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“WHAT GETS LAWYERS SUED”

**REPRESENTATIVE CASES ON AIDING AND
ABETTING, CONFLICTS OF INTEREST, DRAFTING ERRORS
AND UNAUTHORIZED PRACTICE OF LAW**

By

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I. AIDING AND ABETTING

One notable recent trend in legal malpractice defense is the seeming proliferation of claims against lawyers by non-client third parties. It is well settled in most jurisdictions that a lawyer does not owe a duty of reasonable care to an adverse party. *See e.g. Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 106 N.M. 757, 750 P.2d 118 (1988) (no cause of action for negligence or negligent misrepresentation against lawyer by adverse party in litigation). Generally, lawyers understand that with certain limited exceptions, their sole duty is to their client. Indeed, lawyers almost certainly understand that their role as advocate is to advance their client’s interest, often at the expense of some non-client third party. Lawyers typically do not proceed in a representation with an understanding that they may have a duty to protect the interests of someone who is on the other side of the deal or the lawsuit.

It may surprise some lawyers to learn that they can be sued by adverse parties for “intentional” torts, even when they are acting solely as advocate on behalf of a client. Such claims may include fraud, malicious prosecution, abuse of process, and intentional infliction of emotional distress. The fact that the lawyer is acting solely on behalf of, and as agent for, a client does not shield the lawyer from such claims. More surprising, however, is the courts’ recent willingness to hold lawyers vicariously liable for the alleged wrongs of their clients, under such theories as aiding and abetting and conspiracy. Arguably, “aiding and abetting” their clients in accomplishing their objectives and “conspiring” with their clients to pursue the client’s ends are the very essence of a lawyer’s function, even if it is at the expense of some third party. So long as the client’s conduct is not criminal or outright fraud, one might presume that the lawyer could not be held liable if the client breaches a duty to a third party. The following cases suggest otherwise.

In the recent case of *Thornwood, Inc. v. Jenner & Block*, No. 1-01-1767 (Ill. App. First Div. November 10, 2003), lawyers were sued by a non-client for aiding and abetting a breach of fiduciary duty by the lawyers’ client, aiding and abetting a scheme to defraud, and aiding and abetting a scheme of fraudulent inducement. The claim arose out of a limited partnership that had been formed to develop a parcel of land into a residential community and golf course called “Thornwood.” Thornton contributed the land and the capital for a 75% ownership; Follensbee contributed his expertise and experience as an architect, engineer and developer for a 25% ownership.

The partnership expended significant funds trying to develop the property. Efforts were made to recruit investors, including the PGA, with the hope of making

Thornwood a TPC golf course, which would virtually guarantee the project's success. The PGA initially turned the project down. Follensbee duly advised Thornton. Follensbee, however, continued to pursue the PGA, without advising Thornton. The defendant law firm was not involved in any of this.

Thornton advised Follensbee that he was running out of money and that he wanted to liquidate the partnership. Follensbee suggested that he would buy out Thornton's interest. Follensbee did not advise Thornton that he was then in negotiations with the PGA. It was at this point that Follensbee hired the defendant law firm. The law firm assisted Follensbee in acquiring Thornton's interest in the partnership, and also participated in the negotiations with the PGA.

As part of Follensbee's buy-out of Thornton, Thornton executed releases in favor of Follensbee and the lawyers. In the ensuing lawsuit brought by Thornton against Follensbee's lawyers, much of the Court of Appeals' opinion concerns the validity of the release obtained by the lawyers, which the court determined was invalid.

In addition to defending on the basis of the release, the lawyers contended that the aiding and abetting claims failed to state a claim upon which relief can be granted. The court disagreed.

The court noted first that, under Illinois law, "a claim for aiding and abetting includes the following elements: (1) the party whom the defendant aids must perform a wrongful act which causes an injury; (2) the defendant must be regularly aware of his role as part of the overall or tortuous activity at the time he provides assistance; (3) the defendant must knowingly and substantially assist the principal violation." Slip op. at 8. The court also relied upon Restatement (Second) of Torts § 876, "Concert of action,"

which subjects one to liability for doing a tortuous act in concert with another pursuant to a common design or giving substantial assistance knowing the other's conduct constitutes a breach of duty. The court also stated that Illinois [like many states] recognizes claims against lawyers for conspiring with their clients for a wrongful purpose. The court noted that Illinois had never recognized a cause of action against a lawyer for aiding and abetting, but saw no reason such a claim could not be recognized.

