place-based, state judicial regulation of the practice of law can and should be balanced against the principle of client sovereignty. Even more fundamentally, however, the question will be whether our regulatory system will be comprehensive enough to reinforce the unifying elements of every lawyer's professional identity, regardless of practice setting. These elements include the duty to exercise independent professional judgment in representing clients, the mandate to serve as an officer of the legal system, and the calling to fulfill a special responsibility for the quality of justice. In a fast-moving world far removed from the old courthouse on the town square—we may be losing a sense of place, but we can still maintain our identity.

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Endnotes

1 Carl E. Bianchi (ed.), *Justice for the Times: A Centennial History of the Idaho State Courts* (Idaho Law Foundation, Inc., 1990)

2 When lawyers work within entities other than law firms, they may encounter tensions between the ethical requirements imposed upon them by the Model Rules of Professional Conduct and the rules of other professional disciplines that seemingly apply to nonlawyers in the entity. This tension underlies a host of issues—including exercise of independent professional judgment, protection of confidential information, and avoidance of conflicts of interest—that frame the controversy over multidisciplinary practice (MDP). That controversy, as opposed to the issue of multijurisdictional practice (MJP), is outside the scope of this article.

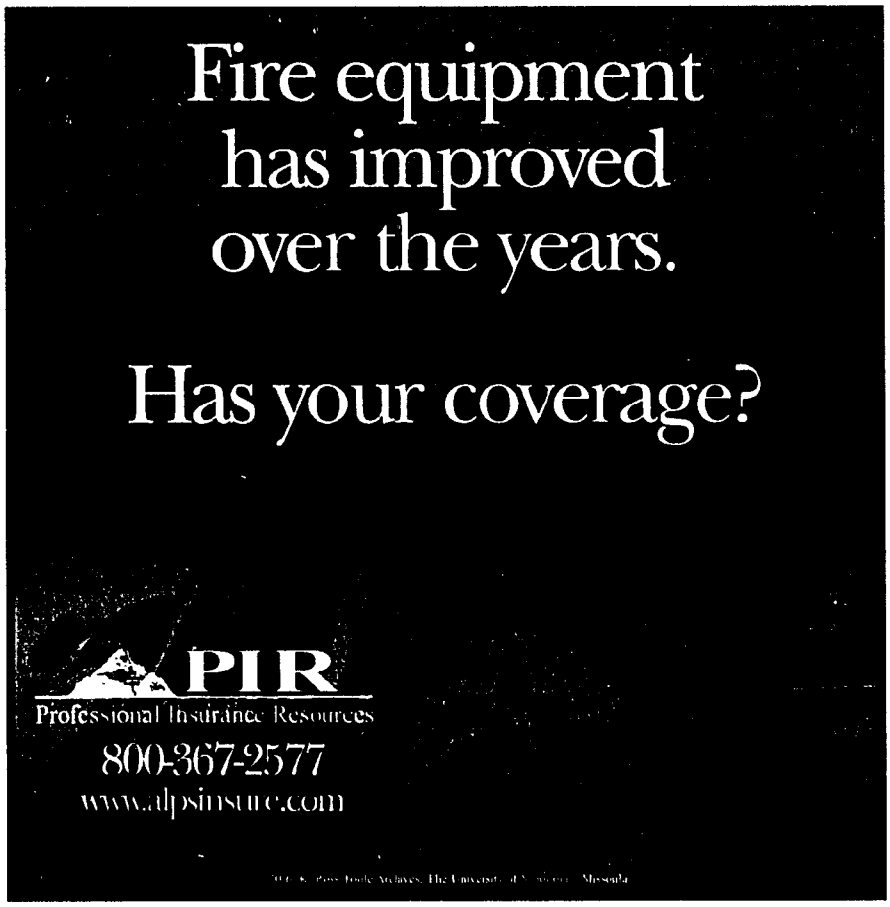
3 *See generally*, Comment [Kristine Moriarty], *Law and the Internet: The Ethical Implications that Arise from MultijurisdictionalOnline Legal Service*, 39 IDAHO L. REV. 431 (2003).

