

Professional Liability Concerns for In-House Counsel: The Unauthorized Practice of Law

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In-house counsel are often involved in significant aspects of strategic development, multi-jurisdiction transactions or litigation for their employer-client requiring the performance of legal services outside of the jurisdiction in which they are licensed to practice law. The question arises as to whether the performance of legal services by in-house counsel for their employer in jurisdictions in which they are not licensed to practice is the unauthorized practice of law.

Regardless of where the employer-corporation has its principle place of business, most states prohibit in-house counsel from providing legal advice, drafting legal documents or appearing in state courts if they are not admitted to practice law in that state. Many states, however, permit unadmitted in-house counsel to obtain certification or other authorization to practice law and represent their employer. It cannot be assumed that any in-house attorney is licensed to practice law in any particular jurisdiction without taking the necessary steps to confirm licensure. In the best of circumstances, this should be done in advance of the need, where possible, as part of disaster preparedness efforts.

The practice of law is generally governed by regulations promulgated by the State's highest court. The laws regarding

the unauthorized practice of law and multi-jurisdictional practice must be examined on a state-by-state basis. Only a person licensed as a lawyer in a jurisdiction, or otherwise allowed to practice by the State Court through measures such as pro hac vice admission, is authorized to provide legal advice to a client in that jurisdiction. The unauthorized practice of law restrictions which are designed to protect clients from non-lawyers can also act as a barrier preventing in-house counsel from representing their clients in other jurisdictions. Of course, attorneys may be authorized to provide legal services in another jurisdiction by means other than by passing the bar exam. In litigation, an attorney in good standing in another state is typically provided with pro hac vice admission on a particular case in a specific jurisdiction within a state in which he or she is not admitted to practice. Some states, however, are now taking steps that will restrict pro hac vice admission by such measures as raising fees for the application, monitoring the number of times a particular attorney seeks pro hac vice admission in that state, or specifically limiting the number of pro hac vice admissions. Other states, recognizing the need to lower the barrier for commerce





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among states that have active cross-border transactions, have undertaken efforts to provide admission to attorneys in good standing. See, e.g., N.J.R.Ct. 127-2.

A number of states have adopted a multi-jurisdictional practice regulation based upon Model Rule 5.5 adopted in 2002 by the ABA House Delegates. It provides the basis for multi-jurisdictional practice and unauthorized practice of law regulations. Rule 5.5(a) and (b) state as follows:

- (a) A lawyer shall not practice law in the jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
- (b) A lawyer not admitted to practice in this jurisdiction shall not:
 - (1) Except as authorized by these rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law;
 - (2) Hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

There are currently 14 states, also referred to as host states, in which regulations identical to the model rule have been adopted to allow lawyers licensed elsewhere in the United States to provide legal services as in-house counsel in the host state consistent with the Model Rule 5.5(d)(1). Rule 5.5(d) – Relief and Application for the In-House Lawyer states as follows:

- (d) A lawyer admitted in another United States jurisdiction, not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
 - (1) Are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission.

Comment 16 to the Rule indicates that it applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates which are entities it controls, are controlled by, or are under common control with the employer. It also goes on to specifically state:

This paragraph does not authorize the provision of personal legal services to the employer’s officers or employees.

This paragraph applies to in-house corporate lawyers, government lawyers, and others who are employed to render legal services to the employer.

The rationale for this rule is further set forth in Comment [16] which recognizes that the in-house lawyer is serving the interests of its employer and does not create an unreasonable risk to that client and others because the employer is “...well situated to assess the lawyer’s qualifications and the quality of the lawyer’s work.” These include: Alaska, Arkansas, Indiana, Illinois, Iowa, Maryland, Massachusetts, Nebraska, New Hampshire, Oregon, Rhode Island, Utah, Vermont, and Washington. See, www.ABAnet.org/cpr/mjp/quick-guide_5.5.pdf. These states have enacted regulations that generally read:

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 are provided to the lawyer’s employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission.

Once permitted to provide legal services in the jurisdiction, the newly “accepted” lawyers will not have to take the bar exam in the host state, but they will have to comply with the requirements the new jurisdiction may impose such as mandatory CLE and annual registration fees. Often not specifically stated, but inherent in the rule, is the requirement that in-house lawyers are also subject to the disciplinary rules and regulations of that state. In-house lawyers are restricted to providing legal services only to the employer and its affiliated entities. This does not include legal advice being provided to executives, managers or any other constituents of the corporation not specifically included under the language of Model Rule 5.5(b)(1). The language is specific in that legal advice can only be provided to or on behalf of the corporation.