The lynchpin of the decision appears to have been the fact that Follensbee and Thornton were partners and Follensbee thus owed Thornton a fiduciary duty. It seems to be the concept of aiding a breach of *fiduciary* duty that raised the lawyers' conduct to an actionable level in the court's eyes. The lawyers' conduct specifically cited by the court as supporting the claim was otherwise fairly unremarkable: communicating the potential PGA plan to others but not to Thornton; negotiating the purchase of Thornton's interest without disclosing the ongoing PGA negotiations; preparing investment materials, financial projections and marketing literature "which purposely failed to identify Thornton as a partner," etc. Almost certainly, Follensbee – their client -- instructed the lawyers to do just what they did, and the lawyers were simply following their client's express directions. It can certainly be argued that, while it may have been Follensbee's duty to inform Thornton of the true state of affairs, the lawyers cannot have had an independent duty to do so, especially if Follensbee instructed them not to.

Query what the lawyers could or should have done to avoid being exposed to such a claim for aiding and abetting? Apparently, they should have declined the representation to begin with, assuming that they knew that their services would be used to aid Follensbee in proceeding with the development to the possible detriment of his partner;

or they should have withdrawn once that became clear. The court in *Thornwood* does not address the question how these lawyers could or should have made the disclosures that the court held they had some duty to make, without creating a conflict of interest with their own client.

Section 51(4) of the Restatement of Law Governing Lawyers, “Duty of Care to Certain Non-clients,” provides that a lawyer owes a duty to a non-client, where the lawyer’s client is a fiduciary, to prevent the breach of a fiduciary duty owed by the client where the breach is a crime or fraud, or where the lawyer has assisted or is assisting the breach; but only where “such duty would not significantly impair the performance of the lawyer’s obligations to the client.” Section 51(4)(d). Arguably, disclosure to Thornton by the lawyers would have “significantly impaired the performance of the lawyer’s obligations to the client.” Indeed, It would probably have conflicted with the client’s express wishes. Thus, reliance by the lawyers on Section 51(4), if it had existed at the time, would have not necessarily have helped the lawyers avoid exposure.

In addition, Comment h to Section 51 of the Restatement explains that Subsection (4) is limited to lawyers representing only “true” fiduciaries: trustees, executors, guardians and the like. “Thus, Subsection (4) does not apply when the client is a partner in a business partnership, a corporate officer or director, or a controlling stockholder.” *Id.* *Thornwood* and the Restatement appear to be in conflict.

To the extent that *Thornwood* rests on the fact that the lawyers allegedly assisted their client in breaching fiduciary duties, the decision would also appear to conflict with ABA Formal Opinion 94-380 as well. “The fact that the fiduciary [the client] has obligations to the beneficiaries of [a] trust or estate does not in itself either expand or

limit the lawyer's obligations to the fiduciary client ... nor impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties." Id.

Granewich v. Harding, 329 Or. 47, 985 P.2d 788 (1999), is perhaps the seminal case on aiding and abetting claims against lawyers. Plaintiff, Harding and Hergert each owned one third of a closely held corporation, FFG, and all were directors, officers and employees. Harding and Hergert decided to squeeze plaintiff out of the corporation. They met, removed him as a director, relieved him of his executive position and fired him as an employee. Plaintiff argued that their actions violated the corporation's by-laws and an employment agreement among the parties. Up to this point, the lawyer defendants were not involved.

However, Harding and Hergert then hired the defendant lawyers to represent the corporation. The complaint alleges that the lawyers entered into an agreement with Harding and Hergert to assist them in depriving plaintiff of his position as a director. The complaint alleged that Harding and Hergert breached fiduciary duties to plaintiff, and that the lawyers were liable as joint tortfeasors. Although the district court and the Oregon Court of Appeals ruled that the complaint failed to state a claim against the lawyers, the Oregon Supreme Court disagreed.