4 American Bar Association, *Report of the Commission on Multijurisdictional Practice* (August, 2002), at p. 9.

5 *Id.*

6 *Id.* at p. 12.

7 Idaho's version of the rule states "[a] lawyer shall not ... practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction ...." See Rule 5.5 (a), Idaho Rules of Professional Conduct (IRPC).



8 In Idaho, for example, I.C. § 3-420 makes it an offense, punishable as a misdemeanor, for a person, "without having become duly admitted and licensed to practice law within this state or whose right or license to practice therein shall have been terminated ... [to] practice or assume to act or hold himself out to the public as a person qualified to practice or carry on the calling of a lawyer within this state."

9 The Idaho Supreme Court has declared that "[t]he practice of law, as generally understood, is the doing or performing services in a court of justice, in any matter [pending] therein, throughout its various stages, and in conformity with adopted rules of procedure. But in a larger sense, it includes legal advice and counsel, and the preparation of instruments and contracts by which legal rights are secured, although such matter may or may not be [pending] in a court." *In re Matthews*, 62 P.2d 578, 581-82 (Idaho 1936).

10 See Rule 1-300, California Rules of Professional Conduct.

11 California's general statute on unauthorized practice provides simply that "[n]o person shall practice law in California unless the person is an active member of the State Bar. West's Ann. Cal. Bus. & Prof. Code § 6125. It is followed by § 6126, which describes unauthorized practice and provides criminal penalties.

12 Brian P. Kane, "Into the Lion's Den: Taking Your License to Practice Law on the Road," *The Advocate* (Idaho State Bar, May, 2001), at p. 14.

13 In Idaho, admission *pro hac vice* is governed by Rule 222, Idaho Bar Commission Rules (IBCR), promulgated by the Commissioners of the Idaho State Bar and adopted by order of the Idaho Supreme Court.

14 Under a limited form of reciprocity established by the states of Idaho, Oregon and Washington, a lawyer who satisfies a character and fitness requirement ("good moral character"), who has been admitted in one of the reciprocating states, and who has actively practiced for three years, may be admitted in the other two states without taking the bar examinations of those states. Rule 204A, IBCR, supra n. 10. Additional states reportedly are interested in joining this reciprocity consortium in the future.

15 Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665 (1995).

16 Charles W. Wolfram, *Expanding State Jurisdiction to Regulate Out-of-State Lawyers*, 30 HOFSTRA L. REV. 1015, 1016 (2002).

17 Fred. C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994).

18 *See, e.g.*, Wolfram, *supra* n. 16; Christine R. Davis, 29 FLA. ST. L. REV. 1339 (2002); Pamela A. McManus, *Have Law License, Will Travel*, 15 GEO. J. LEGAL ETHICS 527 (2002).

19 D. Bruce Shine, *The European Union's Lack of Internal Borders in the Practice of Law: A Model for the United States?* 29 SYRACUSE J. INT'L L. & COM. 207 (2002). See also Barrie Althoff, *Multijurisdictional Practice, THE PROFESSIONAL LAWYER* 83 (Symposium Issue 2002) (comparing the State of Washington's approach to regulating international cross-border law practice with the approach of the European Union).

20 *Shine, supra* n. 19, at 208.

21 *See* "Client Representation in the 21st Century: Report of the ABA Commission on Multijurisdictional Practice" (December, 2002), *available* at www.abanet.org/cpr (the Web site of the ABA's Center for Professional Responsibility). As the MJP Commission and the Ethics 2000 Commission wrestled with their respective charges, they identified a basic need to develop a comprehensive working definition for "the practice of law." Consequently, the ABA created yet another group: the "Task Force on the Model Definition of the Practice of Law." By September 2002, the group had drafted a model definition, and it appears at the Web site shown above.

22 *Althoff, supra* n. 19; see also ABA Journal Special Report (May 10, 2002).