States such as Arizona, Kentucky and Pennsylvania have similar language, but also add other requirements and include specific language to make clear that all out-of-state attorneys practicing in the jurisdiction are subject to attorney discipline in the host state as well as in their home jurisdiction. Other states require lawyers licensed in other jurisdictions to comply with special registration



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protocols for in-house counsel in order to become eligible to practice in that host state. These states include: Arizona, Connecticut, Delaware, Florida, Kentucky, Louisiana, Minnesota, Missouri, Ohio and Pennsylvania. These states have adopted regulations which require an in-house lawyer licensed in another jurisdiction to obtain the host state's limited license for out-of-state in-house counsel in order to be eligible to establish an office within that host state. This rule provides limited admission and seeks to address the needs of in-house counsel who want authorization to provide legal services in the host state on a continuous and systematic basis.

In Ohio, one of the states with special regulations for in-house counsel, out-of-state in-house counsel may register for Corporate Status as per Gov. Bar R. VI, Section 3 and Ohio Rule of Professional Conduct 5.5(d) (1). The registration process involves filing a Certificate of Registration and paying Ohio's registration fee (at this time, \$350). An attorney registering for Corporate Status will be required to provide a certificate of admission and good standing from his or her home jurisdiction. Corporate Status allows an attorney who is licensed in another jurisdiction and is employed fulltime by a nongovernmental Ohio employer to perform legal services for which pro hac vice is not required, but only for his or her employer. According to Gov Bar R. VI, Section 3(C), If an attorney fails to register for Corporate Status, he or she "shall be precluded from applying for admission without examination." Limited licensure can be a valuable tool for in-house counsel, and failure to comply can result in a charge of unauthorized practice of law.

Professional liability concerns arising from the unauthorized practice of law for in-house counsel can be triggered where an attorney fails to consider the limit and extent of his or her own licensure. Consequences of violating unauthorized practice of law restrictions are disciplinary proceedings in the host state or the licensing state that can include potential criminal prosecution, loss of fees, waiver of the attorney-client privilege, possible contempt of court, and disqualification in representing a client.

In the circumstance where in-house counsel is providing legal advice to his client in a jurisdiction in which he is not licensed, an argument can be made that the attorney-client privilege does not protect that communication. See, e.g., *Gucci America, Inc. v. Guess?, Inc.*, 2010 WL 1416896 (S.D.N.Y. 2010). In *Gucci America*, an attorney held an active California license but then changed his license to inactive status during the 13 years he was working in-house. During litigation in which the in-house attorney was representing *Gucci America*, his lack of an active license came to light and he subsequently lost his job. As a result, the judge ruled in an order available at <http://www.nylj.com/nylawyer/adgifs/decisions/063010cott1.pdf> that communication between the attorney and his purported client was not subject to the attorney-client privilege. Therefore, it is important to not only receive but maintain proper licensure as an in-house attorney even in one's home jurisdiction.

Each state must be examined for its practice limitations by reviewing the actual law and then identifying the specific requirements that permit multi-jurisdictional practice. As soon as possible, the in-house lawyer must register with the bar of jurisdictions where legal work is likely to occur. For example, in the circumstance where an in-house lawyer establishes an office or other presence in a host jurisdiction for the purpose of rendering legal services to the employer, that attorney must register very promptly. In some states, such as Arizona, Iowa and Kansas, in-house lawyers must register within ninety (90) days of beginning practice in that state. New Jersey and Wisconsin require attorneys to register within sixty (60) days. In Ohio, the timeframe is even earlier in which attorneys are required to register sixty (60) days before starting work as an in-house lawyer. Of course, once admitted with a limited license, annual dues for law license renewals and registrations must be paid promptly.

In summary, professional liability concerns for in-house counsel are heightened where a licensed attorney is practicing and providing legal advice to his employer in other states. Where such a situation can be anticipated, the necessary steps need to be taken in order to first evaluate that state's laws and then comply with the state's



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requirements and regulations. Once an attorney obtains permission to practice in another jurisdiction, that attorney must be vigilant in ensuring that he complies with the ongoing licensure requirements of that jurisdiction. The increasingly global nature of the practice of law highlights what may be considered an antiquated licensure structure of American attorneys. There are 53 States and U.S. territories, each with their own particular practice standards. A violation in any of the rules controlling licensure of attorneys can result in the charge of unauthorized practice of law and a consequential attack on the ability to practice in your home state.

Kevin M. Norchi is managing partner and Ashley Budd is an attorney affiliated with Norchi Forbes LLC in Cleveland, Ohio which specializes in the defense of professional liability claims, including those against attorneys, medical providers and other professionals, in addition to the defense of employment and general liability matters. Norchi Forbes LLC is a Charter member of the International Society of Primerus Law Firms.