The complaint alleged, as in *Thornwood*, that the lawyers knew that the purpose for their legal services was to help their clients violate their fiduciary duty to plaintiff. Probably the key consideration causing trouble for the lawyers in *Granewich*, however, was the fact that the lawyers' client was actually the corporation, and the corporation itself had no legitimate corporate interest in favoring Harding and Hergert over plaintiff.

Whether the outcome of the case would have been different had the lawyers been hired by Harding and Hergert individually, rather than by the corporation, is unknown.

As in *Thornwood*, the court relied in part on Section 876 of the Restatement (Second) of Torts. The court also stated the general rule that “one who knowingly aids another in the breach of a fiduciary duty is liable to the one harmed thereby” and stated (without citing any authority): “That principle readily extends to lawyers.” 985 P.2d at 793-94; *but see* ABA Formal Opinion 94-380 and Restatement of Law Governing Lawyers § 51, discussed above.

The court rejected the conclusion that the court of appeals had found dispositive: that there was no fiduciary duty flowing directly from the lawyers to the plaintiff, and that a fiduciary relationship must exist between a plaintiff and all joint tortfeasors. The court also rejected the court of appeals’ conclusion that holding lawyers liable in such circumstances would unduly interfere with lawyer-client relations, noting:

The complaint...alleges that the corporation hired the lawyers, that the corporation had no interest in the dispute between plaintiff and [Harding and Hergert], and that the work that the lawyers performed was outside the scope of any legitimate employment on behalf of the corporation.... Under that circumstance, the lawyers stand in no different position in relation to plaintiff than anyone else, and their status as lawyers is irrelevant.

794 P.2d at 795.

A similar case is *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057 (2d Cir. 1977). *Newburger* involved a partnership, and an effort by certain partners to convert the partnership to a corporation, squeezing out certain other partners in the process. Unlike the two previous cases, the lawyer defendants in *Newburger* were allegedly involved in the “squeeze out” effort from the beginning. Indeed, one of the lawyers allegedly

masterminded the effort and was instrumental in implementing it from beginning to end. Among the lawyers' alleged wrongful acts was threatening the target partner with *in terrorem* litigation and facilitating one critical transaction by producing a bogus opinion letter.

The claim against the lawyers in this case was conspiracy. “[T]he significance of an allegation of conspiracy under New York law is to charge that an actionable wrong was committed jointly by the defendants so that the acts of one may be imputed to the others because of their common purpose and intent.” 563 F.2d at 1074. The court found that the partners, “guided by” the lawyers, engaged in a plot to gain control of the partnership. There is nothing to suggest that the lawyers stood to become owners of the partnership, or to gain anything other than their fee for legal services. Arguably, while the wrong may have been committed with the lawyers' guidance, it was the clients' wrong, the clients who owed the duty to the minority partner, the clients who breached that duty, and the clients who stood to benefit by gaining control of the partnership: not the lawyers. Again, however, one critical fact may be that the lawyers had originally been retained by the partnership entity itself, not by the “ousting” partners individually. Among the risk management lessons for lawyers here is the basic admonition to know who your client is, and to represent that client appropriately.

II. CONFLICTS OF INTEREST

Good intentions and fairness will not protect a real estate attorney from a claim of malpractice arising from a conflict of interest with his clients. Admittedly, our clients often have business deals that make us question why we went to law school, and the temptation to buy into their deals can be overwhelming. Time and again, real estate

lawyers are disciplined and found liable for engaging in transactions with their client. The Model Rules of Professional Conduct require that an attorney make full written disclosure to his client of the transaction and the terms and recommend in writing that his client seek the advice of independent counsel before entering into a business relationship with his attorney. Model Rules of Prof'l Conduct R. 1.8(a) (2003). Then the client must give informed consent in writing, signed by the client, and explaining the lawyer's role in the transaction. *Id.* The two following disciplinary opinions are demonstrative of typical pitfalls for the real estate attorney.

