

MJP and UPL: Danger Ahead for Commercial Leasing Lawyers?

Eric D. Rapkin
Akerman Senterfitt
Las Olas Centre II
350 East Las Olas Boulevard, Suite 1600
Ft. Lauderdale, Florida 33301
Main Telephone: 954.463.2700
Facsimile: 954.463.2224
E-mail: erapkin@akerman.com
Website: www.akerman.com

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The concepts of Multijurisdictional Practice ("MJP") and the Unlicensed Practice of Law ("UPL"), while having always been issues that lawyers need to be aware of in virtually every practice area, whether related to litigation or transactional work, are issues that have moved to the forefront in today's world, especially due to the ability for attorneys and clients to instantaneously communicate and exchange documents regardless of physical location.

These written materials will focus on MJP and UPL as those concepts relate to transactional lawyers involved in commercial real estate leasing. This is not to diminish the critical importance of MJP and UPL as they relate to litigators representing clients in courts and in alternative dispute resolution forums such as arbitrations, as well as to transactional attorneys in areas other than leasing (including other types of commercial real estate transactions). Attorneys in all practice areas are cautioned to be aware of these issues as their legal practices take them (physically or virtually) to jurisdictions in which the attorney is not licensed. (A brief word concerning MJP and UPL in connection with commercial real estate transactions other than leasing: It seems to the author that real estate transactions such as acquisition and finance for a project located in a state (or states) in which the lead attorney is not licensed almost always involve the use of local counsel, so it might be somewhat less of an issue in those types of transactions. For example, local law opinions are often required, and so lead counsel will associate with local counsel in order to obtain the necessary local law opinion.)

MJP, UPL, and Commercial Leasing

In connection with commercial real estate leasing, in these times leasing lawyers¹ tend to do work all over the country, and in the author's estimation rarely engage the use of local counsel. National retailers in particular seem to prefer a small number of outside counsel firms to handle leases in many different states, and the attorneys handling those transactions are

¹ This article presumes that the lawyer is properly licensed in at least one jurisdiction.

usually not licensed in the majority of jurisdictions in which the real property being leased is located.

The issues of MJP and UPL are not new to transactional lawyers. The issue started to become more relevant with the advent of a global (or at least a national) economy in which businesses were expanding 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.² So for lawyers with national practices, the risks involve possible civil and criminal violations in the state in which the unlicensed lawyer is practicing (i.e., UPL), as well as discipline from the bar association in the lawyer's home state.

The seminal 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 regular New York 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. While the decision does not seem to be groundbreaking, there is little doubt that the case sent shockwaves across the national legal community.

Mainly due to advances in telecommunications, transactional practice has gone from mostly local work to nationally-focused practices, seemingly overnight. And 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 way of doing business and negotiating leases (regardless of where the client is or will be doing business) is of utmost importance, as opposed to the client 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.³ For example, understanding the differences in each state's available remedies for defaults are normally not as important to the real estate client as much as having an attorney that 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.

² Excellent (and more detailed) descriptions of these issues can be found in Charles W. Wolfram's law review article called *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. Tex. L. Rev. 665 (1995), and in William T. Barker's law review article called *Extrajurisdictional Practice by Lawyers*, 56 Bus. Law. 1501 (2001).

³ See Raymond J. Werner, *Licensed in One State But Practicing in Another*, Probate & Property, March/April 2003.

The ABA Takes Action

It is against this backdrop that the American Bar Association ("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").⁴ In particular, the revisions to Rule 5.5 attempt to establish four "safe harbors" for lawyers engaging in MJP (so long as the lawyer is licensed in another state, not disbarred or suspended, and, most importantly for leasing lawyers, is providing services on a "temporary basis"). The first safe harbor is a restatement of the rather obvious notion that a lawyer can provide temporary services in another jurisdiction in association with a lawyer admitted to practice in such other jurisdiction and the local lawyer actively participates in the matter. The engaging of local counsel to assist lead counsel from another state is a time-honored method of protecting a client's interests in connection with local law issues while still having lead counsel that is familiar with the client's business needs. For commercial leasing lawyers that 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 second safe harbor is mainly for litigators, in that it recognizes the ability of an unlicensed lawyer 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 for the ability to engage in MJP not within the purview of the second and third safe harbors, but instead "arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice." Model Rule 5.5(c)(4).

For commercial leasing lawyers with national practices, the fourth safe harbor does not seem to work, because it requires the representation to "arise out of" or be "reasonably related" to the lawyer's practice in his or her home state. While this is a reasonableness standard and needs to evolve through court decisions and debate among the various state bar associations, it seems somewhat intuitive that, for example, a lawyer in New York that represents a 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. Additionally, 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 ten 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 fifty-store shopping center or a thirty-story office building, is that practicing on a "temporary basis"? The ABA recognizes that the term "temporary basis" will need to be interpreted over time. The Comment to the ABA Report in connection with the amendments to Model Rule 5.5 states that

⁴ See *Report of the Commission on Multijurisdictional Practice*, American Bar Association Center for Professional Responsibility, August 12, 2002, available at <http://www.abanet.org/cpr/mjp-home.html> (the "ABA Report").

[T]here 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.⁵

Clearly, there is as yet no bright-line rule that a lawyer can look to in analyzing the issue of whether his or her services are being provided on a "temporary basis." The author's opinion is that there will likely never be a bright-line rule to answer this issue.