The Supreme Court of Iowa affirmed its Grievance Commission's suspension of an attorney's license after that attorney rented to his client a property in which he had an interest without making full disclosure or advising the consultation of independent counsel. *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Fay*, 619 N.W. 2d 321 (Iowa 2000). Attorney Michael Fay represented Jeanice Havlic, an interior decorator. *Id.* at 323. Havlic met with her attorney to discuss the operation of her business. During that meeting, Havlic expressed that her business was experiencing some financial difficulties, including the pending expiration of the lease of her business premises. *Id.* Havlic was hoping to reduce her expenses by living and working in the same building. *Id.* Her attorney just happened to have the perfect residence/business premises for her. He lived in an older Victorian style home in which he held a life estate. *Id.* at 323-4. The home was owned by his daughter. *Id.* The house was zoned for residential use, but Fay told his client "that he believed the business use of the house would qualify under the home occupancy exception to the city zoning ordinance." *Id.* at 324. Substantial exterior

improvements were also needed due to the rundown nature of the home, and Fay offered to make these improvements.

The city zoning officials would not permit Havlic to operate her business in the home under the home occupancy exception to the zoning ordinance. *Id.* City officials also discovered numerous code violations within the interior of this old rundown home. *Id.* When Fay could not remedy these problems, Havlic became disenchanted and contacted another lawyer. *Id.* Havlic then stopped paying the monthly rent required under the lease, and Fay imprudently responded by attempting to evict her. *Id.* Then Havlic sued Fay on a variety of claims including negligent misrepresentation, and Fay countersued for the unpaid rent. *Id.* In an unusual twist, a disciplinary action was instigated by Fay's former wife who filed a complaint with the Iowa Board of Professional Ethics and Conduct regarding Fay's activities in the lease transaction with Havlic. Aside from the conflict of interest between Fay and Havlic, as lessor/lessee, Fay maintained an interest in the property and also represented the interest of his daughter.

Rule 1.8 of the Model Rules of Professional Conduct clearly mandates that a lawyer cannot represent a client whose business interests conflict with a lawyer's own interests in the absence of client consent after full disclosure. *Id.* at 325. The burden of proof in such situations is heavily weighted against the attorney. "[A] lawyer must refrain from entering into the transaction unless the client has consented after full disclosure by the lawyer." *Id.* "Full disclosure" not only means disclosure of the nature of the transaction, but it also means explaining to the client why he or she would benefit from independent counsel and insisting independent counsel be secured. *Id.* at 326.

In *Fay*, Fay first acted as Havlic's attorney and then attempted to change hats and act as Havlic's landlord. Courts typically frown upon an attorney who attempts to turn the attorney-client relationship on and off like a light switch. The attorney will always be held to the higher standard requiring full disclosure and the recommendation that the client seek independent counsel. Whether it is fair or not, the Model Rule of Professional Conduct mandates that lawyers adhere to the strictest ethics when they are engaging in a business transaction with the client.

Even collecting fees can trigger the requirements of Rule 1.8. Taking a mortgage on a client's residence to secure payment of legal fees is not recommended, unless the attorney has strictly followed the requirements of Rule 1.8. When his clients could not afford their legal fees from previous litigation, a New Jersey attorney took a mortgage on their property. *Petit-Clair v. Nelson*, 782 A. 2d 960 (N.J. Super. Ct. App. Div. 2001). Although the attorney had represented the interests of his clients' corporate entity, the clients allowed the attorney to take a mortgage against their personal residence in lieu of his fees. *Id.* at 540. The mortgage was taken without the attorney making full disclosure and advising the desirability of seeking advice from independent counsel. *Id.* at 541. When the clients defaulted on their mortgage payments, the attorney filed a foreclosure complaint. *Id.* The trial court held that the mortgage was invalid because the attorney had failed to comply with the ethical rules requiring that he advise his clients to seek independent counsel. *Id.* Although the mortgage was otherwise enforceable, the attorney's failure to adhere to the ethics rule invalidated the mortgage. *Id.* at 542. In both *Fay* and *Petit-Clair*, the incident giving rise to the attorney's downfall was the attorney's attempt to assert his rights in the transaction. Regardless of the propriety of the attorney's

actions in the business transaction, the attorney's failure to abide by the ethics rules is the deciding factor.

Courts also frown on attorneys attempting to use technicalities to avoid their ethical obligations. In *Petit-Clair*, when the attorney argued that he represented the clients' corporation and not the individuals, as an excuse for not giving the individuals advice to seek independent counsel, the court held that it was undisputed that the clients and the attorney related to each other as attorney and clients. *Id.* at 543. The court further noted that it was the individuals whom the attorney persuaded to allow a mortgage to be taken against their property and not the corporation. *Id.* The district court's invalidation of the mortgage was upheld.

Finally, avoid the temptation of seeking a broker's commission even when your work as an attorney strays into the broker's realm in a real estate transaction. A New Jersey attorney narrowly escaped discipline after he attempted to act as the "buyer's broker" on behalf of a secretary in his office. *In re Roth*, 577 A. 2d 490 (N.J. 1990). The attorney, who had taken the real estate licensing courses and exam but had never become licensed as a real estate professional, offered to assist his secretary in purchasing a home. *Id.* at 492. The attorney intended to reduce the purchase price of the home by his portion of the commission. *Id.* at 492-93. Although the intentions of the attorney were gracious and altruistic, the Supreme Court of New Jersey held that an attorney could not seek a real estate commission for participating as a broker in the purchase of real estate when the attorney was not licensed as a real estate broker. "[A]n unacceptable conflict of interest is created if an attorney who is not licensed as a real estate broker claims or accepts a commission for participating as a broker in the purchase or sale of real estate if

the attorney also represents one of the parties in the transaction. That conflict, however, may be overcome if the brokerage activities are incidental to the legal services rendered and do not generate any entitlement to compensation.” *Id.* at 496. An attorney is authorized to perform those brokerage services incidental to the normal practice of the profession, but only in a manner that is ancillary and subordinate to the normal activities of the lawyer. *Id.* at 494. Relying on Kentucky law, the New Jersey court held that it was unethical for an attorney to split a commission between himself and a real estate agent in order to lower the cost for his/her client, the buyer. *Id.* at 495 (citing *Ky. Bar Ass’n v. Burbank*, 539 S.W. 2d 312 (Ky. 1976)). Regardless of whether the attorney intended to apply commission receipts for the benefit of his client, the New Jersey court held that an attorney who seeks to obtain a commission for brokerage services in connection with legal services rendered in the same transaction for the client violates the ethics rules. The higher standard of ethical proprieties required of attorneys forms the basis for this strict decision which appears to defy the attorney’s duties of loyalty and zealouslyness to his client. *Id.* at 495. The attorney may perform brokerage services which are incidental or ancillary to the performance of legal services in a transaction, but the attorney must not be independently and separately compensated for the brokerage services. *Id.* at 495. The attorney was not disciplined because the issue before the disciplinary board was unclear and unsettled. *Id.* at 497.

Even when lawyers and their clients have a mutual understanding that they are engaging in a business transaction, the lawyer must document his disclosures and his client’s consent pursuant to the Rules of Professional Conduct. Not only will

documented disclosure assist in responding to a disciplinary complaint, but it will inevitably become the most important exhibit in a legal malpractice defense.

II. DRAFTING ERRORS v. ERRORS OF JUDGMENT

Most drafting errors occur because of lack of attention to detail. Whether a drafting error is the by-product of rushed work, late nights, or poor proofreading, drafting errors can give rise to a claim of negligence against the attorney. There are instances, however, in which a “drafting error” is actually an error in judgment. Courts do not expect lawyers to gaze into their crystal balls and accurately predict how the law will be settled. If the issue from which the drafting error arises is well settled in the law, the attorney will typically be found negligent. If the legal principle is unsettled, the attorney may have viable defenses.

The Court of Appeals of Georgia has held that the unsettled state of the law with respect to a material issue of a contract precluded a law firm’s liability. *Jones, Day, Reavis & Pogue v. Am. Envirecycle, Inc.*, 456 S.E. 2d 264 (Ga. Ct. App. 1995). This is the general rule. In *Jones*, the law firm was sued for failure to include affirmatively the statement of purpose of the contract within the body of that document. At the time the contract was drafted, whether the law required that the statement of purpose be contained within the body of the contract was neither well settled nor widely recognized. *Id.* at 267. Taking notice that the legal profession is, at best, an inexact science, the Georgia Court of Appeals affirmed that “unless the law is so well settled, clear and widely recognized, an attorney acting in good faith and to the best of his knowledge will be insulated from liability for adverse results.” *Id.* (citations omitted). The relatively obscure and unsettled legal principle at issue not only insulated the law firm from liability for legal malpractice

for negligent drafting of the contract for sale; it also insulated the law firm from any liability by reason of negligence in legal research and investigation. *Id.* at 267.