[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 author has 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 August 2004, eleven states have adopted the ABA's revisions to Model Rule 5.5 (or a very similar version thereof).⁶ Additionally, twelve other states have recommendations by their bar associations before the state's highest court recommending the adoption of identical or very similar rules.⁷ The bar associations of four other states⁸ recommended adoption of identical or similar rules through MJP study committees, and one bar association (Connecticut) rejected such a proposal by its MJP study committee.⁹ Moreover, according to the ABA, all of the remaining states have created committees to study the ABA's revisions to the Model Rules.¹⁰

The Risks

So, 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. (When the law firm sued for its legal fees (as part of a counterclaim in the client's malpractice lawsuit), the client raised the UPL issue.) Additionally, lawyers in the state in which the out-of-state lawyer is practicing could raise the issue. (This may arise for a number of reasons, such as "protecting turf" by the in-state lawyer, in that the in-state lawyer may feel threatened by lawyers from out-of-state taking away business; or simply if an in-state lawyer is or feels duty-bound to report any potential situation of unlicensed activity in the state. Also, in particularly heated lease negotiations, the in-state lawyer might use a veiled

⁵ See ABA Report, Appendix B.

⁶ Those states are Arizona, California, Colorado, Delaware, Georgia, Idaho, Nevada, New Jersey, North Carolina, Pennsylvania, and South Dakota. See *RPPT Bulletin*, American Bar Association, August 2004, <http://www.abanet.org/rppt>.

⁷ Those states are Arkansas, Florida, Illinois, Indiana, Louisiana, Michigan, Minnesota, Montana, Nebraska, North Dakota, New York, and South Carolina. *Id.*

⁸ Maryland, Oregon, Washington, and Wisconsin. *Id.*

⁹ *Id.*

¹⁰ *Id.*

threat of UPL to gain advantage over the out-of-state lawyer in the negotiations (presumably the in-state lawyer does not himself or herself engage in MJP, so the in-state lawyer is not worried about someone else bringing up the issue).)

A recent well-publicized example is the case involving a Georgia law firm, in which the firm (and two of its lawyers) has been indicted by a North Carolina grand jury for UPL in North Carolina. The case stems from the law firm giving advice to a university in North Carolina. The underlying facts involve what appears to be a bitter dispute involving the university trustees and the president of the school, which resulted in an attorney in North Carolina (and former school trustee) filing a complaint against the law firm with the North Carolina State Bar Association.¹¹ Without getting into a full discussion of the case, suffice it to say that the law firm's position is that its representation of the university did not constitute "practicing law" in North Carolina, but in any event the law firm and its lawyers now have to defend themselves in a North Carolina criminal court, and then possibly in a Georgia disciplinary proceeding.

Further Action is Needed to Protect Commercial Leasing Lawyers

Based on the discussion above, it is the author's position that neither of the two safe harbors applicable to transactional lawyers (the first safe harbor in Model Rule 5.5(c)(i) and the fourth safe harbor in Model Rule 5.5(c)(iv)) settles the issue for commercial leasing lawyers that have a regular, national practice. There are still too many gray areas and issues yet to be resolved, particularly in connection with what it means to practice in a jurisdiction on a "temporary basis" and also (as to the fourth safe harbor) determining if a representation really does "arise out of" or is "reasonably related" to the lawyer's practice in his or her home state.

If the ABA (and the 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, then further clarification of the MJP rules will likely be needed.

So What Can Be Done in the Meantime?

Until the rules are further clarified through debate, court decision, legislation, further amendments, or in some other way, how can the commercial leasing lawyer with a national practice attempt to protect himself or herself 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 not representing its client in that state (or, at the very least, retain local counsel and rely 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, there is no bright-line rule in this regard.

¹¹ See Law.com, available at <http://www.law.com/jsp/article.jsp?id=1081348826442>, accessed August 27, 2004.

Assuming a lawyer is satisfied that the work in question is in fact being performed on a temporary basis, then the lawyer then needs to fit within either the first safe harbor in Model Rule 5.5(c)(i) (*i.e.*, local counsel) or the fourth safe harbor in Model Rule 5.5(c)(iv) (*i.e.*, 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, for commercial leasing lawyers with national practices, the fourth safe harbor may be difficult to establish.

It would seem that the best chance of complying with the Model Rule would be to associate with local counsel pursuant to Model Rule 5.5(c)(i). It is probably a true statement that most national leasing clients would not be interested in paying two different law firms to handle a lease negotiation. If that statement is true, then what is the national leasing bar to do (other than giving up the practice)?

Here is a modest proposal that might be worth considering as a starting point: 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. Each lawyer in the coterie agrees to review leases for out-of-state lawyers solely for compliance with local law requirements and issues, and agrees 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.¹² Assuming that the coterie can come up with a standard letter that each lawyer is comfortable in giving, then the in-state lawyer could review a lease relatively quickly (say, an hour), and is paid a fee for such review as set by the coterie (presumably an agreed-upon amount that is comparable to one hour's work).¹³ And if a client will not agree to cover the cost of the local counsel review (even if minimal), then the local lawyer could be paid out of the lead counsel's legal fees. In order to be able to practice commercial leasing on a national basis in compliance with a state bar association's rules, would you pay local counsel for one hour's worth of time out of your fee? And if there is a similar amount of local counsel lease review coming in as a lawyer is sending out, then ultimately a 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 in order 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."

¹² For example, qualifications could include statements that not every remedy in a particular lease is enforceable (such as self-help), and may also be limited by equitable defenses.©

¹³ This presumes that this scenario satisfies the requirement in Model Rule 5.5(c)(i) that local lawyer "actively participates in the matter."