However, even if a legal principle is unsettled, an attorney may still be obligated to advise his client about any potentially adverse material effect.

In Florida, an attorney has the duty to inform clients of his awareness of a possible change in the law through certification of the question to a higher court, even though the issue has not been settled. In *Stake v. Harlan*, 529 So. 2d 1183 (Fla. Dist. Ct. App. 1988), the attorney's clients purchased a condominium unit. The purchase involved payment of cash, the execution of a promissory note secured by a balloon purchase money second mortgage, and the assumption of a first mortgage which contained a "due-on-sale" clause. *Id.* at 1184. The "due-on-sale" clause required prior written consent of the first mortgagee to the clients' assumption of the mortgage. *Id.* The clients retained defendant attorney to review documents pertaining to the purchase, to protect their interest in the transaction and to advise them regarding the execution of certain documents relative to the transaction. *Id.* In the course of this representation, the defendant attorney advised his clients that they did not need to comply with the technical notice requirements of the "due-on-sale" clause, but could instead effect a "quiet assumption" of the mortgage by "tendering to the mortgagee the next monthly payment and informing the mortgagee that upon its acceptance of that payment, they would assume that the mortgagee had acquiesced to the purchase of the unit by [clients]." *Id.* Compounding the difficulties his clients would ultimately face, the attorney further advised them to execute a release and hold harmless agreement to both the sellers and the

title company relieving them of any responsibility in the event that the first mortgagee declared the mortgage due and payable in full. *Id.*

At the time the attorney was giving this advice, he was aware of an appellate case certifying to the Supreme Court of Florida the issue of whether a due-on-sale clause in mortgages was enforceable in Florida “without a showing that the mortgagor’s transfer of the mortgaged property would impair the mortgagee’s security.” *Id.* His knowledge was clearly evidenced by his citing to the case in his letter to the first mortgage holder when tendering his client’s monthly mortgage payment. *Id.* at 1185-6. As fate would have it, the Florida Supreme Court answered the issue by holding that such due-on-sale clauses are enforceable in accordance with their terms. *Id.* at 1186. Like a row of dominos, the holder of the first mortgage declared the entire sum due and payable, the clients failed to pay, the mortgagee filed a foreclosure suit, and a judgment of foreclosure was entered against the clients. The clients also lost their potential avenue of recovery because of the release and hold harmless agreement to the sellers and the title company that was recommended by their attorney.

The general rule is that a lawyer has no duty to predict accurately a change in the law. *Id.* at 1186. Lawyers are not burdened with the duty of being a guarantor of their advice. This legal principle, however, does not provide a defense when the lawyer has actual knowledge that there is a possibility of a change in the law which may have a materially adverse effect on his client. *Id.* at 1186-87. Because the attorney had specific knowledge that this issue had been certified to the supreme court, he had a further obligation to inform his clients of a possible change in the law. The court of appeals specifically indicated that it was not addressing whether a lawyer has a duty to be aware

of all questions certified to appellate courts. *Id.* at 1186. The dismissal was reversed, and the case was remanded to the lower court.

When a lawyer is giving advice on an unsettled point of law written disclosure to the client is the best protection. Most clients suffer from a severe case of “litigation amnesia” after they decide to sue their attorney for a bad result. Written communication explaining the pros and cons of a particular course of action can be used to paint a convincing picture of the factors weighed by the client when making a particular decision.

III. MULTIJURISDICTIONAL PRACTICE AND THE UNAUTHORIZED PRACTICE OF LAW

Another trap for the unwary lawyer in this age of representing national and international clients, is the unauthorized practice of law in a state in which the lawyer is not a member of the bar. As the following cases show, the issue typically comes up in the context of a fee dispute. Although the client may be fully aware that the lawyer is not admitted to practice in a particular jurisdiction at the time the services are performed for the client there, that fact will not protect the lawyer later in a dispute with the client over fees.

In *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998), the defendant law firm was a New York professional corporation. The client, ESQ, was a California corporation that hired the law firm to provide legal services, including resolving claims against Tandem Computers, Inc. The law firm spent substantial time in California meeting with ESQ, meeting with Tandem representatives,

and attempting resolve ESQ's dispute with Tendem. The law firm claimed, and ESQ disputed, that ESQ knew the firm/its lawyers were not admitted to practice in California.

ESQ sued the law firm for legal malpractice. The firm countersued for fees. California has a statute, Section 6125, part of its State Bar Act, that provides that no one but an active member of the State Bar may practice law for another person in California. ESQ relied on that statute to contend that, by practicing law in California without a license, the law firm violated Section 6125, rendering the fee agreement unenforceable. The California Supreme Court agreed.

The Court held that legal advice and legal instrument and contract preparation, whether or not rendered in the course of litigation, constituted legal services in the State. "In our view, the practice of law 'in California' entails sufficient contact with the California client to render the nature of the legal service a clear legal representation." 949 P.2d at 5. Mere fortuitous or attenuated contacts are not sufficient. "The primary inquiry is whether the unlicensed lawyer engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations." *Id.* Physical presence is one factor in the equation "but it is by no means exclusive. For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax computer, or other modern technological means." *Id.*

Although the attitude of the California court may seem provincial in this day and age, its statement of the basic principle behind its decision is worth remembering:

"Authority to engage in the practice of law conferred in any jurisdiction is not per se a

grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so.” 949 P.2d at 6.

Apparently in response primarily to *Birbrower*, Rule 5.5 of the ABA Model Rules of Professional Conduct has been expanded considerably in an effort to recognize the changed nature of legal practice and to permit multijurisdictional practice in certain circumstances. However, unless and until the new Model Rule is adopted in a particular state – and as long as California, for example, has a statute like section 6125 – then out-of-state lawyers serving clients in that state run the risk of violating the local unauthorized practice of law rule.

Ranta v. McCarney, 391 N.W.2d 161 (N.D. 1986) involved a Minnesota tax lawyer with clients in North Dakota. Similar to the *Birborwer* situation, a fee dispute arose between the lawyer and a North Dakota tax client. The client defended the fee claim on the basis that the lawyer was not authorized to practice in North Dakota, barring compensation for his legal services. The North Dakota Supreme Court agreed, even though it recognized that this resulted in a forfeiture for the lawyer and a windfall for the client.

In *Office of Disciplinary Counsel v. Fucetola*, 753 N.E.2d 180 (Ohio 2001), a New Jersey lawyer filed a complaint in state court in Ohio for a long-time client who could not find an Ohio lawyer to represent her in the particular matter. At the same time that he filed the complaint, the lawyer filed a motion to appear *pro hac vice*, to which an Ohio attorney consented. The court did not rule on the *pro hac vice* motion until approximately nine months later. During all that time, the court and the other parties acted as though the motion had been granted. However, the court denied the motion.

The lawyer immediately obtained local counsel to represent the client. A disciplinary complaint was filed against the lawyer, however. He was found to have engaged in the unauthorized practice of law, which was affirmed by the Ohio Supreme Court, and he was enjoined from further violation of the rule.

In *Wellmore Coal Corp. v. Harman Mining Corp*, 568 S.E.2d 671 (Va. 2002), a Kentucky attorney was admitted *pro hac vice* to represent a party in Virginia state court, in association with local counsel. A judgment was entered against the client. The Kentucky lawyer filed a notice of appeal, signed only by him. Shortly thereafter, a Virginia lawyer filed an entry of appearance for the client and an amended notice of appeal “to add additional counsel.” The opposing parties filed a motion to dismiss the appeal based upon a failure to file a timely notice of appeal. They contended that the original notice of appeal, signed only by foreign counsel, was invalid; and that the “amended” notice of appeal filed by the Virginia lawyer was untimely, which was true standing alone. The Virginia Supreme Court granted the motion and dismissed the appeal.

For a lawyer who has a “national” transactional practice, there may be little that she can do to protect herself from a claim of unauthorized practice of law in circumstances like those described here. Obviously, in litigation, the cure is to associate with local counsel and get admitted *pro hac vice*. Outside the litigation context, the rules are changing, the ability to practice multijurisdictionally is expanding, and the problem should resolve itself over time.